WHAT CAN THE PLAINTIFF RECOVER?
DAMAGES UPDATE

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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WHAT CAN THE PLAINTIFF RECOVER?
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I. INTRODUCTION

Gone are the days when you could call up your opponent and often reach an agreed settlement in the range of “three times specials.” Recent legislation, judicial decisions and publicized “runaway” jury verdicts have contributed to a new settlement environment where the defense must be aware of what elements of damages are recoverable in each type of case.

The best method of evaluating or predicting a reasonable jury verdict range is to actually construct a “draft” jury verdict form and list the elements of damages which will be itemized and go to the jury for their determination. If there is evidence presented at trial to support including an element of damage on the jury verdict form, that element will have its own specific “line” on the verdict form. In the eyes of the plaintiff, “the more lines, the more money” is likely to be awarded. To get a clear picture of what type of verdict form a jury in a personal injury case may receive, we include the potential available “line items” below from a claim involving an adult and then a minor.

We also discuss the three typical counts or causes of action the defense faces in a death case. Finally, we discuss and highlight five significant new developments in the area of recoverable damages which continue the recent trend of potentially increasing the amount of total damages a plaintiff may recover under Illinois law.

II. PART ONE: LIVING PLAINTIFFS – SAMPLE VERDICT FORMS

A. Living Injured Adult Plaintiff

Disfigurement $_____________________

Disability/loss of a normal life $_____________________

The increased risk of future harm resulting from the injury $_____________________

Pain and suffering (past and future) $_____________________

Loss of earnings (past and present cash value of earnings reasonably certain to be lost in the future) $_____________________

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Reasonable caretaking expenses (past and present cash value of such expenses reasonably certain to be required in the future) $______________

Medical expenses (past and present cash value of the reasonable expenses of medical care reasonably certain to be received in the future) $______________

**NEW**: Shortened life expectancy $______________

**TOTAL**: $______________

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**B. Living Injured Minor with Parents & Sibling – Plaintiff-Minor with the Right to Recover Expenses Not Assigned to the Minor**

- Disfigurement $______________
- Disability/loss of a normal life $______________
- The increased risk of future harm resulting from the injury $______________
- Pain and suffering (past and future) $______________
- Loss of future earnings (the present cash value of earnings reasonably certain to be lost in the future after plaintiff has reached the age of 18) $______________

Reasonable caretaking expenses (the present cash value of such expenses reasonably certain to be required in the future after plaintiff has reached the age of 18) $______________

Medical expenses (the present cash value of medical care reasonably certain to be incurred in the future after plaintiff has reached the age of 18) $______________

Shortened life expectancy $______________

**TOTAL**: $______________
III. PART TWO: DEATH CASES

A. Deceased Adult – The Three Basic Causes of Action in a Death Case for a Deceased Adult and the Recoverable Damages


2. Wrongful Death Act Count/740 ILCS 180/1 et seq.

Generally, the “next of kin,” which includes any surviving spouse, is entitled to recover fair compensation for their “pecuniary injuries” sustained due to a decedent’s death. In re Estate of Finley, 151 Ill. 2d 95, 601 N.E.2d 699, 176 Ill. Dec. 1 (1992). The law also provides that the jury be instructed that with regard to these, “pecuniary injuries, “a surviving spouse and children of a decedent are entitled to a presumption that they have sustained some “substantial pecuniary loss” by reason of the decedent’s death. I.P.I. (Civil) No. 31.04. Any future losses are to be limited by the decedent’s life expectancy.

“Pecuniary injuries” include:

- loss of consortium/loss of society
- loss of support (future losses discounted to present cash value)
- loss of household personal services (future losses discounted to present cash value)
- **NEW**: the grief, sorrow and mental suffering of the “next-of-kin”

“Pecuniary injuries” do **not** include:

- the pain and suffering of the decedent
- the poverty or wealth of the decedent or the widow/next-of-kin
- investment income lost from cashing in estate assets to discharge the estate’s tax liability or other debts, Elliott v. Willis, 92 Ill. 2d 530, 442 N.E.2d 163, 65 Ill. Dec. 852 (1982).
- hedonic damages

**NOTE**: The jury “may” also consider what the evidence shows concerning the decedent’s personal expenses and other relevant deductions in possibly reducing any amount shown or argued by plaintiff. “Other deductions” do not include income taxes.

3. Family Expense Act Count/750 ILCS 65/15

A surviving spouse, parent or legal guardian may recover for the medical, medically-related, caretaking, and rehabilitation costs and expenses, as well as funeral and burial expenses, under the statute. This recovery should only be available under a separate count brought by an individual who is statutorily liable for the claimed expenses and bills under the strict terms of the Family Expense Act. The Estate cannot pursue a claim under this statute.
B. Deceased Minor with Parents and Siblings Surviving – The Same Three Basic Causes of Action Are Available in a Death Case for a Deceased Minor

1. Survival Act Count

2. Wrongful Death Act Count

Generally, the “next-of-kin” include the parents and siblings, and each is entitled to recover fair compensation for their “pecuniary injuries” sustained due to the minor’s death. The jury will be instructed that the parents are entitled to a presumption that they have sustained some “substantial pecuniary loss” as a result of their minor-child’s death. However, the siblings are not entitled to any such presumption.

The jury is also instructed that a parent’s “pecuniary loss” must be reduced by the expenditures that the parents would have been likely to incur for that child had the child lived. I.P.I. (Civil) 31.01. However, to request and argue this “child rearing expenses” deduction, there must be some evidence of those expenses admitted during trial.

NEW: The inclusion of a possible specific and itemized award to the parents for their grief, sorrow and mental suffering as a result of their child’s death is a substantial new element which is likely to increase case values for the death of minors.

3. Family Expense Act Count

A surviving parent or legal guardian may bring a separate count in their individual capacity to recover medical, hospital, caretaking, and rehabilitation costs and expenses, as well as funeral and burial expenses, of the deceased minor-child.

NEW: Parent caretaking services are now recoverable at the reasonable value of caretaking services charged by the relevant professional services.

IV. PART THREE: NEW DEVELOPMENTS

A. NEW: Medical Bills


In Arthur v. Catour, 216 Ill. 2d 72, 833 N.E.2d 847, 295 Ill. Dec. 641 (2005), our Illinois Supreme Court ruled that a personal injury plaintiff can present to a jury and recover the full amount of medical bills initially billed for the service rendered, even though the provider had accepted a lower amount pursuant to a preferred provider agreement with a private health insurance company, as payment in full.
The rationale behind this rule was the “well established” principle that a wrongdoer should not benefit from a contractual situation where he did not pay any of the insurance premiums. Also, the Court was fearful that any other result would somehow allow the presence of health insurance to be before the jury, which could then conclude that the plaintiff sustained no losses if his medical bills were paid for by insurance.

The Arthur v. Catour case implied that there was a difference in the way paid medical bills should receive treatment, depending on whether they were paid or compromised by private insurance versus paid by Medicare, Medicaid or some governmental plan.

2. Wills v. Foster (2008)

In Wills v. Foster, 229 Ill. 2d 393, 892 N.E.2d 1018, 323 Ill. Dec. 26 (2008), our Supreme Court clearly withdrew any prior notion that there was some distinction on how medical bills were to be given evidentiary treatment depending on who paid them. The Court changed the focus from the actual cost or amount of the payment of the plaintiff’s medical bills to the “reasonable value” of the services rendered.

Thus, under the Wills decision, a plaintiff may place the entire initial billed amount into evidence, provided the plaintiff establishes the proper foundational requirements to show the bill’s reasonableness. The Court noted that since the entire billed amount had not been paid, the plaintiff would be faced with the problem of not being able to establish a prima facie case of reasonableness based on the bills alone.

Also, the Wills decision prohibits a defendant from introducing any evidence regarding the payment of the medical bills in an effort to circumvent the collateral source rule. Thus, it is now irrelevant whether bills were paid by insurance or a health plan, by Medicare or Medicaid at less than the amount claimed, or provided by Easter Seals at no cost to the plaintiff – the only issue now is what is the “reasonable value” of the medical services which were rendered.

B. NEW: Pending SB 184 Would Provide for Prejudgment Interest

Proposed as a new section to the Code of Civil Procedure at 735 ILCS 5/2-1303.1, this Senate Bill 184 would provide that prejudgment interest must be awarded in a civil suit or arbitration under certain circumstances. This proposal, which was initiated by the Illinois State Bar Association and has the full support of its leadership, would be very beneficial to plaintiff attorneys. If enacted, the proposal would apply to all causes of action accruing on or after its proposed effective dates of January 1, 2010.

Good news! As of April 7, 2009, this SB 184 has been amended in a fashion that literally gutted the legislation and stalled its progress, at least for now. Nevertheless, it is likely that the concept will be resurrected or reincarnated within some other legislation, so the basic concepts of SB 184 are worth reviewing.
The proposed statute would award prejudgment interest from the date the party from whom damages are sought is given written notice of the claim for money damages, or when the suit or arbitration is filed, whichever is earlier, until the award or judgment is entered.

The written notice would have to refer to the statute (735 ILCS 5/2-1303.1) and be served either by personal service by the sheriff or a private process server; or by certified mail, return receipt requested; or by any documented method considered to be an accepted business practice.

The written notice could be sent by the party seeking money damages or its attorney to the party from whom the money damages are sought, or to its attorney or liability insurer.

The proposal would allow a defendant to possibly avoid paying prejudgment interest by making a written offer of settlement to the plaintiff any time after that defendant files an Answer, but no later than 120 days after filing an Answer. The amount of that written settlement offer would be significant and there would be no prohibition against making more than one such offer during the 120-day period. If the plaintiff did not accept the offer of settlement in writing within 30 days of receipt, and the plaintiff’s judgment or arbitration award was less than or equal to that offer of settlement, then no prejudgment interest could be awarded against that defendant. If there was no offer made within the specified 120-day period, or if the plaintiff’s judgment or arbitration award was more than the defendant’s offer, then prejudgment interest must be awarded.

The parties could agree in writing to extend the 120-day period.

The proposal would require that the monthly prejudgment interest rate be calculated by the State Comptroller and published on his website each month.

The proposed statute would not apply to:

- a unit of local government, school district, community college district, or other governmental entity;
- a small claims case;
- a claim for punitive damages; or
- any suit or action governed by a more specific State statute, including but not limited to the Interest Act, or preemptive federal law

Comment: The “written notice” would not require the plaintiff to include a demand, but the defendant or his insurer would be forced to unilaterally make an offer.

Comment: There was no provision for the trial court to extend the 120-day period. As a consequence, unfair gamesmanship could lead to a plaintiff delaying or refusing to respond to defendant’s discovery during the 120-day period, thus leaving the defendant or his insurer with little or no information upon which to reasonably evaluate the case and formulate an offer.
Comment: The insured would need to be kept informed of all such “written notices” and “offers” in a timely manner.

Comment: The statute, as originally formulated, would also presumably apply to counterclaims, third party actions, and claims for contributions, and thus might provide some tactical leverage by forcing reluctant co-defendants to participate in a joint settlement effort.

Chuck Timmerwilke of our Rockford office will provide an update on this legislation in his discussion of legislative developments at the May 21 seminar.

C. **NEW: Parent Caretaking Services for Injured Minor**

In *Worley v. Barger*, 347 Ill. App. 3d 492, 807 N.E.2d 1222, 283 Ill. Dec. 381 (5th Dist. 2004), a mother settled her daughter’s injury claim and then filed suit for her own lost wages sustained in order to provide care to her injured daughter. Although other states have allowed parents to recover their own lost wages for caring for their injured child, the court denied this request, but allowed the mother to recover the reasonable value of caretaking services that would have been incurred as if someone had been employed to take care of her child, plus the present cash value of such expenses reasonably certain to be required in the future.

D. **NEW: Parent Caretaking Services for Disabled Adult Child**

In *Clark v. Children’s Memorial Hospital*, No. 1-08-0610, 2009 WL 987413 (April 9, 2009, 1st Dist.), an appeals court extended potential damages recoverable by parents in a “wrongful birth” suit to now include recovery for the reasonable value of caretaking services for a severely disabled child beyond the age of majority. The court reasoned that since a parent could be ordered to provide support for an unemancipated, disabled adult child, these post-majority caretaking expenses should be available in a suit on behalf of the disabled adult child by his parents. See 750 ILCS 5/513(a)(1). This appellate decision will likely be appealed to the Supreme Court.

E. **NEW: Grief and Sorrow in Death Cases**

Until May 31, 2007, the law in Illinois did not allow plaintiffs in a Wrongful Death Act case to recover for grief, sorrow or bereavement suffered by the surviving spouse or next-of-kin. In fact, there was a specific jury instruction which told the jury they were not to consider such elements in assessing damages in a death case. I.P.I. (Civil) No. 31.07 (2006). All that changed when the legislature passed an amended § 2.0 of the Wrongful Death Act, which now allows a jury award to include money damages to a surviving next-of-kin for grief, sorrow and mental suffering caused by the decedent’s death, for any cause of action which accrued on or after May 31, 2007. 740 ILCS 180/2.
F. OLD: No Punitive Damages in Survival or Wrongful Death Cases

Several recent Appellate Court opinions (LaSalle National Bank v. Willis, 378 Ill. App. 3d 307, 880 N.E.2d 1075, 317 Ill. Dec. 83 (1st Dist. 2007) and Marston v. Walgreen, No. 1-07-0209, 2009 WL 884813 (March 31, 2009, 1st Dist.) have reaffirmed the long-standing Illinois public policy and established law that actions for punitive damages in survival or wrongful death cases will not survive the death of the original plaintiff because the Illinois legislature has not specifically authorized such actions. Will this be the next area of legislative initiative on the part of the plaintiff’s bar?

G. NEW: Shortened Life Expectancy

In mid-2008, the Illinois Supreme Court approved a Civil Jury Instruction on “Shortened Life Expectancy.” IPI (Civil) No. 30.04.05. Assuming there is evidence at trial to support this new measure of damages, this new instruction adds one more “line item” to the list of potential elements of damages a plaintiff may now recover. While the plaintiff’s bar had been advocating for this additional element of damages, their cause was strengthened by the Appellate Court’s decision in Bauer v. Memorial Hospital, 377 Ill. App. 3d 895, 879 N.E.2d 478, 316 Ill. Dec. 411 (5th Dist. 2007), which affirmed the trial court’s giving of an instruction which included “Shortened Life Expectancy” as an additional damage measure. To present and preserve such a claim, plaintiffs will most likely be required to produce medical expert witness opinion testimony, all of which will likewise require an expert from the defense to counter any such opinion. It is not clear whether a mere treating physician would have the necessary training and qualifications to render an opinion on life expectancy, but it is expected that many will try, regardless of how speculative the resulting opinion may be. However, this new strategy by plaintiffs may also “open the door” for the defense to introduce many facts about a plaintiff which would otherwise be totally irrelevant, namely the plaintiff’s health habits such as smoking, alcohol consumption and other dangerous hobbies in order to counter any opinion on what would otherwise be a normal life expectancy. In addition, if a plaintiff pursues this new element, the defense should argue that any instruction on the element of “disability” is correspondingly limited so no jury award over-compensates a plaintiff for overlapping periods of time.
Edward M. Wagner  
- Partner

Ed is the partner in charge of our Urbana office, which covers east central Illinois. He has spent his entire legal career with Heyl Royster, beginning in 1980.

Prior to law school, Ed served in the United States Marine Corps from 1973 to 1977 and was discharged at the rank of Captain.

Ed concentrates his civil litigation practice on defending healthcare providers in malpractice claims, employers in civil rights discrimination and termination claims, and professional liability claims. With extensive trial experience throughout central Illinois, Ed has successfully defended or skillfully negotiated over 500 medical, hospital, dental or nursing home cases.

Ed is currently in his third term as an appointed member of the Illinois Supreme Court Rules Committee which drafts, reviews and submits proposed rules and revisions to the Supreme Court on all areas of practice, procedure and ethics. He is also co-chair of the Professional Liability Committee of the Illinois Defense Counsel.

Ed has spoken and written for many civic organizations on the issues of employers’ liability and rights in the workplace and has presented at an Illinois State Bar Association seminar on corporate internal audits and investigations in Employment Law. Ed has also lectured at the University of Illinois College of Law on the topic of federal civil discovery. He has been designated one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Record. Ed has also been named to the 2009 Illinois Super Lawyers list. The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Recognition
- Martindale-Hubbell AV Rated
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the 2009 Illinois Super Lawyers list.
- Appointed by the Illinois Supreme Court to its Rules Committee and is serving in his third three-year term

Professional Associations
- Illinois Supreme Court Rules Committee
- Illinois Association of Defense Trial Counsel (IDC co-chair of Professional Liability Committee
- Defense Research Institute
- American Bar Association
- Illinois State Bar Association
- Champaign County Bar Association

Courts Admissions
- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit

Education
- Juris Doctor (Cum Laude), Creighton University, 1980
- Bachelor of Arts-History, Marquette University, 1973

Significant Cases
- **Ehrbright v. R, M.D., et al.**, Trial; hung jury after 2 week trial against our orthopedic surgeon and hospital for alleged wrongful death of a 42 year old father and wage earner following rotator cuff repair surgery with allegations of lack of monitoring and medication errors. Plaintiff asked jury for $6.7 million.
- **Lane v. Troxell and Rockwell**, Trial; minimal jury verdict in favor plaintiff-passenger on the back of a motorcycle that was struck by insured-driver's pick-up.

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