

Illinois

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A. General

The theory of damages in Illinois is stated in the Illinois Constitution, which provides that, “[e]very person shall find a certain remedy in the laws for all injuries and wrongs. . . He shall obtain justice by law, freely, completely, and promptly.”¹

B. Compensatory Damages

Compensatory damages in Illinois are to make the plaintiff whole after conduct of another caused harm, and not to punish the tortfeasor.²

C. Non-Economic Damages

The general rule in Illinois is that the amount of damages to be assessed is peculiarly a question of fact for the jury to determine and great weight is given to the jury's decision.³

Even though Illinois courts give broad deference to a jury's award of damages, the power of remittitur is a long recognized and accepted part of Illinois law.⁴ If an award “falls within the flexible range of conclusions which can be reasonably supported by the facts,” the court should not entertain a reduction in the jury's award.⁵ Remittitur is employed only when an award falls outside the

¹ ILL. CONST. 1970, art. I, § 12.

² See *Wills v. Foster*, 229 Ill. 2d 393, 401 (Ill. 2008) (quoting *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 363, 392 N.E.2d 1, 29 Ill. Dec. 444 (Ill. 1979)).

³ *Snelson v. Kamm*, 204 Ill. 2d 1, 36-37 (Ill. 2003).

⁴ *Epping v. Commonwealth Edison Co.*, 315 Ill. App. 3d 1069 (Ill. App. Ct. 2000).

⁵ *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 470 (Ill. 1992).

range of fair and reasonable compensation, appears to be the result of passion or prejudice, or is so large that it shocks the judicial conscience.⁶ Specifically, the court held that, “the very nature of personal injury cases makes it impossible to establish a precise formula to determine whether a particular award is excessive or not.”⁷ “[A] court reviewing a jury’s assessment of damages should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered.”⁸

Although there is no mathematical formula for deciding whether an award is fair and reasonable, the court will consider several factors when deciding whether to reduce the jury’s award, including: the extent of the injuries suffered and permanency of the plaintiff’s condition, the plaintiff’s age, the possibility of future deterioration, the extent of the plaintiff’s medical expenses, and the restrictions imposed on the plaintiff by the injuries.⁹ Illinois courts do

not employ a “comparison” concept when determining whether to reduce a jury’s award of damages.¹⁰ Instead, the court should consider the facts of each individual case and courts “have traditionally declined to make . . . comparisons [with damages awarded in other cases] in determining whether a particular award is excessive.”¹¹ As stated in *Barry v. Owens-Corning Fiberglas Corp.*, “[e]stablishing predictability of outcome for people similarly situated has surface attraction, but the courts of this state never have imposed on juries a requirement of conformity in damage awards.”¹²

D. Punitive Damages

Punitive damages are designed “to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future.”¹³

Before a claim for punitive damages can be submitted at trial, the plaintiff must demonstrate at a pretrial hearing that the evidence would support a punitive damages award.¹⁴ In cases where punitive

⁶ *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 411-412 (Ill. 1997); *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, 983 N.E.2d 1095, quoting *Epping*, 315 Ill. App. 3d at 1072.

⁷ *Snelson*, 204 Ill. 2d at 37.

⁸ *Id.*

⁹ *Richardson v. Chapman*, 175 Ill. 2d 98 (Ill. 1997); *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1064, 645 N.E.2d 284, 206 Ill. Dec. 279 (Ill. App. Ct. 1994).

¹⁰ *Tierney*, 268 Ill. App. 3d at 1065.

¹¹ *Richardson*, 175 Ill. 2d at 114. See also *Kopczick v. Hobart Corp.*, 308 Ill. App. 3d 967, 721 N.E.2d 769, 242 Ill. Dec. 490 (Ill. App. Ct. 1999).

¹² 282 Ill. App. 3d 199, 207 (Ill. App. Ct. 1996).

¹³ *Doe v. Catholic Bishop of Chicago*, 2017 IL App (1st) 162388, quoting *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N.E.2d 397, 150 Ill. Dec. 510 (Ill. 1990).

¹⁴ *Loitz*, 138 Ill. 2d at 415-416.

damages are sought, the trial court makes the initial determination, as a matter of law, whether punitive damages may be imposed.¹⁵ It is a question for the trier of fact to decide whether the defendant's conduct was sufficiently willful and wanton to support an award of punitive damages.¹⁶

The trial court may allow a claim for punitive damages if the evidence would reasonably support a finding that defendant acted “willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.”¹⁷ A defendant's knowledge of the surrounding circumstances, or utter indifference to or conscious disregard for the safety of others given that knowledge, are factors to consider when determining whether conduct amounts to willful and wanton misconduct.¹⁸

E. Limits on Damages

Although the Illinois General Assembly attempted to limit damages in civil cases, there are presently no statutory limits on damages. The Civil Justice Reform Amendments of 1995,¹⁹ issued limitations on damages. However,

in 1997, the Illinois courts found this Act to be unconstitutional and held “the compensatory damages cap of section 2-1115.1 violates the constitutional prohibition against special legislation and also violates the separation of powers clause.”²⁰

F. Collateral Source

“Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor.”²¹ As set forth in the Restatement (Second) of Torts, the rule provides that “payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.”²²

The collateral source rule has been described as an “established exception to the general rule that damages in negligence actions must be compensatory.”²³ Although the rule appears to allow a double recovery, the Illinois appellate court has held that it is not a windfall for

¹⁵ *Id.* at 414.

¹⁶ *Cirrincone v. Johnson*, 184 Ill. 2d 109, 116 (Ill. 1998).

¹⁷ *Loitz*, 138 Ill. 2d at 415.

¹⁸ *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122-123 (Ill. App. Ct. 2010).

¹⁹ Pub. Act 89-7, eff. March 9, 1995.

²⁰ *Best*, 179 Ill. 2d at 432.

²¹ *Arthur v. Catour*, 216 Ill. 2d 72, 295 Ill. Dec. 641, 833 N.E.2d 847 (Ill. 2005), quoting *Wilson v. The Hoffman Group, Inc.*, 131 Ill. 2d 308, 320 (Ill. 1989).

²² Restatement (Second) of Torts §920A(2), at 513 (1979).

²³ 25 C.J.S. *Damages* §172 (2002).

the injured party since, typically, the collateral source will have a lien or subrogation right that prevents such a double recovery.²⁴

In Illinois, the courts have held that the collateral source rule has both evidentiary and substantive components. As a rule of evidence, the rule prevents the jury from learning anything about collateral income.²⁵ For example, a defendant may not introduce any evidence that all or part of a plaintiff's losses have been covered by insurance.²⁶ As a substantive rule of damages, the collateral source rule "bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source."²⁷

G. Interest

In *Cotton v. Cocco*, the court addressed the theory of pre- and post-judgment interest and explained the justification to award both.²⁸ It explained that the goal of tort law is to place a tort victim in a

position as close as possible to his original position, prior to the tort, and to issue money damages to the tort victim commensurate with the injury suffered.²⁹ The court acknowledged that the wrinkle is that the tort victim often waits years before their legal claim is adjudicated and reduced to a judgment, and as a result, even though the tortfeasor has caused an immediate injury to the tort victim, the tortfeasor does not make immediate recompense, and instead, the tortfeasor may not pay damages for years.³⁰ So, as in most states, Illinois allows pre-judgment and post-judgment interest.³¹

Although Illinois has traditionally allowed pre-judgment interest where authorized by statute, contract, or equity, it was not until 2021 that the Illinois legislature codified the recovery of prejudgment interest in personal injury and wrongful death actions.³² By extending pre-judgment interest to tort cases, Illinois law now recognizes that the historic

²⁴ *Wills*, 372 Ill. App.3d at 673.

²⁵ *Arthur*, 216 Ill. 2d at 79.

²⁶ *Id.* at 79-80.

²⁷ *Id.* at 80, quoting J. FISCHER, UNDERSTANDING REMEDIES § 12(a), at 77 (1999).

²⁸ 2023 IL App (1st) 220788.

²⁹ *Id.* at 17; *McLane v. Russell*, 131 Ill. 2d 509, 523-524 (Ill. 1989).

³⁰ *Id.* at 18.

³¹ See 102d Ill. Gen. Assem., Senate Proceedings, March 25, 2021, at 37 (statements of Senator Harmon) ("As I said, forty-six other states already have some form of prejudgment interest.").

³² See 815 ILCS 205/2 (West 2020) (allowing for prejudgment interest in actions on an "instrument of writing" and seven other circumstances); see also 4220 *Kildare, LLC v. Regent Ins. Co.*, 2020 IL App (1st) 181840.

justifications for pre-judgment interest in contract cases apply with equal force to personal injury and wrongful death cases, and provides a plaintiff with a more complete recovery and requires a defendant to bear the full cost of its breach is consistent with basic fairness.³³

H. Limited Damages

There is no fixed Illinois rule applicable to all liquidated damages agreements; rather each clause must be evaluated on its own facts and circumstances.³⁴ Illinois recognizes that a general rule of contract law, for reasons of public policy, provides that a liquidated damages clause which operates as a penalty for nonperformance or as a threat to secure performance will not be enforced.³⁵

Under Illinois law, a liquidated damages provision will be enforced if it satisfies the test outlined in Section 356 of the Restatement (Second) of Contracts that states, “damages for breach by either party

may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”³⁶

There are three elements that must be met in order to validate a liquidated damages clause: (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove.³⁷

Offering further explanation, Illinois courts have interpreted this test by holding that, when determining whether actual damages would be uncertain in amount and difficult to prove, courts must look to “the time of contracting, not the time of breach.”³⁸

³³ *Cotton*, 2023 IL App (1st) 220788 at 19-20.

³⁴ *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447 (Ill. App. Ct. 2000), citing *Likens v. Inland Real Estate Corp.*, 183 Ill. App. 3d 461 (Ill. App. Ct. 1989).

³⁵ *Jameson Realty Grp. v. Kostner*, 351 Ill. App. 3d 416 (Ill. App. Ct. 2004), citing *Med + Plus Neck & Back Pain Center v. Noffsinger*, 311 Ill. App. 3d 853 (Ill. App. Ct. 2000); *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill.

App. 3d 737, 749, 607 N.E.2d 1337, 180 Ill. Dec. 824 (Ill. App. Ct. 1992).

³⁶ *Penske Truck Leasing*, 311 Ill. App. 3d at 454, quoting Restatement (Second) of Contracts § 356 (1979).

³⁷ *Noffsinger*, 311 Ill. App. 3d at 860, quoting *Grossinger*, 240 Ill. App. 3d at 749.

³⁸ *Penske Truck Leasing Co.*, 311 Ill. App. 3d 447 at 454, citing Restatement (Second) of Contracts § 356, Comment *b* (1979).

Additionally, the damages contained in a liquidated damages clause must be for a specific amount for a specific breach; the provision may not merely serve as a threat to secure performance or as a means to punish nonperformance.³⁹ Although exculpatory language in the contract stating that the liquidated damages provision is not a penalty does not control, it should be given some weight.⁴⁰

I. Attorneys' Fees

Litigation expenses are generally not allowable to the successful party in the absence of a statute or a contractual agreement between the parties.⁴¹ However, attorney fees and costs incurred as a result of a defendant's conduct may be awarded as a form of damages.⁴² A plaintiff can recover the attorney fees expended in an effort to cure the damage caused by the defendant, but may not recover fees expended in the action against the defendant.⁴³

³⁹ *Noffsinger*, 311 Ill. App. 3d at 860.

⁴⁰ *Penske Truck Leasing Co.*, 311 Ill. App. 3d at 455.

⁴¹ *Duignan v. Lincoln Towers Ins. Agency*, 282 Ill. App. 3d 262 (Ill. App. Ct. 1996), citing *Glass v. Burkett*, 64 Ill. App. 3d 676, 683, 381 N.E.2d 821, 21 Ill. Dec. 494 (Ill. 1978).

⁴² *Bituminous Casualty Corp. v. Commercial Union Insurance Co.*, 273 Ill. App. 3d 923, 928-929 (Ill. App. Ct. 1995) (attorney fees incurred in a third-party complaint that was the result of defendant's breach of contract are recoverable); *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 372-374 (Ill. App. Ct. 1980) (attorney fees expended to obtain refunds of tax penalties assessed as a result of defendant's negligence are recoverable).

⁴³ *Sorenson*, 90 Ill. App. 3d at 372.