



If you have questions regarding Considerations in Assessing Damages, please contact:

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## ILLINOIS LAW MANUAL

### CHAPTER XIV DAMAGES

#### **B. CONSIDERATIONS IN ASSESSING DAMAGES**

##### **1. Nature, Extent, and Duration of Injury**

In determining the various elements of damages, it is important to note that the jury is to consider the nature, extent, and duration of the claimant's injuries. In other words, "nature, extent, and duration" are not separate elements of recoverable damages. Rather, any award for one of the various elements of damages (such as disability, pain and suffering, lost wages, etc.) must involve, and be based upon, an assessment of the nature, extent, and duration of the claimant's injuries. Powers v. Illinois C. G. R. Co., 91 Ill. 2d 375, 387 (1982); Hendricks v. Riverway Harbor Service St. Louis, Inc., 314 Ill. App. 3d 800 (2000).

##### **2. Proximate Cause**

Only those damages proximately caused by the defendant's negligent act or omission are recoverable. Generally, the defendant is liable for all injuries directly resulting from his or her wrongful act or omission, as long as they are a natural consequence of that act or omission and could reasonably have been anticipated. Braun v. Craven, 175 Ill. 401 (1898); Haudrich v. Howmedica, Inc., 169 Ill. 2d 525 (1996). Significantly, the damages must naturally, usually, and reasonably flow from the act or omission.

The finder of fact must base a damages award or verdict on the evidence and not upon speculation, prejudice, or sympathy. I.P.I. 1.01(2).

##### **3. Future Damages – Reasonable Certainty Required**

Future damages are also available under certain circumstances. To assess compensation for future damages, there must be sufficient evidence to show that the future damages are reasonably certain to occur. They cannot be speculative or merely a future possibility. Wolf v. Bueser, 279 Ill. App. 3d 217 (1996); but also see Dillon v. Evanston Hospital, 199 Ill. 2d 483 (2002).

##### **4. Actual Damages Required in Illinois Negligence Actions**

"Actual damages" are required for recovery, even where the defendant is liable. Jeffrey v. Chicago Transit Authority, 37 Ill. App. 2d 327 (1962). "Actual damages" are "compensatory" and are those damages recoverable under Illinois Pattern Jury Instruction 30.01 set forth above. They are awarded to restore the injured claimant to his or her pre-injury position. Black's Law Dictionary (8<sup>th</sup> ed. 2004).

##### **5. Aggravation of a Pre-existing Ailment or Condition**

In Illinois, the aggravation of a pre-existing ailment or condition is a compensable element of damages. Accordingly, a claimant can recover for such an exacerbation of a previous condition, taking into consideration the nature, extent, and duration of the injury. Podoba v. Pyramid Elec., 281 Ill. App. 3d 545 (1996); I.P.I. 30.01; 30.03 (2000).

In fact, a claimant's right to recover damages is not limited by the fact that the injury complained of resulted due to a pre-existing condition, or that such injury may not have occurred but for a peculiar weakness caused by the pre-existing condition. Balestri v. Terminal Freight Cooperative Assoc., 76 Ill. 2d 451 (1979) (citing Chicago C. R. Co. v. Saxby, 213 Ill. 274 (1904)); Voykin v. DeBoer, 192 Ill. 2d 49 (2000). On the same note, it is not a defense that the plaintiff was more susceptible to injury because of a pre-existing physical condition. Id.

## **6. Disability, Disfigurement and Loss of Normal Life**

"Disability" is generally defined as the state of not being fully capable of performing all functions, whether mental or physical. Damages are allowed for this "disabling effect." Black's Law Dictionary (8<sup>th</sup> ed. 2004); Kirchbaum v. Chicago City Ry. Co., 207 Ill. App. 44 (1917); Smith v. City of Evanston, 260 Ill. App. 3d 925 (1994); Baker v. Hutson, 333 Ill. App. 3d 486 (2002).

"Disfigurement," on the other hand, is defined as an impairment of or injury to the beauty, symmetry, or appearance of a person. It is that which renders one unsightly, misshapen, imperfect, or deformed in some manner. Black's Law Dictionary (8<sup>th</sup> ed. 2004); Rapp v. Kennedy, 101 Ill. App. 2d 82 (1968); White v. Leuth, 283 Ill. App. 3d 714 (1996).

It is important to note that disability and disfigurement are separately compensable elements of damages. They are not mutually exclusive and, where applicable, can both be recovered by the same claimant as separate and distinct elements of damages. I.P.I. 30.04; 30.04.01 (2000).

In 2003, the Illinois Supreme Court in Snelson v. Kamm, 204 Ill. 2d 1 (2003) declared that the term "loss of normal life" is a separate element of compensable damage in Illinois and not just a component of a compensable damage element.

It is in the trial court's discretion to determine whether the term "loss of normal life" or "disability" is to be given as an instruction depending on the evidence at trial pursuant to Illinois Pattern Jury Instruction I.P.I. 30.04.01. Hendrix v. Stepanek, 331 Ill. App. 3d 206 (2002) cited in Snelson v. Kamm, 204 Ill. 2d 1 (2003).

Damages for disability and disfigurement are not reduced to present cash value. Drews v. Gobel Freight Lines, Inc., 144 Ill.2d 84 (1991) (citing Schaffner v. Chicago & N.W. Trans. Co., 129 Ill. 2d 1 (1989)); King v. Clemens, 264 Ill. App. 3d 138 (1994).

Once a defendant is found liable, the issue of whether the claimant's personal appearance has been marred/disfigured is to be considered (as always, taking into account the nature, extent, and duration of the injury/disfigurement). Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455 (1965); Simon v. Kaplan, 321 Ill. App. 203 (1<sup>st</sup> Dist. 1944).

For example, a scar on one's face may require much greater compensation than the same scar on one's foot. Further, the size and severity of that scar or other disfigurement should be taken into account. However, an award of zero damages for permanent disfigurement by a jury is not inconsistent with an award for costs of scar revision as future medical expenses. Simon v. VanSteenlandt, 278 Ill. App. 3d 1017 (1996).

Importantly, the law prohibits recovery of damages for mental suffering due to "embarrassment" or "humiliation" only under the heading of disfigurement. Simon v. Kaplan, 321 Ill. App. 203 (1944) (citing Chicago C. R. Co. v. Anderson, 182 Ill. 298 (1899)); Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455 at 459-460 (1965).

However, disfigurement could lead to other compensable damages, such as the inability to secure employment (loss of earnings), which damages should be considered under their own heading rather than under "disfigurement" as well. Simon v. Kaplan, 321 Ill. App. 203 (1944).

## 7. Pain and Suffering – Past and Future

Other compensable damages for an injured claimant are pain and suffering of both the body and mind. Ziencina v. County of Cook, 188 Ill. 2d 1 (2000). Such pain and suffering is limited to the time the claimant is conscious, as an unconscious person does not suffer pain because the mind is not conscious of the body's condition. Pain and suffering can also be shown in limited circumstances in an unconscious person where there is evidence of increased heart pressure, rising pulse rate, and a declining blood pressure during surgery given without an anesthesia. Holston v. Sisters of the Third Order Of St. Francis, 165 Ill. 2d 150 (1995).

Such damages include both pain and suffering experienced to date, and reasonably certain to be experienced in the future. However, "reasonably certain" does not necessarily require expert medical testimony. Rheinheimer v. Village of Crestwood, 291 Ill. App. 3d 462 (1997).

Pain and suffering, both past and future, are separate and distinct from disability. Wood v. Mobil Chemical Co., 50 Ill. App. 3d 465 (1977); Hastings v. Gulledge, 272 Ill. App. 3d 861 (1995). Accordingly, if appropriate under a particular situation, a claimant can recover for pain and suffering and disability.

The dollar value of damages for pain and suffering is not necessarily related to the amount of medical bills incurred, thus giving a jury great discretion in assessing damages for pain and suffering. Snover v. McGraw, 172 Ill. 2d 438 (1996). A jury is not required to make an award for pain and suffering where it awards damages for pain-related medical expenses. Id.

Damages for pain and suffering are not reduced to present cash value. Drews v. Gobel Freight Lines, Inc., 144 Ill.2d 84 (1991) (citing Schaffner v. Chicago & N.W. Transp. Co., 129 Ill. 2d 1 (1989)).

## 8. Medical Expense – Past and Future

An adult or an emancipated minor (free of parental control), or a minor whose parent has assigned his or her claim to the minor, may recover past and future medical expense. I.P.I. 30.06 (2000). Such damages include the reasonable expense of necessary medical care, treatment, and services reasonably certain to be rendered in the future. Donk Bros. Cole & Coke Co. v. Thil, 228 Ill. 233, 241 (1907); Villanueva v. O'Gara, 282 Ill. App. 3d 147 (1996).

In order to recover for "medical expenses," the claimant must prove:

- (1) that the claimant has paid, or has become liable to pay, the medical bills; and
- (2) that the expenses incurred are reasonable, usual, and customary for the services rendered.

American Nat'l Bank & Trust Co. v. Peoples Gas Light & Coke Co., 42 Ill. App. 2d 163 (1963) (citing Wicks v. Cuneo-Henneberry Co., 319 Ill. 344 (1925)); Barreto v. Waukegan, 133 Ill. App. 3d 119 (1985).

Accordingly, a claimant is not entitled to recover for the value of free hospital, nursing, and medical services obtained without obligation or liability.

Damages for future medical expense are discounted to present cash value. Drews v. Gobel Freight Lines, Inc., 144 Ill. 2d 84 (1991).

## 9. Present Cash Value

Future medical expenses cannot just be multiplied by the number of years those expenses will continue. Rather, the interest which will be earned on those damages before the time they are actually needed must be accounted for. Accordingly, the assessed sum of money, which, when added to the amount that sum may reasonably be expected to earn in the future (i.e.,

in interest), should equal the amount of medical expenses required, at the time in the future when said expenses are needed. In this way, the claimant receives money now to cover future medical costs to be paid later.

Future damages, except for pain and suffering, disfigurement, disability, and loss of society and consortium are to be reduced to present cash value. Drews v. Gobel Freight Lines, Inc., 144 Ill. 2d 84 (1991) (citing Schaffner v. Chicago & N.W. Transp. Corp., 129 Ill. 2d 1 (1989)). Illinois Pattern Jury Instructions 34.01, 34.02, and 34.04 deal with the discount to present cash value. There is no requirement that actuarial or statistical evidence be presented to guide the jury in determining the present cash value. Robinson v. Greeley & Hansen, 114 Ill. App. 3d 720 (1983); Brown v. Chicago and North Western Transportation Co., 162 Ill. App. 3d 926 (1987). However, actuarial or statistical evidence, as well as annuity or mortality, can be presented for use in determining present cash value. Id.

#### **10. Loss of Earnings or Profits – Past and Future**

Where the claimant is an adult or emancipated minor (free of parental control), or a minor whose parent has assigned his or her claim to said minor, past and future loss of time, earnings, profits, or salary are recoverable. I.P.I. 30.07 (1993). An injured party may recover for time lost from work even if that person was paid a regular wage during incapacitation. Muranyi v. Turn Verein Frisch-Auf, 308 Ill. App. 3d 213 (1999).

Damages for future loss of earnings/profits are discounted to present cash value. Drews v. Gobel Freight Lines, Inc., 144 Ill. 2d 84 (1991) (citing Schaffner v. Chicago & N.W. Transportation Co., 129 Ill. 2d 1, 25 (1989)).

Considerations with respect to damages for loss of earnings and profits are loss of time and inability to work due to the injury suffered. Donk Bros. Cole & Coke Co. v. Thil, 228 Ill. 233, 241 (1907).

With respect to lost earnings or profits to date, or in the past, the injured claimant/plaintiff may recover for the time lost, even though he or she was paid a regular wage during the time off. Cooney v. Hughes, 310 Ill. App. 371 (1941); Muranyi v. Turn Verein Frisch-Auf, 308 Ill. App. 3d 213 (1999).

With respect to future lost earnings or profits (those which have not yet occurred, but may occur in the future), there must be evidence that such losses are reasonably certain to be lost in the future. Branum v. Slezak Constr. Co., 289 Ill. App. 3d 948 (1997).

Since recovery for loss of earnings cannot be speculative or uncertain, the fact that a claimant was unemployed at the time of the injury, and was not scheduled to begin new work, is a relevant factor to be considered. Turner v. CTA, 122 Ill. App. 3d 419 (1984); Long v. Friesland, 178 Ill. App. 3d 42 (1988).

Loss of future earning capacity is generally calculated by deducting the amount the claimant was capable of making after the injury from what he or she was capable of making before the injury. (It is important to look to what he or she was capable of making, as compared to what he or she was making.) LaFever v. Kemlite Co., 185 Ill. 2d 380 (1998).

Future lost earnings cannot just be multiplied by the number of years they will continue. Rather, the interest which will be earned on those damages, before the time they are actually needed, must be taken into account to reduce the damages to a present cash value. Accordingly, the sum assessed, which, when added to the amount that sum will reasonably be expected to earn in the future (i.e., in interest), should equal the amount of earnings required at the time in the future time when the earnings would have been received but for the injury. In this way, the claimant receives the earnings he would have received in the future, without also gaining the benefit of current interest on money he would otherwise not have received for several years.