NEGLIGENCE: ELEMENT IV: DAMAGES

CHAPTER OUTLINE

• Kinds of Damages
• Present Value
• Pain and Suffering
• Software
• Property Damage
• Mitigation-of-Damages Rule
• Collateral Source Rule
• Joint Tortfeasors
• Release
• Contribution
• Indemnity
• Settlement
• September 11th Victim Compensation Fund
• Taxation of Damages

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:
• Understand the kinds of compensatory damages.
• Define nominal and punitive damages.
• Explain how to calculate the present value of an award that covers future damages.
• Describe how damages for pain and suffering are awarded.
• Explain the mitigation-of-damages and collateral source rules.
• Describe the liability of joint tortfeasors.
• Describe what is meant by release, contribution, and indemnity.
• Understand the tax consequences of an award of damages.
The plaintiff in a negligence action must suffer actual harm or loss to person or property. It is not enough that the defendant has engaged in unreasonable or even reckless conduct. Without actual harm or loss, the negligence action fails. Although the focus of this chapter is on damages in a negligence action, most of the principles discussed here also apply to intentional and strict liability torts.

**KINDS OF DAMAGES**

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**Compensatory Damages**

Compensatory damages are monetary payments designed to restore an injured party to his or her position prior to suffering the injury or other loss. They seek to make the plaintiff whole. An important purpose of tort law is to return the plaintiff to the position he or she was in before the injury or loss. The payment of money, of course, cannot always accomplish this. The payment of compensatory damages is designed to come as close as possible to returning the plaintiff to the status quo before the accident.

Compensatory damages cover two kinds of losses: economic and non-economic. Economic losses can be objectively verified through specific dollar amounts that have been paid or are expected to be paid in the future to replace whatever has been lost because of the tort. Economic losses also consist of objectively verifiable lost past earnings and lost future earning capacity.

**EXAMPLES**
- present and future medical expenses
- burial costs
- loss of the use of property
- costs of repair
- costs of obtaining substitute domestic services
- present and future loss of wages
- loss of business or employment opportunities

Non-economic losses, on the other hand, are those losses for which no objective dollar amount can be identified.

**EXAMPLES**
- pain
- mental anguish
- inconvenience
- loss of companionship
- humiliation

Collectively, these non-economic damages are sometimes referred to as **pain and suffering** damages.

Another important classification of compensatory damages is the distinction between general and special damages. **General damages** are those compensatory damages that usually result from the kind of harm caused by the defendant’s conduct. General damages naturally follow from the harm caused by such conduct. Pain and suffering, for example, naturally follow from a severe head injury. In most states, the complaint of the plaintiff does not have to allege general damages with specificity.
The law will presume that general damages result from the wrong complained of. Most plaintiffs, of course, will try to offer as much evidence on general damages as they can in order to increase the final amount of the monetary award. The point, however, is that the absence of such evidence is not fatal to the plaintiff’s case; the fact finder can presume that they exist. **Special damages**, on the other hand, are economic or pecuniary losses, such as medical expenses and lost wages, that must be alleged and proven. They are compensatory damages that are not presumed to exist. They would include medical expenses, loss of earnings, destroyed property, etc. The law does not presume that they exist. They must be specifically pleaded in the complaint.

**EXAMPLE**
Sam is seeing a psychiatrist to help him overcome the anxiety he feels over the negligent conduct of the defendant who almost killed Sam with scalding water in a freak accident. His pain and suffering due to the anxiety are part of his general damages. The cost of the psychiatrist, however, is part of Sam’s special damages.

**Nominal Damages**

**Nominal damages** are a small monetary payment (often $1) awarded when the defendant has committed a tort that has resulted in little or no harm, so no compensatory damages are due. Nominal damages are not awarded in negligence cases since one of the elements of negligence is actual damages. Nominal damages are awarded in intentional tort and strict liability tort cases when there has been a technical commission of the tort but no actual harm.

Attorneys usually do not take cases that do not present the possibility of substantial damages since fees are often a percentage of the damages award. When nominal damages are likely, the plaintiff’s incentive to bring the case is to vindicate a right, to make a public record of the defendant’s misdeed, or to warn the defendant that future misconduct of the same kind will lead to further lawsuits. If the attorney is not taking such a case **pro bono** (for free), he or she is probably being paid an hourly or set fee rather than a percentage.

**Punitive Damages**

**Punitive damages** are noncompensatory damages that seek to punish the defendant and to deter similar conduct by others. Punitive damages are awarded when the defendant has acted maliciously, outrageously, recklessly, or in conscious disregard for the safety of others. **Ordinary negligence** is not enough. Nor is intentional conduct enough unless the court can conclude that the defendant acted in a morally reprehensible way.

In most states, the plaintiff receives all of the punitive damages that are awarded. In a few states, however, a portion of an award of punitive damages goes to the state government.

In recent years some courts have been alarmed at the size of punitive damage awards, particularly in relationship to the compensatory damages in the case. The question arises as to whether there are limits on how high punitive damages can go. For example, can punitive damages be five hundred times the compensatory damages? There is no clear answer to this question. Some states impose limits on the amount of punitive damages that can be awarded, but in many states, extraordinarily high punitive damages are allowed. Change, however, is on the horizon. The United States Supreme Court has said that to “the extent an award [of punitive damages] is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” To assist courts in determining whether a punitive damage award is grossly excessive and violates due process, the Court has identified three guideposts: (1) the degree of reprehensibility of the defendant’s conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff...
and the punitive damage award, and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. Although these guideposts do not clearly tell us when awards of punitive damages are too high, they are a signal that very high awards of punitive damages are likely to be challenged as unconstitutional.

### Interrogatory Questions on Damages

A major tool of defendants in tort cases is the use of **interrogatories** to obtain information from the plaintiff prior to trial. In Exhibit 18–3 of Chapter 18 you will examine interrogatories on the following topics pertaining to damages:

- current injury
- treatment received to date
- anticipated future treatment
- costs of treatment
- prior injuries
- loss of wages or employment to date
- anticipated future loss of wages or employment
- collateral sources (funds received independent of the alleged tortfeasor—see discussion of collateral sources later in this chapter)
- etc.

Reading these interrogatories will provide a good overview of the kinds of evidence parties seek on the issue of damages.

### Present Value

By the time a trial ends, the court will want to reach one number to cover all past and future damages in a **lump-sum payment**. The alternative would be for the court to retain jurisdiction of the case to keep it open for the life of the plaintiff in order to take account of actual medical costs, loss of income, inflation, and other uncertainties of the economy. This would create chaos in the court system since no tort case would ever end. Hence, the court will want to have a lump-sum judgment. Normally, this judgment is paid at one time, although some states allow the amount to be paid in periodic payments over a set time. This may be required in certain kinds of tort cases such as medical malpractice.

Parties have more flexibility when negotiating a settlement. A **structured settlement**, for example, would consist of periodic payments for a designated period of time such as the life of the victim. The periodic payments are often paid through an **annuity** that the defendant funds. The settlement might call for a reduced lump sum payment now with the balance covered by future periodic payments through an annuity.

Whenever you are entitled to a payment of economic damages now to cover something that will happen in the future, the payment must be reduced to present value. This is the amount of money an individual would have to be given now in order to generate a certain amount of money within a designated period of time through prudent investment, usually at compound interest. **Compound interest** is interest that is calculated on the principal and on the interest already accrued. The latter consists of interest on interest.

**Simple interest** is interest earned on the principal alone, not on already accrued interest.

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**EXAMPLE**

Ted negligently injures Mary in 2012. During 2012, Mary paid $15,000 in medical bills. For the next four years (2013–2016), she is expected to spend...
$12,500 a year for further medical expenses. The negligence trial against Ted ends on December 31, 2012, at which time Mary’s total past and future economic damages for medical expenses are calculated at $65,000.

- **2012:** $15,000 (past medical expenses)
- **2013–2016:** $50,000 (future medical expenses; $12,500 × 4)
- **$65,000** (calculated at the end of the trial on December 31, 2012)

Mary has already incurred a loss of $15,000 for 2012. There is no need to reduce this amount to present value. The determination of present value pertains to future damages. Her future damages for the next four years will be $50,000. But it would be a **windfall** to give her $50,000 at the end of the trial on December 31, 2012. The reason is that she could take the $50,000 and immediately invest it. Whatever was not spent on medical expenses during the four years would be earning interest, so that by the end of four years she would have had available to her $50,000 plus the interest earned.

To prevent the windfall, $50,000 must be reduced to present value on December 31, 2012. To do this, we pick an interest rate that Mary would be assumed to earn during the four years. The higher the interest rate, the lower the amount Mary would have to be given on December 31, 2012. Assume, for example, that investing $38,000 in 2012 at 6 percent would yield $50,000 in 2016. The present value of $50,000, therefore, is $38,000. This is the amount Mary would have to be given in 2012 in order to cover her $50,000 of future expenses over the next four years. If we picked an interest rate of 10 percent, she would have to be given considerably less in 2012 because of the higher returns that 10 percent would generate over this period.

The interest rate used in calculating present value is called the **discount rate**. During negotiations, the parties may agree on what the discount rate should be. In the absence of agreement, the court will determine what the rate should be, usually based on generally accepted practice in the area. Once the discount rate is set, computer programs can quickly make the necessary calculations of compound interest over the designated period of time. For an example, see Exhibit 16–2 later in the chapter.

Exhibit 16–1 contains an example of jury instructions on damages. Notice that the trial judge tells the jury that it must use present value (referred to as “present cash value”) for all future economic losses. Anything lost up to the date of the trial, however, is not reduced to present value.

Next we look at lost future wages more closely through the case of **O’Shea v. Riverway Towing Co.** The case provides an excellent overview of other economic factors that go into a determination of damages in a personal injury case. As you will see in the case, the downward adjustment that results from the determination of present value is not the only adjustment made in an award of damages. Make careful note of all of the factors the court uses to reach the final award. In particular, note the following questions covered by the court in reaching the result in the **O’Shea** opinion.

**Guide to Reading O’Shea v. Riverway Towing Co.: Questions Asked by the Court in Calculating Damages for Lost Wages**

- What was the injury suffered by the plaintiff? (Answer: broken leg.)
- Is the plaintiff able to continue working in her current job after the injury? (Answer: no.)
- Can the court take into consideration whether the plaintiff would have been able to find gainful employment anywhere in the economy after the accident? (Answer: yes. Wages the plaintiff could have earned in another job—discounted by the probability that she would be able to find another job—should be deducted from the future wages she would have earned in the

**windfall** An extra amount to which one is not entitled under the original understanding of the parties.

**discount rate** The interest rate used by the parties when determining the present value of money to be received in the future.
job she had at the time of the accident. The attorneys, however, did not ask the judge to make the calculation in this way.)

- Can the court take into consideration what the plaintiff would earn for a full year even if the plaintiff had not worked in her current job for a full year? (Answer: yes.)
- Can the court take into consideration the wages the plaintiff would have earned if she had been able to take the new job she was considering? (Answer: yes, although in this case the trial court may not have given this consideration much weight.)
- Can the court allow the plaintiff to take into account an amount by which her wages would have been increased by inflation? (Answer: yes.)
- Should a discount rate be used to reduce future lost wages to present value? (Answer: yes; at trial an accountant used an 8.5 percent discount rate.)
- Should inflation be taken into consideration in projecting lost future earnings and in the discount rate? (Answer: yes; it is illogical to build inflation into the discount rate yet ignore it in calculating the lost future wages that are to be discounted.)

Exhibit 16–1
Jury instructions on damages.5
• Should the court assume that the plaintiff’s future wages would have increased even if there had been no inflation? (Answer: yes.)
• In calculating future lost wages to a projected age of retirement, should the amount be reduced by the probability that the plaintiff would not reach her retirement age if the accident had not occurred? (Answer: yes.)
• When determining the discount rate, should the economist take into consideration the tax bracket of the plaintiff as an indication of what safe investments she would have used? (Answer: yes, but the economist did not do so here; this is not a critical error, however, because of other offsetting errors the economist made.)
• In estimating future lost wages, should the plaintiff’s entire income tax liability be deducted? (Answer: no; although the damage award is not taxable, interest earned on the award is taxable.)

**CASE**

**O’Shea v. Riverway Towing Co.**

677 F.2d 1194 (7th Cir. 1982)

United States Court of Appeals for the Seventh Circuit

**Background:** Margaret O’Shea was a cook on a Mississippi towboat. After falling and breaking her leg getting off the boat, she sued her employer, Riverway, for negligently causing the fall. She won in the district court (the federal trial court), which awarded her over $86,033 in damages for lost future wages. The case is now on appeal before the United States Court of Appeals for the Seventh Circuit.

**Decision on Appeal:** The award of damages was proper.

**OPINION OF COURT**

Judge POSNER delivered the opinion of the court. . . .

When the harbor boat reached shore it tied up to a seawall the top of which was several feet above the boat’s deck. There was no ladder. The other passengers, who were seamen, clambered up the seawall without difficulty, but Mrs. O’Shea, a 57-year-old woman who weighs 200 pounds (she is five foot seven), balked. According to Mrs. O’Shea’s testimony, which the district court believed, a deckhand instructed her to climb the stairs to a catwalk above the deck and disembark from there. But the catwalk was three feet above the top of the seawall, and again there was no ladder. The deckhand told her that she should jump and that the men who had already disembarked would help her land safely. She did as told, but fell in landing, carrying the assisting seamen down with her, and broke her leg. . . .

Mrs. O’Shea’s job as a cook paid her $40 a day, and since the custom was to work 30 days consecutively and then have the next 30 days off, this comes to $7200 a year although, as we shall see, she never had earned that much in a single year. She testified that when the accident occurred she had been about to get another cook’s job on a Mississippi towboat that would have paid her $60 a day ($10,800 a year). She also testified that she had been intending to work as a boat’s cook until she was 70—longer if she was able. An economist who testified on Mrs. O’Shea’s behalf used the foregoing testimony as the basis for estimating the wages that she lost because of the accident. He first subtracted federal income tax from yearly wage estimates based on alternative assumptions about her wage rate (that it would be either $40 or $60 a day); assumed that this wage would have grown by between six and eight percent a year; assumed that she would have worked either to age 65 or to age 70; and then discounted the resulting lost-wage estimates to present value, using a discount rate of 8.5 percent a year. These calculations, being based on alternative assumptions concerning starting wage rate, annual wage increases, and length of employment, yielded a range of values rather than a single value. The bottom of the range was $50,000. This is the present value, computed at an 8.5 percent discount rate, of Mrs. O’Shea’s lost future wages on the assumption that her starting wage was $40 a day and that it would have grown by six percent a year until she retired at the age of 65. The top of the range was $114,000, which is the present value (again discounted at 8.5 percent) of her lost future wages assuming she would have worked till she was 70 at a wage that would have started at $60 a day and increased by eight percent a year. The judge awarded a figure—$86,033—near the midpoint of this range. He did not explain in his written opinion how he had arrived at this figure, but in a preceding oral opinion he stated that he was “not certain that she would work until age 70 at this type of work,” although “she certainly was entitled to” do so and “could have earned something”; and that he had not “felt bound by [the economist’s] figure of eight percent increase in wages” and had “not found the wages based on necessarily a 60 dollar a day job.” If this can be taken to mean that he thought Mrs. O’Shea would probably have worked till she was 70, starting at $40 a day but moving up from there at six rather than eight percent a year, the economist’s estimate of the present value of her lost future wages would be $75,000.
There is no doubt that the accident disabled Mrs. O’Shea from working as a cook on a boat. The break in her leg was very serious: it reduced the stability of the leg and caused her to fall frequently. It is impossible to see how she could have continued working as a cook, a job performed mostly while standing up, and especially on a boat, with its unsteady motion. But Riverway argues that Mrs. O’Shea (who has not worked at all since the accident, which occurred two years before the trial) could have gotten some sort of job and that the wages in that job should be deducted from the admittedly higher wages that she could have earned as a cook on a boat.

The question is not whether Mrs. O’Shea is totally disabled in the sense, relevant to social security disability cases but not tort cases, that there is no job in the American economy for which she is medically fit. It is whether she can by reasonable diligence find gainful employment, given the physical condition in which the accident left her. Here is a middle-aged woman, very overweight, badly scarred on one arm and one leg, unsteady on her feet, in constant and serious pain from the accident, with no education beyond high school and no work skills other than cooking, a job that happens to require standing for long periods which she is incapable of doing. It seems unlikely that someone in this condition could find gainful work at the minimum wage. True, the probability is not zero; and a better procedure, therefore, might have been to subtract from Mrs. O’Shea’s lost future wages as a boat’s cook the wages in some other job, discounted (i.e., multiplied) by the probability—very low—that she would in fact be able to get another job. But the district judge cannot be criticized for having failed to use a procedure not suggested by either party. The question put to him was the dichotomous one, would she or would she not get another job if she made reasonable efforts to do so? This required him to decide whether there was a more than 50 percent probability that she would. We cannot say that the negative answer he gave to that question was clearly erroneous.

Riverway argues next that it was wrong for the judge to award damages on the basis of a wage not validated, as it were, by at least a year’s employment at that wage. Mrs. O’Shea had never worked full time, had never in fact earned more than $3600 in a full year, and in the year preceding the accident had earned only $900. But previous wages do not put a cap on an award of lost future wages. If a man who had never worked in his life graduated from law school, began working at a law firm at an entry level, his lack of a past wage history would be irrelevant to computing his lost future wages. The present case is similar if less dramatic. Mrs. O’Shea did not work at all until 1974, when her husband died. She then lived on her inheritance and worked at a variety of part-time jobs till January 1979, when she started working as a cook on the towboat. According to her testimony, which the trial judge believed, she was then working full time. It is immaterial that this was her first full-time job and that the accident occurred before she had held it for a full year. Her job history was typical of women who return to the labor force after their children are grown or, as in Mrs. O’Shea’s case, after her husband dies, and these women are, like any tort victims, entitled to damages based on what they would have earned in the future rather than on what they may or may not have earned in the past.

If we are correct so far, Mrs. O’Shea was entitled to have her lost wages determined on the assumption that she would have earned at least $7200 in the first year after the accident and that the accident caused her to lose that entire amount by disabling her from any gainful employment. And since Riverway neither challenges the district judge’s (apparent) finding that Mrs. O’Shea would have worked till she was 70 nor contends that the lost wages for each year until then should be discounted by the probability that she would in fact have been alive and working as a boat’s cook throughout the damage period, we may also assume that her wages would have been at least $7200 a year for the 12 years between the date of the accident and her seventieth birthday. But Riverway does argue that we cannot assume she might have earned $10,800 a year rather than $7200, despite her testimony that at the time of the accident she was about to take another job as a boat’s cook where she would have been paid at the rate of $60 rather than $40 a day. The point is not terribly important since the trial judge gave little weight to this testimony, but we shall discuss it briefly. Mrs. O’Shea was asked on direct examination what “pay you would have worked” for in the new job. Riverway’s counsel objected on the ground of hearsay, the judge overruled his objection, and she answered $60 a day. The objection was not well taken. Riverway argues that only her prospective employer knew what her wage was, and hence when she said it was $60 she was testifying to what he had told her. But an employee’s wage is as much in the personal knowledge of the employee as of the employer. If Mrs. O’Shea’s prospective employer had testified that he would have paid her $60, Riverway’s counsel could have made the converse hearsay objection that the employer was really testifying to what Mrs. O’Shea had told him she was willing to work for. Riverway’s counsel could have cross-examined to probe the basis for Mrs. O’Shea’s belief that she was going to get $60 a day in a new job, but he did not do so and cannot complain now that the judge may have given her testimony some (though little) weight.

We come at last to the most important issue in the case, which is the proper treatment of inflation in calculating lost future wages. Mrs. O’Shea’s economist based the six to eight percent range which he used to estimate future increases in the wages of a boat’s cook on the general pattern of wage increases in service occupations over the past 25 years. During the second half of this period the rate of inflation has been substantial and has accounted for much of the increase in nominal wages in this period; and to use that increase to project future wage increases is therefore to assume that inflation will continue, and continue to push up wages. Riverway argues that it is improper as a matter of law to take inflation into account in projecting lost future wages. Yet Riverway itself wants to take inflation into account—one-sidedly, to reduce the amount of the damages computed.
For Riverway does not object to the economist’s choice of an 8.5 percent discount rate for reducing Mrs. O’Shea’s lost future wages to present value, although the rate includes an allowance—a very large allowance—for inflation.

To explain, the object of discounting lost future wages to present value is to give the plaintiff an amount of money which, invested safely, will grow to a sum equal to those wages. So if we thought that but for the accident Mrs. O’Shea would have earned $7200 in 1990, and we were computing in 1980 (when this case was tried) her damages based on those lost earnings, we would need to determine the sum of money that, invested safely for a period of 10 years, would grow to $7200. Suppose that in 1980 the rate of interest on ultra-safe (i.e., federal government) bonds or notes maturing in 10 years was 12 percent. Then we would consult a table of present values to see what sum of money invested at 12 percent for 10 years would be at the end of that time have grown to $7200. The answer is $2318. But a moment’s reflection will show that to give Mrs. O’Shea $2318 to compensate her for lost wages in 1990 would grossly undercompensate her. People demand 12 percent to lend money risklessly for 10 years because they expect their principal to have much less purchasing power when they get it back at the end of the time. In other words, when long-term interest rates are high, they are high in order to compensate lenders for the fact that they will be repaid in cheaper dollars. In periods when no inflation is anticipated, the risk-free interest rate is between one and three percent. See references in Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 n.2 (2d Cir. 1980). Additional percentage points above that level reflect inflation anticipated over the life of the loan. But if there is inflation it will affect wages as well as prices.

Therefore to give Mrs. O’Shea $2318 today because that is the present value of $7200 10 years hence, computed at a discount rate—12 percent—that consists mainly of an allowance for anticipated inflation, is in fact to give her less than she would have been earning then if she was earning $7200 on the date of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation.

There are (at least) two ways to deal with inflation in computing the present value of lost future wages. One is to take it out of both the wages and the discount rate—to say to Mrs. O’Shea, “we are going to calculate your probable wage in 1990 on the assumption, unrealistic as it is, that there will be zero inflation between now and then; and, to be consistent, we are going to discount the amount thus calculated by the interest rate that would be charged under the same assumption of zero inflation.” Thus, if we thought Mrs. O’Shea’s real (i.e., inflation-free) wage rate would not rise in the future, we would fix her lost earnings in 1990 as $7200 and, to be consistent, we would discount that to present (1980) value using an estimate of the real interest rate. At two percent, this procedure would yield a present value of $5906. Of course, she would not invest this money at a mere two percent. She would invest it at the much higher prevailing interest rate. But that would not give her a windfall; it would just enable her to replace her lost 1990 earnings with an amount equal to what she would in fact have earned in that year if inflation continues, as most people expect it to do. (If people did not expect continued inflation, long-term interest rates would be much lower; those rates impound investors’ inflationary expectations.)

An alternative approach, which yields the same result, is to use a (higher) discount rate based on the current risk-free 10-year interest rate, but apply that rate to an estimate of lost future wages that includes expected inflation. Contrary to Riverway’s argument, this projection would not require gazing into a crystal ball. The expected rate of inflation can, as just suggested, be read off from the current long-term interest rate. If that rate is 12 percent, and if as suggested earlier the real or inflation-free interest rate is only one to three percent, this implies that the market is anticipating 9–11 percent inflation over the next 10 years, for a long-term interest rate is simply the sum of the real interest rate and the anticipated rate of inflation during the term.

Either approach to dealing with inflation is acceptable (they are, in fact, equivalent) and we by no means rule out others; but it is illogical and indefensible to build inflation into the discount rate yet ignore it in calculating the lost future wages that are to be discounted. That results in systematic undercompensation, just as building inflation into the estimate of future lost earnings and then discounting using the real rate of interest would systematically overcompensate. The former error is committed, we respectfully suggest, by those circuits, notably the Fifth, that refuse to allow inflation to be used in projecting lost future earnings but then use a discount rate that has built into it a large allowance for inflation. See, e.g., Culver v. Slater Boat Co., 644 F.2d 460, 464 (5th Cir. 1981) (using a 9.125 percent discount rate). We align ourselves instead with those circuits (a majority, see Doca v. Marina Mercante Nicaraguense, S.A., supra, 634 F.2d at 35–36), notably the Second, that require that inflation be treated consistently in choosing a discount rate and in estimating the future lost wages to be discounted to present value using that rate. . . .

Applying our analysis to the present case, we cannot pronounce the approach taken by the plaintiff’s economist unreasonable. He chose a discount rate—8.5 percent—well above the real rate of interest, and therefore containing an allowance for inflation. Consistency required him to inflate Mrs. O’Shea’s starting wage as a boat’s cook in calculating her lost future wages, and he did so at a rate of six to eight percent a year. If this rate had been intended as a forecast of purely inflationary wage changes, his approach would be open to question, especially at the upper end of his range. For if the estimated rate of inflation were eight percent, the use of a discount rate of 8.5 percent would imply that the real rate of interest was only .5 percent, which is lower than most economists believe it to be for any substantial period of time. But wages do not rise just because of inflation. Mrs. O’Shea could expect her real wages as a boat’s cook to rise as she became more experienced and as average real wage rates throughout the economy rose, as they usually do over a decade or more. It would not be outlandish to assume that even if there were no inflation,
Mrs. O'Shea's wages would have risen by three percent a year. If we subtract from that which the economist's six to eight percent range, the inflation allowance built into his estimated future wage increases is only three to five percent; and when we subtract these figures from 8.5 percent we see that his implicit estimate of the real rate of interest was very high (3.5–5.5 percent). This means he was conservative, because the higher the discount rate used the lower the damages calculated.

If conservative in one sense, the economist was most liberal in another. He made no allowance for the fact that Mrs. O'Shea, whose health history quite apart from the accident is not outstanding, might very well not have survived—let alone survived and been working as a boat's cook or in an equivalent job—until the age of 70. The damage award is a sum certain, but the lost future wages to which that award is equated by means of the discount rate are mere probabilities. If the probability of her being employed as a boat's cook full time in 1990 was only 75 percent, for example, then her estimated wages in that year should have been multiplied by .75 to determine the value of the expectation that she lost as a result of the accident; and so with each of the other future years. The economist did not do this, and by failing to do this he overstated the loss due to the accident.

But Riverway does not make an issue of this aspect of the economist's analysis. Nor of another: the economist selected the 8.5 percent figure for the discount rate because that was the current interest rate on Triple A 10-year state and municipal bonds, but it would not make sense in Mrs. O'Shea's federal income tax bracket to invest in tax-free bonds. If he wanted to use nominal rather than real interest rates and wage increases (as we said was proper), the economist should have used a higher discount rate and a higher expected rate of inflation. But as these adjustments would have been largely or entirely offsetting, the failure to make them was not a critical error.

Although we are not entirely satisfied with the economic analysis on which the judge, in the absence of any other evidence of the present value of Mrs. O'Shea's lost future wages, must have relied heavily, we recognize that the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive. Therefore, we will not reverse an award of damages for lost wages because of questionable assumptions unless it yields an unreasonable result—especially when, as in the present case, the defendant does not offer any economic evidence himself and does not object to the questionable steps in the plaintiff's economic analysis. We cannot say the result here was unreasonable. If the economist's method of estimating damages was too generous to Mrs. O'Shea in one important respect it was, as we have seen, niggardly in another. Another error against Mrs. O'Shea should be noted: the economist should not have deducted her entire income tax liability in estimating her future lost wages. While it is true that the damage award is not taxable, the interest she earns on it will be (a point the economist may have ignored because of his erroneous assumption that she would invest the award in tax-exempt bonds), so that his method involved an element of double taxation.

If we assume that Mrs. O'Shea could have expected a three percent annual increase in her real wages from a base of $7200, that the real risk-free rate of interest (and therefore the appropriate discount rate if we are considering only real wage increases) is two percent, and that she would have worked till she was 70, the present value of her lost future wages would be $91,310. This figure ignores the fact that she did not have a 100 percent probability of actually working till age 70 as a boat's cook, and fails to make the appropriate (though probably, in her bracket, very small) net income tax adjustment; but it also ignores the possibility, small but not totally negligible, that the proper base is really $10,800 rather than $7200.

So we cannot say that the figure arrived at by the judge, $86,033, was unreasonably high. But we are distressed that he made no attempt to explain how he had arrived at that figure, since it was not one contained in the economist's testimony though it must in some way have been derived from that testimony. Unlike many other damage items in a personal injury case, notably pain and suffering, the calculation of damages for lost earnings can and should be an analytical rather than an intuitive undertaking. Therefore, compliance with Rule 52(a) of the Federal Rules of Civil Procedure requires that in a bench trial the district judge set out the steps by which he arrived at his award for lost future earnings, in order to assist the appellate court in reviewing the award. The district judge failed to do that here. We do not consider this reversible error, because our own analysis convinces us that the award of damages for lost future wages was reasonable. But for the future we ask the district judges in this circuit to indicate the steps by which they arrive at damage awards for lost future earnings.

Judgment Affirmed.

ASSIGNMENT 16.1

a. What is meant by present value? What role does it play in an award of damages?
b. What tactical mistakes did the attorney representing the employer make in the trial of this case?
PAIN AND SUFFERING

Pain is often experienced when a tort is committed, at the time of medical treatment, and while recovering. During these periods, mental suffering or distress can also occur. For example:

- fright
- humiliation
- fear and anxiety
- loss of companionship
- unhappiness
- depression or other forms of mental illness

The amount recovered for pain and suffering will depend on the amount of time it was experienced and the intensity of the experience. Also considered are the age and condition of life of the plaintiff. It is, of course, very difficult to assign a dollar amount that will compensate the plaintiff for pain and suffering. The main guide available is the amount a reasonable person would estimate as fair. (See paragraph 5 in Exhibit 16–1.) A minority of states permit counsel to make a per diem argument to the jury whereby a certain amount is requested for every day the pain and suffering has been endured and is expected to continue. (The per diem argument is also called the unit-of-time argument.) Other states, however, do not allow such arguments on the ground that they are too arbitrary.

Damages for pain and suffering are controversial. The largest portion of an award of damages is usually the amount given for pain and suffering. Juries have been known to give amounts for pain and suffering that are fifty times the compensatory damages. It is sometimes said that pain and suffering “pays the attorney fees.” Most attorneys in personal injury cases are paid a percentage of what the plaintiff receives. When the attorney walks away with a large fee, it is usually due to the pain and suffering portion of the final judgment or of the settlement if the case does not go to trial. Some states have passed reform proposals designed to set limits on damages for pain and suffering in certain categories of cases. For example, a state might pass a statute that sets limits (i.e., a cap) on damages for pain and suffering in medical malpractice cases at $250,000. As you might expect, trial attorneys are often vigorous opponents of such statutes.

**Hedonic damages** are compensatory damages that cover the victim’s loss of pleasure or enjoyment for life’s activities such as raising children, experiencing the morning sun, reading a good book, singing in a choir, and attending college. Some courts, however, say that an award of hedonic damages is improper because they are already provided for in the award of pain and suffering. If, however, the victim dies immediately, there may have been no pain and suffering. The concept of hedonic damages is relatively new; it is unclear how many states will allow juries to consider it.

**ASSIGNMENT 16.2**

Due to medical negligence during an operation, a patient becomes permanently comatose, although she did respond to certain stimuli such as light. What damages are possible?

Before a case goes to trial, a plaintiff will usually try to settle with the insurance company of the defendant, if any. How does a claims adjuster calculate damages? Although insurance companies do not all operate in the same way, there is a rough formula that many companies use as a starting point:

A claims adjuster begins with the medical expenses. Then the intangibles—pain and other non-economic losses—are multiplied by 1.5 to 2 times if the injuries...
are relatively minor, and up to 5 times if the injuries are particularly painful, serious, or long-lasting. Finally, lost income is added to that amount. Several factors raise the damages formula toward the 5-times end:

- more painful, serious, or long-lasting injuries
- more invasive or long-lasting injuries
- clearer medical evidence of extent of injuries
- more obvious evidence of the other person’s fault

Plaintiff’s attorney will often prepare a settlement brochure (or its shorter version, a settlement précis) to encourage settlement with the defendant or its insurance company. It is a written presentation on the merits of a cause of action, including documentation of alleged damages. We will examine these settlement efforts in Chapter 29.

SOFTWARE

Often a law office will use computer programs to help it calculate the damages that it will request. For example, Advocate Software, Inc. has software used in personal injury cases. It can be used to:

- convert future losses to present value
- calculate life expectancy
- calculate work life expectancy
- estimate average earnings for specific categories of work
- calculate household service values
- estimate fringe benefits a worker would have received
- prepare reports to be sent to insurers for settlement negotiations

See Exhibit 16–2, which provides damages projections for Robert T. Exemplar. When planning a case, the law office needs to calculate damages based on certain

### Exhibit 16–2
Software to help calculate damages.

assumptions such as the discount rate and the rate of inflation. Software allows the office to change assumptions quickly and easily in order to assess alternatives.

**PROPERTY DAMAGE**

The defendant can inflict loss to property through the commission of a number of torts, such as negligence, trespass to chattels, and conversion. The measure of damages depends on the extent of the loss caused by the tort.

- **Property destroyed:** The measure of damages is the *fair market value* of the property at the time of the destruction.
- **Property damaged but not destroyed:** The measure of damages is the difference between the fair market value of the property before the damage was done and its fair market value after the damage was done.
- **Deprivation of the use of the property:** The measure of damages is the fair market value of the use of the property during the time the plaintiff was wrongfully deprived of its use.

Fair market value is the price agreed upon by a willing buyer and a willing seller, neither being under any compulsion to enter the transaction and both having reasonable knowledge of the relevant facts. The fair market value of the use of the property might be the cost that an unpressured *lessee* would have to pay to rent the property from a willing *lessor*.

There are times when the fair market value of property is not a proper measure of damages. For example, a family portrait may have no exchange value or a dog may be trained to answer only one master. In such cases, other measures of damage might be used, e.g., replacement value, original cost, or value of the time spent producing it.

Some plaintiffs experience considerable emotional distress when their property is destroyed or interfered with in substantial ways. In most cases, however, damages for such distress cannot be added to the damages for harm to the property itself even if the emotional attachment to the property (e.g., a pet) is strong. To recover for this distress, other torts would have to be tried such as intentional infliction of emotional distress (see Chapter 9).

**MITIGATION-OF-DAMAGES RULE**

Under the *mitigation-of-damages rule* (also called the avoidable-consequences doctrine) injured parties must take reasonable steps to alleviate their injury. A wrongdoer will not be liable for any increase or *aggravation* of the injury caused by the injured party’s failure to take such steps. All recovery is not barred. The amount of the recovery is reduced to cover those damages the plaintiff brought on him- or herself by failing to use reasonable follow-up care in responding to the injury. The most obvious example is the plaintiff who fails to obtain medical help after being injured by the defendant. The plaintiff has thereby aggravated his or her own injury. The defendant will be liable for the initial injury, but not for the aggravation of that injury if the failure to seek medical assistance was unreasonable under the circumstances (e.g., such assistance was available, the plaintiff knew about it, and it had a good chance of helping the plaintiff).

The same principles apply to property loss. Suppose that the defendant negligently sets fire to a small portion of the plaintiff’s barn. The plaintiff cannot sit by and watch the entire farm burn up if some reasonable steps by the plaintiff could have mitigated the loss (e.g., throwing an available bucket of water on the fire or calling the fire department).
contributory negligence The failure of plaintiffs to take reasonable precautions for their protection, helping to cause their own injury or other loss.

The mitigation-of-damages rule differs from contributory negligence, which is unreasonable conduct by the plaintiff that helped cause the initial injury. Contributory negligence, where it applies, bars all recovery of damages by the plaintiff. The mitigation rule reduces the damages. We will cover contributory negligence in Chapter 17.

ASSIGNMENT 16.3

Mary negligently hits a pedestrian. The pedestrian is rushed to the hospital and told that a blood transfusion is necessary. The pedestrian refuses on religious grounds. The pedestrian dies. For what damages will Mary be responsible in the negligence action brought by the pedestrian's estate?

CASE

Keans v. Bottiarelli
35 Conn. App. 239, 645 A.2d 1029 (1994)
Appellate Court of Connecticut

Background: In this action for dental malpractice, the plaintiff sued her oral surgeon for injuries resulting from a tooth extraction. The trial court found for the plaintiff, awarding her $20,000. Of this amount, $14,965.54 was for pain and suffering, and $5,034.46 was for the hospitalization the plaintiff needed because of the defendant's negligence. The trial court reduced the award by $5,034.46 after finding that the plaintiff was the cause of this hospitalization due to her failure to mitigate her damages by not following instructions after the oral surgery. Both parties appealed the award of damages. The case is now before the Appellate Court of Connecticut.

Decision on Appeal: The judgment affirmed. There was a failure to mitigate. The award for pain and suffering was fair.

OPINION OF COURT
Judge SCHALLER delivered the opinion of the court . . . :

The trial court could reasonably have found the following facts. On July 19, 1990, the plaintiff consulted the defendant, an oral surgeon, to have a tooth extracted. On the initial visit to the defendant, the plaintiff informed the defendant that she suffered from myelofibrosis, a rare blood disorder that inhibits production of red blood cells and platelets, thereby affecting the blood clotting ability of afflicted individuals. The plaintiff's condition requires her to receive frequent blood and platelet transfusions and to self-administer interferon injections. The plaintiff further informed the defendant that her platelet count was 39,000. The defendant performed the extraction without first consulting the plaintiff's hematologist, concluding that the plaintiff "looked good" and would not require a platelet transfusion. The plaintiff remained in the defendant's recovery room until the area around the extraction site stopped bleeding and was sent home with a prescription for penicillin and a pamphlet detailing postoperative instructions. After returning home, the extraction site began to bleed. The plaintiff's son called the defendant, who advised him that the plaintiff should bite down on a tea bag to release tannic acid to facilitate blood clotting. The plaintiff made no further effort to contact the defendant that day, despite worsening of her condition.

The next morning, the plaintiff contacted Richard Hellman, her hematologist, who admitted her to the hospital. The plaintiff, diagnosed with neutropenia, severe thrombocytopenia, severe anemia and myelofibrosis, was hospitalized for three days and was discharged on July 23, 1990, with no permanent injuries. . . .

The plaintiff's expert testified that the conduct of the defendant deviated from prudent and standard dental practice. He testified that because the plaintiff reported a low platelet count, the defendant should have consulted her hematologist prior to attempting the extraction. One of the defendant's experts reported that on the one occasion that he himself performed an extraction on a myelofibrotic patient he consulted with a hematologist. The trial court determined that the plaintiff's expert was more credible than that of the defendant, and that a causal connection existed between the deviation from prudent and standard dental practice and the plaintiff's initial injury. We conclude that the trial court's finding that the plaintiff had established the elements necessary to prove dental malpractice by the defendant was not clearly erroneous.

The trial court applied the doctrine of mitigation of damages and reduced the award by the amount of the plaintiff's hospitalization expense. Our Supreme Court has stated that "[w]e have long adhered to the rule that one who is injured by the negligence of another must use
reasonable care to promote recovery and prevent any aggravation or increase of the injuries." (Internal quotation marks omitted.) Preston v. Keith, 217 Conn. 12, 15, 584 A.2d 439 (1991). "When there are facts in evidence that indicate that a plaintiff may have failed to promote his recovery and do what a reasonably prudent person would be expected to do under the same circumstances, the court, when requested to do so, is obliged to charge on the duty to mitigate damages." Jancura v. Szwed, 176 Conn. 285, 288, 407 A.2d 961 (1978). "[A]lthough the defendant need not specially plead [a duty to mitigate damages], the defendant ‘must bring forward evidence that the plaintiff could reasonably have reduced his loss or avoided injurious consequences. . . . ’ " Preston v. Keith, supra, 217 Conn. at 22, 584 A.2d 439. To prevail, the wrongdoer “ ‘must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages could have been avoided and can be measured with reasonable certainty.’ " Id., quoting 2 M. Minzer, Damages in Tort Actions (1989) § 16.11, p. 16–18.

The trial court concluded that the three requirements to establish a failure to mitigate damages set forth in Preston v. Keith, supra, 217 Conn. at 22, 584 A.2d 439 were proven. The trial court found that the plaintiff’s conduct exacerbated her initial injury. The trial court found that the plaintiff failed to take reasonable action to lessen the damages by neglecting to fill the prescription for penicillin and by not following the defendant’s post-operative instructions. The trial court further found that this failure on the part of the plaintiff caused the need for her hospitalization. We conclude that the trial court’s reduction of the damage award for this reason was not clearly erroneous. . . .

The defendant . . . contends that the plaintiff’s damage award of $14,965.54 for her pain and suffering was excessive. At the outset, we note the “question of damages in personal injury cases . . . is always a difficult one.” Prosser v. Richman, 133 Conn. 253, 256, 50 A.2d 85 (1946). The “amount of an award is a matter peculiarly within the province of the trier of facts.” Pisel v. Stamford Hospital, 180 Conn. 314, 342, 430 A.2d 1 (1980); Angelica v. Fernandes, 174 Conn. 534, 535, 391 A.2d 167 (1978). Because we find that the amount of the damage award was properly within the bounds of fair and reasonable compensation and is far from “shock[ing] to our] sense of justice”; Herb v. Kerr, 190 Conn. 136, 139, 459 A.2d 521 (1983); we find the lower court did not abuse its discretion in assessing the damages. . . . The judgment is affirmed.

**ASSIGNMENT 16.4**

a. The dentist was negligent but the only damages he was held liable for were pain and suffering. Why?

b. In the next chapter, you will learn that, in some states, if the plaintiff was also negligent in contributing to his or her own injury, the plaintiff recovers nothing no matter how negligent the defendant was. If this rule applied in Connecticut where this case was decided, would the plaintiff have recovered anything?

**COLLATERAL SOURCE RULE**

When a person is injured or dies, he or she often receives funds or services from a variety of sources other than the defendant:

- the plaintiff’s own medical or life insurance
- company insurance
- veteran’s benefits
- Social Security
- wage continuation plans
- free medical care provided by a relative

Each of these is a **collateral source**—a source to which the defendant did not contribute. When the time comes to calculate the total amount in damages owed by the defendant to the plaintiff, should this amount be reduced by what the plaintiff has received through collateral sources? Should there be an **offset**? All states do not

**collateral source** Someone other than (and independent of) the tortfeasor who provides direct or indirect financial assistance to the victim of the tort.

**offset** A deduction; that which compensates for or counters something else.
answer this question in the same way. Here are some of the approaches taken by different states:

- The damages are not reduced by collateral sources in any case even though the plaintiff, in effect, recovers twice for part or all of his or her injury. Furthermore, the defendant is not allowed to tell the jury about the collateral sources. The defendant is not given the benefit of the plaintiff’s good luck or resourcefulness in obtaining benefits from collateral sources.
- The damages are not reduced by collateral sources in any case, but the defendant is allowed to tell the jury about the collateral sources in the hope that it might reduce the verdict because of them. (A reduction that is allowed but not required is called a permissive offset.)
- The damages are reduced by collateral sources, but only in certain kinds of cases such as medical malpractice. (A required reduction is called a mandatory offset.)
- The damages are reduced by collateral sources in all cases.
- The damages are reduced by some collateral sources. For example, the state may allow reduction of social security benefits, but not for life insurance proceeds or other death benefits.

When a state refuses to offset damages because of what is provided by collateral sources, the refusal is called the collateral source rule.

**JOINT TORTFEASORS**

Joint tortfeasors are persons who contribute to the commission of a single tort. They fall into two categories:

- persons acting in concert to produce a wrong
- persons not acting in concert whose wrongs produce a single indivisible result

It should be noted, however, that some states disagree that the second category of persons should be classified as joint tortfeasors. According to this view, joint tortfeasors should be limited to defendants who act by mutual agreement (i.e., in concert) and should not extend to independent defendants who happen to act at the same time (i.e., concurrently) to produce a wrong.

The significance of being a joint tortfeasor is that each joint tortfeasor has joint and several liability for the entire harm suffered by the plaintiff. This means that the plaintiff can sue any individual joint tortfeasor for the entire harm or can join them all to recover for the entire harm. It does not mean that the plaintiff receives a multiple recovery. The plaintiff can receive only one satisfaction. Yet the plaintiff chooses whether to go after all of them or one of them. If the plaintiff sues one, but is unable to collect the full judgment, the plaintiff can sue the remaining tortfeasors until the full amount of the damages is recovered. Suppose only one joint tortfeasor pays the entire judgment. Can this person then collect anything from the other joint tortfeasors as their “share”? We will consider this separate topic later when we discuss contribution. It is of no concern to the plaintiff that the joint tortfeasors did not pay the judgment equally. They are left to fight this out among themselves. The plaintiff’s only interest is in recovering full damages.

**Persons Acting in Concert**

Persons act in concert when they undertake an activity by mutual agreement. They are joint tortfeasors if, while acting in concert, they commit negligence or another wrong. They thereby become jointly and severally liable. If they had a business or profit purpose, their activity is often called a joint venture.
CHAPTER 16  NEGLIGENCE: ELEMENT IV: DAMAGES

EXAMPLES

- Mary and Jane buy a truck to make deliveries together. One day, they are late in making a delivery. Mary, the driver, starts speeding. Jane urges her to go even faster. The truck negligently hits the plaintiff. Both Mary and Jane are joint tortfeasors.
- Al and Donald agree to steal the plaintiff’s goods. Al takes the goods while Donald acts as lookout. Both are joint tortfeasors.

There must be either an express agreement or a tacit understanding that each will participate in the activity that produces the wrong. No such agreement or understanding would exist, for example, with a hitchhiker in the truck of Mary and Jane at the time of the accident in the first case. The hitchhiker would not be a joint tortfeasor along with Mary and Jane. To be a joint tortfeasor, the person must cooperate in the wrong, encourage it, or otherwise be an active participant. Someone who approves or ratifies the wrong after it is done for his or her benefit can also be a joint tortfeasor.

Persons Not Acting in Concert

Assume that two individuals, acting independently of each other, cause an accident.

EXAMPLE

Two cars carelessly collide on the highway. They both run into and kill a pedestrian.

The two drivers acted concurrently, but they were not acting in concert. There was no joint venture between them. Yet, each was a substantial factor in producing a harm (the death of the pedestrian) that is indivisible. (A result that cannot be practically divided is considered indivisible.) In our example, we cannot separate the harm by determining which driver caused which part of the death. When two persons cause an indivisible harm, they are jointly and severally liable for the harm even though they were not acting in concert. They are treated the same as if they acted in concert.

If the harm is divisible, there is no joint tortfeasorship and no joint and several liability. Suppose that two companies independently pollute a stream with different chemicals, which can be separately identified. In such a case, each company will be liable only for that portion of the damage it caused. Suppose, however, that it is difficult to apportion the damages, because the companies used the same chemicals or because the different chemicals cannot be separately identified. The plaintiff and the defendants are in difficult positions. The plaintiff must do more than show that “somebody caused me harm.” How is the plaintiff to meet his or her burden of proving what the individual defendants caused? From the defendants’ perspective, it is unfair to saddle any one of them with the harm caused by the other defendants. A few courts shift the burden to the defendants and require them to establish who caused what. Most courts do not go this far; yet, they will assist the plaintiff in such cases by accepting a rough approximation of the portion of the harm caused by each defendant.

ASSIGNMENT 16.5

Ten families live in an apartment complex. They are very unhappy with the maintenance service provided by the landlord. Nine of the families begin throwing their garbage in a pile in one of the alleys next to the main building. The garbage draws many rats, which infest the apartment of the tenth family. This family sues the other nine families for negligence when it is forced to move out because of the rats. Are the nine families jointly and severally liable?
RELEASE

Satisfaction is the fulfillment of an obligation, such as the payment of a debt, based on an order to pay damages. If the plaintiff receives satisfaction from one joint tortfeasor, the others can no longer be sued by the plaintiff. As indicated earlier, the plaintiff is entitled to only one satisfaction.

Satisfaction is different from release. The latter is the giving up of a claim. This can be done for “free” (i.e., it is gratuitous) or it can be done for consideration.

EXAMPLE

While Tim and Fred are fishing in a lake, they negligently destroy Diane’s boat, which was moored at the dock. Because they were engaged in a joint enterprise, they are jointly and severally liable to her for the damage. Diane agrees, however, to give up (i.e., release) all her claims against Tim and Fred if they stop fishing in the lake where the accident occurred. They agree. If they abide by their agreement, Diane cannot later change her mind and sue them for the damage to her boat. In this example, there was consideration for the release. Something of value was given for the release—the promise to stop fishing.

What happens if the plaintiff releases only one of the joint tortfeasors? Are the other joint tortfeasors likewise released? Yes. In most states, the release of one joint tortfeasor automatically releases the others. Statutes in some states change this result by providing that the release of one does not automatically discharge the others. The plaintiff under these statutes can still go after the other joint tortfeasors.

In states where the release of one discharges all the joint tortfeasors, there is a device designed to get around this result. The device works as follows: In the negotiation with one joint tortfeasor, the plaintiff does not provide a release. Rather, he or she makes a promise or covenant not to sue that joint tortfeasor. The covenant, unlike the release, does not act as a bar to go after the other joint tortfeasors.

CONTRIBUTION

Suppose that the plaintiff obtains satisfaction of the entire amount of damages from one of the joint tortfeasors. Can that tortfeasor now force the other joint tortfeasors to contribute their share of the amount paid? Can he or she obtain contribution? Contribution is the right of one tortfeasor who has paid a judgment to be proportionately reimbursed by other tortfeasors who have not paid their share of the damages caused by all the tortfeasors. States do not all agree on the availability of contribution among joint tortfeasors:

- Some states deny contribution among joint tortfeasors.
- Some states allow contribution only among joint tortfeasors against whom the plaintiff has secured a judgment. Those not sued would not be subject to contribution claims by joint tortfeasors who were sued.
- Some states allow contribution only among joint tortfeasors who were negligent. Intentional joint tortfeasors cannot obtain contribution.

When contribution is allowed, the allocation is usually pro rata, or proportionate to the number of joint tortfeasors: two would be responsible for 50 percent each, three for 33 1/3 percent each, etc. A few states, however, make the allocation according to the relative fault of the joint tortfeasors. Again, contribution is not a concern of the plaintiff who has received satisfaction. Contribution is a battle among the tortfeasors.
INDEMNITY

Indemnity is a device whereby one party who has paid the plaintiff can force another party to reimburse him or her for the full amount paid. Unlike contribution, which usually calls for a proportionate sharing of the loss, indemnity shifts the entire loss from the defendant (who has paid the judgment) onto someone else. Indemnity can arise by contract, where one person agrees to indemnify the other for any loss that results if the latter is sued. Indemnity can also arise by operation of law independent of any agreement between the parties.

EXAMPLES

- The ABC Company buys the tanning plant of the XYZ Company. As part of the agreement, XYZ agrees to indemnify ABC for any tort claims filed against ABC that are based on facts that arose before the sale of the plant.
- An employer who has vicarious liability for the tort committed by his or her employee (see Chapter 14) can seek indemnity from the employee. Seeking indemnity, of course, would be impractical if the employee is judgment proof.
- A supermarket found liable for strict liability in tort for a defective product it sold (see Chapter 19) can seek indemnity from the manufacturer that made the product.
- Someone engaged in passive negligence may be able to obtain indemnity from the person whose active negligence (or intentional tort) created the hazard.

The person seeking indemnity is liable for the tort. This person, however, is allowed to make someone else reimburse him or her for the judgment he or she has paid when it appears equitable to do so. The relationship between the party who has paid and the party against whom indemnity is sought must be such that in fairness we can say that the latter should pay.

SETTLEMENT

A great deal can be learned about tort damages by examining demand packages such as those found in a settlement brochure and a settlement précis. As indicated earlier, they are written by one party and sent to the other (or to the latter’s insurance company) in an effort to encourage a settlement. They cover the merits of the causes of action and provide details on the damages that are alleged. We will study these documents in Chapter 29.

SEPTEMBER 11TH VICTIM COMPENSATION FUND

After the 9/11 attack against the World Trade Center towers and the Pentagon killed 2,280 people, Congress created the September 11th Victim Compensation Fund to compensate injured persons and relatives of those who were killed. To receive compensation from the fund, participants had to agree to waive their right to seek compensation for their injuries through tort litigation against entities involved in the attack, such as the airlines. The waiver, however, “does not apply to a civil action to recover collateral source obligations or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.” For those who died, the administrator of the Fund estimated the earnings they would have had if they had lived a full life. Over 98 percent of eligible families participated in the payout of over $7 billion. The average award received by relatives of those who died was approximately $2 million.
TAXATION OF DAMAGES

Compensatory damages for physical injuries are not subject to federal taxes. For example, a plaintiff does not have to pay federal taxes on an award of $100,000 in damages for pain and suffering and medical bills for a leg injury suffered in an accident due to the defendant’s negligence. The same would be true if this amount is received in a settlement. Damages for nonphysical injuries and for punitive damages, however, are taxable. If a physically injured plaintiff receives damages of $250,000, of which $150,000 are punitive damages and $100,000 are compensatory damages for the physical injury, taxes are owed on $150,000 only. Damages for nonphysical injuries (e.g., emotional harm not connected with a physical injury) are taxable.

CHECK THE CITE

Sarah Overstreet was having supper at Shoney’s Restaurant when two dinner plates fell from the tray of a waitress. A shard from one of the broken plates struck Ms. Overstreet in her left eye, blinding her in that eye. What damages issues were before the court in her action against Shoney’s and how were they resolved? Read the case of Overstreet v. Shoney’s, Inc., 4 S.W.3d 694 (Tenn. Ct. App. 1999). To read the opinion online: (1) Go to the site of the Court of Appeals of Tennessee (www.tsc.state.tn.us/OPINIONS/TCA/Oplsttca.htm). Click the link for the opinions of 1999, Second Quarter. Locate the case in the list (www.tsc.state.tn.us/opinions/tca/PDF/992/overstre.pdf). (2) Run a citation search (“4 S.W.3d 694”) or a party search (Overstreet Shoney) in the Legal Opinions and Journals database of Google Scholar (scholar.google.com).

PROJECT

Read the quote below on tort damages from plaintiff’s attorney Jan Schlichtmann, played by John Travolta in the movie A Civil Action. In Google, Bing, or another general search engine, run the following search: “tort damages.” Write a short essay in which you quote material on the Internet that supports the view of tort damages expressed in the quote by Schlichtmann. You can consult as many websites as you wish, but you must quote from at least three separate sites. Here is the Schlichtmann quote: “It’s like this. A dead plaintiff is rarely worth more than a living severely maimed plaintiff. However, if it’s a long, slow, agonizing death as opposed to a quick drowning or car wreck, the value can rise considerably. A dead adult in his twenties is generally worth less than one who is middle aged. A dead woman less than a dead man. A single adult less than one who’s married. Black less than white. Poor less than rich. The perfect victim is a white male professional, forty years old, at the height of his earning power, struck down at his prime. And the most imperfect, well, in the calculus of personal injury law, a dead child is worth the least of all.” A Civil Action (1998) (www.imdb.com/title/tt0120633/quotes)(www.mooviees.com/2026/quotes).

ETHICS IN A TORTS PRACTICE

You are a paralegal working in the law office of Gallagher & Gallagher, a personal injury law firm. You sometimes answer the phone when prospective clients call. Often they ask about fees. You have been instructed to tell them that there is no cost to the client unless the office wins the case through court decision or settlement. One day a caller asks what the cost would be if the client won $100,000. You answer, “One-third.” What ethical problems, if any, might exist?
SUMMARY

Damages are monetary payments awarded for a legally recognized wrong. Three main categories exist: compensatory, nominal, and punitive. Compensatory damages are monetary payments to restore an injured party to his or her position prior to the injury or other wrong. The damages cover two kinds of losses: economic losses (which can be objectively verified) and non-economic losses (for which no objective dollar amount can be identified). General damages are compensatory damages that usually result from the kind of harm caused by the conduct of the defendant. Special damages are compensatory damages that consist of economic or pecuniary losses (e.g., medical expenses and lost wages) that must be alleged and proven. They are not presumed to exist. Nominal damages consist of a small monetary payment (a trifling sum) when there has been a technical violation of a right but no significant loss or injury. Punitive damages are damages that are added to actual or compensatory damages in order to punish malicious, outrageous, or reckless conduct and to deter similar conduct in the future.

Future economic losses such as lost wages and medical expenses must be reduced to present value, which is the amount of money an individual would have to be given now in order to generate a certain amount of money within a designated period of time through prudent investment, usually at compound interest.

Damages for pain and suffering are sometimes capped in certain kinds of cases. Hedonic damages are compensatory damages that cover the victim's loss of pleasure or enjoyment in life. Insurance claims adjusters sometimes use a rough formula in calculating the damages they may be willing to settle for. Software programs exist to help a law office calculate the variables involved in an assessment of damages. The measure of damages to property is often the fair market value of the property before and after the wrong. Under the mitigation-of-damages rule, a defendant will not be liable for the additional or aggravated damages that the victim's reasonable steps could have avoided. Under the collateral source rule, the amount of damages caused by the tortfeasor shall not be reduced by any injury-related funds received by the plaintiff from sources independent of the tortfeasor, such as a health insurance policy of the plaintiff. Some states, however, do allow reductions for amounts received from collateral sources.

Joint tortfeasors are two or more persons who contribute to the commission of a single tort. They are jointly and severally liable for the harm they wrongfully cause. Each wrongdoer is individually responsible for the entire judgment; the plaintiff can choose to collect from one wrongdoer or from all of them until the judgment is satisfied. Joint tortfeasors may have acted in concert or independently to produce an indivisible result. The relinquishment (release) of a claim against one joint tortfeasor usually acts to discharge the others. States differ on whether and when joint tortfeasors can seek contribution and thereby allocate the damages among themselves. Indemnity is the device whereby one party who has paid the plaintiff can force another party to reimburse him or her for the full amount paid.

Compensatory damages for physical injuries are not subject to federal taxes. Damages for nonphysical injuries and punitive damages are taxable.

KEY TERMS

damages 284
compensatory damages 284
pain and suffering 284
general damages 284
special damages 285
nominal damages 285
pro bono 285
punitive damages 285
ordinary negligence 285
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lump-sum payment 286
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vicarious liability 301  
judgment proof 301  
strict liability in tort 301  
passive negligence 301  
active negligence 301

■ REVIEW QUESTIONS

1. What are damages?  
2. What are the three main categories of damages?  
3. What are compensatory damages?  
4. Distinguish between economic and non-economic compensatory damages.  
5. Give examples of pain and suffering.  
6. How do general damages differ from special damages?  
7. What are nominal damages, and when are they awarded?  
8. What are punitive damages, and when are they awarded?  
9. Why must future economic damages be reduced to present value?  
10. What is a structured settlement?  
11. Distinguish between simple and compound interest.  
12. What is a discount rate?  
13. How are damages for pain and suffering calculated?  
14. What are hedonic damages, and why do some courts refuse to award them?  
15. How are damages for property losses calculated?  
16. What is the mitigation-of-damages rule?  
17. What is the collateral source rule?  
18. What are joint tortfeasors?  
19. Define joint and several liability.  
21. When can defendants who are joint tortfeasors obtain contribution?  
22. Under what circumstances will indemnity be granted?  
23. What is a settlement brochure? A settlement précis?  
24. What right had to be waived under the law that created the September 11th Victim Compensation Fund?  
25. What damages are taxable?

■ HELPFUL WEBSITES

• Damages and Jury Verdicts  
  www.juryverdicts.com  
  www.jvra.com  
  morelaw.com  
  lawyersusaonline.com (click “Verdicts & Settlements”)  

• Punitive Damages  
  www.tobacco.neu.edu  
  (type “punitive” as a search term)  
  www.atra.org/show/7343  
  en.wikipedia.org/wiki/Punitive DAMAGES  

• Pain and Suffering  
  www.seattlepi.com/local/122105_colossus15xx.html  
  en.wikipedia.org/wiki/Pain_and_suffering  

• Collateral Source Rule  
  biotech.law.lsu.edu/Books/lbb/x93.htm  
  en.wikipedia.org/wiki/Collateral_source_rule  

• September 11th Victim Compensation Fund  
  www.justice.gov/archive/victimcompensation  
  www.kentlaw.edu/honorsscholars/2002students/Levin.html  

• Damages in General  
  topics.law.cornell.edu/wex/Damages  
  www.llrx.com  
  (type “damages” as a search term)  
  en.wikipedia.org/wiki/Damages  

• In Google, Bing, or another search engine, run the following search: elements negligence damages tort.
CHAPTER 16  NEGLIGENCE: ELEMENT IV: DAMAGES

ENDNOTES

1. Equity was once a court system that was separate from the common-law court system. The equity courts administered equitable remedies that were based on a somewhat flexible sense of fairness as opposed to the more rigid legal remedies available in the common-law courts. Today the two court systems have merged in most states so that equitable remedies and legal remedies are usually available in the same court.


4. Uniform Medical Malpractice Interrogatories, 17B Arizona Revised Statutes.

5. Adapted from David W. Robertson et al., Torts 349–350 (2d ed. 1998); 2 California Jury Instructions—Civil §§ 14.00–14.13 (7th ed. 1986) (Book of Approved Jury Instructions (BAJI) of the Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California); Robert E. Keeton et al., Tort and Accident Law 449–450 (3d ed. 1998); and Illinois Pattern Jury Instructions, Civil §§ 30.01–30.07, 34.01, 34.02 (2d ed. 1971).


8. Restatement (Second) of Torts § 911, comment e (1979).
