



RESTATEMENT OF THE LAW THIRD TORTS: REMEDIES

Preliminary Draft No. 1

(October 14, 2020)

SUBJECTS COVERED

INTRODUCTION	The Right to a Remedy (§ 1)
CHAPTER 1	Compensatory Damages
TOPIC 1	General Rules for Measuring Compensatory Damages (§§ 2-9, 11-16)
APPENDIX	Black Letter of Preliminary Draft No. 1

THE EXECUTIVE OFFICE
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: <http://www.ali.org>

©2020 BY THE AMERICAN LAW INSTITUTE
ALL RIGHTS RESERVED

This draft was prepared for internal discussion by the Advisers and the Members Consultative Group at their meeting on November 13, 2020, via Zoom. This draft has not been considered by the Council or membership of The American Law Institute and is not for public dissemination. This draft does not represent the position of the Institute on any of the issues with which it deals.

Black Letter of Preliminary Draft No. 1

§ 1. Availability of Tort Remedies

A plaintiff who establishes a defendant's liability in tort is entitled to an appropriate remedy. The most common tort remedy is compensatory damages. In some cases, other remedies are available in addition to or instead of compensatory damages. These remedies are:

- (a) nominal damages (§ 38),
- (b) punitive damages (§§ 39-41),
- (c) restitution of defendant's gains (§§ 42 and 55),
- (d) injunctions against threatened or continuing torts (§§ 43-51),
- (e) specialized remedies for the recovery of chattels or possession of land (§§ 52-53), and
- (f) declaratory judgments to determine or clarify the rights of the parties (§ 54).

§ 2. The Rightful Position

A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy that will restore that plaintiff, as nearly as possible, to the position he or she would have occupied if the tort had not been committed. This basic principle is implemented by more specific rules, some of which limit its reach.

§ 3. One Satisfaction

(a) Except as provided in Subsection (b), a plaintiff cannot recover an amount of compensatory damages that exceeds one full compensation for an indivisible injury. In determining whether plaintiff has received full compensation, the finder of fact shall take into account all sources of payment made on account of the injury, except as otherwise provided with respect to collateral sources under the rules set forth in § 9.

(b) A plaintiff who settles with a defendant for an amount that turns out to be greater than that defendant's share of responsibility for the amount of the final judgment, as

determined by the finder of fact, is entitled to keep the entire settlement. Other defendants are not entitled to a credit for the amount that the settling defendant paid in excess of that defendant's share.

§ 4. Direct and Consequential Damages

(a) A plaintiff who establishes a defendant's liability in tort is entitled to compensation for the damages from the direct impact of the tortious conduct as well as the damages suffered later as a further consequence of that conduct, whether or not the amount of these direct or consequential damages was reasonably foreseeable.

(b) Other tort doctrines limit compensation for both direct and consequential damages, including requirements that damages be reasonably certain (§ 5), within the scope of defendant's liability (§ 6), and not reasonably avoidable (§ 7). Special rules for particular types of harm, such as emotional distress (§§ 20-21) and economic loss not resulting from injury to the plaintiff's person or damage to the plaintiff's property (§ 28), may also limit a plaintiff's recovery of both types of damages.

§ 5. Reasonable Certainty

To establish liability for compensatory damages for the harm caused by a defendant's tort, a plaintiff must prove the existence of damages by a preponderance of the evidence and must prove the amount of damages with reasonable certainty considering the nature of the tort, the nature of the damages, and the evidence that is or should be reasonably available.

§ 6. Scope of Liability (Proximate Cause)

Rules that limit the scope of defendant's liability on policy grounds sometimes bar compensation for harm caused by a tort and suffered by a plaintiff. These rules are restated in §§ 29-36 of the Restatement Third, Torts: Liability for Physical and Emotional Harm.

§ 7. Avoidable Consequences (Mitigation of Damages)

(a) A plaintiff cannot recover damages for any harm caused by defendant's negligent or strict-liability tort if the plaintiff could have avoided that harm by reasonable effort or expenditure after the commission of the tort and failed to do so.

(b) A plaintiff cannot recover damages for any harm caused by defendant's intentional or reckless tort if

(1) the plaintiff was aware of the tort and of a means to avoid that harm by reasonable effort or expenditure after the commission of the tort, and

(2) the plaintiff intentionally or recklessly failed to do so.

(c) A plaintiff is entitled to compensation for the cost of reasonable efforts to avoid threatened harm resulting from a tort whether or not those efforts are successful.

§ 8. Offsetting Benefits

If a defendant's tort harms the plaintiff and also causes the plaintiff to receive a benefit that the plaintiff would not have received but for the tort, the finder of fact should generally reduce the plaintiff's damages by the amount of the benefit. The court may refuse to set off such a benefit if it would be inequitable or inappropriate to do so. The court shall not set off any benefit that plaintiff is entitled to retain under § 9 on compensation from collateral sources.

§ 9. Compensation or Benefits from Collateral Sources

(a) Except as otherwise provided by statute, the finder of fact shall not reduce the damages awarded to a plaintiff on account of any payment or benefit, in cash or otherwise, that a collateral source pays or provides to or on behalf of the plaintiff either

(1) gratuitously, or

(2) in performance of an obligation undertaken for consideration paid before plaintiff discovered the injuries or losses, or

(3) under the terms of an insurance policy, whenever purchased, or

(4) under the terms of a social-welfare program sponsored by a government or non-profit entity.

(b) A collateral source is a person or entity that is either

(1) independent of any defendant, or

(2) a defendant or affiliated entity acting in a different capacity from the one in which defendant committed the tort and paying from a fund to which plaintiff contributed, or to which another person contributed on plaintiff's behalf.

§ 11. Multiple Sufficient Causes

(a) If a defendant's tortious conduct is one of two or more sufficient factual causes of an indivisible harm to a plaintiff, and

(1) if none of the other sufficient factual causes is tortious, the defendant is liable for the full amount of plaintiff's damages, less any reduction to account for the plaintiff's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(2) if one or more of the other causes is tortious, each defendant is liable for that defendant's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(b) If all or part of the harm to a plaintiff resulting from multiple sufficient causes is divisible, each defendant is liable, under the rules stated in Restatement Third, Torts: Apportionment of Liability § 26, for the portion of the divisible harm caused by that defendant's tortious conduct.

§ 12. Taxes

(a) Damages That Will Not Be Taxed.

The finder of fact shall not reduce the amount of damages on the ground that the plaintiff's receipt of the damages will be exempt from income taxes or on the ground that the plaintiff would have paid taxes on income that the award of damages will replace.

(b) Damages That Will Be Taxed.

(i) With respect to damages that will be subject to income taxes, the court generally should assume that the taxes incurred as a result of the tort will approximately equal the taxes that would have been incurred but for the tort, so that the finder of fact can ignore the effect of taxes. This rule is subject to the exception stated in Subsection (b)(ii).

(ii) If either party proves with reasonable certainty that the taxes on the judgment, plus any other taxes that the plaintiff incurred or will incur as a result of the tort, will be substantially different from the taxes that plaintiff would have incurred but for the tort, and that this difference is within the scope of liability, then the finder of fact shall account for this difference in measuring damages. But this

Subsection does not apply to punitive damages, to taxable damages that compensate for emotional distress, or to taxable damages that compensate for any other harm in which the original loss had no tax consequences. This Subsection also does not apply to the tax-exempt damages governed by Subsection (a).

§ 13. Interest

(a) Except as otherwise provided by statute or rule of court, a plaintiff who establishes a defendant's liability in tort is entitled to prejudgment interest at a reasonable market rate, on the amount of damages found by the finder of fact, from the date or dates of injury (or a reasonable approximation thereof) to the date of judgment.

(b) A plaintiff who obtains a judgment awarding damages in tort is entitled to postjudgment interest on the amount of that judgment as provided by statute or rule of court.

§ 14. Present Value

For any damage that can be valued by prices in a market, and that plaintiff will not incur until after the date of judgment, the finder of fact should award an amount that, if safely invested from the date of judgment to the date on which the damage will be incurred, would yield principal and interest that in total is equal to the amount of the damage. Principal categories of damage subject to this rule are lost earnings, lost profits, and the cost of medical and rehabilitative services.

§ 15. Litigation Expenses

(a) Subject to the exceptions in Subsection (b), a plaintiff cannot recover compensation for attorneys' fees or other litigation expenses.

(b) A court may award compensation for attorneys' fees and other litigation expenses to a plaintiff who establishes a defendant's liability in tort if

- (1) the tort caused the plaintiff to incur attorneys' fees to investigate, negotiate, or litigate a dispute with a person other than the defendant;
- (2) the tort alleged and proven is bad faith conduct by an insurer;
- (3) a statute authorizes the award of attorneys' fees;

(4) the court awards the attorneys' fees from a common fund that benefits others similarly situated with the plaintiff;

(5) the court awards the attorneys' fees as a sanction for bad-faith conduct in the litigation; or

(6) the court awards the attorneys' fees as a sanction for contempt of court or as compensation for harm that defendant's contempt of court caused.

§ 16. Excessive and Inadequate Damages (New Trials, Remittitur, and Additur)

(a) A court may review the amount of compensatory damages awarded by a jury to determine if the award is excessive or inadequate.

(b) A court concluding that an award of damages is excessive may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, a remittitur, which gives the choice between a new trial and accepting a lower amount of damages as determined by the court. This lower amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the largest amount that could be upheld if awarded by the jury.

(c) A court concluding that an award of damages is inadequate may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, an additur, which gives the choice between a new trial and accepting a higher amount of damages as determined by the court. This higher amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the smallest amount that could be upheld if awarded by the jury.

(d) The choice to accept a remittitur may be offered to the plaintiff whose damages are at issue, and the choice to accept an additur may be offered to the defendant or defendants obligated to pay those damages. Alternatively, the jurisdiction may require the unanimous consent of the affected plaintiff and all affected defendants to accept a remittitur or additur.

(e) A court must have a strong evidentiary basis to hold a jury's damage award to be excessive or inadequate. Key factors for a court to consider in determining whether an award is excessive or inadequate are (1) gross inconsistency between the damages proven by the evidence and the amount awarded by the jury; (2) the likelihood that the award was due to

Appendix

the jury's emotional reaction to the case rather than to a rational evaluation of the evidence on damages; and (3) the discrepancy between the amount awarded for any damages that cannot be valued in a market and the amounts awarded for such damages in similar cases.