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Damages Pt. 1 – Introduction to Damages and Loss of Consortium

Introduction

In the legal world there are several ultimate results that can be awarded to a successful plaintiff. There are fundamentally five types of results that a plaintiff can seek and be awarded: (1) declaratory judgment; (2) injunctive relief; (3) specific performance; (4) replevin; and (5) monetary damages. Over the course of the next few weeks the attorneys at Pavlack Law will make available a series of blog posts discussing different aspects of plaintiff recovery in legal cases. In this addition we will cover a basic overview of types of legal recovery and then discuss a specific type of monetary damages called "loss of consortium."

Declaratory judgments actions are the most basic type of legal action though far from the most common. The purpose of a declaratory judgment case – often referred to as a DJ action by lawyers – is to have a court conclusively decide rights and duties or the status of the parties to the case. While this sounds like what a court does in every case – and indeed that is true – what makes a declaratory judgment action unique is that a successful plaintiff cannot recover anything else. Meaning that in such an action a court cannot award money or property to either party. The only thing the court is doing in such a case is to determine what the law says on the issue and nothing more. Since nothing more is on the line than a legal

determination of the rights and duties of each party these kinds of cases are rather rare compared to the other types. One of the more common areas of law in which declaratory judgments are sought is in cases involving a patent. Often in these cases a major issue is whether the patent is enforceable and this may be an effective means by which to determine such an issue.

Injunctive relief is much more commonly sought than declaratory judgment. Indeed, injunctive relief is often sought in addition to other forms of recovery. The purpose of an injunction is to receive a court order telling someone or something (such as a business) to not do something. That something could be anything from preventing someone from cutting down a tree to ordering a business to stop overbilling its clients. A unique aspect to injunctive relief is, unlike the other recoveries available, that an injunction can be granted at the beginning of a case as a temporary injunction or later in a case as a permanent injunction. While an injunction is not appropriate for every case it can provide a very useful tool to plaintiffs who need court intervention to protect their rights.

The third form of recovery is specific performance. This is perhaps the least common form of relief awarded from the list of five; however, it is often the most useful. Specific performance is an order from a court to require a person to perform some specific act – hence the name. Typically this means that a party must do something to which he has agreed in a contract. While this might sound like it would be an appropriate remedy in most contract cases, its application is much more narrow. This is what is known as an equitable remedy and is not one in which the successful litigant might recover money. Rather, this is reserved for very rare and specific circumstances in which monetary damages would not be sufficient. The most common situation in which specific performance might be awarded is in a contract for the sale of property. Land, unlike most items of personal property, is universally recognized as inherently unique – meaning that no two pieces of land are exactly the same. In such a case a court will often require a person who has breached a contract by deciding to sell his land to someone else to sell his land to the person with whom he has a contract. While this is typically seen in the sale of land context, specific performance has also been awarded in contracts for personal service. One such case involved a band that had agreed to play a wedding. A few days before the wedding the band backed out. The soon to be husband and wife sued for specific performance as they could not have gotten another band on such short notice. The court found for the couple and ordered the band to perform. I will note that it is extremely rare for a court to order specific performance in a personal service contract as there is some discussion that to do so would run afoul of the Thirteenth Amendment's prohibition of involuntary servitude/slavery.

The fourth form of recovery is a replevin action. A replevin action is

extremely basic and can be a very effective tool for a plaintiff. What a replevin action does is requires a person to return a piece of property which properly belongs to the plaintiff. It really is that simple.

The fifth form of recovery, monetary damages, is far and above the most complex and easily the most common remedy sought. This is what is meant when a court or lawyer uses the term "remedy at law." This terminology dates back to a time when there were two separate courts – one of law and one of equity. The court of law could only award money damages whereas the court of equity could award anything else that was not monetary so long as justice and fairness required it. In Indiana, as in most places, courts of law and equity have been merged into a single court with the power to do both. Only a handful of states and the U.S. Bankruptcy Court still have specific courts of equity. It is this fifth category of recovery which will be the focus of upcoming blog posts. This area covers everything from breach of contract cases to tort cases and, depending on the basis of the claim being brought, the way that the monetary damages are calculated can be vastly different.

Loss of Consortium

Where someone breaches a contract by failing to pay money owed, the calculation of such damages may be quite simple. The court will look to the contract, determine the amount of money owed, and order the defendant to pay the plaintiff the amount owed plus interest for the time withheld. However, in the world of personal injury the calculation of damages is not always so easy. The injuries suffered by a physically injured person can easily go far beyond his or her medical bills. Indeed that is why this area of law is known as personal injury and not physical injury. It recognizes that a person is far more than just his physical being. An injured person may well have to miss a substantial amount of work, thus, foregoing wages he or she would have otherwise received. But the law is not simply constrained to these more obvious areas of injury. In the hundreds of years of American jurisprudence courts have recognized that in order to make an injured person whole there are more injuries than what might first come to mind.

One such type of monetary damage that covers more than the readily apparent physical injuries and bills is known as "loss of consortium." Loss of consortium damages are only recoverable in tort cases and not in contract cases. The premise of a loss of consortium claim is to compensate the spouse of an injured person for the loss of certain aspects inherent in a marriage. The Indiana Court of Appeals discussed the unique nature of loss of consortium in recognizing aspects of married life in the case *Greene v. Westinghouse Electric Corp*. In that case the

Court of Appeals noted that "marriage is one of the basic civil rights of man, fundamental to our very existence and survival" and that "marriage is the most important relationship in life." The Court of Appeals further stated:

> We fully agree that the law must protect the marital relationship, and we observe that the term loss of consortium . . . can indeed entail significant harm to the spouse of a plaintiff. For example, the foremost element in loss of consortium is disruption in conjugal intercourse, which is a matrimonial benefit of constitutional magnitude. . . . Deprivation of conjugal relations may cause mental anguish to both partners, which is another aspect of damages in loss of consortium actions. Moreover, loss of consortium involves loss of the injured spouse's companionship and services in maintaining the household. These losses may become permanent, depending on the severity of the injury, and are compounded where the couple has dependent children. "Consortium does not consist alone of intangible mental and emotional elements, but embraces within its ambit also services and charges which one partner in the marriage performs for the other and have a monetary and pecuniary value."

As the court in *Greene* so appropriately noted, there are aspects to the marital relationship upon which all married people rely and society cannot deny. The serious injury to a married person necessitates this kind of loss and hardship for his or her spouse.

The current state of Indiana law only recognizes loss of consortium damages where the couple was married before the injury causing event. Meaning, where a couple was only engaged or cohabitating, Indiana law will not award loss of consortium damages. While the need for clarity in the law is unquestionable, the desire for a bright line rule requiring the couple to be married is ludicrous in light of the vast number of cohabitating couples and the prohibitions on same-sex marriages. I personally hope and endeavor to help shape Indiana law to recognize that the same injuries experienced by married couples are felt by many cohabitating couples throughout the state. Loss of consortium law, like negligent infliction of emotional distress law, has lagged behind the evolutions of modern American society. In the late 1970s there were fewer than a million unwed couples cohabitating in the United States. By 2007 this number had risen to 6.7 million and in just three years that number had risen by 13% to 7.5 million. With this reality in mind it is readily apparent that American and Hoosier society is ready to recognize a more expansive definition of loss of consortium than the courts have noticed thus far. However, at the moment, the law does not recognize loss of consortium damages for non-married partners.

Nevertheless, for those plaintiffs to whom it is available, loss of consortium damages provide a great mechanism for an injured spouse to recover damages for the injury of his or her partner and help in part to help restore an injured person's life and try to make him whole. But as we here at Pavlack Law recognize, no amount of money can ever make an injured person completely whole. So remember to do everything to keep yourself safe and if you should happen to be injured by the negligent or intentional acts of another get the best care you can find and then find lawyers who know Indiana law, are experienced, and can zealously advocate to protect your rights.

Check in next week for another installment on damages.

- Pt. 2 – Duty to Mitigate Damages
- Pt. 3 – Diminished Value of Vehicle Due to Traffic Accident
- Pt. 4 – Damages for Negligently Inflicted Emotional Distress
- Pt. 5 – Assessing Damages When Injured Person is Partially at Fault
- Pt. 6 – Availability of Prejudgment Interest
- Pt. 7 – Indiana Crime Victim's Relief Act
- Pt. 8 – Ability to Recover by Piercing the Corporate Veil
- Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice
- Pt. 10 – Punitive Damages Under Indiana Law
- Pt. 11 – Wrongful Death
- Pt. 12 – Contract Damages

Sources

- *Greene v. Westinghouse Electric Corp.*, 573 N.E.2d 452 (Ind. Ct. App. 1991).

- In support of the statistics on unwed cohabitating couples Read Sharon Jayson's articles, *Census Reorts More Unmarried Couples Living Together*, USA Today, July 28, 2008 and *Cohabitation Numbers Jump 13%, Linked to Job Losses*, USA Today, Jan. 27, 2011.

- In order to read the author's article in the Rutgers Law Record in support of expanding Negligent Infliction of Emotional Distress recovery visit http://lawrecord.com/files/39_Rutgers_L_Rec_28.pdf.

- For those seeking to guidance on how to calculate loss of consortium

damages, consider Judge Richard Posner's discussion on applying a ratio between compensatory damages and loss of consortium damages similar to Supreme Court analyses for punitive damages in *Arpin v. United States*, 521 F.3d 769 (7th Cir. 2008):

> Courts may be able to derive guidance for calculating damages for loss of consortium from the approach that the Supreme Court has taken in recent years to the related question of assessing the constitutionality of punitive damages. The Court has ruled that such damages are presumptively limited to a single-digits multiple of the compensatory damages, and perhaps to no more than four times those damages. The first step in taking a ratio approach to calculating damages for loss of consortium would be to examine the average ratio in wrongful-death cases in which the award of such damages was upheld on appeal. The next step would be to consider any special factors that might warrant a departure from the average in the case at hand. Suppose the average ratio is 1:5 — that in the average case, the damages awarded for loss of consortium are 20 percent of the damages awarded to compensate for the other losses resulting from the victim's death. The amount might then be adjusted upward or downward on the basis of the number of the decedent's children, whether they were minors or adults, and the closeness of the relationship between the decedent and his spouse and children. In the present case the first and third factors would favor an upward adjustment, and the second a downward adjustment because all of Arpin's children were adults when he died.