

A man decided to have lunch at a new restaurant. While the man was eating his lunch, an accidental fire broke out in the kitchen, and the dining room quickly filled with smoke. The other restaurant patrons experienced mild discomfort, which did not require medical treatment. However, the man had been born with an acute and discerning sense of smell, and he had a job as a senior perfumer at a fragrance corporation. He subsequently sued the restaurant in negligence for the injury to the olfactory sensory cells in his nasal cavity that left him unable to work. His annual salary had been \$250,000 before the accident.

Assuming that the man can otherwise establish the elements of negligence, can he recover damages for the injury to his olfactory sensory cells as well as for his loss of employment?

- A. No, because economic damages due to loss of employment are not recoverable in a negligence action.
- B. No, because the man's acute and discerning sense of smell was a preexisting condition.
- C. Yes, because the man can recover even if the extent of his injuries was not reasonably foreseeable.
- D. Yes, because the man's damages were severe and exceeded those of the other restaurant patrons.

Explanation:

A successful **negligence** claim requires proof that the plaintiff suffered physical harm (ie, personal injury or property damage) as a result of the defendant's negligent conduct. Assuming all other elements are proved, the plaintiff can then recover **compensatory damages** for his/her **initial physical harm** AND any **subsequent harm** (physical, economic, or emotional) that is **traceable to** that **initial harm**. This is true **even if the extent of the harm** was **unusual or unforeseeable** because "the defendant takes the victim as found."*

Here, the man suffered injuries to his olfactory sensory cells (initial physical harm) as a result of the fire. This left the man unable to perform his job as a senior perfumer (economic harm traceable to initial harm). Therefore, the man can recover compensatory damages for the injury to his olfactory sensory cells as well as for his loss of employment—even if the extent of his injuries was not reasonably foreseeable.

*This is known colloquially as the "thin-skull" or "eggshell plaintiff" rule.

(Choice A) A plaintiff who suffers economic damages (eg, due to loss of employment) without any related personal injury or property damage cannot recover in a negligence action. But economic damages stemming from physical harm (as seen here) are recoverable.

(Choice B) The physical harm required for negligence includes the exacerbation of a preexisting condition, so the fact that the man's acute and discerning sense of smell was a preexisting condition does not defeat his claim.

(Choice D) While a negligence plaintiff must prove actual damages, the damages need not be severe or exceed those suffered by others who did not have a preexisting condition.

Educational objective:

A successful negligence plaintiff can recover compensatory damages for his/her initial physical harm as well as any subsequent harm (physical, economic, or emotional) that stems from that initial harm. This is so even if the extent of the harm was unusual or unforeseeable.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 31 (Am. Law Inst. 2010) (preexisting conditions and unforeseeable harm).

Recovery of compensatory damages
(initial harm + normal consequences)

Initial physical harm



Subsequent physical harm



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Subsequent economic harm



Subsequent emotional harm

