

Personal Injury Damages

(a) Compensation for Damages

If you find that DFT was negligent and that DFT's negligence caused injury to PLF, then you must decide what amount of money damages, if any, to award. You do that by answering Question __, which asks: "What total amount of money will fully and fairly compensate PLF for his/her damages resulting from DFT's negligence." Of course, the fact that I am instructing you on damages does not suggest anything about how to answer Questions __ and __.

(1) General Principles

I'll start with a few ground rules. If you award damages, you must award an amount sufficient to compensate PLF for the injuries or harm s/he suffered because of DFT's negligence. You must not use your damages award to reward PLF, nor may you use it to punish DFT.

The law gives you no special formula to assess PLF's damages. So, working together as the jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars and cents an amount that will fairly and reasonably compensate PLF for the particular type of harm you find. PLF must show, more likely than not, what his/her damages are. However, the law does not require any witness to express an opinion about the amount of such damages. PLF may prove damages by direct evidence, indirect evidence, or both. Now, let me turn to the specific types of damages that you should consider.

<omit any category of damages that is not applicable>

(2) Pain and Suffering Damages

You should consider damages for pain and suffering. There are two kinds of pain and suffering: physical pain and suffering, and mental pain and suffering.

For physical pain and suffering, you must consider any physical injuries to PLF's body resulting from DFT's negligence. You must consider the pain and suffering that PLF endured in each part of his/her body since the date of the incident, [any present pain and suffering caused by the injuries, and any future pain and suffering that PLF proved with reasonable medical probability].

You should also consider any past, [present, and probable future] mental suffering that DFT's negligence caused. Mental pain and suffering includes nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, if PLF's injuries caused him/her to lose enjoyment of activities such as work, play, family life or otherwise, then you should award damages for that reduction in the enjoyment of life.

<*loss of function, if applicable*> You should also allow a fair, reasonable sum for any [temporary or] permanent condition that PLF experienced because of DFT's negligence. This could include any loss of bodily function [or scarring].

(3) Pre-existing Condition or Injury

If PLF suffered from a preexisting medical [mental] condition, you may not award damages for that pre-existing condition itself. However, you should compensate PLF for any worsening of an existing condition that resulted from DFT's negligence. You should ask yourself: did the negligence worsen PLF's preexisting condition? If so, then you may award damages only for the worsening of the condition.

(4) Medical Expenses

You should consider any medical [hospital, chiropractic, and nursing] expenses that PLF incurred because of the negligence. You must compensate PLF for those expenses if they were reasonably necessary and were reasonable in amount. So, you must answer two questions:

- Were the medical services provided to PLF reasonably necessary because of an injury that resulted from the incident? ; and
- Were the charges themselves reasonable in amount?

The exhibits include doctors' reports, medical records, and medical bills relating to medical services provided to PLF. You may consider those exhibits as evidence of PLF's diagnosis, treatment, prognosis, and his/her resulting disability or incapacity, if any. You may also consider them in deciding whether DFT's negligence was a cause of PLF's injuries. And you may consider them on the question of reasonable medical expenses.

You do not have to believe something simply because it appears in a medical record or report. It is entirely up to you to decide whether you believe what appears in a record or report and how much importance to give the exhibit.

Although the use of health insurance and other reimbursement programs is widespread, that fact should not enter into your calculation. It is not relevant whether PLF paid his/her own medical expenses, or whether s/he was covered by insurance, or otherwise received reimbursement. If necessary, someone else will consider those matters, perhaps with information that is not even in evidence here. It would be unfair for you to speculate about such matters, because if you start guessing, you could easily guess wrong and do an injustice.

(5) Lost Earning Capacity

You should also award damages for any lost earning capacity resulting from DFT's negligence. Earning capacity is simply the ability to earn money. People can have an earning capacity whether they are employed, working at home, or retired, and even if they never worked a day in their life. If PLF had earning capacity before the incident, and lost the necessary physical or mental ability to earn money at the same level for some time because of DFT's negligence, then s/he is entitled to damages for lost earning capacity during that period.

You must consider PLF's own earning capacity, not that of an average person in his/her position. Earning capacity varies by person depending on a number of factors, including:

- What did PLF do until the incident, including his/her occupation?
- What did PLF earn before and after the injury?
- What were PLF's education, capacity, training, experience, health and habits?
- What talents, skills, intelligence, and motivation did PLF have?; and
- What were PLF's interests?

You may not, however, consider anything that is only possible or speculative. Rather, you must decide what is reasonably likely.

<Employer Payments, if applicable> Even if a person does not lose wages because his/her employer continues his/her pay voluntarily, or as compensation for disability, s/he may nevertheless recover damages for impairment of earning capacity. It is not relevant whether PLF received disability payments. If necessary, someone else will consider those matters, perhaps with information that is not even in evidence here. It would be unfair for you to speculate about such matters.

<Claim Exceeding Prior Wages, if applicable> A person may have an earning capacity that exceeds his/her wages in the job that s/he had before or at the time of the incident. Evidence of wages paid is only one factor in your determination of diminution of earning capacity.

(6) Out of Pocket Costs

Finally, if DFT's negligence has caused PLF to incur any [property damage] [out of pocket] costs, you should award PLF an amount to compensate him/her for [the reasonable and necessary costs s/he incurred] [the fair market value of the damaged property] [the loss of fair market value of the damaged [property]].

(7) Future Damages

If PLF has proven [with reasonable medical probability] that, more likely than not, in the future, s/he will experience any [pain and suffering, medical expenses, lost earning capacity, out-of-pocket expenses or property damage] because of DFT's negligence, you should award damages for that future harm. [If you find that PLF will suffer damages throughout his/her lifetime, you may consider life expectancy tables in evidence, to determine how long s/he will live.] There will be no future trial to evaluate any future damages that PLF may have. You must keep in mind that any judgment in this case will be paid in a lump sum and may be invested and earn money. Therefore, if you award future damages, you must reduce that portion of the damages to its present value as of [year], when PLF filed this case.¹

< ***Future Earning Capacity, if applicable*** > Of course, you do not award any damages for earnings in any year after PLF would have retired or lost any earning capacity even if the incident had not occurred.

(8) Mitigation of Damages

In addition, PLF had the duty to take all reasonable steps to reduce the damages s/he incurred as a result of his/her injuries. On this issue [— called mitigation of damages —] it is DFT, not PLF, who has the burden to prove that, more likely than not, PLF could have prevented some of his/her damages by reasonable measures.

PLF may not recover damages that s/he reasonably could have avoided. This rule applies to all types of damages in this case, including [medical expenses, pain and suffering, and lost earning capacity]. If you find that, by reasonable efforts, PLF could have prevented some amount of the damages, then you must not include that amount in your damages award.

¹ See *Griffin v. General Motors Corp.*, 380 Mass. 362, 367 (1980); *Copson vs. New York, New Haven, and Hartford Railroad Company*. 171 Mass. 233, 236-237 (1898).

(9) Interest and Taxes

You must not consider any interest on your damages award. The court will calculate interest on any award. Nor may you consider federal or state income taxes, because any damages in this case may or may not be subject to taxation. Someone else will have to address any tax considerations, depending upon what you decide. In other words, just follow my instructions on what issues to consider. If you go beyond what I have outlined, your verdict may well have unexpected consequences that you did not intend.

(10) Concluding Remarks

I'll conclude with a few general instructions about all types of damages that I have mentioned in this case.

First, sometimes there is uncertainty in proving one or more area of damage. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence.² Even so, you may not determine the plaintiff's damages by guessing. It is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.

[Second, 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

² "It is of course true that damages must be reasonably ascertainable from the evidence. But the fact that there is an element of uncertainty in their assessment is not a bar to recovery. 'The amount of damages seldom can be proved with the exactness of mathematical demonstration. Much must be left to estimate and judgment, sometimes upon meager evidence.' " *Dalton v. Demos Bros. Gen. Contractors*, 334 Mass. 377, 378-379 (1956) (internal citations omitted), quoting *Piper v. Childs*, 290 Mass. 560, 563 (1935).

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.]

Finally, once you have calculated damages for [past, present, and future] [pain and suffering, medical expenses, lost earning capacity, out-of-pocket expenses, or property damage], you should add each of these areas of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire injury. You must avoid duplicating or double counting any items of damages. When you have made your determination on the amount of damages, using the instructions I have just given, you should write down an amount in numbers and in words on the verdict slip.