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An Overview of Damages in an Auto Injury Third-Party Liability Claim

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I. Introduction

This article provides an overview, not an exhaustive treatment, of damages plaintiffs may recover in an auto injury third-party liability claim in Colorado. Although most of the damages discussed in this article also apply in medical malpractice, wrongful death and survival claims, this article does not address the specific and unique issues in those claims or in other claims. It is imperative that plaintiff's counsel review and comply with the specific provisions of the medical malpractice, wrongful death, and survival statutes and the interpretive cases when handling such claims. This article addresses liens and subrogation claims only briefly, as it focuses on the recovery of damages at trial rather than on the bite that liens and subrogation claims take out of settlement proceeds and post-judgment payments. This article also does not address interest and costs.

II. General and Special Damages

A. General Damages

General damages are those damages that flow naturally and necessarily from the defendant's wrongful conduct.[1] An example would be pain and suffering. The law presumes that everyone who is injured suffers physical pain and emotional distress. But the pain and suffering is not quantifiable. And that is what distinguishes general damages from special damages. You cannot quantify general damages in a monetary amount. You can quantify special damages monetarily.

B. Special Damages

Special damages are damages that are specific to the particular plaintiff.[2] For example, the plaintiff incurred a specific dollar amount of vehicle damage, medical bills, or lost wages. The plaintiff needs to have as much documentation as possible in order to prove the monetary value of each item of special damages.

III. General Principles[3]

A. Natural and Probable

An injured person is entitled to recover those damages that naturally and probably result from the negligence of another.[4]

B. Measure of Loss

Damages measure the loss – in the form of pecuniary compensation – that the injured person suffered as a result of another person's unlawful or negligent conduct.[5]

C. Compensatory Damages

Compensatory damages are awarded to make the injured person whole by paying for all losses suffered.[6] In Colorado, there are three categories of compensatory damages for personal injuries: economic, noneconomic and physical impairment.[7]

D. Make Whole

The principle of making the injured party whole through the payment of damages underlies all negligence cases.[8]

E. Causation

A plaintiff must prove that the defendant's unlawful or negligent conduct proximately caused the damages.[9] However, the Colorado Supreme Court Committee on Civil Jury Instructions has "intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions . . . and because the word 'proximate' tends to be confusing to the jury."[10]

F. Reasonable Certainty of the Fact of Damages

The plaintiff must prove damages with reasonable certainty. The standard of reasonable certainty means that the plaintiff must prove the *fact* of damages by a preponderance of the evidence.[11]

G. Reasonable Estimate of the Amount of Damages

The law permits an *approximation* of the amount of damages if the *fact* of damages is reasonably certain[12] and if the plaintiff introduces some evidence which is sufficient to allow a reasonable *estimate* of damages.[13] For example, if the plaintiff proves by a preponderance of the evidence that he has suffered permanent injury and will incur future medical expenses, then the plaintiff can estimate future medical expenses and does not have to prove them by a preponderance of the evidence (there just has to be some evidence to support a reasonable estimate).

IV. Damages

A. Economic Damages

1. Property Damage (using a vehicle as an example).

a. **The vehicle is "totaled."** If the insurance company "totals" the vehicle (the estimated cost of repair exceeds a defined percentage (often 70 or 80 percent) of the fair market value (FMV) of the vehicle, then it declares the vehicle a total loss and pays the FMV. The plaintiff may recover the difference between the market value of the property immediately before the crash and its market value immediately after the crash.[14] Insurers use valuation programs that often understate the FMV, so be sure to document and prove overlooked or undervalued elements of value.

b. The vehicle is not "totaled." The plaintiff can recover the cost of repairing the vehicle plus the decrease in the fair market value of the vehicle as repaired plus the value of the loss of use of the vehicle. However, if the cost of repair plus the decrease in the FMV of the vehicle as repaired is more than the FMV of the vehicle prior to the crash, then the plaintiff can recover the pre-crash FMV of the vehicle.[15]

i. Cost of repair. If the client has collision or comprehensive coverage, then the client should compare what his own insurer is offering to do and pay for versus what the liability insurer is offering to do and pay for and then choose the better deal.

ii. Reduced fair market value. **NOTE**: Insurers routinely pay only for the costs of repairs to a non-totaled vehicle. This is an underpayment of damages. The defendant is legally liable to pay for the diminution in value of the crashed and repaired vehicle. Assuming that a crash and repair always reduces the value of the vehicle (even if only one dollar), there is ***never*** a case in which the defendant/liability insurer is only obligated to pay only the costs of repair. The defendant/liability insurer must pay for the reduced fair market value of the vehicle. The practical difficulty is proving the reduced FMV. If the reduced FMV is significant, then it may be productive to retain an expert to provide an appraisal. If the reduced FMV is trivial, then it may not be economically productive to hire an expert. The practitioner must engage in cost/benefit analysis on a case-by-case basis.

iii. Loss of use of property (using a vehicle as an example). If the crash deprives the plaintiff of the use of the vehicle, then he or she can recover damages for loss of use.[16] Typically, the liability insurer provides a rental car to cover these damages. However, the provision of a rental car may be inadequate for several reasons.

- It may provide one for only a few days. If the liability policy provides only x number of days, the defendant is nevertheless legally liable for all days that the plaintiff does not have the car.
- The rental car may not be a suitable replacement. If the plaintiff drove a luxury car, then the liability insurer must provide a luxury rental car.
- The plaintiff may have used the damaged vehicle to earn profits; e.g., a customized wilderness tour vehicle. A rental car may not be suitable for generating the profits previously earned; if so, then the plaintiff can recover those lost profits.[17]

The plaintiff may recover damages even if he or she does not rent or obtain a replacement auto. The law presumes a loss if the plaintiff's personal vehicle is unavailable.[18]

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2. Medical Expenses.

Medical expenses are compensable to the extent that they are reasonable in amount as well as necessary.[19]

a. **Medical expenses - gratuitous services**. An adult plaintiff could recover the reasonable value of medical services gratuitously provided to her by her mother, but she could not recover the value of medical services gratuitously provided by a governmental entity.[20] A plaintiff might be able to recover, through assignment of the spouse's claim, the value of nursing services provided by a spouse rather than the value of the wages lost by the spouse while providing the nursing services.[21] A plaintiff could recover damages for medical expenses even though her brothers had already paid them.[22]

These cases pre-date the enactment of the collateral source statute,[23] but they evidence a desire by the courts to prevent defendants from obtaining a windfall for not paying for services spouses and family members provide to injured persons while saddling the injured person's spouse and/or family members with the cost of providing or paying for these services. A strong case can be made for the proposition that spouses – as opposed to other family members – have contracted for the provision of medical services in the event of injury ("in sickness and in health"). Thus, the statutory collateral source rule excepts the gratuitous medical services that spouses provide. In other words, the injured person can recover the reasonable value of the medical or nursing services provided by the spouse as damages because the spouse provided them pursuant to the marriage contract.

One might ask, "why not have the injured person just hire the spouse and have the spouse's medical bills paid for like any other provider?" Answer – because the spouse is not like any other provider. A post-incident express contract for the payment of money from the injured spouse to the caretaker spouse after recovery against the defendant would be unseemly, and it would probably be viewed as overreaching and greedy. Actual payments by the injured person to the spouse would be viewed as artificial and silly – a sham. It would be preferable to bill the spouse's services at the local market rate for nursing or home care with the injured plaintiff pursuing the amounts billed as damages just as he or she would do for the amounts billed for the services of a nurse or home care attendant provided by a health insurer.

b. Past medical expenses. These are the medical expenses incurred from the date of the incident to the date of trial. The plaintiff can recover all medical expenses billed (vs. "paid") as long as they are reasonable, necessary, and incident related.[24]

c. **Collateral sources (billed versus paid)**. The collateral source statute provides that the trial judge, after the verdict, will reduce the verdict by the amount of collateral source payments received by the plaintiff – except that the verdict will not be reduced by compensation paid to the plaintiff as a result of a contract entered into and paid by or on behalf of the plaintiff. This sounds complicated; however, there is currently only one collateral source (Medicaid) that reduces the verdict.[25] As of this writing, a collateral source never reduces the verdict unless the plaintiff received Medicaid. Further, the defendant cannot introduce evidence of collateral source payments into evidence during the trial.[26] This means that the plaintiff's introduces medical bills into evidence, but the defendant does not introduce the amounts that collateral sources actually paid (e.g., health insurance, med pay, Medicare, Medicaid, Social Security disability, assigned workers' compensation claims, sick pay, pension benefits). Thus, the plaintiff can recover all incident related medical bills (subject to proving that the bills were reasonable and necessary).

d. **The effect of liens and subrogation claims upon the verdict**. Only a few liens or subrogation claims (e.g., Medicaid, workers' compensation) affect the verdict. After the verdict, Medicaid is set off from the verdict. Workers' compensation is not set-off from the verdict, but it can affect the verdict because the workers' compensation carrier can pursue its own statutory subrogation claim at trial.[27] Alternatively, the workers' compensation carrier may assign its rights to the plaintiff in which case the carrier's claim is subject to "common fund" recovery, i.e., the amount recovered on the carrier's assigned claim is payable to the carrier less reasonable attorneys fees and costs.[28] Complete treatment of the effect of the workers' compensation laws is beyond the scope of this article.

e. **The effect of liens and subrogation claims upon the client's recovery**. Liens and subrogation claims can massively affect (reduce) the client's recovery – sometimes to zero. Therefore, it is imperative that plaintiff's counsel determine all liens, subrogation claims and all other potential claims on the recovery. Complete treatment of the effect of liens and subrogation claims is beyond the scope of this article, but it briefly addresses certain matters below.

f. **Liens versus subrogation claims**. A lien is an express charge upon the plaintiff's recovery that was created by law (e.g., hospital lien, Medicare) or contract (e.g., doctor's lien). The plaintiff – and the plaintiff's attorney – must honor the lien and pay it out of the plaintiff's recovery pursuant to the

applicable law or contract. A subrogation claim is not a lien. A subrogation claim is an equitable concept in which the subrogee (payor of benefits to or for the plaintiff) steps into the shoes of the plaintiff (subrogor) and asserts the plaintiff's rights to the extent of the subrogation claim subject to the defendant's defenses. Unfortunately, the plaintiff (subrogor) can contract away his rights or be subject to federal preemption. For example, self-funded ERISA plans often contain provisions that require the policyholder to reimburse it 100 percent on a first dollar basis with no reduction for "make whole" or "common fund."

g. **The "make whole" statute**. C.R.S. § 10-1-135 (the "make whole" statute) codified the common law make whole doctrine to some extent. The common law make whole doctrine provides that the injured party must first be made whole through the recovery of all damages before subrogation claimants get paid anything. However, the make whole statute does not go quite that far. It provides a set of rules and presumptions to determine whether the recovery makes the injured party whole. If the injured party recovers less than the total insurance coverage available, then there is a rebuttable presumption that the recovery has fully compensated the injured party (thus, third parties can seek subrogation and common fund recovery applies).[29] If the injured party recovers the total insurance coverage available, then there is a rebuttable presumption that the recovery has not fully compensated the injured party, and subrogation is not allowed.[30] The make whole statute expressly does not apply to hospital liens,[31] Medicaid liens[32] or workers' compensation and certain self insured employers.[33] Additionally, although the statute does not address ERISA, Medicare and veterans' benefits, it is probably safe to assume that federal law will continue to govern those areas.

h. **Intervention**. Other than workers' compensation statutory liens, lien holders do not generally pursue liens in third-party negligence litigation and trials. Lien holders sometimes attempt to intervene, but the plaintiff should contest it. There is significant danger of jury confusion and an inadequate award of damages (the sideshow taking over the circus), which results in the plaintiff not recovering all damages in the verdict. The plaintiff should also contest attempts by subrogation claimants to intervene in the litigation.

i. **Unpaid medical bills**. If the patient did not sign a lien, and a law does not create a lien or subrogation interest, then unpaid medical bills are simply debts just like any other debt; e.g., the client's electricity bill. The plaintiff does not have to pay the electricity bill out of the recovery nor the unpaid medical bill. However, this is subject to a huge qualification. If the plaintiff's attorney provided a "letter of protection" or in any way gave the medical provider justification to rely upon payment out of the client's recovery, then the plaintiff's attorney cannot simply ignore the unpaid bill. If there is a dispute, and they cannot reach an agreement, then the attorney must interplead the disputed amount into the court registry.[34]

j. **Future medical expenses.** These are the medical expenses that the plaintiff will probably incur from the date of the verdict into the future.

i. Recoverability. An injured person's history of medical treatment for the

injury at issue may support an award of future medical expenses.[35] A need for future surgery need not be established where a plaintiff is incurring other medical expenses, such as therapy and medications, or suffers from reduced movement as a result of the injury.[36]

ii. Permanent Injury. Although Colorado law does not require expert testimony that the plaintiff suffered "permanent" injury in order to recover damages for future medical expenses, many judges think that it does.[37] Therefore, the plaintiff's counsel should obtain an opinion from a treating provider that the injury is or is not permanent. Most medical providers will not provide a permanency opinion until the patient is at "maximum therapeutic benefit" or at "maximum medical improvement" or until the patient is stable and at least six months have passed since the incident. After obtaining a permanency opinion, the plaintiff's counsel should obtain a future treatment and expense opinion.

iii. Expert opinions and proof. Although a plaintiff has the burden of proving his case by a preponderance of the evidence (probability; more probable than not), the standard for the admission of scientific evidence (e.g., medical opinions) is "possibility" - subject to Colorado Rule of Evidence 702.[38] That is, a physician may to testify that it is **possible** that the plaintiff will need treatment for X number of years or for life and the treatments may cost Y dollars. Of course, it is highly preferable for the physician to testify to his opinions to a "reasonable degree of medical probability" even though that is no longer the standard for admissibility of medical expert opinions.

iv. Life care plans. In the case of severe or catastrophic injury, retain a certified life care planner to draft a life care plan. A life care plan is a plan that details the day-to-day treatments, services and expenses that the plaintiff will need and/or incur for the remainder of his life.

k. Family medical expenses. Because parents are liable for the expenses of their children, parents may sue in their own names to recover damages for the expenses of their child,[39] including medical expenses.[40] But the common practice is to sue in the name of the child "by and through" the parent and legal guardian seeking all damages including the medical expenses of the child. A parent cannot validly encumber the child's damages by signing a lien in favor of the child's medical provider.[41] However, if the parents do not honor the purported lien, then the medical provider may have a remedy in quantum meruit or unjust enrichment.[42]

3. Loss of Income

a. **Past lost income**. This is the amount of income lost by the injured person from the date of the incident to the date of trial.

i. Wages and salary. Lost income damages are usually in the form of lost wages or salary and are usually proved through documentation such as pay stubs, W2 forms or tax returns; however, the plaintiff may prove lost income through testimony that explains how the loss was calculated.[43]

ii. Lost profits. The plaintiff cannot recover "lost profits" as a separate element of damages in a personal injury action.[44] This result seems to be founded on the assumption that the plaintiff (an individual, not a business) earns income from the business profits so that the individual plaintiff may pursue lost income as opposed to lost profits (which a business would pursue). Lost profits may be relevant in proving lost income. Although a plaintiff may not recover lost profits, a plaintiff may recover for the loss of time from his occupation as a result of his injuries.[45]

iii. Loss of time.

(a) Earnings. Loss of time damages are available when a plaintiff misses work, continues to be paid but has had to use sick leave or vacation.[46] An employed person who loses time from work he would have performed has suffered work loss, even if his employer continues his wages under a formal wage continuation plan or as a gratuity. Employer payments in this situation are collateral source payments rather than wages since they are not payments for work done during the time the employee was absent. Nor would you subtract wage continuation payments in the calculation of net loss.[47] For example, a plaintiff who earns $500 per week, misses a week of work and still receives $500 by using a week of sick leave may recover $500 in loss of time damages.

(b) No earnings. Loss of time damages are available when a plaintiff has no earnings but who loses time from work due to injury.[48] For example, a spouse who works in the other spouse's business "for free" and who missed a week of work may recover the value of his or her time as if he or she had been earning wages. For example, if the injured spouse would have been earning $500 per week on the payroll, then he or she may recover $500 per week in loss of time damages, or, the injured spouse would be entitled to recover the amount paid to a replacement.[49]

iv. Fringe benefits. The injured person is entitled to damages for all lost fringe benefits; e.g., lost sick time, vacation, income replacement, etc. Such benefits are collateral sources that cannot be set off from the verdict.[50]

v. Household services. Members of a family provide services for the household and those services have monetary

value. In a personal injury case, it is the husband/father or the wife/mother whose household services will be valued. Studies have shown that husbands spend about 12 hours per week in household work and wives spend about 42 hours per week in household work.[51]

There are studies about the monetary value of household services.[52] Household services are valued in one of three ways.

- **The asked-wage rate**: the lowest after-tax wage rate an individual will accept to do one or more hour of work in the labor market. This creates the largest estimate.
- **The offered-wage rate**: the wage rate the individual commands in the labor market or could command if he or she entered the labor market.
- **The market alternative cost**: the rate one would have to pay to have someone do the household work. This creates the lowest estimate.[53]

If injury has significantly reduced a spouse's ability to perform household services, then the other spouse should seriously consider including damages for loss of household services in a loss of consortium claim. Colorado law does not allow a parent's consortium claim for injury to a child.[54] The author's experience is that the plaintiffs' bar in Colorado has vastly underutilized claims for lost household services because they believe that loss of consortium claims have little value. Plaintiffs' attorneys undervalue loss of consortium claims because they have not been diligent in investigating, documenting and valuing the household services that the injured spouse formerly provided. If an injured wife performs 20 hours of household work when she formerly provided 40 hours, that deprives the husband of 20 hours of his wife's household services. If you calculate that loss at $10 per hour, it is a $200 per week loss. The husband can overcome the perception that he should just do the work and not ask for damages if the wife's injuries are obvious and significant and he is industrious and does perform more household work. Of course he cannot do everything his wife was doing.

vi. Living expenses. The plaintiff cannot recover living expenses that the defendant's wrongful conduct did not cause or increase.[55] It logically follows that that the plaintiff can recover living expenses that the defendant's wrongful conduct did cause.

vii. Calculation. Simply add up the amounts of the various elements of past economic losses to determine the total past lost income.

b. Loss of future income. This is the amount of income that will be lost from the time of trial until the end of the Plaintiff's expected work life. If the plaintiff will never be able to work again, then this loss will be the amount of income that the plaintiff would have earned but for the injury caused by the defendant (the elimination of future income). If the plaintiff will be able to work again or is working at a lower income level, then the loss will be the amount of income that the plaintiff would have earned had the defendant not caused the injury less what he or she probably will earn until retirement (the reduction in, rather than the elimination of, the plaintiff's future income).

i. Expected work life. The expected work life is the period from trial to the person's probable date of retirement had he not been injured. The probable date of retirement is fact dependent. It depends upon the person's pre-incident family background, education, experience, temperament, and intentions, etc.

ii. Income (usually wages or salary). The plaintiff may recover all damages that are the natural and probable result of the injuries caused by the defendant, including loss of future income.[56]

iii. Loss of profits. "Lost profits," as a separate element of damages, are not recoverable in a personal injury action.[57]

iv. Fringe benefits. The plaintiff may recover damages for the loss of or reduction in fringe benefits. Such benefits include sick leave, vacation, income replacement, health insurance, life insurance, pension, profit sharing, retirement, stock options, Social Security and other benefits specific to the case. An economic loss expert will be required to determine the recoverability and present value of various fringe benefits. Some fringe benefits are included in gross wages and some are not. Although the technically most correct method to calculate fringe benefits would be to independently determine the present value of each fringe benefit and add them all up, the most common method is to calculate benefits as a percentage of pay. Fringe benefits can sometimes reach thirty to forty percent of total pay.

v. Household services. Simply add up past, lost household services. However, if an injury is permanent, and it permanently restricts the spouse in the ability to perform household services, then it deprives the non-injured spouse of the injured spouse's household services over his or her life expectancy. Thus, the future damages could be huge.

vi. Living expenses. Future living expenses caused or increased by the defendant's wrongful conduct may be substantial in severe and catastrophic injury cases. If such damages are very substantial, then plaintiff's counsel should consider obtaining a life care plan.

vii. Present value.

(a) The concept. A dollar received today is worth more than a dollar received next year. That is, rational people would choose to receive $1.00 today rather than $1.00 a year from now. That is because you can invest the $1.00 you receive today to receive more than $1.00 a year from now – and because today's $1.00 can buy more than $1.00 can buy a year from now due to inflation (or also likely, instant gratification makes it valuable). Focusing on investment, what amount of money invested in a safe investment would grow to $1.00 a year from now? The answer to that question depends upon the investment interest rate. If the interest rate is five percent, then 95.23809 cents will grow to $1.00 in one year. Thus, the present value of $1.00 a year from now is 95.23809 cents. Note that this is an illustration of the concept of present value. It is not how present value is calculated in litigation.

(b) The concept applied to damages. Because the plaintiff has not yet incurred the future damages, the calculation of loss of future income damages is more complex than simply adding up historical losses. The losses are in the future.[58] Because money the plaintiff receives now is more valuable than money the plaintiff receives later, the plaintiff should receive the present value of the money that he or she would have earned over an expected work life because the defendant/insurer will pay the future damages in a lump sum (if there's enough liability insurance) rather than over time. Otherwise, the plaintiff would be overcompensated for his future losses.

(c) Present value in various litigation settings. You might think that Colorado would have a simple rule for the calculation of the present value of future damages, but you would be wrong. There is no simple rule for the calculation of present value. In fact, there is no prescribed or recommended calculation at all. The trial court should not inquire about the process that the jury used to determine present value.[59] But it is safe to say that the present value *amount* (as opposed to the process of calculation) of future damages must be determined pursuant to statute in medical malpractice cases,[60] in Federal Employees Liability Act cases,[61] in dissolution of marriage cases,[62] and in ski injury cases.[63]

(d) Present value in personal injury cases. Unlike the aforementioned cases, there is not a mandatory requirement that the present value *amount* of future damages be determined in a personal injury case. The author has not found *any* Colorado state court case that holds that the present value of future damages must, or even should, be discounted to present value. It appears that the Colorado bench and bar have simply *assumed* that they should discount future damages to present value in personal injury cases. But this is probably not an unreasonable assumption, given that the determination of present value is required in other cases and given that testifying economic loss experts almost always present evidence of the present value of future damages.

The author has found only two cases that even mention the determination of present value in a personal injury case. The first holds that the court does not have to instruct the jury to award the present value of future damages. It further holds that a detailed instruction of the methodology of present value calculation would be confusing to the jury.[64] The second holds that a minor plaintiff with permanent injuries need not present any evidence of post-majority economic damages or the present value of such post-majority damages and that the determination of the minor plaintiff's future economic damages is left to the sound judgment, experience, and conscience of the jury.[65]

In short, Colorado law does not expressly require that the present value of future damages be determined in a personal injury case and does not provide any method to calculate present value in a personal injury case. This article recommends methods for the calculation of present value in a business loss case and in a personal injury case. It also compares and contrasts the calculation of present value in a business loss case versus a personal injury case and explains why you should not use the discount rates that apply to business loss cases in personal injury cases. But first, discount rates must be examined.

(e) Discount rate. In the example of $1.00 received now or a year from now, the discount rate was five percent - the interest rate at which 95.23809 would grow to $1.00 in one year. The discount rate in a personal injury case is the rate of return on a safe investment. The safe investment that is most commonly used is the historical yield on United States Treasury bonds and bills, which may be about five to six percent.

(f) Do not use the discount rate. Do not use the discount rate to determine present value in a personal injury case. Use the net discount rate.

(g) Use the net discount rate. The net discount rate is the discount rate minus the wage growth rate (so you do have to use the discount rate - in order to determine the net discount rate).

(h) Wage growth rate. The wage growth rate is the rate at which wages grow annually. Historically, the wage growth rate is about four percent. Currently, it is less than two percent.

(i) The formula for present value calculation. The formula for present

value calculation is $PV = C \times (1 + w)^n / (1 + d)^n$ where

C is compensation (annual)

w is the annual wage growth rate of compensation

d is the discount rate (e.g., U.S. Treasury bond or bill yield) and

n is the number of years of future loss.

The formula is very simple. The complexity comes from choosing the values for the variables. The plaintiff's expert and the defendant's expert will probably choose very different values. For example, you can use a current yield (e.g., 1.1% for three-year T-bills) versus a historical average yield (e.g., 5.8% for three-year T-bills). Or, use a current yield (e.g., 3.2% for a ten-year T-bill) versus a historical average yield (e.g., 6.3% for a 10-year T-bill) etc. The choice of the discount rate can result in huge variations in present value.

(j) The higher the discount rate the lower the present value. In the example of $1.00 received now or a year from now, a discount rate of five percent yields a present value of 95.23809 cents. A discount rate of ten percent yields a present value of 90.90909 cents. A discount rate of fifty percent yields a present value of 66.66666 cents.

(k) The effect of using the discount rate for present value. Assume that the injured plaintiff is 40 years old, permanently impaired and unable to work ever again. His annual compensation is $40,000, his expected work life is 25 years, the wage growth rate is four percent and the discount rate is six percent.

First, calculate without using any discount factor. The present value is one million dollars ($40,000 per year x 25 years.

Using the six percent discount rate, the present value is $511,334.25.

Using the net discount rate (six percent less four percent), the present value is $780,938.26.

So, if plaintiff's counsel agrees to reduce future damages at the discount rate of six percent instead of at the net discount rate of two percent, then he or she deprives the plaintiff of $269,604.01. Unfortunately, the author has seen plaintiff's counsel agree to the use of a six percent discount rate to determine present value. The author has used net discount rates of zero, one, two and three percent but never more than three percent. With current low interest rates, the net discount rate may approach "total offset."

(l) Total offset calculation of present value. The total offset method of determining present value assumes that wage growth offsets interest rates; therefore, there is no discounting of future damages. That is, future damages are not reduced at all because the sum of future damages already is the present value. In the example above, the

present value of the future damages is one million dollars. Alaska appears to be the only state that uses the total offset method.[66]

Theoretically, the present value of future damages can be greater than the sum of the annual future damages (negative offset). That is, if the wage growth rate exceeds the discount rate in the example above, then the present value of the future damages would be greater than one million dollars. Admittedly, this situation is rare, but the economy may have reached a total offset or negative offset situation in early to mid 2012 because of very low interest rates and good wage growth (the wage growth rate has since declined). Do not assume that future damages must automatically be "reduced to present value."

(m) Present value of future business losses. Economists typically use a higher discount rate for future business losses than for future personal injury income losses. Why? Because there is a lot of uncertainty and risk in the operation of businesses. For example, some risk considerations for future business losses include:

Unsystematic or Subjective Risk
- Market Risk
  - Barriers to market entry
  - Market size or share constraints
  - Strength of competition
  - Buyer product or service acceptance
  - Shifting buyer preferences
- Financial Risk
  - Illiquidity
  - Unfavorable contractual obligations
  - Excessive debt
- Management Risk
  - Depth of management talent
  - Key employee dependence
  - Past experience with product or service
- Product Risk
  - Key supplier dependence
  - Obsolescence
  - Reliance on specific patents and licenses
  - Lack of product capacity
  - Commercial impracticality of production
- Company Sales Risk
  - Key customer dependence
  - Lack of product diversification
  - Lack of geographic sales diversification
- Business Environment Risk
  - General economic conditions
  - Government regulation

Systemic Risk
- General equity risk premium
- Beta coefficient for the subject industry to modify the general equity risk premium
- Company size premium[67]

In a business loss case, the more appropriate discount rate would be the damaged business' cost of capital rather than a risk free rate of return (as used in personal injury cases) because the value of a business is the value of the profits that the business will generate. And business is risky. Thus, experts discount the value of risky business ventures more heavily than the value of safe business ventures. However, Colorado has not adopted any methodology for calculating the present value of future business losses. Instead, it is in the trial court's discretion to make this determination.[68]

(n) Present value of future injury losses. In contrast to the calculations of loss in a business case, the calculation in a personal injury future income loss does not consider the above risks because those risks do not exist. Instead, future income loss uses a risk-free rate of return (e.g., United States Treasury bonds or bills) and usually the only variables to consider are the discount rate and the wage growth rate.

The steps to calculate the plaintiff's loss of future income damages are as follows:

(1) Determine that the plaintiff has a permanent injury; obtain an expert medical opinion.

(2) Determine that the plaintiff has permanent limitations and restrictions in activities of daily living, especially work; obtain an expert medical opinion and/or an expert vocational opinion identifying and quantifying the permanent limitations and restrictions.

(3) Obtain an expert medical causation opinion; the incident caused the permanent injuries, impairments and restrictions.

(4) Consider obtaining an impairment rating.

(5) Retain a vocational expert. Be sure to retain an expert who is qualified and experienced in personal injury cases.

(6) Provide the plaintiff's medical records and employment and income records to the vocational expert.

(7) Have the plaintiff interviewed and tested by the vocational expert. The expert may recommend other tests or evaluations such as a functional capacity evaluation or a job site evaluation.

(8) Have the plaintiff further tested or evaluated as appropriate.

(9) Determine the plaintiff's expected work life and obtain an expert vocational opinion.

(10) Determine the plaintiff's pre-incident earning capacity and obtain an expert vocational opinion.

(11) Determine the plaintiff's post-incident earning capacity and obtain an expert vocational opinion.

(12) Review the vocational report/opinions with the vocational expert.

(13) Have the medical expert review and approve the expert vocational opinions.

(14) Retain an economic loss expert to calculate the past and future economic losses. Be sure to retain an expert who is qualified and experienced in calculating present value and who is qualified and experienced in calculating every element of economic loss in a personal injury case and in your specific case.

(15) Provide the medical reports/opinions and vocational reports/opinions and income documentation to the economic loss expert.

(16) Have the economic loss expert interview the plaintiff.

(17) Discuss the medical reports/opinions and vocational reports/opinions with the economic loss expert.

(18) Review the economic loss report with the expert.

(19) Subject the economic loss report to the "smell" test. Some things may just not smell right.

(20) Correct and/or clarify the things that do not smell right.

(o) Taxation. The calculation of economic damages should not include evidence of future income taxes.[69] The jury should not be instructed that personal injury damages are not taxable.[70]

c. Loss of earning capacity.

i. Earning capacity. Earning capacity is a person's capacity to earn money; i.e., the capacity to earn $X per hour or week or month or year, etc. A person's earning capacity is fact dependent. It depends upon the person's pre-incident family background, education, experience, work history, income history, temperament, and intentions, etc. Ideally, plaintiff's counsel should retain a vocational expert to determine the plaintiff's earning capacity. However, if a cost/benefit analysis of the case precludes the expense of an expert, then you can use the plaintiff's earnings history or provable earnings potential. For example, if the plaintiff earned $40,000 per year for several years prior to the incident in an occupation that tops out at $40,000 per year, then it is relatively safe to assume that the plaintiff's earning capacity was at least $40,000 per year. Or, if the plaintiff is a college student with a good record, then it is relatively safe to assume that the plaintiff will earn at least the average or median income of graduates in his field.

ii. Distinguished from loss of future income. Loss of future income damages assumes that the plaintiff did earn income or would earn income in the future. Loss of earning capacity damages does not make that assumption. That is, a person who has never worked and has never had income and who never intends to work and never intends to have income may nevertheless recover damages for the elimination of or reduction in his earning capacity. For example, a 40-year-old wandering monk who depends upon the kindness of strangers for his food and who intends to remain a monk for the rest of his life may nevertheless potentially recover millions of dollars for loss of earning capacity because he earned $400,000 per year as a stock trader from age 25 to 35. That is, he had the capacity to earn $400,000 (or more) and could have done so for 25 years or more, but the negligent defendant deprived him of that capacity.[71]

iii. Calculation. See the calculation for loss of future income damages.

iv. Recovery. If there is evidence of permanent disability, a court may instruct the jury on impairment of earning capacity.[72] Damages for loss of earning capacity are compensable even though they may be uncertain in amount.[73] If there is evidence of permanent injury, a plaintiff need not show that but for the injury, he or she could have earned more money.[74] Evidence that the plaintiff was earning more money after the injury did not preclude an award of damages for diminished earning capacity where there was evidence of permanent injury.[75] Colorado has rejected, in a workers' compensation setting, the argument that a post-injury increase in earnings should give rise to a rebuttable presumption of earning capacity commensurate with earnings.[76] An injured person may recover damages for loss of earning capacity regardless of whether or not he intended to work in the future.[77] A person with limited work experience and unemployed at the time of the incident may recover damages for loss of earning capacity.[78]

4. Damage to Credit.

To recover damages for loss of credit reputation, a plaintiff must show that a lender actually denied a loan or charged the plaintiff a higher interest. The plaintiff must prove injury and the amount of damages.[79]

5. Incidental and/or Out of Pocket Expenses.

a. **Medical**. A common example is over-the-counter medications purchased by the plaintiff.

b. **Transportation**. The plaintiff may recover expenses for traveling to and from medical providers. The IRS mileage rate is most commonly used.

c. **Other**. Any other incidental expense or out of pocket expense caused by the tortfeasor is recoverable.[80]

6. Parents' Damages for Injuries to Child.

A parent can recover damages when his or her child is injured. The damages are limited to economic damages such as medical expenses and other expenses incurred due to the child's injuries.[81]

7. Economic Damages Limitations ("Caps").

There is no limitation on the amount of economic damages that an injured plaintiff may recover in a third-party liability auto injury case.

B. Non-Economic Damages

1. Pain and Suffering.

The plaintiff may prove damages for pain and suffering without specially pleading them, and the court may award them in cases where pain and suffering are inseparable from and a natural consequence of the physical injury.[82] You can use a per diem argument to prove pain and suffering damages (counsel may argue that the jury assign a dollar value to each day of pain and suffering and then multiply that amount by the days that the plaintiff has suffered and expects to suffer in the future).[83] However, the plaintiff may not use the "Golden Rule" argument (asking the jury to award what they would be willing to accept in damages if they were required to endure the plaintiff's pain and suffering) is not permissible.[84] Evidence of the failure to wear a seat belt is admissible to mitigate pain and suffering damages.[85] Pain and suffering, as used in the "seat belt defense" statute,[86] is a broad term including all manner of non-economic damages, as distinguished from economic damages, but also distinct from damages for physical impairment and disfigurement.[87] Pain and suffering is not a sub-category of non-economic damages.[88] Where evidence of pain and suffering is undisputed or corroborated by other testimony, an award of pain and suffering is mandatory.[89]

2. Future Pain & Suffering.

An expert witness is not necessarily required to establish future pain or permanent injury.[90] However, if there is no medical expert evidence, there must be evidence that shows with reasonable probability that the plaintiff suffered a permanent injury or lasting impairment.[91] The plaintiff must present some evidence of future pain and suffering before the court will instruct a jury to consider an award of those damages.[92]

3. Loss of Enjoyment of Life.

Unless specifically pled, loss of enjoyment damages are subsumed within pain and suffering damages.[93] That is, if the complaint does not specifically plead loss of enjoyment of life damages then the plaintiff cannot request an award of loss of enjoyment as a separate element of damages at trial. However, if the plaintiff did not specifically plead loss of enjoyment, the plaintiff may nevertheless recover damages for the inability to engage in activities that he or she previously enjoyed in order to establish the extent of pain and suffering.[94]

Practice Note: Specifically and separately plead loss of enjoyment of life and pain and suffering damages in the complaint. Then, at trial, the plaintiff will be able to recover damages for each as a separate element. Evidence of loss of enjoyment of life must be specific to the plaintiff.[95] Expert testimony is not required to support an award of damages for loss of enjoyment of life.[96] The court should give an instruction on loss of enjoyment of life when evidence supports that claim.[97]

4. Emotional Distress.

The terms "emotional distress," "mental distress," and "mental anguish" refer to mental pain and suffering, and are thus subsumed within pain and suffering. Historically, emotional distress damages could not be recovered absent bodily injury (the "impact" rule); but currently, emotional distress damages are recoverable absent bodily impact when the emotional distress manifests in physical symptoms such as headaches, nausea, and continuing mental disturbance.[98] However, recovery of emotional distress damages are not allowed as a result of witnessing another person's injury when the plaintiff was outside the zone of physical peril.[99] Evidence of emotional distress due to the injured plaintiff's inability to pay medical bills is not admissible.[100]

5. Damage Limitations ("Caps").

The Colorado statute limits non-economic damage awards to $250,000.[101] The $250,000 damage "cap" is indexed for inflation.[102] However, if the court finds clear and convincing evidence that warrants greater non-economic damages, then the court may award them, but under no circumstances may they exceed $500,000.[103] The $500,000 damage "cap" is also indexed for inflation.[104] The current $250,000 inflation-indexed non-economic damages cap is $468,010 and the current $500,000 inflation indexed non-economic damages cap is $936,030. The statute limits derivative non-economic claims (loss of consortium, wrongful death, zone of danger without physical impact) to $250,000[105] (or $468,010 as adjusted). The statutory damage limitations do not apply to physical impairment and disfigurement claims.[106] The parties may not disclose non-economic damages limitations to the jury. Instead, the court imposes them after the verdict.[107] The non-economic damages cap applies to individual defendants after apportionment of liability and after reduction for comparative fault. If there are multiple

defendants, then the plaintiff's recovery is subject to the statutory cap from each defendant, rather than limiting the plaintiff to a total recovery of the statutory cap.[108] If there is more than one plaintiff, each plaintiff is entitled to recover non-economic damages up to the statutory cap.[109]

C. Physical Impairment Damages

1. Physical Impairment.

Physical impairment or disfigurement damages compensate the plaintiff for his or her permanent injuries whether or not they cause any pain or inconvenience. Pain and suffering damages compensate the plaintiff for the physical and mental discomfort caused by the injuries.[110] Physical impairment or disfigurement is a separate and independent category of damages in Colorado.[111]

2. Proof.

The plaintiff's counsel should obtain a "permanent impairment" opinion from the treating provider. However, many medical providers are not knowledgeable in assessing permanent limitations and restrictions. Therefore, plaintiff's counsel should make sure to get a permanent impairment opinion from a qualified provider. Or, plaintiff's counsel could obtain an "impairment rating" pursuant to the AMA Guidelines from a physician qualified to rate impairments (only a small percentage of physicians are so qualified). Additionally, plaintiff's counsel should consider having the plaintiff undergo a functional capacity evaluation or similar testing.

3. Damage Limitations ("Caps").

The statutory damage limitations do not apply to physical impairment and disfigurement claims.[112]

D. Punitive Damages

The legislature designed punitive damages to punish the wrongdoer and to make an example out of him or her to deter others from engaging in similar conduct.[113] The court may award punitive damages when the defendant's conduct was fraudulent, malicious, or willful and wanton.[114] "Willful and wanton" conduct means the tortfeasor purposefully committed the conduct, which the actor must have realized was dangerous, heedless and reckless, without regard to the consequences, or of the rights and safety of others, particularly the plaintiff.[115]

The plaintiff cannot request punitive damages in the initial complaint.[116] The award of punitive damages cannot exceed the amount of compensatory damages.[117] The court may increase any award of punitive damages, to a sum not to exceed three times the amount of actual damages, if 1) the plaintiff shows that the defendant has continued the behavior or repeated the action that is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case, or 2) the defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.[118]

The court shall not consider evidence of the income or net worth of a party determining the appropriateness or amount of punitive damages.[119]

V. Pleading Damages

The complaint may not request a dollar amount of damages.[120] You must plead categories of special damages in the complaint.[121] Loss of enjoyment of life damages should be plead separately from pain and suffering damages (otherwise, they will be subsumed within the pain and suffering damages). The complaint should state at a minimum,

> As a result of the defendant's negligence and wrongful conduct, the plaintiff suffered past and future damages including: physical injuries including a, b, and c, permanent physical injuries including d, e, and f, permanent physical impairment including g, h, and i, physical pain and suffering, mental/emotional injuries including j, k, and l (unless the plaintiff is only claiming "mental/emotional distress normally occurring as a result of being injured" – in which case the plaintiff's mental health records are not discoverable[122]), mental/emotional pain and suffering, loss of enjoyment of life including the loss of or reduction in the ability to do m, n, and o, loss of income, lost earning capacity, loss of time, medical expenses, incidental expenses including p, q, and r, special damages including s, t, and u, interest, costs, and such other relief as deemed proper by the Court.

If the parties did not settle the vehicle damage claim, then the complaint should request damages for vehicle damage, costs of repair, reduced market value and loss of use of the vehicle. Plead claims for living expenses, household services and fringe when applicable. You may not request punitive damages in the initial complaint.[123] However, you may amend the complaint to include a request for punitive damages after disclosure or discovery have revealed the requisite wrongful conduct by the defendant.[124]

VI. Conclusion

The negligence and wrongful conduct of others deprives injured persons of their physical health, emotional well-being, income, employment opportunities, family relationships and activities and social and recreational activities. Our legal system cannot magically restore injured persons to their pre-injury condition, relationships and activities. It can only deliver money as an imperfect substitute. It is plaintiff's counsel's job to investigate, assess and determine the monetary value of their clients' damages. It is plaintiff's counsel's duty to know the damages available and to pursue zealously every penny in damages suffered by the client. The author hopes this article will assist the plaintiff's bar in advancing that noble mission. ▲▲▲

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Endnotes

[1] *Rogers v. Funkhouser,* 212 P.2d 497 (Colo. 1949).

[2] *Id.*

[3] Information in this section derives mainly from section 37.2 in GRUND, JOHN W. AND MILLER, J. KENT COLORADO PERSONAL INJURY PRACTICE – TORTS AND INSURANCE, (2d ed. 2000).

[4] *Thompson v. Tartler,* 443 P.2d 365 (Colo. 1968).

[5] *Artery v. Allstate Ins. Co*., 984 P.2d 1187 (Colo. App. 1999).

[6] *Ballow v. PHICO Ins. Co*., 878 P.2d 672 (Colo. 1994).

[7] *See* C.J.I.: 6:1.

[8] *Cope v. Vermeer Sales and Service,* 650 P.2d 1307 (Colo. App. 1982).

[9] *Bruckman v. Pena,* 487 P.2d 566 (Colo. App. 1971), *cert. denied* (1971).

[10] *Colorado Jury Instructions for Civil Trials,* Continuing Legal Education in Colorado, Inc., Colorado Bar Association, ed. 2012, Chapter 9B Special Note, p. 9-34. Plaintiff's attorneys probably should file a motion in limine to preclude the use of the word "proximate" during trial.

[11] *Tull v. Gundersons, Inc*., 709 P.2d 940 (Colo. 1985).

[12] *W. Conf. Resorts, Inc. v. Pease*, 668 P.2d 973 (Colo. App. 1983); *Margenau v. Bowlin,* 12 P.3d 1214 (Colo. App. 2000).

[13] *Great W. Food Packers, Inc. v. Longmont Foods Co*., 636 P.2d 1331 (Colo. App. 1981); *Margenau,* 12 P.3d 1214.

[14] C.J.I. 6:11

[15] C.J.I. 6:12

[16] C.J.I. 6:13

[17] *PurCo Fleet Servs., Inc. v. Koenig,* 240 P.3d 435 (Colo. App. 2010), *cert. granted* (Sept. 10, 2012).

[18] *Francis v. Steve Johnson Pontiac-GMC-Jeep, Inc*., 724 P.2d 84 (Colo. App. 1986).

[19] *Kendall v. Hargrave,* 349 P.2d 993 (Colo. 1960).

[20] *City of Englewood v. Bryant*, 68 P.2d 913 (Colo. 1937). In *Bryant,* the plaintiff's mother provided medical care to the plaintiff without charge, and the plaintiff recovered damages for the value of the care. However, the court did not allow the plaintiff to recover damages for gratuitous medical services provided by the county. It appears that the mother's medical services, although not paid, were not gratuitous, while the county's medical services were gratuitous.

[21] *Town of Salida v. McKinna*, 27 P. 180 (Colo. 1891). It appears that the plaintiff would have recovered the value of the spouse's nursing services but the evidence was insufficient.

[22] *Denver & R.G.R. Co. v. Lorentzen,* 79 F. 291 (8th Cir. 1897).

[23] C.R.S. § 13-21-111.6.

[24] *Wal-Mart Stores, Inc. v. Crossgrove,* 276 P.3d 562 (Colo. 2012).

[25] *Gomez v. Black,* 511 P.2d 531 (Colo. App. 1973); *See also Englewood v. Bryant,* 68 P.2d 913 (1937); *See You Get What You Pay For: The Collateral Source Rule Plain and Simple,* Hester, Mac, Trial Talk, October/November 2008.

[26] *Wal-Mart Stores, Inc. v. Crossgrove,* 276 P.3d 562 (Colo. 2012).

[27] C.R.S. § 8-41-203.

[28] C.R.S. § 8-41-203(1)(e).

[29] C.R.S. § 10-1-135(3).

[30] *Id.*

[31] C.R.S. § 38-27-101

[32] C.R.S. § 25.5-4-301

[33] C.R.S. § 8-41-203

[34] *See* Colo. Bar Ass'n Ethics Op. 94.

[35] *See CeBuzz, Inc. v. Sniderman*, 466 P.2d 457, 461 (Colo. 1970); *Pfantz v. Kmart Corp*., 85 P.3d 564 (Colo. App. 2003).

[36] *Martin v. Porak,* 638 P.2d 853, 855 (Colo. App. 1981); *Zertuche v. Montgomery Ward & Co. Inc.,* 706 P.2d 424, 428 (Colo. App. 1985); *Pfantz,* 85 P.3d 564.

[37] Expert testimony is not required to prove a claim of future medical expenses when there is evidence of the extent of the plaintiff's injuries, past treatment, reduction in motion, ongoing therapy and lingering symptoms. *Pfantz*, 85 P.3d 564; *Newson v. Frank M. Hall & Co*., 101 P.3d 1107 (Colo. App. 2004).

[38] *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

[39] *Espinoza v. Gurule,* 356 P.2d 891 (Colo. 1960).

[40] *Odell v. Pub. Serv. Co.,* 407 P.2d 330 (Colo. 1965).

[41] *In re Est. of Reed,* 201 P.3d 1264 (Colo. App. 2008).

[42] *Id.*

[43] *Grange Mut. Fire Ins. Co. v. Golden Gas Co.,* 298 P.2d 950 (Colo. 1956).

[44] *Ford v. Conrardy*, 488 P.2d 219 (1971).

[45] *Id.*

[46] *Jones v. USAA Cas. Ins. Co.,* 952 P.2d 819 (Colo. App. 1997); *Franklin v. Templeton,* 428 P.2d 361 (Colo. 1967).

[47] *Id.*

[48] *Nemer v. Anderson*, 378 P.2d 841 (Colo. 1963).

[49] *Id.*

[50] *Kistler v. Harvey,* 481 P.2d 722 (Colo. 1971).

[51] Gerald Martin, Determining Economic Damages, § 620 (July 2004).

[52] *Id*. at § 622; W. Keith Bryant and Cathleen D. Zick, The Dollar Value of Household Work (1993); s*ee also* John Ward and Kurt Krueger, The Dollar Value of a Day: Expectancy Data (2011).

[53] Martin, *supra* n. 51 at § 622.

[54] *Elgin v. Bartlett*, 994 P.2d 411 (Colo. 1999).

[55] *Kellihan v. McHutt,* 201 P. 37 (Colo. 1921).

[56] *Thompson v. Tartler,* 443 P.2d 365 (Colo. 1968).

[57] *Ford Motor Co. v. Conrardy,* 488 P.2d 219 (Colo. 1971).

[58] The losses are not really in the future, the losses are right now - in the present. Consider that the accident rendered the plaintiff a quadriplegic, in a permanent vegetative state. The plaintiff lost all future income the instant that the car crash severed the spinal cord. However, because the *receipt* of income would have occurred over the entirety of the expected work life, you should take into account the calculation of the lost future stream of income.

[59] *Garhart ex rel. Tinsman v. Columbia/ HealthOne,L.L.C*., 168 P.3d 512 (Colo. App. 2007).

[60] C.R.S. 13-64-203; *Garhart*, 168 P.3d 512.

[61] *Failing v. Burlington N.R. Co*., 815 P.2d 974, 978 (Colo. App. 1991).

[62] C.R.S. 14-10-113(4); *In re Marriage of Zappanti,* 80 P.3d 889 (Colo. App. 2003).

[63] C.R.S. 22-44-113; *Stamp v. Vail Corp*., 172 P.3d 437 (Colo. 2007).

[64] *Van Schaack & Co. v. Perkins*, 272 P.2d 269 (Colo. 1954).

[65] *Stewart v. Rice*, 25 P.3d 1233 (Colo. App. 2000).

[66] *Beaulieu v. Elliot*, 434 P.2d 665 (Alaska 1967)

[67] Dunn, Robert L. and Harry, Everett P., *Modeling and Discounting Future Damages: Income Stream Analysis Gives a Better Picture of What a Plaintiff Really May Have Lost*, J. of Acct., Jan. 2002.

[68] *McDonald's Corp. v. Brentwood Center, Ltd*., 942 P.2d 1308 (Colo. App. 1997).

[69] *Hoyal v. Pioneer Sand Co*., 188 P.3d 716 (Colo. 2008) *citing with approval*, *Gerbich v. Evans*, 525 F. Supp. 817 (D. Colo. 1981).

[70] *McKown-Katy v. Rego Co*., 776 P.2d 1130 (Colo. App. 1989).

[71] This example illustrates the principle – and the law – but a jury could very well decide to reject the principle and refuse to apply the law if they believed that, in actuality, the plaintiff was never going to work again and it just feels wrong to award him millions of dollars. However, if they applied the law, then they would award him the millions of dollars. The jury must compensate an injured party for proven damages. *Villandry v. Gregerson,* 824 P.2d 829 (Colo. App. 1991).

[72] *Phillips v. Monarch Rec. Corp*., 668 P.2d 982 (Colo. App. 1983).

[73] *Brittis v. Freemon*, 527 P.2d 1175 (Colo. App. 1974).

[74] *Jones v. Cruzan*, 33 P.3d 1262 (Colo. App. 2001).

[75] *Id*.

[76] *Vail Associates, Inc. v. West*, 692 P.2d 1111 (Colo. 1984).

[77] *Moyer v. Merrick*, 392 P.2d 653 (Colo. 1964); *Brittis*, 527 P.2d 1175.

[78] *Martinez v. Shapland,* 833 P.2d 837 (Colo. App. 1992).

[79] *Texas Mut. Ins. Co. v. Ruttiger*, 265 S.W.3d 651 (Tex. App. Houston [1 Dist.] 2008) *citing EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857 (Tex.App. - Dallas 2008, no pet.). Although no reported Colorado case has been found, it is reasonable to assume that damage to credit reputation would be allowed as a "natural and probable consequence" of personal injuries.

[80] *Meiter v. Cavanaugh*, 580 P.2d 399 (Colo. App. 1978).

[81] *Odell v. Pub. Serv. Co.,* 407 P.2d 330 (Colo. 1965).

[82] *Colorado Springs & I. Ry. Co. v. Marr*, 141 P. 142 (Colo. App. 1914).

[83] *Newbury v. Vogel*, 379 P.2d 811 (Colo. 1963).

[84] *Adams Express Co. v. Aldridge*, 77 P. 6 (Colo. App. 1904).

[85] C.R.S. § 42-4-237(7).

[86] *Id*.

[87] *Pringle v. Valdez*, 171 P.3d 624 (Colo. 2007).

[88] *Id*.

[89] *Denton v. Navratil*, 459 P.2d 761 (1969); *Peterson v. Tadolini,* 97 P.3d 359 (Colo. App. 2004).

[90] *Morgan v. Bd. of Water Works*, 837 P.2d 300 (Colo. App. 1992).

[91] *Barter Mach. & Supply Co. v. Muchow*, 453 P.2d 804 (Colo. 1969).

[92] *Sours v. Goodrich*, 674 P.2d 995 (Colo. App. 1983).

[93] *Rodriguez v. Denver & R.G.W. R. Co*., 512 P.2d 652 (Colo. App. 1973).

[94] *Id.*

[95] *Scharrel v. Wal-Mart Stores, Inc*., 949 P.2d 89 (Colo. App. 1997).

[96] *Id.*

[97] *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo. 1985); *Hildyard v. Western Fasteners, Inc*., 522 P.2d 596 (Colo. App. 1974).

[98] *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978).

[99] *Kimelman v. City of Colorado Springs*, 775 P.2d 51 (Colo. App. 1988), *cert. denied,* 110 S. Ct. 512 (1989).

[100] *Garcia v. Mekonnen,* 156 P.3d 1171 (Colo. App. 2006).

[101] C.R.S. § 13-21-102.5.

[102] C.R.S. § 13-21-102.5(c).

[103] C.R.S. § 13-21-102.5(3)(a).

[104] C.R.S. § 13-21-102.5(c).

[105] C.R.S. § 13-21-102.5.

[106] C.R.S. § 13-21-102.5(5).

[107] C.R.S. § 13-21-102.5(4).

[108] *General Electric Co. v. Niemet*, 866 P.2d 1362 (Colo. 1994).

[109] *Palmer v. Diaz*, 214 P.3d 546 (Colo. App. 2009).

[110] *Pringle v. Valdez*, 171 P.3d 624 (Colo. 2007).

[111] *Id*.; *Preston v. DuPont,* 35 P.3d 433 (Colo. 2001).

[112] C.R.S. 13-21-102.5(5).

[113] *Ark Val. Alfalfa Mills v. Day*, 263 P.2d 815 (Colo. 1953).

[114] C.R.S. § 13-21-102(1)(a).

[115] C.R.S. § 13-21-102(1)(b).

[116] C.R.S. § 13-1-102(1.5)(a).

[117] C.R.S. § 13-1-102(1)(a).

[118] C.R.S. § 13-1-102(3).

[119] C.R.S. § 13-21-102(6).

[120] C.R.C.P. 8(a).

[121] C.R.C.P. 9(g).

[122] *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005); *Weil v. Dillon Companies, Inc*., 109 P.3d 127 (Colo. 2005); *Hoffman v. Brookfield Republic, Inc*., 87 P.3d 858 (Colo. 2004); *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999).

[123] C.R.S. § 13-1-102(1.5)(a).

[124] *Id.*