Personal Injury Damages

Proving Damages in a Car Wreck Case

An Overview

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Introduction

Personal Injury Damages can be divided into two main categories, actual damages and punitive and/or exemplary damages.

Actual damages are meant to compensate the injured party so as to return the injured party to the same position in which he or she was, prior to the injury. In awarding actual damages, a jury is asked to assess the amount of money which, if paid at the time of trial, would fairly and reasonably compensate an injured claimant for his or her loss, both in the past and in the future. Actual damages are further sub-divided into two categories which are economic damages and non-economic damages.

Economic damages are those specific amounts of money which have been spent by and/or incurred on behalf of the injured Plaintiff. Examples of economic damages are: medical expenses, loss of earning capacity (which includes lost wages), and amounts for loss of use and/or damage to personal property.

Non-Economic or human damages are those sums of money for categories of damages which are not capable of precise definition, except by a jury. Examples of non-economic/human damages would be awards for the following: pain and suffering; mental anguish; physical disfigurement; and physical disability.

The second main category of damages is punitive and/or exemplary damages. These two words are often used interchangeably but, to best understand the concept behind punitive and/or exemplary damages, one need merely to think about the fact that they are intended to punish and/or make an example of the wrong-doer. Theoretically, punitive and/or exemplary damages are not awarded to the claimant to compensate the claimant for any loss the claimant has suffered. Rather, the concept behind the law authorizing punitive and/or exemplary damages is that the conduct committed by the wrong-doer was so reprehensible that the wrong-doer should be punished and an example should be made of the wrong-doer.

The purpose of this paper is to provide an overview of personal injury damages with supporting case law. It is not intended to be an in-depth discussion or analysis of personal injury damages, but rather a quick reference resource that could be kept in your trial notebook to assist as matters may come up at trial.

Actual Damages

The basic elements of actual damages currently recognized in personal injury cases in Texas are:

- Medical Expenses [in the past and in the future]
- Loss of Earning Capacity [in the past and in the future]
- Physical Pain [in the past and in the future]
- Mental Anguish [in the past and in the future]
- Physical Impairment [in the past and in the future]
- Disfigurement [in the past and in the future]
- Loss of Consortium [in the past and in the future]
- Loss of Household Services [in the past and in the future]

Medical Expenses

Past Medical Expenses

Plaintiff can recover his expenses for medical, surgical, hospital and nursing services and any other items incurred in effecting a cure of Plaintiff's injuries. Coca-Cola Bottling Co. v. White, 545 S.W. 2d 279, 280-81 (Tex. App.-Waco 1976, no writ) *Texas & N.O.R. Co. v. Parry*, 1 S.W.2d 760 (Tex. Civ. App.--Texarkana 1927), *rev'd on other grounds*, 12 S.W.2d 997 (Tex. 1929). To recover these past medical expenses, Plaintiff must prove that the expenses were a reasonable amount and necessary to treat Plaintiff's injuries.

"Reasonable" means the medical expense was comparable to the usual and customary charges for such services at the time and place the service was rendered. *Ibrahim v. Young*, 253 S.W. 3d 790, 808 (Tex. App.—Eastland 2008, pet denied); *Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.--Fort Worth 1958, writ ref'd n.r.e.). *Haygood v. De Escabedo*, 356 S.W.3d 390, 391 (Tex. 2011).

"Necessary" means the treatment was required as a result of claimant's injury. *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377 (Tex. 1956) In addition, Plaintiff must prove that the expenses were incurred or paid by the Plaintiff or on Plaintiff's behalf. Tex. Civ. Prac & Rem. Code 41.0105; *Haygood v. De Escabedo*, 356 S.W.3d 390, 391 (Tex. 2011). *Dallas Ry. & Terminal Co., supra*.

A Plaintiff can establish the reasonableness and necessity of the charges for the Plaintiff's medical care by either submitting expert testimony supporting same, or can submit an 18.001 affidavit.

The Legislature enacted Section 18.001 of the Texas Civil Practice and Remedies Code to accomplish three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed controverting affidavit. *Id.* § 18.001; *Castillo v. Am. Garment Finishers Corp.*, 965 S.W.2d 646, 654 (Tex. App.-El Paso 1998, no pet.); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App.-Eastland 1995, no writ); *Hong v. Bennett*, 209 S.W.3d 795, 800 (Tex. App.-Fort Worth 2006).

A section 18.001(b) affidavit that is uncontroverted provides legally sufficient—but not conclusive—evidence to support a jury's finding that the amount charged for a service was reasonable and necessary. *Ferrer v. Guevara, 192 S.W.3d 39, 47 (Tex.App.-El Paso 2005, pet. granted); Owens v. Perez ex rel. San Juana Morin, 158 S.W.3d 96, 110 (Tex.App.-Corpus Christi 2005, no pet.); Horton v. Denny's Inc., 128 S.W.3d 256, 259 (Tex.App.-Tyler 2003, pet. denied); *801 Beauchamp, 901 S.W.2d at 749.*

However, Tex. Civ. Prac. & Rem Code 18.001 (f) provides that a defendant may file a controverting affidavit through which the defendant can prevent Plaintiff's affidavits of reasonableness and necessity from being used as evidence. *See Allright, Inc. v. Strawder, 679 S.W.2d 81, 83 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.);*[3] *see also Hilland v. Arnold, 856 S.W.2d 240, 241–42 (Tex.App.-Texarkana 1993, no pet.)* <u>*Hong v. Bennett*</u>*, 209 S.W.3d 795, 800-01 (Tex. App.—Fort Worth, 2006)*

<u>Future Medical Expenses</u>

Texas follows the "reasonable probability" rule for damages for future medical expenses. *Antonov v. Walters,* 168 S.W.3d 901, 908 (Tex. App.-Fort Worth 2005, pet. denied). *Whole Foods Mkt. Sw., L.P. v. Tijerina*, 979 S.W.2d 768, *809 781 (Tex. App.-Houston [14th Dist.] 1998, pet. denied).

To recover future medical expenses, a plaintiff must show there is a "reasonable probability" that such expenses will be incurred in the future. *Antonov*, 168 S.W.3d at 908. While the preferred practice is to establish future medical expenses through expert medical testimony, the rule does not require this. *Id.* Instead, a jury can make an award for future medical expenses based on the nature of the plaintiff's injuries, medical care rendered to a plaintiff before trial, and the condition of the plaintiff at the time of trial. *Id. See also City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex. App.-San Antonio 1988, writ denied)

Furthermore, a jury's award of future medical expenses lies mostly within the jury's discretion. *Id.* "Because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain, appellate courts are particularly reluctant to disturb a jury's award of these damages." *Id.* *See Pilgrim's Pride Corp. v. Mansfield*, No. 09-13-00518-CV, 2015 WL 794908, at *8 (Tex. App. – Beaumont, 2015) supplemented, No. 09-13-00518-CV, 2015 WL 994643 (Tex. App. – Beaumont, 2015); *Armellini Express Lines of Florida, Inc. v. Ansley*, 605 S.W.2d 297 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.) overruled on other grounds 711 S.W.2d 622; *Powell v. Underbrink*, 499 S.W.2d 206 (Tex. Civ. App.--San Antonio 1973, no writ).

Miscellaneous Issues Regarding Medical Expenses

Minors -- A parent is liable for medical expenses of a minor child and can recover for same. *Morrell v. Finke*, 184 S.W.3d 257, 290 (Tex. App.—Fort Worth 2005); *Coates v. Moore*, 325 S.W.2d 401 (Tex. Civ. App.--Houston 1959, writ ref'd n.r.e.).

Transportation -- Transportation expenses in relation to medical treatment are recoverable. *Coca-Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279 (Tex. Civ. App.--Waco 1977, no writ).

Volunteer Nursing -- Nursing services furnished by a family member can be recovered even though rendered gratuitously. The tortfeasor cannot claim an exemption from his or her liability even if these services were voluntary, as such nursing services were rendered for the benefit of the injured and not for the benefit of the defendant. *Fort Worth & D.C. Ry. Co. v. Walker*, 48 Tex. Civ. App. 86, 106 S.W. 400 (1907, no writ).

Affordable Care Act – As of the writing of this paper, we are not aware of any Texas cases directly addressing if or how the Affordable Care Act (ACA) may impact the ability to obtain full value of future medical expenses. Anecdotally, there have been attempts by Defense lawyers to limit future medical expenses to Medicare or Insurance rates since the ACA requires everyone to either have health insurance or pay a penalty. Defenses against the argument that the ACA should limit an award of future medical expenses include the following: CPRC 41.1015 pertains to medical expenses that have been "incurred" and does not apply to medical expenses in the future because they have not yet been incurred; health insurance that may cover future medical expenses is a collateral source and thus cannot be mentioned to the jury; and, if or what the Affordable Care Act will require in the future is speculative and it is not clear if it will still be valid law in the next 1, 2, 5 or 10 years, or in other words, the defense is unable to prove these benefits will be available in the future.

Loss of Earning Capacity and Loss of Earnings

Loss of earning capacity is the diminished earning power of the plaintiff directly resulting from the injuries sustained. *See Metropolitan Life Ins. Co. v. Haney,* 987 S.W.2d 236, 244 (Tex. App.-Houston [14th Dist.] 1999, pet. denied); *Plainview Motels, Inc. v. Reynolds,* 127 S.W.3d 21, 35 (Tex. App. 2003); *Southwestern Bell Tel. Co. v. Sims,* 615 S.W.2d 858, 864 (Tex. Civ. App.-Houston [1st Dist.] 1981, no writ). While lost wages in the past can be a measure of loss of earning capacity, it is important to keep in mind that the proper measure of damages is not the actual lost wages, but the diminishment of earning capacity. *Greyhound Lines, Inc. v. Craig,* 430 S.W.2d 573, 575 (Tex. Civ. App. Houston 14th 1968, writ ref. n.r.e.); *Ryan v. Hardin*, 495 S.W.2d 345, 350 (Tex. Civ. App. -- Austin 1973).

There are several factors to consider when ascertaining loss of earning capacity:

> [Plaintiff's] stamina, efficiency, ability to work with pain, and the weakness and degenerative changes which naturally result from an injury and from long suffered pain are legitimate considerations in determining whether or not a person has experienced an impairment in future earning capacity. *Tri–State Motor Transit Co. v. Nicar,* 765 S.W.2d 486, 492 (Tex. App.-Houston [14 th Dist.] 1989, no writ) (quoting *Springer v. Baggs,* 500 S.W.2d 541, 544–45 (Tex. Civ. App.-Texarkana 1973, writ ref'd n.r.e.)).

In determining what evidence is sufficient to support a finding for loss of earning capacity, no general rule can be laid down, except that each case must be judged upon its peculiar facts and the damages are proved to the degree of certainty to which the case is susceptible. *Strauss v. Cont'l Airlines, Inc.,* 67 S.W.3d 428, 435-36 (Tex. App.-Houston [14th Dist.] 2002, no pet.); *Reliance Steel & Aluminum Co. v. Sevcik,* 268 S.W.3d 65, 71 (Tex. App.--Corpus Christi 2006) *rev'd on other grounds,* 267 S.W.3d 867 (Tex. 2008).

Damages for loss of earning capacity do not have to be based on any specific degree of physical impairment, but can be based on a composite of all of the factors affecting earning capacity. *See id.; Metro. Life Ins. Co. v. Haney,* 987 S.W.2d 236, 244 (Tex. App.--Hous. [14th Dist.] 1999, pet. denied); *Goldston Corp. v. Hernandez,* 714 S.W.2d 350, 352 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.).

The correct measure of damages for loss of earning capacity is not the actual wages earned before or after the injury, but the change in the Plaintiff's capacity to earn an income due to an injury. *Pilgrim's Pride Corp. v. Smoak,* 134 S.W.3d 880, 900 (Tex. App.-Texarkana 2004, pet. denied).

> "Our courts have consistently upheld judgments for reduced earning capacity, even though the plaintiff was making as much or even more money after the injury than before, where it was shown that

> pain, weakness, diminished functional ability, or the like indicated that plaintiff's capacity to get and hold a job, or his capacity for duration, consistency or efficiency of work was impaired." *Springer v. Baggs*, 500 S.W.2d 541, 544-45 (Tex. Civ. App.--Texarkana 1973, writ ref'd n.r.e.)

The fact that the injured party may continue to work and earn as much as or more than he formerly did does not bar him from recovering for loss of earning capacity. In *Mikell v. La Beth*, 344 S.W.2d 702, 707 (Tex. Civ. App.--Houston 1961, writ ref'd n.r.e.), the court upheld a jury award for loss of earning capacity where the plaintiff continued to work after his injuries, but there was evidence that the plaintiff had declined over-time work because of his physical condition, and his lost time from work which was charged against his accumulated sick leave, even though his wages were paid. *Id. citing Dallas Consolidated Electric Street Railway Co. v. Motwiller*, 1908, 101 Tex. 515, 109 S.W. 918; *Lantex Construction Co. v. Lejsal*, 1958, 315 S.W.2d 177, writ ref., n. r. e.;

At least one Texas court has upheld an award for lost earning capacity when the only evidence of the plaintiff's earnings was from twenty years before the accident. *See El Paso Elec. Ry. Co. v. Murphy,* 49 Tex. Civ. App. 586, 109 S.W. 489, 490 (1908, writ ref'd) ("It must be observed that the matter to be determined is not what he actually earned before his injury, but what his earning capacity actually was, and to what extent that capacity has been impaired. For whatever capacity he had for earning money before the injury, whether he exercised it or not, was his, and he was entitled to it unimpaired by injury wrongfully inflicted by another.").

In *American Airlines, Inc. v. Morrissey*, 1998 WL 564718 (Tex. App. –Dallas 1998), a plaintiff made a loss of earning capacity claim as a result of a bodily injury. The Plaintiff was a senior accountant with Bell Helicopter and after the incident which resulted in his injury he turned down a promotion within Bell due in part to the reservations he had about being able to perform the job with his injuries. In *American Airlines*, the Defendants argued that by turning down the job the Plaintiff curtailed his loss of earning capacity claim because the promotion would have offered the Plaintiff more money than he was currently earning. The Court disagreed with the Defendants finding that because the Plaintiff demonstrated an impairment that lasted beyond the time when he turned down the promotion, he had a valid claim for loss of earnings capacity. *Id at 3.*

While evidence of the business profits before and after the injury are admissible, *Greyhound Lines, Inc. v. Craig*, 430 S.W.2d 573 (Tex. Civ. App.--Houston [1st Dist.] 1968, writ ref'd n.r.e.), mere proof that profits decreased after the claimant's injury will not support a recovery just as mere proof that profits rose or stayed the same after the injury does not bar recovery. *Greyhound lines, Inc. v. Duhon*, 434 S.W.2d 406 (Tex. Civ. App.--Houston [1st Dist.] 1968, no writ.

Miscellaneous Issues Regarding Loss of Earning Capacity

With respect to "retired" persons, the Court in *Wharf Cat, Inc. v. Cole*, 567 S.W.2d 228 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd. n.r.e.) held that a sixty-five year old retiree could not recover for future lost earnings when he was not looking for work when injured but testified he "might" want to work in the future and he would work if he found the right job.

Information about jobs the claimant held and the amount of money she earned is admissible into evidence. *Jones v. Martin*, 481 S.W.2d 467 (Tex. Civ. App.--Texarkana 1972, no writ).

Plaintiff's tax records may be discoverable and admissible into evidence to the extent they show earnings from claimant's work. *Wilkens v. Royal Indemnity Co.*, 592 S.W.2d 64 (Tex. Civ. App.--Tyler 1979, no writ). However, tax records often contain extraneous information that is irrelevant or that a Plaintiff would otherwise find objectionable. Instead of tax returns, it is often preferable to establish past wages through Social Security Earnings information.

Plaintiff's physical and mental ability and his education and training for work are admissible into evidence. *Martin v. Jenkins*, 381 S.W.2d 115 (Tex. Civ. App.--Amarillo 1964, writ ref'd n.r.e.).

Plaintiff's fringe benefits in addition to the base salary are admissible into evidence. *Tom's Toasted Peanuts, Inc. v. Doucette*, 469 S.W.2d 399 (Tex. Civ. App.--Beaumont 1971, writ ref'd n.r.e.).

Plaintiff's prospects for advancement or promotion with increased pay, if there is a "reasonable prospect" of same, are admissible into evidence. *Smith v. Triplett*, 83 S.W.2d 1104 (Tex. Civ. App.--Galveston 1935, no writ); *Clanahan Const. Co. v. Mills*, 426 S.W.2d 265, 268 (Tex. Civ. App. 1968), *writ refused NRE* (July 17, 1968);

The collateral source rule renders inadmissible any gratuitous payments to claimant or payments from third party sources such as Social Security payments, workers' compensation payments and welfare benefits. *R.E. Dumas Milner Chevrolet Co. v. Morphis*, 337 S.W.2d 185 (Tex. Civ. App.--Fort Worth 1960, writ ref'd n.r.e/).

The Self-Employed Plaintiff

Loss of earning capacity where claimant is self-employed presents its own unique problems. Methods of proof which have been approved include:

a. Plaintiff's probable earnings had he performed the same tasks for another employer rather than for himself and admissible into evidence. *King v. Skelly, supra.* See also, *McCandless v. Beech Aircraft Corp*., 779 F.2d 220 (5th Cir. 1985).

b. The effect of claimant's injury on the financial returns of the business, that is, a comparison of the before and after financial returns or income of the business. *Red Arrow Freight Lines v. Gravis,* 84 S.W.2d 540 (Tex. Civ. App.--San Antonio 1935, no writ).

c. Plaintiff's inability to carry on business in the usual way and the resulting loss of profits. *Dallas Ry. & Terminal Co. v. Darden*, 38 S.W.2d 777 (Tex. Comm'n App. 1931, opinion adopted). However, while the loss of profits may be considered by the jury, it is important to note that where profits do not result solely from claimant's personal earning capacity, but also from the labor of claimant's employees and the return on capital invested in machinery, profits from self-employment are not a true, complete measure of claimant's earning capacity. *King v. Skelly, supra*.

d. The cost of hiring someone to take claimant's place at a stated wage or what it would cost to hire such a person. *Red Arrow Freight Lines, supra*.

Physical Pain

Physical pain is a recognized element of damages and the law recognizes that it is susceptible only of approximate money evaluation. The jury is asked to determine fair compensation based on their common knowledge and sense of justice. The amount of damages that would reasonably compensate for "pain" cannot be determined by a set formula but rather is left to the jury's sound discretion. *Diamond Offshore Servs. Ltd. v. Williams*, No. 01-13-01068-CV, 2015 WL 4480577, at *11 (Tex. App. July 21, 2015); *Telesis/Parkwood Ret. I, Ltd. v. Anderson*, 462 S.W.3d 212, 238 (Tex. App. 2015); *Hernandez v. Baucum,* 344 S.W.2d 498 (Tex. Civ. App.--San Antonio 1961, writ ref'd n.r.e.).

No direct proof of the actual existence of physical pain is needed if the evidence of the nature and extent of injuries permits an inference that pain would normally be suffered. *Coastal States Gas Production Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.--Houston [14th Dist.] 1968, no writ).

A doctor can testify that the injury in question is a "painful injury", that the patient was "in pain", that the patient's history included complaints of pain, and that the doctor found objective signs of injury such as muscle spasms which confirm the presence of pain. See, *Missouri P.R.R. v. Cunningham*, 515 S.W.2d 678 (Tex. Civ. App.--San Antonio 1974, writ dism'd).

In jury argument, Plaintiff's attorney may suggest to the jury what is fair compensation for pain in view of the evidence. *Hernandez v. Baucum, supra*.

Plaintiff may testify both about the objective symptoms, such as a bump on the head, and the subjective symptoms, such as headaches. *Tamburello v. Welch*, 383 S.W.2d 936 (Tex. Civ. App.--Waco 1964), *rev'd on other grounds,* 392 S.W.2d 114 (Tex. 1965).

Plaintiff may describe how his or her pain or anguish has improved or worsened. *Tamburello v. Welch, Id.*

Plaintiff may show the jury the injured part of his body. *Loughry v. Hodges*, 215 S.W.2d 669 (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.).

Photographs showing the injuries are admissible into evidence. *Irving v. Shipp*, 342 S.W.2d 449 (Tex. Civ. App.--Fort Worth 1961, writ ref'd n.r.e.).

Persons acquainted with the claimant may testify as to their observations which would tend to prove that claimant suffered pain or anguish. *Classen v. Benfer*, 144 S.W.2d 633 (Tex. Civ. App.--San Antonio 1940, writ dism'd judgmt. cor.).

Declarations or statements by the claimant to others about his or her pain or anguish may be admissible evidence under an exception to the hearsay rules. TEX. R. CIV. EVID. 803(3).

a. Plaintiff's declarations to a treating physician are admissible into evidence. *Austin Road Co. v. Thompson*, 275 S.W.2d 521 (Tex. Civ. App.--Fort Worth 1955, writ ref'd n.r.e.).

b. Declarations by the Plaintiff to others, which are a contemporaneous statement about bodily condition, are admissible into evidence. *Carrico v. Busby*, 325 S.W.2d 413 (Tex. Civ. App.--Houston 1959, writ ref'd n.r.e.).

c. Inarticulate cries, screams, groans or facial contortions are also admissible. *Salinas v. Casualty Insurance Co. of California*, 323 S.W.2d 600 (Tex. Civ. App.—San Antonio 1959) *affirmed,* 160 Tex. 445, 333 S.W.2d 109 (Tex.1960), U.S. Fire Ins. Co. v. Alvarez, 657 S.W.2d 463, 473 (Tex. App. –San Antonio 1983); *United States Fidelity & Guaranty Co. v. Nettles*, 21 S.W.2d 31 (Tex. Civ. App.--Waco 1929), *rev'd on other grounds*, 35 S.W.2d 1045 (Tex. Comm'n App. 1931, holding approved).

Mental Anguish

Under Texas law, to show an entitlement to mental anguish damages, the plaintiff must put on evidence showing "the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine," or showing " 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger.' " *Parkway Co. v. Woodruff,* 901 S.W.2d 434, 444 (Tex.1995) (quoting *J.B. Custom Design & Bldg. v.*

Clawson, 794 S.W.2d 38, 43 (Tex.App.1990)). Plaintiffs are not required to show the mental anguish resulted in physical symptoms. *Id.* at 443. *See also McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 482 (5th Cir. 2015)

Despite the fact that physical pain and mental anguish are often treated as one element of damages for jury submission purposes, mental anguish can exist in a variety of circumstances, even while the claimant is not actually experiencing pain from the injury, and is a much broader element of damages than simply dwelling on one's physical pain. *Southwestern Bell Tel. Co. v. Cook*, 30 S.W.2d 497 (Tex. Civ. App.--Fort Worth 1930, writ ref'd). *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 650 (Tex. 1987) *overruled on other grounds by Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

There are many ways mental anguish manifests in a Plaintiff, including the following:

a. Plaintiff's consciousness of approaching death can be considered by the jury in evaluating mental anguish. *Jenkins v. Hennigan*, 298 S.W.2d 905 (Tex. Civ. App.--Beaumont 1957, writ ref'd n.r.e.). The Texas Supreme Court in *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986) upheld a mental anguish claim on behalf of the estates of the decedents in an airplane crash case to recover for mental anguish suffered by the decedents from the time the aircraft broke up in flight until the time they hit the ground. The jury awarded $500,000 to each decedent for mental anguish suffered from the time of the mid-air breakup of the aircraft until the time of impact with the ground.

b. Plaintiff's fear of possible paralysis resulting from an injury. *Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379 (Tex. Civ. App.--Fort Worth 1940, writ dism'd judgmt. cor.) disapproved on other grounds *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 384 (Tex. 1997);

c. Contemplation by claimant of claimant's changed physical condition. *Missouri, K. &T. Railway Co. v. Miller*, 61 S.W. 978 (Tex. Civ. App. 1901, writ ref'd).

d. Humiliation, mortification, fright, apprehension as to effects of injury, nervousness and embarrassment suffered by claimant are all sub-elements of mental anguish. See, *Houston Lighting & Power Co. v. Reed*, 365 S.W.2d 26 (Tex. Civ. App.--Houston 1963, writ ref'd n.r.e.).

e. Plaintiff's anxiety over disfigurement may be viewed as a sub-element of mental anguish (*Houston Lighting & Power Co., supra*), but it is treated by the courts as a separate item of damages for jury submission purposes.

f. Embarrassment suffered by the claimant due to "Bugs Bunny" dentures the claimant had to wear for injuries or other embarrassing medical appliances.

Southwestern Bell v. Cook, 30 S.W.2d 497 (Tex. Civ. App.--Fort Worth 1930, writ ref'd).

g. Mental anguish includes such items as worry, concern, fear, embarrassment and despondency suffered by the claimant. *Southwestern Bell Tel. Co. v. Cook*, 30 S.W.2d 497 (Tex. Civ. App.--Fort Worth 1930, writ ref'd.);

Mental anguish may be inferred by the jury from the nature and extent of the injuries. *Patel v. Hussain*, No. 14-14-00459-CV, 2016 WL 270014, at *22 (Tex. App. Jan. 21, 2016); *Exxon Corp. v. Roberts*, 724 S.W.2d 863, 868 (Tex. App. 1986), *writ refused NRE* (May 13, 1987); *Robertson v. Rig-A-Lite Co.*, 394 S.W.2d 838 (Tex. Civ. App.--Houston 1965, writ ref'd, n.r.e.); *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.--Houston [14th Dist.] 1968, no writ).

However, fear of future damage absent a serious injury is not recoverable as mental anguish. *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999).

To contest evidence of mental anguish, the defendant may show that the plaintiff is suffering mental anguish for reasons other than the injuries. *See Russell v. Ramirez*, 949 S.W.2d 480, 485 (Tex. App. 1997); *Marange v. Lew Williams Chevrolet Co.*, 371 S.W.2d 900 (Tex. Civ. App.--San Antonio 1963, writ ref'd n.r.e.); *White v. McElroy*, 350 S.W.2d 251 (Tex. Civ. App.--El Paso 1961, no writ).

Mental Anguish in the Future

To support an award of future mental anguish damages, the plaintiff must demonstrate a reasonable probability that the plaintiff will suffer compensable mental anguish in the future. *See Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008); *Patel v. Hussain*, No. 14-14-00459-CV, 2016 WL 270014, at *19 (Tex. App. Jan. 21, 2016).

Claims for Bystander Recovery

To recover for a claim of mental anguish caused by a bystander injury, a Plaintiff must prove the following:

(1) The plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it;

(2) The plaintiff suffered shock as a result of a direct emotional impact upon the plaintiff from a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and

(3) The plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

See Freeman v. City of Pasadena, 744 S.W.2d 923, 923–24 (Tex.1988); *see also Edinburg Hosp. Auth. v. Trevino,* 941 S.W.2d 76, 80 (Tex.1997); *Boyles v. Kerr,* 855 S.W.2d 593, 597–98 (Tex.1993); *Reagan v. Vaughn,* 804 S.W.2d 463, 467 (Tex.1990); *United Servs. Auto. Ass'n v. Keith,* 970 S.W.2d 540, 541-42 (Tex. 1998).

Physical Impairment

Physical impairment is defined as impairment beyond loss of earning capacity or mere pain and suffering. *Lawson–Avila Constr., Inc. v. Stoutamire,* 791 S.W.2d 584, 599 (Tex. App.—San Antonio 1990, writ denied); *Green v. Baldree,* 497 S.W.2d 342 (Tex. Civ. App.--Houston [14th Dist.] 1973, no writ). For example, a paralyzed person confined to a wheelchair suffers considerable disability beyond a loss of earning capacity, for his life in general is destroyed. Physical impairment can be submitted as a separate element of damage along with loss of earning capacity.

Plaintiff's only burden is to prove that she has physical disability which extends beyond mere pain or impairment of her earning capacity to an extent that it produces a separate and distinct loss that is substantial and for which she should be compensated. *See Peter v. Ogden Ground Serv., Inc.,* 915 S.W.2d 648, 650 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Schindler Elevator Corp. v. Anderson,* 78 S.W.3d 392, 412 (Tex. App. 2001), *review granted, judgment vacated* (May 22, 2003) *disapproved of by Roberts v. Williamson,* 111 S.W.3d 113 (Tex. 2003); See also *Green v. Baldree, supra*. In cases of less obvious disability, claimant should testify directly as to how disability causes him a separate and distinct loss that is substantial. *Green v. Baldree, supra*.

However, in *Dollison v. Hayes*, 79 S.W.3d 246, 250-51 (Tex. App.--Texarkana 2002), the Court upheld a jury award in which the jury declined to award past or future impairment even when there was an injury. "The mere fact of injury, however, does not prove compensable pain and suffering, nor does it demonstrate the plaintiff suffered either mental anguish or impairment." *Id.*

Disfigurement

Disfigurement means that which impairs or injures the beauty, symmetry, or appearance of a person, or that which renders a Plaintiff unsightly, misshapen or deformed in some manner. *Goldman v. Torres*, 161 Tex. 437, 447, 341 S.W.2d 154, 160 (1960).

Disfigurement is an element of damages separate and apart from physical pain and mental anguish. *Goldston Corp. v. Hernandez*, 714 S.W.2d 350, 352-53 (Tex. App.—Corpus Christi 1986), *writ refused NRE* (Nov. 26, 1986); *Pedernales Electric Cooperative, Inc. v. Schulz*, 583 S.W.2d 882 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.).

When disfigurement is submitted to the jury as a damage issue separate and apart from physical pain and mental anguish, an instruction should be given against double recovery. The

need for this instruction against double recovery derives from disfigurement including such things as self-consciousness and embarrassment. See, *Rosenblum v. Bloom*, 492 S.W.2d 321 (Tex. Civ. App.--Waco 1973, writ ref'd n.r.e.).

The fact that claimant is disfigured at the time of trial will permit the jury to draw a reasonable inference of future disfigurement. *Robertson v. Rig-A-Lite Co.*, 394 S.W.2d 838 (Tex. Civ. App.--Houston 1965, writ ref'd n.r.e.).

Counsel for claimant may give his opinion in argument as to what would be a reasonable value and may argue for recovery based on per diem or unit of time formula. *International Harvester Co. v. Zavala*, 623 S.W.2d 699 (Tex. Civ. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.--Houston [14th Dist.] 1968, no writ).

Loss of Consortium

In *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978), the Texas Supreme Court recognized that although "loss of consortium" has come to be referred to as a cause of action, the Supreme Court noted that it is more accurately described as an element of damage rather than a cause of action. It is a remedy for the negligent or intentional impairment of the familial interest.

Loss of consortium and loss of household services are not the same thing. In Texas, loss of services is considered to be a loss of performance by a spouse of the household and domestic duties, and is community property. Loss of consortium, on the other hand, is a separate and distinct claim belonging to the spouse of the physically injured party and concerns the emotional and intangible elements of the marriage. *Id.*

"Consortium" was noted by the Supreme Court in *Whittlesey* to include the following elements:

(1) affection
(2) solace
(3) comfort
(4) companionship
(5) society
(6) assistance
(7) sexual relations
(8) emotional support
(9) love
(10) felicity.

Id. at 666.

A settlement with a release executed by the physically injured spouse does not affect the deprived spouse's right to recover for loss of consortium. *Id.*

Parental consortium has also been allowed in Texas on behalf of both minor and adult children. *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990). Parental consortium can be recovered if there is a finding that there are serious permanent and disabling injuries. The court outlines factors to be considered which include: (1) the severity of the injury to the parent and its actual effect upon the parent/child relationship; (2) the child's age; (3) the nature of the child's relationship with the parent; (4) the child' emotional and physical characteristics; and (5) whether other consortium-giving relationships are available to the child. However, parents can only make a loss of consortium claim for ***fatal*** injuries to their child. *Roberts v. Williamson*, 111 S.W.3d 113, 116 (Tex. 2003). The court also held that this was a derivative cause of action. As such, all defenses to the primary claim apply equally to the loss of consortium claim.

Loss of Household Services

Household services are defined as those services which a wife or husband performs around the home and in caring for the family. *Dallas Ry. & Terminal Co. v. Sutherland*, 27 S.W.2d 830 (Tex. Civ. App.--El Paso 1920, writ dism'd); *C.E. Duke's Wrecker Service v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.--Houston [1st Dist.] 1975), *appeal on remand; Oakley v. C.E. Duke's Wrecker Service*, 557 S.W.2d 810 (Tex. Civ. App.--Houston [1st Dist.] 1977, writ ref'd n.r.e.).

The value of a wife or mother is not measured necessarily by a pecuniary wage, but is intangible and within the sound discretion of a jury in light of their everyday life experience. The term "services" includes household and domestic duties performed by a spouse. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 n. 2 (Tex.1978). No evidence of the monetary value of the services is required. *Armellini Express Lines of Florida, Inc., v. Ansley*, 605 S.W.2d 297, 312 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). The value is to be determined by the jurors based on their everyday experiences. *EDCO Prod., Inc. v. Hernandez*, 794 S.W.2d 69, 77 (Tex. App. 1990), *writ denied* (Nov. 14, 1990)

Exemplary Damages

Exemplary damages are not designed or intended to compensate or enrich individual victims. *See Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex.1994); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Instead, the purpose of exemplary or punitive damages is to punish a party for its "outrageous, malicious, or otherwise morally culpable conduct" and to deter it and others from committing the same or similar acts in the future. *See Moriel*, 879 S.W.2d at 16–17; *Lunsford v. Morris*, 746 S.W.2d 471, 471–72 (Tex.1988). *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 39-40 (Tex. 1998).

Exemplary Damages in most personal injury cases will be governed by the Damages Act (Tex. Civ. Prac. & Rem Code Chapter 41).

Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003.

Tex. Civ. Prac. & Rem. Code § 41.011 provides that "in determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

> (1) the nature of the wrong;
> (2) the character of the conduct involved;
> (3) the degree of culpability of the wrongdoer;
> (4) the situation and sensibilities of the parties concerned;
> (5) the extent to which such conduct offends a public sense of justice and propriety; and
> (6) the net worth of the defendant."

However, the 41.011 factors often overlap and do not all apply in every case. *See Leonard & Harral Packing Co. v. Ward*, 971 S.W.2d 671, 673 (Tex. App.—Waco 1998, no pet.); *Gray v. Allen*, 41 S.W.3d 330, 332 (Tex. App. 2001); *Foley v. Parlier*, 68 S.W. 3d 870, 881 (Tex. App.—Fort Worth, no pet.).

The Damages Act also places a cap on the amount of exemplary damages that can be recovered in most personal injury actions. Tex. Civ. Prac. & Rem. Code 41.008 states that:

> (a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.
>
> (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
>
> (1) (A) two times the amount of economic damages; plus
>
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.

The Damages Act cap does not apply if the cause of action is based upon one of the criminal acts listed in Tex. Civ. Prac. & Rem. Code 41.008(c). However, there is a separate cap on the amount of exemplary damages based upon the Due Process Clause of the United States Constitution. *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 127 S. Ct. 1057, 1060, 166 L. Ed. 2d 940 (2007). *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006).