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Dilemma of the Florida Defendant in a Personal Injury Suit

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COMMENT

DILEMMA OF THE FLORIDA DEFENDANT IN A PERSONAL INJURY SUIT*

I. The Era of Negligence

The great criminal lawyer was front page news and biographical material in the early part of the twentieth century. Trials involving the possible execution of the accused were living drama in which the personality of counsel often overshadowed that of the defendant. Interest in this type of trial has declined, perhaps because crime has become more syndicated and less passionate. Legal protection for the accused is greater than ever; there is more mercy and less capital punishment.

There is a new courtroom scene. The negligence lawyer displays his immense photographs and charts, while medical experts show the jury a section of a skeleton.[1] Bones, ligaments, tendons and nerves are the medico-legal stock in trade. Specialization in negligence has led also to organization and exchange of ideas at regular conferences.[2] Typical subjects for papers or panel discussions are:

> Pleading a Damage Suit;
> Medical Preparation of a Personal Injury Suit;
> Trauma and Cardiac Conditions;
> The Typical Head Injury, Back and Nerve Lesion Case.[3]

It is not surprising that this highly lucrative field has drawn to it talented and enterprising attorneys, who, like the Darrows and Fallons are making names in the history of the law. There are analogies also in the appeal to the sympathies of the jury and in the manner in which the presentation of proof is weighted so that it benefits the physically injured plaintiff as it protects the accused criminal.

Counsel are given wide latitude in argument, though it include "the fanciful play of their imagination."[4] While argument should be restricted

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*For a view from the plaintiff's side see Belli, *The Adequate Award*, 39 Calif. L. Rev. 1 (1951).

1. First Federal Sav. & Loan Ass'n. of Miami v. Wylie, 46 So.2d 396, 400 (Fla. 1950). (Approved . . . "the use of medical charts of the human body and a skeleton of the arm of a body to aid an expert witness in demonstrating to the jury the nature of the injury to the plaintiff and its resultant incapacitating effect.")

2. National Ass'n. Claimants' Compensation Attorneys, Fifth Annual Convention, San Francisco, Cal., August 6-12, 1951.

3. *Supra* note 2. These materials are not available to non-members.

4. Johnson v. State, 88 Fla. 461, 463, 102 So. 549, 550 (1924); Gaston v. State, 134 Fla. 538, 542, 184 So. 150, 151 (1938).

to the evidence and reasonable deductions, wide discretion is given[5] and the court encourages forensic talents.[6]

II. Liability: The Effect of Substantive and Procedural Defenses

A rapid check of this phase of personal injury actions will show some of the advantages that lie with the plaintiff. We deal in part with the establishment of legal liability, but primarily with the effect of such defenses as may be generally available to the parties.

Punitive and special damages. To recover exemplary or punitive damages[7] the Florida Supreme Court has required the showing of negligence of such gross and flagrant character that it evinced a disregard for human life.[8] This reasoning is analogous to the culpable type of negligence necessary to prove manslaughter in criminal cases.[9] It is akin to the type of negligence necessary to set aside the automobile guest statute.[10] Recklessness and wanton disregard for human life has, in law, become synonymous with criminal intent.

Special damages are those that arise as a proximate result of negligence of a lesser degree. Special damages should be alleged in the bill of complaint, though they may be inferred from the facts.[11]

Contributory negligence. While a legion of cases say that contributory negligence is an affirmative defense[12] which should be pleaded and proved,[13] the issue may actually be injected by plaintiff's presentation of his case, which may raise a factual presumption of negligence from the evidence.[14] The defensive plea admits the negligence of the defendant and seeks to cancel or minimize it.

Florida subscribes to the common law rule that the plaintiff's contributory negligence bars recovery for injuries,[15] but the defendant must affirmatively prove that such contributory negligence was the proximate cause of the injury sustained.[16] Further, the negligence of the plaintiff and the defendant must be "mutual, concurring and contemporaneous"[17] and the plaintiff's action or non-action at the time must be objectively tested to determine whether he should have known or foreseen the probable results of his conduct.[18]

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5. Alford v. Barnett Nat. Bank, 137 Fla. 564, 188 So. 322 (1939).
6. Henderson v. State, 94 Fla. 318, 113 So. 689, (1927).
7. Smith v. Bagwell, 19 Fla. 117 (1882).
8. Russ v. State, 140 Fla. 217, 191 So. 296 (1939).
9. Jackson v. Edwards, 144 Fla. 187, 197 So. 833 (1940).
10. Fla. Stat. § 320.59 (1949).
11. Jacksonville Elec. Co. v. Batchis, 54 Fla. 192, 44 So. 933 (1907).
12. E.g., Carter v. J. Ray Arnold Lumber Co., 83 Fla. 470, 91 So. 893 (1922).
13. Seaboard Air Line Ry. v. Good, 79 Fla. 589, 84 So. 733 (1920).
14. Atlantic Coast Line R.R. v. Webb, 112 Fla. 449, 150 So. 741 (1933).
15. General Outdoor Adv. v. Frost, 76 F.2d 127 (S.D. Fla. 1935).
16. Connell v. Petri, 159 Fla. 67, 30 So.2d 922 (1947).
17. Winner v. Sharp, 43 So.2d 634 (Fla. 1949).
18. The "reasonable man" test. Lindsay v. Thomas, 128 Fla. 293, 174 So. 418 (1937).

Whether plaintiff is contributorily negligent is for the jury[19] and it is submitted that juries will often refuse to find contributory negligence, although verdicts will show that they applied *comparative negligence* doctrines, which in Florida are lawfully applied only under statutes governing railroads[20] and hazardous occupations.[21] Thus, although the majority of answers in personal injury actions allege contributory negligence, its effectiveness as a defense has limitations of proof and jury reaction.

Last clear chance. This doctrine is said by the supreme court not to constitute an exception to the doctrine of contributory negligence, but to be a qualification of it.[22] It is recognized in Florida[23] and may operate in the plaintiff's favor,[24] negativing plaintiff's negligence in some instances. It need not be specially pleaded.[25]

Concurrent negligence. The plaintiff may hold two or more persons jointly or severally liable where their concerted or independent acts concurred to produce injury to him.[26] Liability is imposed even if neither of the acts without the concurrence of the other would have caused the accident.[27]

Imputed negligence. It is well settled law that the doctrine of imputed negligence does not obtain in Florida.[28] This operates in favor of the plaintiff, especially minor children.[29] Within the family relation of husband and wife it may be possible to prove joint venture[30] or to rely on the fiction of husband and wife being one legal entity.[31] A passenger in an automobile which collides with a truck may sue the truck driver and truck owner, despite the negligence of the driver of the automobile.[32]

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19. Sokolsky v. Feigen, 49 So.2d 88 (Fla. 1950).

20. FLA. STAT. § 768.06 (1949); Atlantic Coast Line R.R. v. Fogleman, 117 Fla. 334, 158 So. 108 (1934) (Verdict for $15,000.00 reduced to $9,000.00 on basis that it could be inferred from evidence that plaintiff's decedent was contributorily negligent); Atlantic Coast Line R.R. v. Britton, 109 Fla. 212, 146 So. 842 (1933). (Contributory negligence may be considered in reducing damages, though not pleaded).

21. FLA. STAT. § 769.03 (1949).

22. Dunn Bus Service Inc. v. McKinley, 120 Fla. 778, 178 So. 865 (1937).

23. Miller v. Ungar, 149 Fla. 79, 5 So.2d 598 (1942); Miami Beach Ry. v. Dohme, 131 Fla. 171, 179 So. 166 (1938).

24. Ward v. City Fuel Oil Co., 147 Fla. 320, 2 So.2d 586 (1941). Under the last clear chance doctrine plaintiff must, in addition to showing that defendant was negligent in failing to avert the accident after knowledge of the situation in sufficient time to act on it, show that plaintiff's negligence did not continue up to the moment of injury and was not a contributing and efficient cause.

25. Kenan v. Withers, 137 Fla. 561, 188 So. 95 (1939).

26. Putnam Lumber Co. v. Berry, 146 Fla. 595, 2 So.2d 133 (1941); Nichols v. Rothkopf, 135 Fla. 749, 185 So. 725 (1939).

27. Red Top Cab & Baggage Co. v. Masilotti, 190 F.2d 668 (5th Cir. 1951).

28. Arline v. Brown, 190 F.2d 180 (5th Cir. 1951); Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (1923).

29. Burdine's Inc. v. McConnell, 146 Fla. 512, 1 So.2d 462 (1941).

30. Caliando v. Huck, 84 F. Supp. 598 (N.D. Fla. 1949).

31. In Corren v. Corren, 47 So.2d 774 (Fla. 1950), where husband entrusted automobile to daughter, wife could not recover from husband for injuries sustained as the result of daughter's negligent operation. The court said that FLA. STAT. § 708.08 (1949) did not abrogate the common law fiction of husband and wife as one entity. *See also* Lundy v. United States, 78 F. Supp. 354 (N. D. Fla. 1948).

32. Miami Coca-Cola Bottling Co. v. Mahlo, 45 So.2d 119 (Fla. 1950).

Respondeat superior. In addition to the normal liabilities of a principal for the torts of his agent operating within the scope of authority, the doctrine of respondeat superior extends to liability of an owner of a motor vehicle for the accidents of any driver to whom he may *intrust* that vehicle.[33] It is but a step from here to the current holding that the bailor of an automobile is liable for the torts of the bailee.[34] As a result, the U-Drive-It businesses that flourish in resort cities have considerable difficulty in securing and retaining sufficient insurance to cover the eventualities which the application of this doctrine present.

The rationale which so applies the ancient principle of agency is the modern one that an automobile is a *dangerous instrumentality.*[35] Since the majority of personal injury actions arise from the operation of motor vehicles, it can readily be seen that the defendant's chance to escape liability is negligible.[36]

Self-preservation. It is assumed that the plaintiff did everything possible to escape injury.[37]

Violation of statute — negligence per se. The defendant is liable if the statute is one designed to protect the plaintiff from the particular hazard;[38] otherwise, violation of an ordinance should not serve as the only criterion for determining negligence.[39] It has been held, however, that parking of a truck on a traveled highway at night, with lights shining in an unnatural position across the highway, and with no flares out, constitutes negligence per se.[40]

Automobile guest statute. The driver is protected against suits by his invitees unless he is guilty of gross negligence or wilful and wanton misconduct.[41]

Other invitees — business guests. While an owner is not an insurer of his premises as to visitors[42] there is a legal duty to use reasonable care

33. Carter v. Baby Dy-Dee Service, 159 Fla. 380, 31 So.2d 400 (1947); Holstun v. Embry, 124 Fla. 554, 160 So. 400 (1936).

34. Yarbrough v. Ball U-Drive-It System, Inc., 48 So.2d 82 (Fla. 1950); Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947), *overruling* White v. Holmes, 89 Fla. 251, 103 So. 623 (1925). The *White* case had held that a person bailing to another for hire an automobile without driver would not be liable to a third party *unless* negligent in selection of the bailee. The *Lynch* case establishes a doctrine which is in effect one of strict liability.

35. Foremost Dairies v. Godwin, 158 Fla. 245, 26 So.2d 773 (1946). In Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison, 190 F.2d 727 (5th Cir. 1951) the dangerous instrumentality doctrine was extended to the operation of airplanes.

36. The fact that the name of a trucking company was painted on a truck, the company having received permission from the Railroad and Public Utilities Commission for the truck's operation, was held to be a *prima facie* showing of ownership for a personal injury action arising out of the truck's collision with another vehicle. Wilson v. Burke, 53 So.2d 319 (Fla. 1951).

37. White v. Hughes, 139 Fla. 54, 190 So. 446 (1939); Murden v. Miami Poultry & Egg Co., 113 Fla. 870, 152 So. 714 (1934).

38. Lewis v. Miami, 127 Fla. 426, 173 So. 150 (1937).

39. Crosby v. Donaldson, 95 Fla. 365, 116 So. 231 (1928).

40. Steele v. Independent Fish Co., 152 Fla. 739, 13 So.2d 14 (1943).

41. FLA. STAT. § 320.59 (1949). See Note, 5 MIAMI L. Q. 510 (1951).

42. Moulden v. Jefferson Standard Life Ins. Co., 147 Fla. 36, 2 So.2d 302 (1941).

for the safety of persons who may use the premises under express or implied invitation.[43]

Res ipsa loquitur. This is a rule of evidence, as distinguished from one of law.[44] By shifting the burden of proof, it may operate greatly to the advantage of the plaintiff.[45] It is often invoked in situations where beverages bottles explode. In such a case the plaintiff must prove the control of the defendant, with a showing that the bottle was not improperly handled or subjected to unusual atmospheric changes or changes in temperature.[46] The plaintiff need not exhaust all probabilities to shift the burden of proof to the defendant.[47]

Attractive nuisance. The defendant is liable for dangerous and unprotected places on his property which may attract immature children.[48]

Family of plaintiff. In an early case[49] the supreme court deemed it improper to receive evidence in a personal injury suit concerning the marital status or number and ages of plaintiff's family. This old rule has been vitiated by later cases[50] so that the showing of additional family responsibilities in the case of the breadwinner should tend to increase the size of the verdict.

Pleadings — technicalities. The new Florida Common Law and Equity Rules,[51] designed to simplify pleadings and expedite hearings, are being liberally interpreted. Although special damages must be alleged,[52] a bill of complaint may be amended to conform to whatever is elicited at the trial, and it is practically never too late to amend.[53] The defendant's maneuver of postponing trial, aided by crowded court dockets, is losing its effectiveness as additional circuit judges are appointed.

Witnesses; cross-examination. The rule in Florida is that a witness may be cross-questioned only on matters brought out in the examination-in-chief.[54] Inroads upon this rule are heavy, especially at master's hearings, the rationale being that it is better to bring out the whole truth.

Exhibits. The ease with which exhibits are introduced into evidence

43. Hall v. Holland, 47 So.2d 889 (Fla. 1949).
44. American Dist. Elec. Protective Co. v. Seaboard Air Line Ry., 129 Fla. 518, 177 So. 294 (1937).
43. See Comment, *Application of the Doctrine of Res Ipsa Loquitur to Food Cases.* 3 MIAMI L. Q. 613 (1949).
46. Henning v. Thompson, 45 So.2d 755 (Fla. 1950); Hughs v. Miami Coca-Cola Bottling Co., 155 Fla. 299, 19 So.2d 862 (1944).
47. West Coast Hospital Ass'n v. Webb, 52 So.2d 803 (Fla. 1951); Groves v. Florida Coca-Cola Bottling Co., 40 So.2d 128 (Fla. 1949).
48. *E.g.*, Newby v. West Palm Beach Water Co., 47 So.2d 527 (Fla. 1950).
49. Louisville & N. R.R. v. Collingsworth, 45 Fla. 403, 33 So. 513 (1903).
50. In McHugh v. Miami Transit Co., 159 Fla. 760, 32 So.2d 735 (1947) the court upheld a $40,000.00 verdict as not excessive in the case of a man "earning $3900.00 annually and having a wife and two children."
51. FLA. STAT. ANN. 1941, Vol. 31. Adopted by Supreme Court of Florida Nov. 22, 1949; effective Jan. 1, 1950.
52. J. Ray Arnold Lumber Corp. v. Richardson, 105 Fla. 204, 141 So. 133 (1932).
53. Messana v. Maule Industries, 50 So.2d 874 (Fla. 1951).
54. Hampton v. State, 50 Fla. 55, 39 So. 421 (1905).

might well astonish an older jurist accustomed to strict procedure. Many experienced defense attorneys prefer to refrain from objecting at this stage of the trial.

Photographs have been held admissible, though gruesome, so long as the evidence indicated that the pictures reflected the true condition of the plaintiff.[55] Maps, plans and pictures have repeatedly been held to be acceptable in evidence.[56] A photograph of an automobile, taken after removal from the scene of the accident and submitted by a witness who was not the photographer, was deemed acceptable in evidence where the witness insisted that the photographs were a true representation of the condition of the automobile.[57]

A line of demarcation. There is apparently one type of situation where rules aid the defendant, but it may be of little aid, except perhaps to mark the limits beyond which the court will not go. A directed verdict for plaintiff will rarely be given except when it is clear that there is no evidence whatever adduced that could in law support a verdict for defendant.[58] The supreme court could not tolerate a directed verdict in a situation where defendant claimed unavoidable accident while the trial judge insisted that, by law, the situation was negligence per se.[59]

At the trial level, a barrage of negligence actions, some improperly prepared or without a solid legal liability foundation, have resulted in many jury verdicts for defendants. Negligence lawyers in Dade County, Florida, point to the fact that more local personal injury cases are decided in favor of defendants than of plaintiffs.

III. The Measure of Damages

The judicial attitude toward large verdicts has undergone a decided change during the past ten years. There are both social and legal reasons advanced to explain the new philosophy. The turning point coincides with the new mortality tables.[60] Older cases are of slight value as precedents in this rapidly changing field of law.

Principal elements. The items sought to be changed into dollars, to be proved by the plaintiff are:[61]

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55. *See* Breeding's Dania Drug Co. v. Runyon, 147 Fla. 123, 124, 2 So.2d 376, 377 (1941).

56. Baston v. Shelton, 152 Fla. 879, 13 So.2d 453 (1943); Stanley v. Powers, 125 Fla. 322, 169 So. 861 (1936); Young v. State, 85 Fla. 348, 96 So. 381 (1923).

57. Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1941).

58. Katz v. Bear, 52 So. 2d 903 (Fla. 1951); Welborn v. Kemp, 141 Fla. 89, 192 So. 469 (1939).

59. Oppenheimer v. Werner, 46 So.2d 870 (Fla. 1950).

60. American Experience Table of Mortality, 27 Fla. Stat. Ann. (1941), p. 351 *et seq.* Mortality tables are proper evidence. Tallahassee v. Ashmore, 158 Fla. 73, 27 So.2d 660 (1946). They are admissible only where there is evidence supporting permanent injury. Ward v. Stanley, 130 Fla. 642, 178 So. 398 (1938).

61. Key West v. Baldwin, 69 Fla. 136, 139, 67 So. 808, 813 (1915).

(1) Loss of time during hospitalization and cure.[62]
(2) Expense of cure.
(3) Permanence of injury in relation to future loss.
(4) Pain and suffering.

The first two items are capable of exact proof, and actual damages are recoverable as a matter of right,[63] but item (3) requires expert medical testimony coupled with an ability on the part of counsel to elicit it by proper questioning. Since the matter of damages will be settled once and for all time during one suit,[64] the determination of the permanence of the injury is highly important. So is the degree of disability. For example, the difference in one-half and three-quarters disability for the plaintiff whose life expectancy is forty years, measured on the basis of $60.00 per week, would be $15.00 per week for 2080 weeks, or $31,200.00.

Pain and suffering. The Florida Supreme Court has taken judicial notice that "mental pain and suffering (that thing commonly called 'worry') . . . affects every vital organ and probably results in more mental and physical wrecks than any other one affliction."[65] Such pain and suffering are not compensable unless there has been injury to the person, property, health or reputation,[66] except where there was a malicious tort.[67] As a guide the court has indicated that recovery should be limited to such pain and suffering as evidence shows the plaintiff is reasonably certain to endure.[68] Given a sympathetic "reasonable" jury the elastic yardstick begins to stretch in favor of the plaintiff.

Where pain and suffering continued for a past and definitely measurable period, the supreme court has not disturbed verdicts which apparently allowed plaintiffs approximately one hundred dollars per week.[69] Where future pain and suffering are to be computed the measure is more indefinite, but it is noted that recent verdicts have allowed approximately $20,000.00.[70] There is great consideration shown to children,[71] a natural concomitant of the state's responsibility for infants.

Taking the measure of future pain, suffering or disfigurement from both the physical and mental standpoint, depending upon the *degree* in

62. Ready v. Pure Carbonic, Inc., 84 F. Supp. 321 (S.D. Fla. 1949).
63. Florida East Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).
64. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687 (1907).
65. Baldwin v. Baldwin, 151 Fla. 341, 344, 9 So.2d 717, 721 (1942).
66. Mees v. Western Union Tel. Co., 55 F.2d 691 (S.D. Fla. 1932).
67. Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950).
68. Grainger v. Fuller, 72 Fla. 57, 72 So. 462 (1916).
69. Florida Motor Lines Corp. v. Shontz, 32 So.2d 248 (Fla. 1947); Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213 (1946).
70. Renuart Lumber Yards Inc. v. Levine, 49 So.2d 97 (Fla. 1950) ($30,000.00 for pain and suffering reduced to $16,475.05; 42-year-old man with life expectancy of 28 years); Tamiami Trail Tours, Inc. v. Wooten, 47 So.2d 743 (Fla. 1950) ($21,000.00 allowed for pain, suffering and disfigurement; 20-year-old woman with life expectancy of 41 years).
71. Porter v. Gordon, 46 So.2d 19 (Fla. 1950). (The court's judicial conscience was shocked by inadequate damages); Vining v. American Bakeries, 118 Fla. 572, 159 So. 671 (1935); Burnett v. Allen, 114 Fla. 489, 154 So. 515 (1934).

the individual case, it may readily be seen that a wide variance is possible. For example, with a life expectancy of 20 years, the allowance of one dollar per day is $7,200.00. An allowance of five dollars per day results in $36,500.00.

Loss of consortium.[72] The value of a housewife to her husband may be roughly measured by the cases[73] and appears to be approximately $120.00 per month, for past and definitely measured periods.

Reasonableness of the jury. Reasonableness and the sound discretion of the jury on the evidence before them[74] are the ultimate legal criteria,[75] and the damages once fixed by the jury must shock the judicial conscience to be changed.[76] What it takes to shock the judicial conscience is a variant worthy of profound study, but this factor is not capable of measurement. The rule remains constant, but the judges change.[77]

There is another element which may cause the setting aside of a verdict. This is spoken of variously as the jury's flagrant passion, prejudice, partiality, corruption, bias or some other element improperly influencing it.[78] This calls for judging the jury, a matter which the judiciary is extremely reluctant to undertake insofar as the records go, but which undoubtedly enters privately into the decisions which speak of shocking the judicial conscience.

Damages are sufficiently proved if a reasonable basis is shown for computation, though the result is only approximate.[79] The supreme court is reluctant to intervene and will ordinarily not substitute its findings for

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72. FLA. STAT. § 46.09 (1949).

73. First Federal Sav. & Loan Ass'n. of Miami v. Wylie, 46 So.2d 743 (Fla. 1950); Margaret Ann Supermarkets Inc. v. Scholl, 159 Fla. 748, 34 So.2d 238 (1948).

74. Bell Bakeries Inc. v. Giles, 145 Fla. 148, 198 So. 793 (1940); McDonald v. Stone, 114 Fla. 608, 154 So. 327 (1934); Warfield v. Hepburn, 62 Fla. 409, 57 So. 618 (1912).

75. Margaret Ann Supermarkets Inc. v. Scholl, *supra* note 73; Florida Motor Lines Corp. v. Shontz, 32 So.2d 248 (Fla. 1947); Werner v. Ware, 136 Fla. 466, 182 So. 605 (1938). When damages are "manifestly" or "flagrantly" inadequate or excessive the trial court may set aside the jury verdict or may order a remittitur. Jernigan v. Thompson, 103 Fla. 784, 139 So. 366 (1931). This is really covered within the doctrine of shocking the judicial conscience.

76. Dunn Bus Service Inc. v. Wise, 140 Fla. 341, 191 So. 509 (1939); Werner v. Ware, *supra* note 75; Jacksonville v. Vaughn, 92 Fla. 339, 110 So. 529 (1926).

77. *Compare* Florida Power & Light Co. v. Hargrove, 160 Fla. 405, 35 So.2d 1 (1948) *with* Sebring v. Avant, 95 Fla. 960, 117 So. 383 (1928). *Compare* Margaret Ann Supermarkets Inc. v. Scholl, *supra* note 73 *with* Werner v. Ware, *supra* note 75. In Florida Power & Light Co. v. Watson, 50 So.2d 543 (Fla. 1951) a verdict of $260,000.00 shocked the judicial conscience. Justice Adams doubted that the evidence was sufficient to submit the case to the jury. Liberal Justice Hobson indicated that there was prejudice on the part of the jury which he had not found in the *Renuart* case. The court's judicial conscience is sometimes shocked by the award of inadequate damages. Porter v. Gordon, *supra note* 71.

78. First Fed. Sav. & Loan Ass'n. of Miami v. Wylie, 46 So.2d 396 (Fla. 1950); Upton v. Hutchinson, 46 So.2d 20 (Fla. 1950); Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (1923); Atlantic Coast Line R.R. v. Dees, 56 Fla. 157, 48 So. 28 (1908).

79. Margaret Ann Supermarkets Inc. v. Schnoll, *supra* note 73; Rynveld v. Dupuis, 39 F.2d 399 (5th Cir. 1930).

those of the jury.[80] However, remote, speculative or excessive damages are not allowed[81] and the trial judge may set aside the verdict or order a remittitur when the verdict is against the manifest weight of the evidence. The rationale is that it is not the function of the appellate court to "try cases de novo on cold typewritten manuscripts."[82]

From an appellate standpoint the defendant will find no advantage in trying the case in Federal court. Federal courts of appeal adhere to the same theory and are less disposed to disturb verdicts than the Florida Supreme Court.[83]

The "Present Value" of damages. An old rule is that future damages are to be reduced to their present value.[84] Like the courts of some other states[85] the Florida Supreme Court, speaking through the ebullient Mr. Justice Terrell, has shown recognition of the high cost of living and the decreased purchasing value of the dollar,[86] a view strongly supported by Mr. Justice Hobson in his dissent in the *Renuart* case.[87] In addition, Justice Hobson's dissent makes inroads upon the present value rule by encouraging some future speculation as to changing wage scales.[88] Two dissenting federal judges in the *Sunray case*,[89] considering future earnings, thought it proper to consider a person's *decreased* earning capacity as he grew older.[90]

The Annuity Theory: rates of interest. The *Renuart*[91] and *Sunray*[92] cases offer interesting discussions anent the proper manner in which to estimate damages. It is particularly appropriate to compare these two cases in view of Florida's early following of the Texas view[93] and also because this federal circuit will hear cases appealed from Florida federal courts.

Theoretically, once having determined the loss of future earning capacity, it is necessary only to decide the amount which would purchase an annuity which during the period of plaintiff's life expectancy would reimburse him for the loss.[94] Variables again enter into such a computation;

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80. Martin v. Stone, 51 So.2d 33 (Fla. 1951).
81. Atlanta & St. A. B. Ry. v. Thomas, 60 Fla. 412, 53 So. 510 (1910).
82. Glass v. Parrish, 51 So.2d 717, 721 (Fla. 1951).
83. Sunray Oil Corp. v. Albritton, 188 F.2d 751 (5th Cir. 1951), *cert. denied*, 20 LAW WEEK 3089 (Oct. 1951).
84. Florida Dairies Co. v. Rogers, 119 Fla. 451, 161 So. 85 (1935); Seaboard Air Line Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927).
85. *E.g.*, Gilbertson v. Gross, ——Minn.——, 45 N.W.2d 547 (1951).
86. Margaret Ann Supermarkets Inc. v. Scholl, *supra* note 73, at 241.
87. Renuart Lumber Yards Inc. v. Levine, *supra* note 70, at 103.
88. *Id.* at 103.
89. Sunray Oil Corp. v. Albritton, *supra* note 83, at 752.
90. *Id.* at 754.
91. Renuart Lumber Yards Inc. v. Levine, *supra* note 70.
92. Sunray Oil Corp. v. Albritton, *supra* note 83.
93. Florida Ry. & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714 (1889), which quoted Houston & T. C. R.R. v. Willie, 53 Tex. 318 (1880).
94. See note 60 *supra*.

one is the rate of interest to be used; another is consideration that the judgment funds are tax free.

Again the scales are weighted in the plaintiff's favor, because an appellate court will ascribe the most liberal computation to the jury, and will not disturb it so long as any possible mathematical computation within reason can be found for its support.

IV. The Effect of Large Verdicts

Settlements. The increasing reluctance of courts to disturb verdicts during the past ten years has operated to the advantage of the plaintiff.[95] Many business firms and insurance companies do not desire to go to trial in cases involving recognized liability and serious injuries. Out-of-court settlements, however, have become proportionately higher.[96] The insurer must take a realistic view of the existing situation so the claimant is placed in a more favorable position.

Statistics — nationwide. Claims arising from automotive liability insurance[96] have shown a steady increase in the past ten years, as evidenced by the following statistics:[97]

Year	*Bodily Injury*	*Property Damage*
1941	100.0%	100.0%
1942	120.1	112.0
1943	127.8	132.5
1944	127.4	157.1
1945	117.1	166.9
1946	119.7	178.9
1947	127.8	195.8
1948	140.8	211.4
1949	147.0	216.2
1950	154.9	225.0

95. Miami Transit Co. v. Poulton, 53 So.2d 667 (Fla. 1951) (*Dismissed without opinion;* verdict was $35,000.00); Miami Transit Co. v. Lee, 53 So.2d 667 (Fla. 1951) (*Dismissed without opinion;* verdict was $74,305.00); Goodyear Tire & Rubber Co. v. Johnson, 43 So.2d 715 (Fla. 1949) (*Dismissed without opinion;* verdict was $100,000.00). *But cf.* the Renuart case, *supra* note 70, verdict of $75,000.00 was reduced to $60,000.00).

96. Florida Power & Light Co. v. Watson, *supra* note 77, (Verdict was $260,000.00; settlement out-of-court was $151,000.00); Mueller v. Vanderbilt Hotel Corp., Circuit Court of Dade County, Fla., (1950) (Verdict was $150,000.00; settled for $135,000.00 before motion for new trial presented); Bertha Green Sarasin and her husband, Thomas L. Sarasin v. Florida Power & Light Co., Circuit Court of Dade County, Fla., (1951) (Settled for $200,000.00; medical bills alone were $23,500.00 at date of settlement, the result of severe burns).

96. The Florida Financial Responsibility Law, Fla. Stat. c. 324 (1949) requires insurance or satisfactory proof of financial responsibility to respond in damages. This is not, however, a prerequisite to issuance of license plates or driver's license.

97. Best's Fire and Casualty News, July, 1951. *See, also,* N. Y. Times, July 23, 1950, p. 48, col. 2. Comparative tables prepared by the National Bureau of Casualty Underwriters.

Example of local effect. In hearings before the Miami Beach City Council concerning the necessity of increasing bus fares, officials of the Miami Beach Railway Company gave as compelling reasons increased damage claims and tendency of courts to grant higher damages.[98] Statistics presented by the company were as follows:

Year	*Amount expended for damages and claims*
1948	$35,978.38
1949	51,426.28
1950	86,877.87
1951 (estimate)	202,712.76

The last figure was in excess of the sum of $153,835.00 allowed the company for income tax purposes; however, company officials were insistent upon the premise that when all damage claims for 1951 were paid out in subsequent years, the figure would be actually around the $202,000.00 mark.

It is common knowledge in the Greater Miami area that the favorite corporate targets of the specialized negligence lawyers are in similar straits. The effect upon insurance companies is obvious. No gamblers, they have produced statistical analyses to satisfy the State Insurance Commission that insurance premiums must be correspondingly increased. The spreading of the risk involves higher premiums, not only in the case of corporate organizations, but also in the case of each individual automobile owner. The merchant who must guard against slippery floors in his establishment must increase the price of his wares to pay the higher premiums on his insurance.

V. Legislative Activity

It appears that in those fields of negligence where the legislatures have prescribed formulas, there has generally been some attempt to place a ceiling upon recovery, although liberality has been accorded the claimant by the limiting of some of the substantive defenses formerly allowed by the common law. This is notably true in the field of Workmen's Compensation.[99]

The Warsaw Convention[100] is an example of international treatment of claims arising from travel by aircraft. It is interesting to note the reasons given by the Secretary of State in his recommendation to the President

98. The Miami Herald, Oct. 7, 1951, p. 4B.

99. Fla. Stat. c. 440 (1949). See Burton, *Florida Workmen's Compensation*, 5 Miami L. Q. 74 (1950).

100. Ratified by U. S. Senate June 15, 1934. Proclaimed by the President June 27, 1934. "Article 22(1) *Limit of Liability-Passengers.* In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [in 1934 equal to $0,291.87] . . . Damages may be awarded in the form of periodical payments . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

of the United States, urging the adoption of the Warsaw Convention, as follows:[101]

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

A number of states, not including Florida, have set limits of recovery under wrongful death statutes. These generally provide for actual and reasonable expenses plus compensation not to exceed a certain sum.[102] A trend is becoming apparent in Florida to increase the award to the survivor-beneficiary,[103] the increases running somewhat in proportion to those in personal injury actions. Another field of negligence encompassed within legislation is the Federal Employees' Liability Act.[104]

An attorney searching for negligence statutes will be referred by the index and heading of Florida Statutes or Florida Statutes Annotated to chapter 768. This remarkable patchwork of legislation includes wrongful death, with a special statute of limitations,[105] special railroad sections, such as those dealing with comparative negligence[106] and recovery despite the fellow-servant rule[107] and sections concerning unguarded pits and holes.[108] There are two limitations on damages: in the matter of pits and holes, double the actual damage may be recovered;[109] in a collision of a motor vehicle with any animal at large on a public highway, the owner of the animal may not recover.[110] There is but one section dealing with personal

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101. HOTCHKISS, TREATISE ON AVIATION LAW, 146 (1938).

102. Limit $20,000.00 - Connecticut; limit $15,000.00 - Alaska, Illinois, Indiana, Kansas, Massachusetts, Missouri, New Hampshire, Virginia, Wisconsin; limit $10,000.00 - Canal Zone, Maine, Minnesota, South Dakota, West Virginia. New Mexico has a limitation of $10,000.00 for railroad deaths only. Rhode Island provides a minimum limit of $2500.00, but does not allow compensatory damages for pain and suffering.

103. Pauline M. Smith v. Edward Coco, Circuit Court of Dade County, Fla. (Oct. 1951) (Judgment of $50,010.35 for plaintiff included $25,000.00 compensatory damages and $25,000.00 punitive damages. Trial by court without a jury. Plaintiff's decedent, a 34-year-old Negro car washer, was shot and killed by defendant, now under life sentence for his murder).

104. 35 STAT. 65 (1908), 36 STAT. 291 (1910), 53 STAT. 1404 (1939), 45 U.S.C. §§ 51-60 (1946).

105. FLA. STAT. §§ 768.01 - .04 (1949).

106. FLA. STAT. § 768.06 (1949).

107. FLA. STAT. § 768.07 (1949).

108. FLA. STAT. § 768.10 (1949).

109. FLA. STAT. § 768.11 (1949).

110. FLA. STAT. § 768.12 (1949). The negligent owner of livestock is liable in damages for injury caused by his livestock on the public way. FLA. STAT. § 588.15 (1949).

injury actions[111] and this provides for physical examination of the injured party. Hazardous occupations are treated in chapter 769.

VI. Conclusion

It thus appears that personal injury actions are governed by stare decisis, and it is submitted that the most careful analysis of decisions will fail to provide an adequate yardstick for damages. While a trend toward compensation legislation is evident in allied fields, there is a struggle behind the scenes between the insurance companies and representatives of the specialized negligence lawyers, both of whom are vitally interested in such legislative enactments as may affect them.

Many crippled and deserving victims of accidents recover nothing from defendants who are legally liable but financially irresponsible. Such a defendant may lose his driver's license, if he had one. Proof of financial responsibility prior to issuance of automobile licenses might aid such luckless victims.

In the absence of legislation, it appears that the only guide to fair standards of damages must come at the appellate level of the courts. It is obvious that this is a delicate problem, as evidenced by many close decisions.[112] However, there is ample precedent[113] for preserving inviolate the safeguards of our traditional jury system[114] as a fact-finding body under the direction and guidance of the law as applied by the court. While absolute uniformity is not possible, standards may be evolved which may weigh the social and economic consquences and may establish a more stable basis for predictability. Unless this is done, the defendant, particularly the corporate defendant, will continue to be faced with a situation which will impede the establishment or expansion of vital industry in our rapidly growing state.

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111. Fla. Stat. § 768.09 (1949).
112. *E.g.*, Margaret Ann Supermarkets Inc. v. Scholl, *supra* note 73. (Four to three decision).
113. *See* dissenting opinion of Holmes, C. J. in Sunray Oil Corp. v. Albritton, *supra* note 83 at 752.
114. Fla. Const., *Declaration of Rights*, § 3.