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MEASURE OF DAMAGES IN PERSONAL INJURY CASES[1]

by CARROLL SAMUEL DANIELS*

I INTRODUCTION

Juries throughout the nation are constantly awarding verdicts in excess of $100,000 in personal injury cases.[2] Thus far the highwater mark seems to be a $400,000 verdict rendered by a jury in New York City.[3] It is the purpose of this article to explore the legal theories and rules which lie behind the intricate process of measuring damages in personal injury cases.

II THEORIES UNDERLYING PERSONAL INJURY DAMAGE LAW

In theory personal injury damage law attempts to do two things:

(1) put plaintiff in the same financial condition he would have been in had he not been injured, and

(2) award him sums of money as "compensation" for his past and future mental and physical pain and suffering.

Every rule of personal injury damage law stems initially from one of these theories, with the single exception of punitive damages which will not be dealt with in this article.

III RESTORATION OF PLAINTIFF'S FINANCIAL CONDITION

To protect the injured plaintiff against financial loss, he must be awarded sums to cover the past and future costs of his medical treatment, and to cover all that he has lost in the past and will lose in the future because his injuries have rendered him less able or wholly unable to work. Numerous rules exist as to the recovery of medical expenses and as to loss of earnings and impairment of working capacity.

A. *Medical Expenses*

Defendant can escape liability for medical treatment plaintiff has received and paid for up to the date of the trial if it can be shown that the treatment was not necessary. In addition, defendant is liable for no more than the reasonable value of necessary medical treatment. However, judicial sentiment is strongly pro-plaintiff when it comes to deciding what is necessary and reasonable, and as a practical matter these defenses mean next to nothing. Cases holding that unnecessary treatment was in fact received are practically non-existent[4] and no case has been found holding that plain-

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*B.S., University of North Carolina; LL.B., Columbia Law School; Asst. Professor of Law, School of Law, University of Miami.

1. The author wishes to acknowledge his indebtedness to Young B. Smith, former Dean of the Columbia Law School, with whom the author had the privilege of working for two years on the most recent torts casebook to appear, SMITH AND PROSSER, CASES ON TORTS (1952).

2. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

3. *Id.* at 41.

4. One of the few cases so holding is Berson v. Smith, 254 App. Div. 676, 3 N.Y.S.2d 293 (1938).

tiff paid too much to his hospital or doctors. On the other hand, Florida has held that a trip to New York City by a Florida plaintiff to see a bone specialist was a proper expenditure,[5] and Michigan has held in accord as to a $3,000 visit to Mayo's by a Michigan plaintiff for treatment of a knee injury.[6]

When plaintiff fails to recover for the medical bills he has paid, it is usually the fault of his lawyer in failing to comply with the applicable rules of evidence as to proof of reasonableness and necessity. Most courts hold that sums actually spent are presumed to be reasonable and necessary in the absence of proof to the contrary.[7] However, a few jurisdictions require plaintiff to go further and affirmatively show reasonableness and necessity.[8] In most cases plaintiff gets his medical treatment long before the issue as to defendant's liability is decided. Consequently, plaintiff has a strong incentive to secure nothing but necessary treatment at a reasonable price. He may end up paying the bills himself. For this reason, the majority rule with its rebuttable presumption of reasonableness and necessity seems preferable.

Plaintiff is entitled to recover all his future outlay for medical treatment, but the speculative nature of the subject offers defendant a fertile field for defense. The difficulty comes in proving what treatment will be necessary in the future and how much it will cost at a future date. If plaintiff is certain to require a future operation, evidence as to its cost is clearly admissible.[9] As early as 1907, Missouri allowed a jury to award a "just and reasonable" sum for the attention and services a woman would need for the rest of her life because her injuries made her a helpless paralytic.[10] On the other hand, if plaintiff does not prove the necessity of future treatment, evidence as to its probable cost is inadmissible.[11]

Assuming that plaintiff will need $1,000 worth of medical care each year for twenty years, defendant has an argument that he should not be required to pay the full $20,000 at the end of trial. Plaintiff will be able to invest the amount paid and derive income from it. However, the only case which seems to have considered the point holds that amounts awarded for medical

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5. City of Orlando v. Zapfe, 145 Fla. 120, 198 So. 801 (1940).
6. Grinnell v. Carbide & Carbon Chemical Corp., 282 Mich. 509, 276 N.W. 535 (1937). *Cf.* Johnston v. Long, 30 Cal. App.2d 54, 181 P.2d 645 (1947), in which 31 operations to alleviate disfigurement were held necessary, the court saying, "The accident rendered him so unsightly that it would be unreasonable to expect him to forego restorative surgery."
7. *E.g.*, Carangelo v. Nutmeg Farm, Inc., 115 Conn. 457, 162 Atl. 4 (1932); Graham v. Dressen, 292 Ill. App. 15, 10 N.E.2d 843 (1937).
8. *E.g.*, Houston E. & W.T.R. Co. v. Jones, 1 S.W.2d 743 (Tex. Civ. App. 1927). See also, Konopka v. Montgomery Ward & Co., 133 W.Va. 775, 58 S.E.2d 128 (1950).
9. Edens-Birch Lumber Co. v. Wood, 139 S.W.2d 881 (Tex. Civ. App. 1940); *accord*, Dickson v. Queen City Coach Co., 233 N.C. 167, 63 S.E.2d 297 (1931).
10. Stoebier v. St. Louis Transit Co., 203 Mo. 702, 102 S.W. 651 (1907).
11. Sang v. St. Louis, 262 Mo. 454, 171 S.W. 347 (1914).

expenses should not be discounted to present value.[12] Despite the theories, the decision is probably a wise one since it is impossible to determine just when and how much plaintiff will need for his medical bills and plaintiff should have the money on hand at all times.

Special problems arise when plaintiff attempts to recover for medical treatment he has not had to pay for. Most courts hold that the reasonable value of gratuitous nursing services can be recovered on the theory that such services are a gift to plaintiff which should not inure to the benefit of a wrong-doing defendant.[13] By the same line of reasoning, it has been held that defendant is liable for an injured employee's medical expenses even though the employer has voluntarily paid the bills.[14] To hold otherwise would seem very unwise as it would discourage employers from making such payments, and the injured employee is often in desperate need of money to tide him over until his case is tried.[15]

B. Loss of Earnings and Impairment of Earning Capacity

The major portion of most large verdicts is attributable to the destructive effect of plaintiff's injuries on his ability to work. Financial loss from the date of injury to the date of the trial is usually called "loss of earnings"; whereas losses to occur after the date of trial are commonly referred to as "impairment of earning capacity."[16] The Massachusetts rule does not differentiate the two periods of time and allows a single recovery for "impairment of earning capacity."[17] On the whole it would seem better to allow separate recoveries for the two periods of time. Measuring impaired earning capacity is a much more speculative task than computing loss of earnings. In the former case, guesses must be made as to how long plaintiff will live, what he will make in the future, and what he would have made in the future had he not been injured. In the case of lost earnings, the amount plaintiff actually made from injury to trial can be proven and the only guess involved is what plaintiff would have made but for his injuries. In addition, problems exist as to discounting future awards to present value, and for discounting purposes it would seem that distinctions must be made between plaintiff's financial loss in the past and his losses to occur in the future.

1. *Loss of Earnings*

In keeping with the theory that personal injury damages should attempt to place plaintiff in the financial condition he would have been in but for

12. Yost v. West Penn Rys., 336 Pa. 407, 9 A.2d 368 (1939).

13. *E.g.*, Acme-Evans Co. v. Schnepf, 105 Ind. App. 475, 15 N.E.2d 742 (1938); and cases collected in 128 A.L.R. 686. *Contra:* Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939) (as to services rendered a husband by his wife on the grounds that damages should be compensatory and because of the "statutory restrictions upon dealings between husband and wife").

14. Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922).

15. As to when the minor or his parent should recover the minor's medical expenses, see cases collected in 37 A.L.R. 1. Similarly, see cases collected in 66 A.L.R. 1186 as to when the husband or the wife should collect for the wife's medical expenses.

16. *E.g.*, Dickson v. Queen City Coach Co., 233 N.C. 167, 63 S.E.2d 297 (1931).

17. Doherty v. Ruiz, 302 Mass. 145, 18 N.E.2d 542 (1939).

the injury, most courts compute loss of earnings by subtracting what plaintiff made during the period from the estimated amount he would have made if he had not been injured. However, a few courts base recovery on what plaintiff could have earned instead of what he actually would have earned, and talk in terms of the value of plaintiff's lost time from the date of injury to the date of trial. This is especially true in cases which attempt to follow the Massachusetts rule which does not distinguish loss of earning and impairment of earning capacity.[18] Under this Massachusetts rule, a plaintiff capable of earning $50,000 from the date of injury to the time of trial would recover $50,000 for loss of earnings even though it could be proved that he would, in fact, never have worked during the period.

The courts have not agreed as to how to handle cases where plaintiff has actually had no loss of earnings due to the fact that his employer keeps on paying wages during the period of disability. Some courts take the view that plaintiff should not recover what he has not lost;[19] others treat the payments as gifts to the employee which defendant should not be allowed to take advantage of;[20] and still others take the compromise position that defendant must pay unless the employer was under a legal duty to make the payments, in which case they cannot be considered a gift.[21] Under the Massachusetts rule, such payments are ignored since recovery is based on the supposed value of lost time rather than on what amount was actually lost.[22] Here, as in the case where medical expenses are paid by the employer, it would seem unwise to adopt a rule which would tend to discourage payments by employers.

As would be expected, most of the litigation over loss of earnings centers around the guesswork involved in ascertaining what plaintiff would have made had he not been injured. Logically, if plaintiff was unemployed when injured and can introduce no satisfactory evidence that he would have worked sometime before the trial date, he should recover nothing for lost earnings. A recent Rhode Island case so holds.[23] Plaintiffs who were employed when injured have engaged in so many different types of work that most of the law of evidence could be taught from a casebook of nothing but lost earnings cases. A synthesis of the decided cases leads to the not novel conclusion

18. *E.g.*, Millmore v. Boston Elevated Ry., 198 Mass. 370, 84 N. E. 468 (1908). Courts also talk about the market value of lost time in trying to determine the reasonableness of sums plaintiff pays to others to do the work he no longer can. *See*, Fabbro v. Soderstrum, 252 Mich. 455, 233 N.W. 378, 379 (1930).

19. Whidden v. Malone, 220 Ala. 220, 124 So. 507 (1929); Pensak v. Peerless Oil Co., 311 Pa. 207, 166 Atl. 792 (1933).

20. Campbell v. Sutliff, 193 Wisc. 370, 214 N.W. 374 (1927), and cases cited therein.

21. See cases cited in Donoghue v. Holyoke Street Ry., *supra* n. 19. As to the interplay of workmen's compensation statutes, see cases collected in 67 A.L.R. 249.

22. See Doherty v. Ruiz, 302 Mass. 145, 18 N.E.2d 542 (1939), which so explains Donoghue v. Holyoke Street Ry., 246 Mass. 485, 141 N.E. 278 (1923).

23. Jackson v. Choquette & Co., 80 A.2d 172 (R.I. 1951). However, it should be noted that the Massachusetts rule, which bases recovery on the value of lost time, produces a contrary result. Millmore v. Boston Elevated Ry., 198 Mass. 370, 84 N.E. 468 (1908).

that courts will let plaintiff prove what he used to make unless the sums fluctuated so much or were so unrelated to plaintiff's own personal services that the judiciary will not trust the jury to take the evidence at its face value. Accordingly, evidence as to wages, salaries and professional earnings is usually admitted; evidence as to past commissions is admitted or rejected depending on how stable and regular the commissions were; and evidence as to profits from plaintiff's business is admitted or rejected depending on how regular they were and whether or not plaintiff's services or his capital were his major contribution to the enterprise.[24]

2. *Impairment of Earning Capacity*

In most cases where a plaintiff has been seriously injured, his major item of recovery will be for impairment of his earning capacity. The formula the courts have worked out to protect plaintiff against this item of financial loss consists of the following steps:

a. Estimate how long plaintiff will live or would have lived but for his injuries.
b. Estimate what the average yearly earnings of the plaintiff would have been for the rest of his life had he not been injured.
c. Multiply the estimated average yearly earnings by the estimated life expectancy to determine the estimated total amount plaintiff would have earned had he not been injured.
d. Subtract from the estimated total amount the uninjured plaintiff would have made, those sums which it is estimated plaintiff in fact will make during the rest of his life. The amount thus obtained is the theoretical amount by which plaintiff's earning capacity has been impaired.
e. Discount to present value the amount plaintiff's earning capacity has been impaired.

Assuming that plaintiff is going to or would have lived for twenty years, that he would have averaged $5,000 a year but for the injury, that in his injured condition he will only make $1,000 a year; the formula produces the following answer: 20 x $5,000 = $100,000. $100,000 — (20 x $1,000) = $80,000, and for $63,202.70 plaintiff can purchase an annuity, which will pay him his $80,000 at a rate of $333.33 a month for 20 years. It should be noted that it would be wrong to award plaintiff a sum, the interest on which would give him his net loss of $4,000 a year, because at death plaintiff would still have the capital sum intact.[25]

The "pragmatic" defendant's lawyer who ridicules this formula as too complicated for a jury to comprehend, ignores at least two very important considerations. First, plaintiff's lawyers come to court armed with annuity tables and blackboards (as well as with skeletons and "gruesome" photo-

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24. McCORMICK ON DAMAGES § 87 (1935).
25. McKinney v. Pittsburgh & L.E.R. Co., 57 F. Supp. 813 (S.D. N.Y. 1944).

graphs) and show the jury exactly how much can be awarded on the evidence. Second, the formula is constantly used by the appellate courts in deciding whether verdicts are excessive or inadequate.

Resort to mortality tables is the accepted method of determining the probable duration of plaintiff's life.[26] However, either party is free to introduce evidence which tends to show that for some reason or other plaintiff does not have a normal life expectancy. Some courts, fearing that juries will place too much emphasis on the mortality tables, require that the charge given governing the use of such tables "must include a survey of such matters as sex, prior state of health, nature of daily employment, and its perils, if any, manner of living, personal habits, individual characteristics, and other facts concerning the injured party, which may affect the duration of his life."[27] An interesting problem arises when the injuries plaintiff is suing for have the effect of shortening his life. In such a situation it has been held that impairment of earning capacity should be computed on a basis which ignores the effects of the injury on life expectency.[28]

After estimating plaintiff's life expectancy, it becomes necessary to estimate what his average yearly earnings for the rest of his life would have been had he not been injured. As in the case of lost earnings, the litigation centers around admissibility of evidence to show what the financial future held for plaintiff. Rules governing admissibility are similar in both cases, but there probably is a tendency to admit more evidence on the impaired earning capacity issue since future earnings of necessity are much more speculative and difficult of proof.

It is important to note that impaired working capacity is computed on a basis of plaintiff's ability to earn rather than on his past record of earnings. What a person has made in the past may be some evidence of what he will make in the future, but other considerations are also involved. Infants are entitled to recover something for impairment of earning capacity[29] regardless of the fact that they have never worked a day in their lives, and no one knows whether they will be plumbers or presidents. Similarly, persons in the process of higher education may have never made a nickel, but their ability to earn as prospective doctors, lawyers, or engineers, might be very great.[30]

Computation of a housewife's earning capacity is an issue which frequently arises. The Florida Supreme Court was faced with this problem in *Florida Greyhound Lines v. Jones*,[31] which was decided on August 1, 1952.

26. McManus v. Jarvis, 128 Conn. 707, 22 A.2d 857 (1939). *Cf.*, Mitchell v. Arrowhead Freight Lines, Ltd., 214 P.2d 620 (Utah 1950), in which use of the American Experience and Mortality Tables was held proper. McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926), contains an exhaustive survey of the use of mortality tables in American courts.
27. McCaffrey v. Schwartz, *id.* at 574, 132 Atl. at 814.
28. Crecelius v. Gamble-Skogmo, 144 Neb. 394, 13 N.W.2d 627 (1944); Webb v. Omaha & S. I. Ry., 101 Neb. 596, 164 N.W. 564 (1917).
29. Virginian Ry. v. Armentrout, 158 F.2d 358 (4th Cir. 1946); Goldblatt Bros. v. Parish, 110 Ind. App. 368, 33 N.E.2d 835 (1941).
30. *Cf.* Calihan v. State, 36 N.Y.S.2d 840 (Ct. Cl. 1942).
31. 60 So.2d at 398 (1952).

Here the husband was awarded $17,500 which covered the value of the wife's services as a housewife. At issue was a $50,000 verdict to the wife which the court finally held was not excessive. The court stated that it was "inclined to adopt the view" of a prior Massachusetts case[32] holding "that a wife may recover for the loss of capacity to earn money, that being an injury to her personal rights." It would seem most unfortunate if the Florida Supreme Court were ever to act in reliance on this "inclination" since, as pointed out previously,[33] recovery in Massachusetts is based on a theory of the value of lost time rather than in a theory of compensation. However, the court returned to the theory of compensation in the very next sentence and stated, "We can see much reason for the holding because it might well happen that a woman who has never earned a cent but has faithfully and successfully discharged her duties as a wife and mother would suddenly be faced, by the loss or disability of her mate, with the necessity to earn money to continue maintaining her home and rearing her brood."

Except in jurisdictions following the Massachusetts rule, from defendant's viewpoint, the best person to injure is the one who has never held a paying job in all his life and seems indisposed to ever work for money. In an interesting recent case,[34] the City of Phoenix injured an Indian Prince. Evidence was introduced to show that the Prince was comparable in rank to the Prince of Wales, had represented Mahatma Gandhi, was acquainted with two presidents and numerous senators, and had demonstrated great executive ability in getting some 40,000 Indian soldiers on the Burma Road during World War II. Despite these accomplishments, the Arizona Supreme Court denied the Prince a recovery for impaired earning capacity because there was no evidence to show that he ever had or ever would have earned any money. Under the Massachusetts rule, the Prince might have recovered a great deal since recovery would be based on the value of the Prince's lost time rather than on a theory of compensating him for financial loss.

Defendants are usually better off to injure older persons since they do not have so many years left in which to work. And in any case, it is proper to charge the jury on defendant's behalf that a person does not work every day of his life and that one's capacity to earn money does not continue undiminished throughout life.[35]

Probably the most important question yet to be settled in the whole personal injury damage field involves the interplay of future earnings and federal income tax laws. The Internal Revenue Code exempts personal injury verdicts from taxation.[36] The question thus arises as to whether future

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32. Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943).
33. *Supra* at page 172.
34. Phoenix v. Mubarek Ali Khan, 72 Ariz. 1, 229 P.2d 949 (1951).
35. Southern Ry. v. Alexander, 59 Ga. App. 852, 2 S.E.2d 219 (1939). As a corollary proposition, a youthful plaintiff's earnings should be considered in light of the well known fact that his earnings will increase upon maturity. Bekelja v. James E. Strates Shows, 56 Dauph. Co. Rep. 317 (Pa. 1945).
36. INT. REV. CODE 22 (b) (5)

earnings should be estimated on a basis of plaintiff's earnings before, or after taxes. Two federal cases have reached conflicting results,[37] and a recent law review note takes the position that an estimate on a before-taxes basis is proper.[38] Only one state seems to have considered the problem and it has decided the question differently on two separate occasions, holding on the latter occasion that the after tax basis is proper.[39] Defendants, realizing that the amount of their liability can be reduced as much as 20% in some cases, are beginning to argue that they should not have to pay "taxes" to the plaintiff since plaintiff does not have to pay them to the government.

The writer believes that the damages should be computed on a before-taxes basis. One policy behind exempting the verdict from taxation is to help the injured plaintiff. The government has a strong interest in keeping its citizens sufficiently solvent so that they do not become burdens upon society. The hypothesis behind the award for impaired earning capacity is that plaintiff is now less able or wholly unable to earn money. The exemption for personal injury verdicts is not the only provision of the Internal Revenue Code which attempts to lessen the tax burden of those hard pressed to eke out a livelihood. Special exemptions are also afforded the blind, the deaf, and those over 65.[40] Those who enacted the tax laws must have been aware of the fact that from 30 to 50% of plaintiff's verdict goes to his lawyer. And that even a plaintiff with a $100,000 verdict may really have to scrimp to insure that his life runs out before his share of the jury verdict. Consequently, it would seem that the presently existing tax exemption of personal injury verdicts should be treated as a gift to plaintiff from his government. There is probably much to be said for the view taken by the English Courts that how the government taxes the plaintiff is a matter between plaintiff and his government and none of defendant's business.[41]

Two additional reasons exist which tend to push one towards favoring the before-tax basis. The average individual has difficulty in computing his own taxes. It is to be wondered just how much good it would do to ask a jury to estimate plaintiff's future taxes on a basis of unknown tax rates, unknown deductions, and an estimated future income. Assuming that the jury would attempt to find the after-taxes basis, such a basis would be slightly unfair to plaintiff. His jury award is discounted to present value and he has to invest the verdict to recoup the sums lost in the discounting process. Plaintiff does have to pay taxes on the income the verdict produces and an

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37. Southern Pacific Co. v. Guthrie, 180 F.2d 295 (9th Cir. 1950) (after taxes proper basis); Stokes v. United States, 144 F.2d 82 (2nd Cir. 1944) (before taxes proper basis). The *Stokes* case says that taxes are "to speculative" to be considered. The *Guthrie* case says we can assume that taxes will not be any lower anytime in the near future.

38. Note, 51 COL. L. REV. 782 (1951).

39. Dempsey v. Thompson, 251 S.W.2d 42 (Mo. 1952).

40. INT. REV. CODE 25 (b) (B).

41. See cases collected in Note 51, COL. L. REV. 782 (1951).

after-tax basis ignores this factor. Even without these two reasons, it would seem that the policy behind the Revenue Code should be controlling.

Probably the best chance that defendants' lawyers have of escaping $100,000 verdicts is to show that plaintiff can still make something at some kind of work in spite of the injuries. The burden is on plaintiff to show how much his earning capacity has been impaired. Plaintiff's proof usually follows the form of showing that he can no longer do the work he used to and how much less he is earning because of this fact. It is at this point that a defending lawyer may be able to save his client a lot of money. Defending counsel should do more than attempt to discredit plaintiff's version of his after injury earnings; an affirmative offer should be made of whatever evidence can be mustered tending to show that plaintiff still has considerable ability to earn in the various fields of endeavor, which on the evidence, seems to still be open to the crippled plaintiff. The extent, if any, to which the plaintiff's after injury earning capacity should be measured by the pay for work he can do but does not want to do, is an open question. It will be up to defendants' lawyers to get this issue settled since no plaintiff's lawyer will ever raise the question. To pose the issue more concretely, assume a man exists who never has and never will do any kind of work other than playing the piano for a living. If he should lose a hand, is a court going to say that his earning capacity is wholly destroyed, or is it going to consider the fact that he is still able to do other kinds of work even though he refuses to ever work again?

Assuming that plaintiff's mind has not been affected by his injuries, it would seem that the more education and intelligence he has, the less likely it is that his earning capacity will be substantially impaired by his injuries. To break the back of the ignorant and unskilled laborer is to take away most of his ability to earn.[42] Such is not the case with lawyers, teachers, scientists, and the like. Thus the paradoxical situation arises that the smarter plaintiff's lawyer proves the plaintiff to be in order to show how much might have been earned in the future, the more evidence defendant's lawyer is given to prove that plaintiff still has considerable power to earn in spite of his permanent physical disabilities.

Much of the law in this area remains unsettled since defending lawyers have thus far chosen to remain on the defensive. Here as elsewhere the best defense is probably a good offense.

After the jury has decided how much plaintiff's impaired earning capacity is going to cost him (by subtracting what plaintiff will make from what he could have made), it becomes necessary to discount this sum to its present value. Plaintiff would have to work the rest of his life to get the money and defendant has to pay off in a lump sum at the end of the trial. Courts disagree as to the discount rate to be used.[43] The majority rule discounts the

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42. Texas & P. Ry. v. Crockett, 298 S.W. 654 (Tex. Civ. App. 1927).
43. See cases collected in 105 A.L.R. 235.

principal sum at from 2 to 4% which is considered to be the maximum safe rate of return that plaintiff can get by investing his verdict. Use of such a rate seems in accord with the theory of compensating for the financial losses caused by the injury. To discount at the legal rate of interest, as some courts do,[44] seems wholly arbitrary as the legal rate of interest usually bears little relationship to the return that plaintiff will in fact be able to get.

IV PAIN AND SUFFERING

The physical and mental complexity of human life gives rise to an infinite variety of ways in which a person can be made less happy. Sums awarded plaintiff to refill his pocketbook fit our traditional notions of making defendant compensate for the financial loss he causes. More difficulty is presented in trying to decide why plaintiff should be paid money in an attempt to alleviate his suffering. The answer seems to lie in the impossibility of preventing the pain, suffering, and humiliation that an injury may produce. To the extent that a sum of money will completely remove the unhappiness, judicial sentiment says that defendant must pay. Accordingly, when plastic surgery will eliminate plaintiff's unsightly appearance, and the resulting humiliation, defendant must pay for the operation.[45] In many, if not most, cases money will not eliminate the suffering caused by the injury. However, the money will at least make plaintiff happier in some other ways. The prevailing judicial sentiment was well expressed by the Supreme Court of Washington nearly a half century ago:

> "The law ought not to grant redress alone to the business man who sustains commercial damage, and refuse redress to others who have sustained a more poignant infliction. And he who negligently causes an injury to another who is faultless, which makes the latter an object of pity and abhorrence to his fellow men, and object of ridicule to the thoughtless and unfeeling, and deprives him of the comfort and companionship of his fellows, ought to respond in damages for the injury sustained. It is true that there is no gauge furnished by the law for measuring such damages, and that it is, to a great extent, sentimental. But there is an element of sentiment in all damages . . ."[46]

As the law stands today, all courts agree that something can be recovered for pain and suffering and that there is no yardstick by which this intangible can be converted into dollars and cents.[47] About all that a jury can be told is to award plaintiff a sum "that will reasonably compensate him for his pain and suffering."[48]

What a court will consider pain and suffering seems to be limited only

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44. E.g., Central of Georgia Ry. v. Mosely, 112 Ga. 914, 38 S.E. 350 (1901).
45. Johnston v. Long, 30 Cal. App.2d 54, 181 P.2d 645 (1947).
46. Gray v. Washington Power Co., 30 Wash. 665, 674-5, 71 Pac. 206, 209 (1903).
47. E.g., Austin v. Tennessee Biscuit Co., 255 Ala. 573, 52 So.2d 190 (1951); Denes Bus Lines v. Hargies, 229 P.2d 560 (Okla. 1951).
48. In determining future pain and suffering, there is a rule which may operate to defendant's benefit. When plaintiff's injury will shorten his life, courts hold that future pain and suffering should be based on actual life expectancy rather than on plaintiff's

by the ingenuity of plaintiff's counsel. A recent survey by Smith and Prosser[49] lists the following as items which courts will allow juries to consider and will consider themselves as "pain and suffering": loss of sense of taste and smell, loss of fecundity, mental pain and suffering which follows from a consciousness that capacity to labor has been diminished for life, mental suffering of a virgin of strict religious faith because her hymen was ruptured by a doctor during a physical examination, acquisition of bad moral habits because of a head injury, permanent incontinence of urine, loss of desire for sexual intercourse and impotency, shock, change of personality and change of attitude towards others, fear of death, increased stuttering, nervousness, neurotic condition, insomnia and inability to drive a car, fear of paralysis, and fear of injury to an unborn child.

Humiliation which results from a scarred or maimed body is a special type of suffering about which courts have had much to say. For a long time, Mississippi was probably the only state holding that there should be no recovery for humiliation. In 1951, the Supreme Court of Mississippi concluded that the "sense of justice of the average man revolts against the rule," and reversed its prior line of cases so as to allow a woman with a badly scarred face to recover for the humiliation she will have to endure for the rest of her life.[50] Location of the scar is of considerable importance. In a 1930 New Jersey case,[51] defendant argued that a scar on the calf of a female plaintiff's leg was in such an obscure place that it would not embarrass her. The court rejected this argument, saying, "In the present style of dress including the height of the skirt and the thinness of the hose, it cannot be said that such a scar is either in an obscure place or not subject to observation and consequent embarrassment to the plaintiff." A recent case[52] states that, "One of the greatest assets of a young unmarried woman is her face", and suggests that more should be awarded a young unmarried woman than a married or older female.

V JUDICIAL REVIEW

Different views exist as to the power of a court to order additurs and remittiturs,[53] but it is clear that a court can at least set a verdict aside and order a new trial because damages are thought to be excessive. No issue in the whole of personal injury damage law seems more in need of analysis and clarification than the problem of deciding what should be the method for judicial review of verdicts that are attacked as being too high or too low.

At present there seems to be three different approaches to the question.

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expectancy just before the injury. Hughes v. Chicago, R.I. & P. Ry., 150 Iowa 232 (1911); Howell v. Lansing City Electric Ry., 136 Mich. 432, 99 N.W. 407 (1904).

49. SMITH AND PROSSER, CASES ON TORTS at 617 (1952).

50. Vascoe v. Ford, 54 So.2d 541 (Miss. 1951).

51. Sica v. Public Service Co., 8 N.J. Misc. 268, 149 Atl. 757 (Sup. Ct. 1930).

52. Greer v. Palmer, 55 D. & C. 109, 112, 33 Del. Co. 384 (1945).

53. The Supreme Court held that federal courts have no power to order an additur in Dimick v. Schiedt, 293 U.S. 474 (1935). For a recent case holding that a state court has no such power, see Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

Some courts say that a verdict with the trial judge's appproval should not be modified or set aside in the absence of misconduct on the part of counsel or erroneous instructions to the jury.[54] Other courts attempt to compare the verdict in question with verdicts in past cases of similar injuries, using the latter as a yardstick.[55] The technique which is probably used by the majority of courts consists of analyzing the facts in light of the various damage rules to determine what the jury could have found as to each item on the evidence presented.[56] The same court may use all three of these approaches in a single case; and because of the impossibility of computing the pain and suffering item, the difference between the first and third approaches may be more apparent than real.

The comparative verdict approach seems wholly indefensible. No two cases are exactly the same, and the differences which exist are usually of considerable importance. Even assuming that plaintiff's injuries were identical in both cases, medical bills, loss of earnings, impairment of working capacity, and pain and suffering would vary so much that the approach seems useless. The time lapse between the old verdict and the one in question may be such that the comparative verdict court is forced to compare the purchasing power of the two verdicts rather than their dollars and cents.[57] The fallacy of the comparative verdict approach was pinpointed by a recent court in one sentence when it said, "It does not follow that because a plaintiff 36 years ago received a none too generous verdict, the award herein was too generous."[58]

To illustrate the method of review used by the majority of the courts, assume that defendant is arguing that a verdict for $150,000 is too much. The award for pain and suffering is the only item of damage which is not capable of review as being against the weight of the evidence. If the evidence will support $10,000 for past medical expenses, $10,000 for future medical expenses, $5,000 for loss of earnings, and $75,000 for impairment of earning capacity; we have $100,000 which the jury was justified in awarding and which an appellate court can not touch unless it violates the traditional view that the jury's award must stand unless against the weight of the evidence. At this juncture all that remains is for the appellate court to decide whether it will tolerate a $50,000 award for pain and suffering.[59] The extent to which judicial sentiment varies on the matter is illustrated by the fact that a

54. *E.g.*, James v. Chicago St. P.M. & O. Ry., 218 Minn. 33, 16 N.W.2d 188 (1944).
55. *E.g.*, Abernathy v. St. Louis-San Francisco Ry., 362 Mo. 214, 237 S.W.2d 161 (1951).
56. *E.g.*, Fulton v. Chouteau Farmer's Co., 98 Mont. 48, 37 P.2d 1025 (1934).
57. Inflation seems to be nothing new. As far back as 1908, a Georgia court stated that, "It must be remembered, too, that owing to the low purchasing power of money at the present time every dollar awarded a few years ago offered as much compensation as $2 now." Seaboard Air Line Ry. v. Miller, 5 Ga. App. 402, 63 S.E. 299, 301 (1908).
58. Foster v. Pestana, 77 Cal. App.2d 885; 177 P.2d 54, 58 (1947).
59. It is interesting to note in this connection that good lawyers for plaintiffs have started including in their appellate briefs photographs showing plaintiff's "pathetic" after injury condition and the highlights of various painful operations that plaintiff has had to endure.

Federal District Judge recently allowed $40,000 for pain and suffering;[60] whereas the largest *verdict* ever allowed to stand by the Oregon Supreme Court is $34,528.[61]

VI CONCLUSIONS

Lawyers and learned laymen are sometimes heard making the claim that how much a jury awards an injured plaintiff depends almost exclusively on how sorry the jury feels for plaintiff, how clearly it thinks defendant is liable, and how much money it thinks defendant has. Even if this statement were completely accurate, a lawyer would still need to know the judicial damage rules since trial judges and appellate courts think about and talk in terms of the rules when deciding whether the jury's verdict should be allowed to stand. In addition, the rules teach any lawyer to warn his clients of the possible consequences of driving cars or conducting businesses with less than $100,000/200,000 personal injury liability insurance.

60. McKinney v. Pittsburgh & L.E.R. Co., 57 F.Supp. 813 (S.D. N.Y. 1944).
61. Belli, *The Adequate Reward*, 39 CALIF. L. REV. 1, 39 (1951).