

# Calculation of Damages

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## What are Damages?

Damages are one of the main elements of ANY civil case

Same burden as all of the other elements – plaintiff must prove by a preponderance of the evidence

- You should develop the facts of the case and ask questions designed to determine the amount of damages.

Plaintiff may have a valid cause of action, but no damages

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Determine and identify the cause of action



Different causes of action have different types and measures of damage available

This information is provided in  
O'Connor's Causes of Action

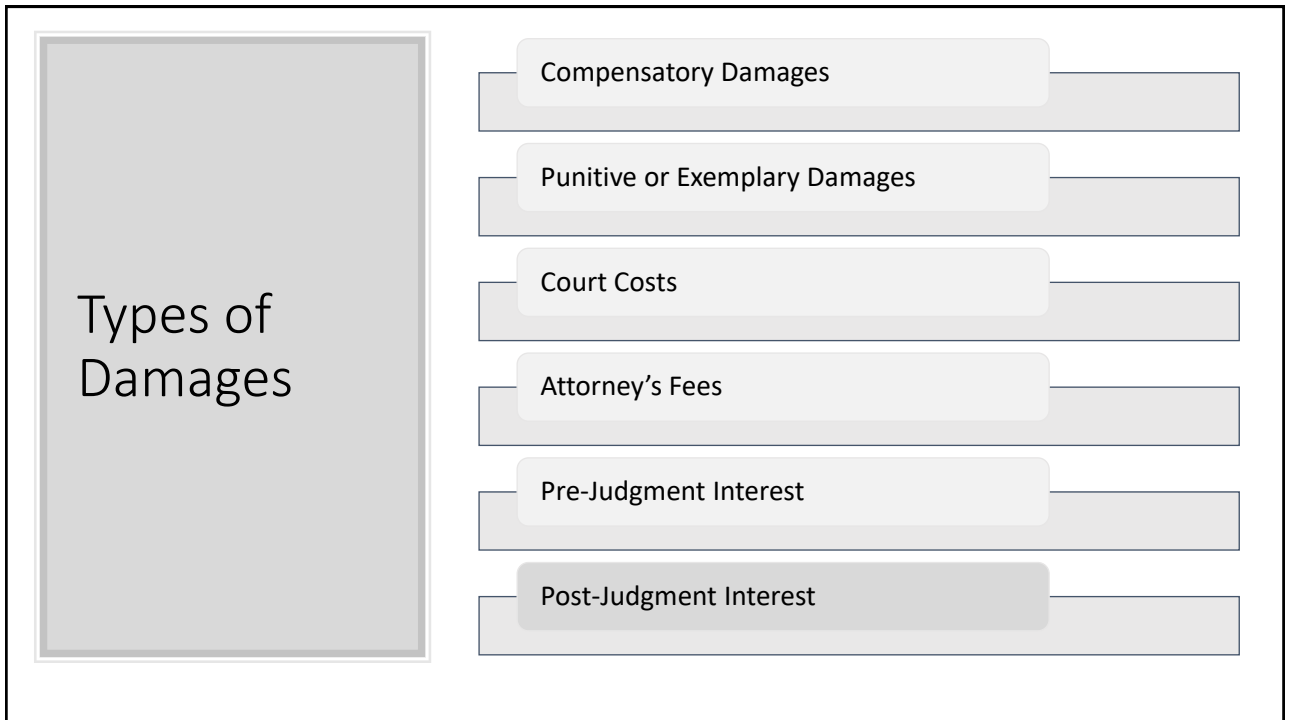
Damages –  
Step 1

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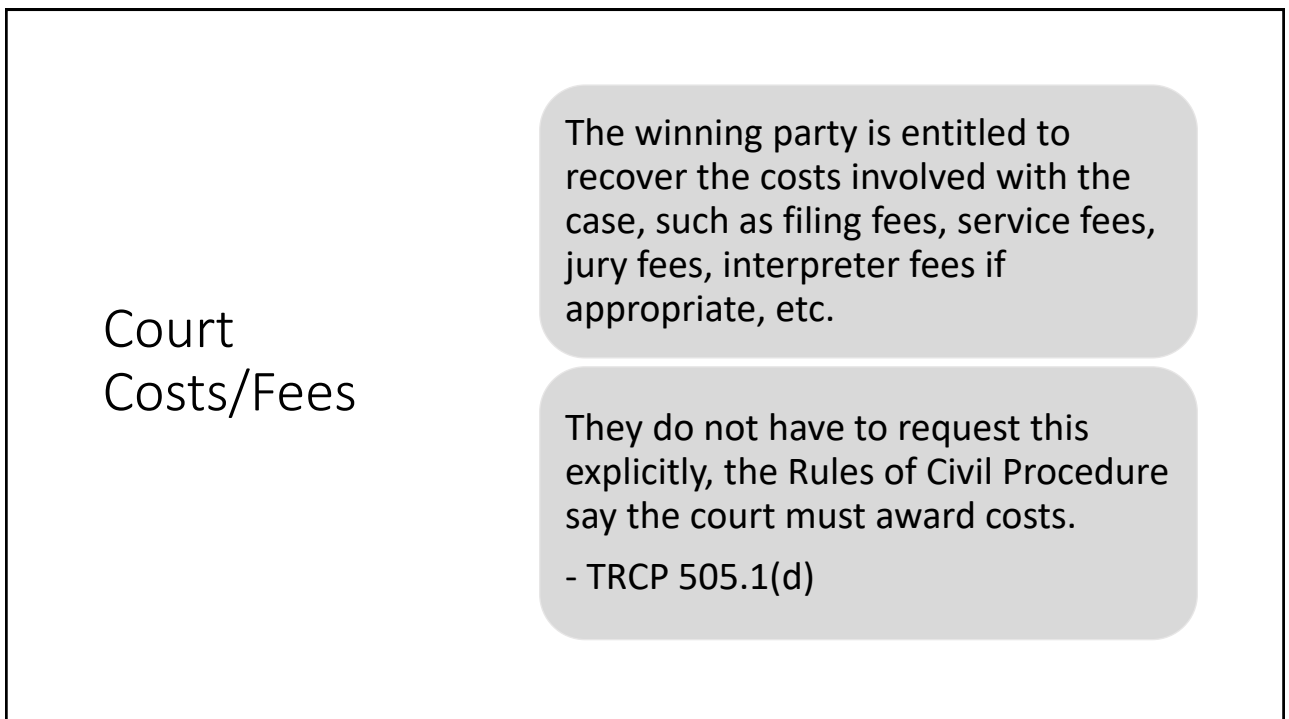
## Damages – Step 2

- Once you have determined what the cause of action is, and what damages are available, you must determine:
  - What type of damages are being sought?
  - What is the appropriate method of measurement?
  - What proof has been offered from each side?
  - What other questions should you ask of the parties or witnesses?

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## Attorney's Fees

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Attorney's fees are awardable in certain causes of action, and not others. If they are awardable, you award "reasonable and necessary" attorney's fees.

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Unlike court costs, the plaintiff **does** have to specifically request attorney's fees, and must prove they are reasonable and necessary, either with affidavits or live testimony from the attorney.

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To determine if the fees are reasonable and necessary, look at hours worked, and rate charged. If those numbers are reasonable and necessary, the fees are as well.

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## Attorney's Fees – Ch. 38, CPRC

- Sec. 38.001 lists the types of suits where a party can recover attorney's fees:
  - Rendered services or performed labor
  - Furnished material
  - Freight or express overcharge or loss/damage
  - Killed or injured stock
  - Sworn accounts
  - Oral or written contract
- What about torts, like a car accident case?

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## Attorney's Fees – Ch. 38, CPRC

To recover attorney's fees, the claimant must be represented by an attorney, and must make the claim for fees to the opposing party and not have been paid within 30 days of the claim.

Usual and customary attorney's fees are presumed to be reasonable, but that presumption may be rebutted.

**Sec. 38.002, 38.003**

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## Attorney's Fees

- This may result in a “reasonable” attorney's fee award that seems large compared to the amount in controversy.
  - If I am owed \$1000, it may take an attorney several hours at \$200/hr to pursue my case. If this isn't allowed, I may never recover my \$1000.
  - Again remember, you've already decided that the hours worked are reasonable, and the rate charged is reasonable.

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## Attorney's Fees

- The court should not make awards based on a percentage of the judgment.
  - Often, attorneys will have a contract with their client that awards the attorney a percentage of the judgment. These contracts are usually in tort cases, where the court may not award attorney's fees. The court awards the judgment to the party, and the attorney collects from them.

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## Attorney's Fees

- The court must not award attorney's fees based on an "average case" basis.
  - For example, "usually these cases take 5 hours at \$250 an hour, so just award me \$1250 per case." This is not fair, because a defendant whose case took 3 hours is paying extra fees because of a completely unrelated case.

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## Pre-Judgment Interest

- This is interest that begins accruing on whichever is earlier:
  - The day suit is filed; or
  - 180 days after the defendant receives notice of the plaintiff's claim (if notice meets certain requirements)
- Stops accruing the day before the judgment is signed, and calculated as simple interest, at the same rate as post-judgment interest.
- The reason this exists is to encourage settlements and discourage delays in litigation. The award of pre-judgment interest compensates the plaintiff for not being able to have the use of their money.

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## Pre-Judgment Interest

- It is only awarded on actual damages, not exemplary damages, court costs, or attorney's fees. It is calculated as **simple interest** (meaning it accrues only on the principal and not on accrued interest) and is the same rate as post-judgment interest.
- Should be automatically added whether requested or not in personal injury and property damage cases.
  - See Finance Code 304.102

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All money judgments **must** include an interest rate that apply to the judgment.

- Finance Code Sec. 304.001.

Unless a contract specifies otherwise (with a maximum of 18%) , the court should use the rate located at: <https://occc.texas.gov/publications/interest-rates>

- Currently 5% as of May 2020, changes monthly, so court needs to check it.

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## Available Damages – CONTRACTS

Compensatory  
Damages

Attorney's Fees

Pre-Judgment  
Interest (if  
specified in the  
contract)

Court Costs & Post-  
Judgment Interest  
(available in all  
cases)

Punitive Damages  
are **not available**.

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## Compensatory Damages, Sometimes Called “Actual Damages”

Main idea – Put plaintiff back in the position where they would have been IF NOT FOR defendant’s conduct.

These damages **compensate** the plaintiff for their loss.

Can be **economic** (medical bills, lost wages, property), **or**

**non-economic** (pain & suffering, mental anguish, etc.)

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## Compensatory Damages

- Do not include the costs of coming to court in actual or compensatory damages.
- Lost income from work can be awarded if the work is missed due to the injury, but not lost income for the day that the party comes to court.
- Travel costs to court are not recoverable.

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## Measure of Compensatory Damages – CONTRACTS

The main idea of **compensatory damages in a contract case** is to give a party “the benefit of their bargain” by placing them in the economic position they would have been in if the contract had been performed.

They include **loss of value** and **consequential losses**, which are losses that naturally flow from the breach of the contract and were foreseeable by the parties.

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## Compensatory Damage Scenario – CONTRACTS

Willie agrees to purchase 2000 widgets from Widgets R Us for \$2 each. In the contract, he specifies that he uses those widgets to create WidgetSpinners©, and he is having a WidgetSpinner© convention where he will sell the spinners for \$10 each.

Widgets R Us breaches and provides 0 widgets. If Willie has to pay \$3 each for widgets, what are his compensatory damages?

What if no other widgets are available, so he has no WidgetSpinners© at the convention? Do his lost profits flow from the breach of contract? If so, would he recover \$10 x 2000? If not, how much?

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## Damage Calculation Issues - CONTRACTS

Many contracts contain clauses that specify what the amount of damages will be in the event of the breach. These are called **liquidated damage clauses**, and they fall under compensatory damages.

Parties cannot recover compensatory damages for inconvenience or delay, unless there is a specific clause in the contract stating that there is a certain time by which the work must be complete.

- This is called a “**time is of the essence clause**.”

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## Damage Calculation Scenario - CONTRACTS

- Audrey hires Red Pool Company to build a pool in her backyard. The contract is signed February 1 and Red Pool says it should take about 3 months. Audrey agrees to pay \$8,000.
- Red Pool hits delay after delay and finally Audrey fires them on July 5th, without having paid them any money.
- Audrey now hires Blue Pool for \$7,700 and they complete the pool on October 1<sup>st</sup>.
- Audrey files suit against Red Pool seeking damages for missing the whole summer with no pool. What are her damages?

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## Available Damages – INTENTIONAL TORTS

Compensatory Damages (personal injury and property damage)

Punitive/  
Exemplary Damages

Court Costs/Post-Judgment Interest (available in all cases).

Pre-Judgment Interest (personal injury or property damage cases only, not on economic damage cases)

Attorney's Fees are **not available** in intentional tort cases.

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## Available Damages – NEGLIGENCE

Compensatory Damages (personal injury and property damage)

Punitive/  
Exemplary Damages (Gross Negligence only)

Court Costs/Post-Judgment Interest (available in all cases).

Pre-Judgment Interest (personal injury or property damage cases only, not on economic damage cases)

Attorney's Fees are **not available** in negligence cases.

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## Punitive or Exemplary Damages

- These are damages that are awarded, not to compensate the plaintiff, but instead to **punish**, or make an **example** out of, the defendant.
- Goal is to punish the defendant for its bad action, as well as deter any future parties from engaging in the same bad behavior.
  - Notable examples include McDonald’s being forced to pay punitive damages in the “hot coffee” case and Ford being forced to pay punitive damages when they knew of the Ford Pinto explosion danger.

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### Damage Calculation Issues – PUNITIVE DAMAGES

Punitive damages are available if the defendant acted with **malice** (intent to harm the plaintiff) or **gross negligence** (defendant was aware of an extreme degree of risk but disregarded that risk)



How do you decide what amount of punitive damages is appropriate?

How much is sufficient to punish the defendant for what they did, and put other actors on notice that they should not engage in that behavior?

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## Damage Calculation Issues - CONTRIBUTORY NEGLIGENCE

- In **negligence** cases, the finder of fact (judge or jury) must assign a percentage of responsibility to each party.
- If the plaintiff is more than 50% responsible, they recover \$0, due to what is called **contributory negligence**.
- If the plaintiff is less than 50% responsible, they recover against the defendant the percentage of their damages that the defendant is responsible for.
  - So if damages are \$5,000 and the jury finds the defendant 40% responsible and the plaintiff 60%, how much does the plaintiff get? What if they flip those percentages?

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### Compensatory Damages – Property Damage

- In **both negligence and intentional tort cases**, a party may seek to recover compensatory damages for property damage. These damages can include:
  - Valuation Damages
    - Market Value
    - Replacement Value
    - Sentimental Value
  - Repair Damages
  - Loss-of-Use Damages

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## Damage Calculation Issues – Personal Property

- How to calculate sentimental value?
  - Similar to pain/anguish, the plaintiff offers testimony and the **finder of fact** decides what an appropriate and reasonable value would be.
  - Generally unavailable for common household goods or clothing.
  - Available on items such as heirlooms, rare items, or irreplaceable items such as pictures, etc.
- How to decide what measure to use out of market value, replacement value, or repair costs?
  - Generally, the lowest value that still makes the plaintiff **whole**, placing them back where they were before the tort happened.

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- Imagine if I took this glass and smashed it against the wall while teaching a live class. The Omni Southpark scoops up all the pieces and sends them to a world-famous glass craftswoman in Florence, Italy. She reconstitutes the shards back into this glass, good as new.
- The Omni files suit against me for the cost of this service, \$8,500.
- Reasonable and fair? Why or why not? What is a better measure of damages?

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## Compensatory Damages – Personal Injury

- In **both negligence and intentional tort cases**, a party may seek to recover compensatory damages for personal injury. These damages can include:
  - Physical pain (past and future)
  - Mental anguish (past and future)
  - Disfigurement or physical impairment
  - Medical expenses
  - Loss of earning capacity
  - Loss of consortium (love & protection) – unlikely in justice court

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## Pain & Suffering / Mental Anguish?

Yes, you CAN award pain and suffering and/or mental anguish damages.

These damages are very difficult to accurately gauge and put a number on.

- Each **finder of fact (judge or jury)** may find a different answer on the same facts.

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## Pain & Suffering

The idea is to compensate the person for the pain they endured.

- Medical bills cover economic damages, but not the actual pain. In a personal injury situation, if the victim didn't get medical treatment, their only actual damages are the pain they suffered.

How to decide how much?

- How much would someone have to be paid to willingly endure the pain?
  - How much to let Mike Tyson punch you full force?
- You can look at the other damages in the case to get a feel for what the person endured (broken glasses, stitches, etc.)
- The person can testify as to the pain they suffered.

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## Mental Anguish

The idea is to compensate the person for the mental pain they endured.

- Can be awarded if there is either a traumatic bodily injury **or**
- If offered direct evidence of the nature and severity of the mental anguish, and how it disrupted the plaintiff's daily routine.

Must be more than just "being mad or upset," something traumatic.  
 – again rare in justice court, because significant trauma will usually incur other damages that are more than \$10,000 – may see a slight uptick 9/1/2020, when this increases to \$20,000.

How to decide how much?

- How much would someone have to be paid to willingly endure the pain?
- What disruptions did the mental anguish cause?

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Ross and Rachel break up. Rachel's new boyfriend Joey works at H-E-B. Joey detains Ross when Ross is leaving the store, saying they have video proof that he is shoplifting and demands that he apologize and confess.

The interrogation goes on for several hours, with Joey threatening that Ross will never leave if he doesn't confess, and that he is going to "go to jail for a long time."

Ross sues for the intentional tort of false imprisonment, and could likely recover mental anguish damages.

## Mental Anguish – Case Example

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# Questions?

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