DAMAGES

I am now going to instruct you on damages. Please understand that by instructing you on damages I am not suggesting how you ought to decide this case; that is your responsibility. I am only informing you as to what the law is regarding the calculation of damages in the event that you get to that point.

You will only reach the issue of damages if you find that the defendant was negligent and that the defendant's negligence caused injury to the plaintiff. As with all the other elements, the plaintiff bears the burden of proving (his / her / their / its) damages by a preponderance of the evidence.

The purpose of the law in awarding damages is to compensate an injured person for the losses incurred because of another's negligent conduct. The goal is to try to restore the plaintiff to the position (he / she / they / it) would have been in had the accident not occurred. The purpose is not to reward the plaintiff or to punish the defendant. Damages are to be awarded to the plaintiff as a fair and reasonable compensation for the legal wrong done to (him / her /

them / it) by the defendant. You must put aside your personal feelings during your deliberations and decide this case as the evidence and law dictate.

Rodgers v. Boynton, 315 Mass. 279, 280 (1943); *Barney v. Magenis*, 214 Mass. 268, 273 (1922).

There is no special formula under the law to assess the plaintiff's damage. The law does not require the plaintiff to prove (his / her / their / its) damages with mathematical precision. It is your obligation to assess what is fair, adequate, and just. You must use your wisdom and judgment and your sense of basic justice to translate into dollars the amount which will fairly and reasonably compensate the plaintiff for (his / her / their / its) injuries. You must be guided by your common sense and by your conscience.

In determining the amount of damages which the plaintiff is entitled to recover, there are certain areas, or subcategories of the law of damages, which you should take into consideration.

CATEGORIES OF DAMAGES

1. *Pain and suffering.* **The first area, or subcategory, of damages is pain and suffering. There are two types of pain and suffering: physical**

pain and suffering and mental pain and suffering. For physical pain and suffering, you are to consider the areas of the body in which you find the plaintiff was physically injured. You are to take into account the past pain and suffering endured by the plaintiff since the date of the injuries, the present pain and suffering caused by the injuries, and any future pain and suffering which were proved with reasonable medical probability.

Mental pain and suffering includes any and all nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, you should take into account past, present, and probable future mental suffering.

Taking into consideration the nature of the injury, you are to determine what would be a fair and reasonable figure to compensate the plaintiff for any physical pain and suffering and any mental pain and suffering. You may consider the extent to which the plaintiff's injuries have caused the plaintiff a loss of pleasures which (he / she / they / it) otherwise probably would have had in the form of work or play or family life or whatever. The plaintiff is entitled to full

compensation for any reduction in the enjoyment of life which you conclude has resulted or probably will result from this accident.

If there is a permanent condition. **You should also consider and allow a fair, reasonable sum for any permanent condition caused or resulting to the plaintiff as a result of the defendant's wrong. This could include any permanent marks or permanent loss of bodily function. You must determine what amount will fairly and reasonably compensate for that loss.**

To arrive at a monetary figure for the plaintiff's pain and suffering, you must use your own good sense, background, and experience in determining what would be a fair and reasonable figure to compensate for past and present [and any probable future] pain and suffering such as you find has been proved by the evidence.

Two areas of pain and suffering: *Rodgers v. Boynton*, 315 Mass. 279, 280 (1943).

In general, Massachusetts still follows the view that in order to recover for mental suffering caused by negligent conduct, a plaintiff must also suffer physical injury or harm. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 137–38 (1993); *Payton v. Abbott Labs*, 386 Mass. 540, 557 (1982). When recovery is sought for negligent rather than intentional or reckless infliction of emotional distress, evidence must be introduced that the plaintiff has suffered physical harm, as emotional distress is not a reasonably foreseeable result of a defendant's

merely negligent conduct. This is also the view presented in Restatement (Second) of Torts § 436 (1965) (with the exception of a few special fact patterns that do allow recovery absent physical injury).

"The requirement of physical harm is interpreted to include a broad range of symptoms; what is required is only enough objective evidence to corroborate [plaintiffs'] mental distress claims." *Lanier v. President and Fellows of Harvard College*, 490 Mass. 37, 44 (2022), quoting *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 137-138 (1993). "Qualifying symptoms include those that could be classified as more mental than physical, provided that they go beyond mere upset, dismay, humiliation, grief and anger." *Id.*, quoting *Gutierrez* v. *Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 412 (2002), *S.C.*, 442 Mass. 1041 (2004) (internal quotations and citations omitted).

Where it is reasonably foreseeable that emotional distress will occur (absent physical harm) because of a defendant's conduct, recovery has been allowed in the following cases: *Dziokonski v. Babineau*, 375 Mass. 555, 568 (1978) (parent witnesses an accident in which [his/her] child was involved or comes upon the scene while the child is there); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 143–45 (1976) (intentional or recklessly inflicted emotional distress is foreseeable).

Mental pain and suffering: W. P. Keeton, *Prosser & Keeton on Torts*, § 54, at 359–66 (5th ed. 1984).

2. *Medical expenses.* **The next area, or subcategory, of damages which you are to consider is medical, hospital and nursing expenses incurred by the plaintiff on account of the injuries.**

The plaintiff is entitled to be compensated for those expenses which were reasonable in amount and which were reasonably necessary. Therefore, for each expense you must consider two things:

First: **Whether the expense was reasonably related to the treatment and care of the plaintiff; and**

Second: **Whether the amount of the charge itself was**

reasonable.

The plaintiff is entitled to recover for whatever expenses (he / she / they / it) proves are reasonably required to diagnose and treat any condition brought on by the accident or the resulting injuries. The plaintiff is entitled to recover for the reasonable costs of cure, alleviation of suffering, or limitation and control of disability related to the accident. You may also consider and allow the plaintiff a fair, reasonable sum for medical, hospital, and nursing expenses that reasonably are to be expected in the future as a result of the accident.

Generally: *Rodgers v. Boynton*, 315 Mass. 279, 280 (1943).

Reasonable future expenses: *Griffin v. General Motors Corp.*, 380 Mass. 362, 366 (1980); *Cross v. Sharaffa*, 281 Mass. 329, 331–32 (1933); *Doherty v. Ruiz*, 302 Mass. 145, 147 (1939).

Optional instruction: Tort threshold for pain and suffering damages.

Unless you find that the plaintiff's injuries include loss in whole or in part of a body member, or consisted in whole or in part of a permanent and serious disfigurement, or results in loss of sight or hearing, the plaintiff must incur more than $2,000 in medical, hospital, and nursing expenses in order to make a claim for pain and suffering. If you find that the plaintiff has failed to prove more than

$2,000 of reasonable and necessary medical expenses, you shall not award the plaintiff any damages for pain and suffering.

P.I.P.: In most motor-tort cases, the parties will stipulate to the "P.I.P. lien"— the amount the insurer paid the plaintiff in "no-fault" Personal Injury Protection benefits. If the parties do not file a written stipulated figure, the Court should inquire about the lien and obtain that figure. The jury is not advised of this amount, but it is deducted from any award made.

3. *Loss of earning capacity.* **The next area, or subcategory, of damages for your consideration is loss of earning capacity. Whether we are employed, are retired, or have never worked in our lives, each of us has the ability the ability to earn money, which is called an "earning capacity." The capacity to earn money varies from individual to individual depending upon a number of factors. Such factors may include evidence of wages, salary, or earnings before and after the injury, occupation, education, training, experience, health, habits, talents that a person has, skills that a person has, intelligence, and work ethic.**

If the defendant caused injury to the plaintiff so that the plaintiff could not exercise that ability for whatever length of time and that earning capacity is affected, then that is an area of damage to be

considered by you.

If wages continue. **Even when a person does not lose wages because (his / her / their) pay is continued by (his / her / their) employer as a gratuity or as compensation for disability, this person may nevertheless recover damages for impairment of earning capacity.**

Keep in mind that a person may have an earning capacity in excess of the wages paid to (him / her / them) in the job that (he / she / they) happens to have at the time of the injury.

Evidence of wages or salary paid is just one factor in your determination of loss of earning capacity. The proper measure is the loss of earning capacity of *this* plaintiff and not some standard of normal person in the plaintiff's position. Therefore, you may consider evidence of what the plaintiff did until the accident, what the plaintiff's interests were, what the plaintiff's training and experience had been, what the plaintiff's talents were, and generally what the plaintiff was like in order to help determine the plaintiff's capacity to earn since the

accident and into the future. You may not take into account anything that is merely possible, speculative, or imaginative. Rather, your award must be based on reasonable probability and can be made on the basis of your collective common knowledge.

If the plaintiff had the ability to earn money before the accident and you find there was a period of time after the accident that, by reason of the injury caused by the defendant, the plaintiff was unable to exercise the necessary physical or mental function to earn money, then that is an area which the plaintiff is entitled to have you consider. If you conclude that the plaintiff will not be able to work anymore because of the injuries or the plaintiff's ability to earn money will be permanently diminished because of the injuries, you may calculate a sum of money to compensate the plaintiff for that loss until the year the plaintiff would not have had a capacity to earn if there had not been an accident.

The determination of the extent of impairment of earning capacity, though involving contingencies and matters of opinion, rests largely on the common knowledge of the jury, sometimes with little aid from the evidence. *Griffin v. General Motors Corp.*, 380 Mass. 362, 366 (1980); *Doherty v. Ruiz*, 302 Mass. 145, 147 (1939).

Factors of earning capacity to consider: *Doherty v. Ruiz*, 302 Mass. 145, 146 (1939). "While proof of damages does not require mathematical precision, it must be based on more than mere speculation." *Squeri v. McCarrick*, 32 Mass. App. Ct. 203, 209 (1992).

Cross v. Scharaffa, 281 Mass. 329, 332 (1933); *Copson v. New York, New Haven & Hartford R.R. Co.*, 171 Mass. 233, 237 (1898) ("It is no objection to a finding that a computation is made without the aid of mathematical experts . . . Every jury in assessing damages in certain classes of actions is at liberty to consider questions of this kind on their own common knowledge, and without the aid of expert testimony.")

FINAL INSTRUCTIONS

Sum of the elements. **Once you have calculated each of these areas of damages – (physical pain and suffering) (mental pain and suffering) (medical expenses) (loss of earning capacity) - you should add up each of these damages to arrive at the total damage award. There must not be any overlapping of the various elements constituting the damages. The total sum of your verdict must be fair compensation for the entire injury, no more and no less.**

Rodgers v. Boynton, 315 Mass. 279, 281 (1943).

If applicable: closing arguments. **The law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.**

See Mass. R. Civ. P. 51(a)(2).