



# The Proper Measure of Damages in a Tort Case . . . (Apparently Can Be Whatever The Trial Judge Thinks It Ought To Be)

By Kirby J. Smith

**A** client, Mrs. Davis, comes into the office, having suffered serious personal injuries in a car accident. While the facts do not suggest a basis for claims of negligent entrustment, negligent or intentional infliction of emotional distress, or wrongful death (see Web version of this article), the facts do support claims for negligence and possibly negligence per se. Of course, double recovery is not allowed, so additional theories may not result in additional damages anyway. *J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 277, 289, 89 P.3d 1009 (2004).

Mrs. Davis suffered an extensive list of damages: physical injuries; mental injuries; a whole person permanent/partial disability; medical expenses; pain and suffering; reduction in activities of daily living; loss of past and future income and earning capacity; loss of past and future household services capacity; future medical care; and prejudgment interest. However, there does not appear to be any support for punitive damages. While the types of damages may be known, for the most part, the specific wording of the allegations of damages in the complaint is probably not going to limit the instructions given by the court to the jury. Instead, the instructions ultimately given will reflect the trial judge's determination of what damages are appropriate to provide just and fair compensation to Mrs. Davis, based on the testimony presented at trial.

## Types of damages available to Mrs. Davis in her negligence claim

In general, a plaintiff, such as Mrs. Davis, who proves liability and has suffered personal injuries is entitled to recover medical expenses, loss of earnings, pain and suffering and related damages.

### General damages

At a minimum, Mrs. Davis should be entitled to recover damages for the past and future physical and mental pain and suffering caused by the defendant's negligence. See, e.g., *Quigley v. Central Pacific R.R.*, 11 Nev. 350, 370 – 371 (1876); *Sierra Pacific v. Anderson*, 77 Nev. 68, 75, 358 P.2d 892 (1961). A person who has a pre-existing condition or disability at the time of an injury is not entitled to recover

damages therefor; however, a plaintiff is entitled to recover damages for any aggravation of such pre-existing condition or disability. See e.g., *Otis Elevator Co. v. Reid*, 101 Nev. 515, 518, 706 P.2d 1378 (1985).

Damages for pain and suffering are peculiarly within the jury's province. *Stackiewicz v. Nissan Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984). No definite standard or method of calculation by which to fix reasonable compensation for pain and suffering is prescribed by law. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Juries are simply instructed to exercise their authority with "calm and reasonable judgment" and fix damages which are "just and reasonable in light of the evidence." Nevada Pattern Jury In-

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struction (NPJI) 5PID.2. A jury's damage award will stand unless it is "flagrantly improper" because "[t]he elements of pain and suffering are wholly subjective." *Stackiewicz*, 100 Nev. at 454, 686 P.2d at 932.

Where a plaintiff's injury or disability is clear and readily observable, no expert testimony is required for an award of future pain, suffering, anguish and disability. However, where an injury or disability is subjective and not demonstrable to others, expert testimony is necessary. See *Krouse Inc. v. Little*, 117 Nev. 929, 938, 34 P.2d 566, 572 (2001) ("the extent to which a broken bone causes pain and suffering is common knowledge"); *Curti v. Franceschi*, 60 Nev. 422, 426, 111 P.2d 53 (1941). Future pain and suffering must be shown to be "a probable, as contrasted to a possible, result." *Id.*; *Gutierrez v. Sutton Vending Serv.*, 80 Nev. 562, 566, 397 P.2d 3, 4 (1964).


An expert may testify as to hedonic damages. *Banks v. Sunrise Hosp.*, 120 Nev. 822, 836, 102 P.3d 52, 61 (2004) (distinguishing between the different types of "pain and suffering"). Hedonic damages are monetary remedies awarded to compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment of life. As such, they are an "element" or "component" of pain and suffering damages.

Nevada common law does not recognize a cause of action for medical monitoring, although a remedy of medical monitoring may be available for an underlying cause of action. *Badillo v. American Brands, Inc.*, 117 Nev. 34, 16 P.3d 435 (2001).

**Special damages**

Generally speaking, special damages are a species of compensatory damages. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 737, 192 P.3d 243, 251 (2008). "When items of special damage are claimed, they shall be specifically stated" in the pleading. Nevada Rule of Civil Procedure 9(g).

At a minimum, Mrs. Davis should be entitled to recover the reasonable value of all medical services and expenses, both past and future, made necessary by the injuries suffered by her. *Shere v. Davis*, 95 Nev. 491, 492, 596 P.2d 499 (1979). Typically, a plaintiff can establish through the testimony of the plaintiff's treating physicians that the nature, extent, and amount of her past medical treatment was "reasonable" and "necessary." An award of future medical expenses must be supported by "sufficient and competent evidence." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998) (relying on testimony of treating physicians that injuries would require continuing medical treatment).



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“In order to establish that the future medical expenses are a natural and probable consequence of defendant’s tortious conduct, the plaintiff must establish that such future medical expenses are reasonably necessary.” *Hall v. SSF, Inc.*, 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996). A plaintiff may have to prove she intends to seek or obtain the future medical treatment. See *York v. Smith*, 2010 WL 3270228 (Nev. 2010) (unpublished see SCR 123).

Additionally, she should receive damages for lost earnings and impairment of earning capacity. *Southern Pacific Transportation Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234 (1978). A claim for loss of past earnings is subject to sufficient documentary evidence that the time off was ordered and approved by her treating provider, actually incurred, and there is an actual loss of income which resulted.

Regarding lost future earnings, a jury could determine whether and to what extent Mrs. Davis’s earning capacity has been impaired. *Sierra Pacific*, 77 Nev. at 75; *Smith v. Garside*, 76 Nev. 377, 385–386, 355 P.2d 849 (1960). The jury can take the plaintiff’s ability—or lack thereof—to engage in a different pursuit into account. There is surprisingly little additional guidance. However, in *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885 (1989), the Nevada Supreme Court specifically approved the use of an economist to assist in the determination of such damages. Claims for future economic damages are thus routinely transformed into a battle of experts. Typically, there will be a medical expert and an economist on both sides. More guidance may possibly be found in discussions of “loss of probable support” because it has been equated with a decedent’s “lost economic opportunity” and both would seem conceptually similar. *Alsens v. Clark Co. School Dist.*, 109 Nev. 1062, 864 P.2d 285 (1993)(in dicta).

A jury has wide latitude in awarding special damages so long as there is an evidentiary basis for determining an amount that is reasonably accurate. *Wyeth v. Rowatt*, 126 Nev. Adv. Op. 44, 244 P.3d 765, 782 (2010). Household services expenses, past and future, have been expressly approved as a type of recoverable damage in *Yamaha Motor Co.*, 114 Nev. at 250. For example, in *Armstrong v. Onufrock*, 75 Nev. 342, 347, 341 P.2d 105, 107 (1959), a mother quit her job to care for her minor child who had been injured. The reasonable value of the nursing services was a proper element of special damages, not the loss of wages resulting from the change of occupation. *Id.* The amount of special damages need not be mathematically exact. *Countrywide Home Loans, Inc.*, 124 Nev. at 737. Damages are awarded in order to “make the aggrieved party whole.” *Hanneman v. Downer*, 110 Nev. 167, 172, 871 P.2d 279, 283 (1994).

In most circumstances, attorneys’ fees will not be recoverable, unless a statute, rule, or contractual provision

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expressly provides for an award of attorneys' fees as a cost of the action. *Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982 (2007). Under certain circumstances, however, attorneys' fees can be pled and recovered as special damages. *Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948, 956, 35 P.3d 964 (2001) (footnotes omitted); *see also Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 862, 124 P.3d 530 (2005).

### **Property damages**

Property damages and loss of use damages generally will have been paid by the defendants' insurance and by trial will likely no longer be an issue at trial. For loss of use, such as a rental of a comparable vehicle, *see Dugan v. Gotsopoulos*, 117 Nev. 285, 22 P.3d 205 (2001).

### **Other damages issues relevant in a tort claim**

In addition to damages related to the specific injuries, other issues regarding damages may arise.

### **Prejudgment interest**

A successful plaintiff is entitled to receive prejudgment interest. When no interest is provided by contract or otherwise by law, prejudgment interest on damages runs at prime rate plus 2 percent from service of the summons and complaint, except interest on future damages runs from the date of judgment, with the rate adjusted every six months. NRS 17.130. Prejudgment interest can be assessed on court costs, and assessed from the time costs are actually paid. *See e.g. Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994).

### **Loss of consortium**

Assuming there is a Mr. Davis, he might have a claim for loss of consortium resulting from the injury. *General Electric Co. v. Bush*, 88 Nev. 360, 368, 498 P.2d 366 (1972). A spouse's claim for loss of consortium is derivative, and, thus, its success is dependent on the other spouse having a valid cause of action against the defendant. *Turner v. Mandalay Sports Entm't*, 124 Nev. 213, 222 n.31, 180 P.3d 1172, 1178 n.31 (2008).

Consortium covers a variety of other intangible interests which the spouse has in the welfare of his/her spouse. These are described as "love, companionship, affection, society, sexual relations, solace and more." *General Electric Co.*, 88 Nev. at 367. The basis of the consortium recovery is the anguish the non-injured spouse suffers when the injury destroys or impairs those components that make for the traditional marriage. *Id.*

Generally, loss of probable "support" will often be considered separately from loss of probable "companionship, society, comfort, and consortium." *Id.* In order to "eliminate the danger that there would be a double recovery a precaution would be to charge the jury that [a spouse's] compensation for loss of [the other spouse's] society and companionship should not include additional damages for [the] right to support." *Id.*

### **Mitigation of damages**

As a general rule, a party cannot recover damages for loss that she could have avoided by reasonable efforts. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). The burden of proof on a failure to mitigate lies with the defendant. *Id.*; *see also Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 646 P.2d 553 (1982) (failure of plaintiff to undergo surgery).

### **Conclusion**

Nevada jurisprudence offers a long line of cases containing broad statements of rights to damages. For example, the Nevada Supreme Court stated long ago that a plaintiff, "is entitled to compensation for all the injuries naturally and necessarily resulting from the wrongful act of the party who caused the injury. In such cases the jury [is] authorized to give such damages as will make the injured party whole for all the injuries resulting directly from the wrongful and unlawful act . . . he that caused the injury must bear its consequences." *Quigley v. Central Pacific R.R.*, 11 Nev. 350, 370-371 (1876). More recently, the Court reiterated that "a successful plaintiff is entitled to compensation for all of the natural and probable consequences of the wrong . . ." *State, University and Community College System v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004). These and other cases arguably stand for the proposition that any general, special, or consequential damages could theoretically be recovered in a tort action if the trial court found them appropriate under the facts of the case. There are limitations—as stated above—but they are few and far between.

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