DAMAGES FOR PAIN AND SUFFERING

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THE SHAPE OF THE LAW GENERALLY

It does not require any lengthy exposition to set forth the basic principles relating to the recovery of damages for pain and suffering in personal injury actions in tort. Such damages are a recognized element of the successful plaintiff's award.[1] The pain and suffering for which recovery may be had includes that incidental to the injury itself and also such as may be attributable to subsequent surgical or medical treatment.[2] It is not essential that plaintiff specifically allege that he endured pain and suffering as a result of the injuries specified in the pleading, if his injuries stated are of such nature that pain and suffering would normally be a consequence of them.[3] It would be a rare case, however, in which plaintiff's counsel failed to allege pain and suffering and claim damages therefor. Difficult pleading problems do not seem to be involved.

The recovery for pain and suffering is a peculiarly personal element of plaintiff's damages. For this reason it was held in the older cases, in which the husband recovered much of the damages for injury to his wife, that the injured married woman could recover for her own pain and suffering.[4] Similarly a minor is permitted to recover for his pain and suffering.[5]

No particular amount of pain and suffering or term of duration is required as a basis for recovery. It is only necessary that the sufferer be conscious.[6] Accordingly, recovery for pain and suffering is not usually permitted in cases involving instantaneous death.[7] Aside from this, however, no quantitative or time limitations are imposed. The pain may be

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[1] 2 SEDGWICK, A TREATISE ON MEASURE OF DAMAGES 920 (9th ed. 1912); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 315 (1935); 15 AM. JUR., *Damages* §72 (1938); 25 C.J.S., *Damages* §62 (1941).

[2] Lane v. Southern Ry. Co., 192 N.C. 287, 134 S.E. 855 (1926); cases on this point are collected in 51 A.L.R. 1122 (1927).

[3] Smith v. Whittlesey, 79 Conn. 189, 191, 63 Atl. 1085 (1906); Morgan v. Kendall, 124 Ind. 454, 24 N.E. 143 (1890). There is some authority that a claim for damages for future pain and suffering must be pleaded specially or at least inferentially. Shultz v. Griffith, 103 Iowa 150, 72 N.W. 445 (1897). Cases are noted in 81 A.L.R. 436 (1932).

[4] 2 SEDGWICK, *op. cit. supra* §486.

[5] Ibid., §486.

[6] Ratushny v. Punch, 106 Conn. 329, 138 Atl. 220 (1927); Missouri P. R. Co. v. Creekmore, 193 Ark. 722, 102 S.W. 2d 553 (1937).

[7] Ratushny v. Punch, 106 Conn. 329, 138 Atl. 220 (1927); Chanson v. Morgan's L. & T. R. & S. S. Co., 18 La. App. 602, 136 So. 647 (1931). *Cf.* Langenstein v. Reynaud, 13 La. App. 272, 127 So. 764 (1930).

[8] Miller v. Southern Pacific Co., 117 Cal. App. 2d 492, 509, 256 P.2d 603 (1953), *cert. denied* 346 U.S. 909 (1953).

for as short a time as twenty minutes; in one California case[8] the evidence showed twenty minutes of pain, and a judgment which included $20,000 allocated *arguendo* to that element was held not to be excessive. Similarly, recoveries have been allowed for pain and suffering extending over a period of two hours ($10,000 judgment reduced to $5,000),[9] three and one half hours ($6,000 of a $45,000 judgment allocated to pain and suffering),[10] and four hours ($10,000 of a $55,000 judgment allocated to pain and suffering, but total verdict reduced to $45,000).[11] In a Minnesota railroad case the decedent lived forty-one hours after the injury. His attending physician testified that he was unconscious during that interval but there was testimony of a nurse and a lay witness to the effect that he was conscious at intervals, talked some, and moaned considerably. In upholding an award for pain and suffering, the court said:

> All that is required to justify a recovery under Section 9 of the act (F. E. L. A.) is that an appreciable length of time shall have elapsed between the injury and death and that the decedent shall have suffered conscious pain.[12]

The period of pain and suffering may, on the other hand be a protracted one. Thus, in a Florida case, an eight year old boy was negligently injured by defendant railroad as a result of which he lost his left leg. His life expectancy was found to be fifty-six years, and an award of approximately $125,000 for pain and suffering was allowed.[13]

Included in the recovery for pain and suffering there may be damages for so-called "phantom pain" in which plaintiff, having lost a bodily member, undergoes the experience of suffering pain in the lost member.[14] The concept of pain and suffering also commonly includes the mental distress accompanying or resulting from injury. Admittedly it is difficult to distinguish mental distress from physical pain in every case but certain types of disturbance which are perhaps more emotional than physical are commonly allowed to be taken into account in the recovery of pain and suffering. Among these are such things as humiliation or embarrassment connected with scars or disfigurement incurred as a result of the injuries;[15] inconvenience of bi-weekly visits over a

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[9] Norton v. Phillips Petroleum Co., 262 App. Div. 881, 28 N.Y.S. 2d 579 (1941).

[10] Giles v. Chicago Great Western Ry. Co. 72 Fed. Supp. 493 (D. Minn. 1947).

[11] Mooney v. Terminal Railroad Association of St. Louis, 353 Mo. 1080, 186 S.W. 2d 450 (1945).

[12] Bimberg v. Northern Pacific Ry., 217 Minn. 187, 14 N.W. 2d 410 (1944). (1944).

[13] Braddock v. Seabord Air Line R. R. Co., 80 So. 2d 662 (Fla. 1955).

[14] Hickenbottom v. The Delaware, Lackawanna and Western R. Co., 122 N.Y. 91, 25 N.E. 279 (1890).

[15] Erie R. Co. v. Collins, 253 U.S. 77 (1920); Patterson v. Blatti, 133 Minn. 23, 157 N.W. 717 (1916); Main v. Railway Co., 207 Mich. 473, 174 N.W. 157 (1919). *Contra,* Maynard v. Oregon R. & N. Co. 46 Ore. 15, 78 Pac. 983 (1904).

long period of time for the purpose of adjustment of the victim's prosthetic equipment;[16] "extreme nervousness";[17] fright experienced at the time of injury;[18] and fear of death.[19] While these forms of distress are not exactly the same as physical pain and suffering they are generally regarded as sufficiently connected with it to be the subject of recovery by the plaintiff.

Not only may recovery be had for pain and suffering up to the time of judgment but it is generally recognized that recovery may be had for future pain and suffering.[20] In this connection it may be mentioned that it is not uncommon to permit the jury to take into account the life expectancy of the injured plaintiff.[21] There has been a division of opinion among the courts on the question of whether damages for future pain and suffering should be reduced to their present worth. A number of courts have approved application of this principle just as in the case of any damages awarded for future events. Others have held that it is inappropriate to treat this type of damage in this manner.[22] The theory of the latter point of view is that the fixing of an amount to be awarded for future pain and suffering is based on such indefinite standards that the imposition of an additional requirement in reaching a determination on the matter would make the problem even more confusing to the jury and would constitute "an absurdity."[23]

A great amount of argumentation and forensic effort has been expended on the question of the terminology of instructions to the jury with respect to awarding damages for future pain and suffering. The dispute revolves around verbalization of the degree of certainty with which the jury should be required to predict the future occurrence of pain and suffering before they may properly award damages therefor. A minority of the courts have considered it adequate protection for defendant if the jury is instructed that damages may be awarded if 'the

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See also Miller, *Assessment of Damages in Personal Injury Actions,* 14 MINN. L. REV. 216, 224 (1930).

[16] See note 13 *supra.*

[17] Redick v. Peterson, 99 Wash. 368, 169 Pac. 804 (1918).

[18] Illinois Central R. Co. v. Nelson, 212 Fed. 69 (8th Cir. 1914); Easton v. United Trade School Contracting Company, 173 Cal. 199, 159 Pac. 597 (1916).

[19] Watson v. Augusta Brewing Company, 124 Ga. 121, 52 S.E. 152 (1905); Elliot v. Arrowsmith, 149 Wash. 631, 272 Pac. 32 (1928). Such damages are not properly awardable where the danger of death was not realized until a long time after the incident. Lake Erie and Western R. Co. v. Johnson, 191 Ind. 479, 133 N.E. 732 (1921).

[20] Rogers v. Boynton, 315 Mass. 279, 52 N.E. 2d 576 (1943); see many cases collected in 81 A.L.R. 423 (1932).

[21] 28 A.L.R. 1181 (1924).

[22] The cases are collected in 28 A.L.R. 1177 (1924), 77 A.L.R. 1451 (1932), and 154 A.L.R. 801 (1945).

[23] Braddock v. Seaboard Air Line R. Co., 80 So.2d 662, 668 (Fla. 1955); Chicago & N.W.R. Co. v. Candler, 283 Fed. 881 (8th Cir. 1922).

occurrence of future pain and suffering is reasonably probable.[24] The great majority of courts insist that the jury be instructed that in order to assess such damages they must be satisfied that such future pain and suffering are reasonably certain to occur.[25] It is doubtful that this debate has made much of a contribution to the solution of the basic problem or to the assistance of juries in their deliberations. The terminology used by trial judges is infinitely varied[26] but unless the instruction baldly suggests to the jury that they engage in free speculation, it is likely to be upheld. The reasoning of the courts is sometimes entertaining. In a Michigan case the instruction which was objected to permitted the jury to award damages if they believed that plaintiff would "in all probability" suffer pain in the future. Michigan is a state which requires reasonable certainty of future pain and suffering. The Supreme Court held that the words "in all probability" meant more than "reasonable probability" and had practically the same meaning as "in all likelihood" which expression was equivalent to "reasonable certainty." The charge was held proper.[27]

THE PRACTICAL PROBLEM

The rule of law that damages may be awarded in a personal injury action for present and future pain and suffering, generates an extremely difficult practical problem for the courts and for lawyers practicing in this area. Two elements contribute to the problem. The first involves the relative ease of proof of the existence of pain and suffering. The second involves the absence of any standard for measurement of the damages to be awarded.

With respect to the first of these subjects, the courts seem to impose few restrictions in the admission of evidence as to pain and suffering. Obviously the plaintiff must be permitted to testify in his own behalf that he endured pain and suffering and continues to do so.[28] Testimony may be received from lay witnesses who observed him and his condition or who witnessed the manifestations of his distress.[29] Testimony by physicians as to his objective symptoms and other medical phenomena are admissable to show the existence or likely presence of pain and suffering.[30] In the absence of objective symptoms it is permissable to allow a physician to testify on the basis of his observations of plaintiff as to whether the

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[24] 81 A.L.R. 467 (1932).

[25] 81 A.L.R. 439 (1932).

[26] See 34 page note in 85 A.L.R. 1019 (1933) covering most of the states' rulings on this point. See also 81 A.L.R. 439 (1932) *et. seq.* on instructions held to be valid or invalid under the rule of reasonable certainty.

[27] King v. Neller, 228 Mich. 15, 199 N.W. 674 (1924).

[28] Jones v. Village of Portland, 88 Mich. 598, 50 N.W. 731 (1891); Judd v. Rudolph, 207 Iowa 113, 222 N.W. 416 (1928).

[29] Note 12 *supra* see also Sherman v. Southern Pacific Co., 33 Nev. 385, 111 Pac. 416 (1910) and Shelby v. Clagett, 46 Ohio St. 549, 22 N.E. 407 (1889).

[30] Fay v. Harlan, 128 Mass. 244, 35 Am. Rep. 372 (1880).

alleged pain and suffering is actual or spurious.[31] Virtually every kind of evidence suggesting the existence of pain and suffering may properly be put before the jury for its consideration.

Of course, where plaintiff has suffered a tangible physical injury such as the loss of a bodily member, the jury is not likely to err in determining that in fact there was pain and suffering. A person who loses an arm or an eye or suffers contusions or abrasions while conscious, undoubtedly endures pain. It would be phenomenal if he did not. The difficult cases are those in which there are no objective symptoms with which the existence of pain can be associated. In such a case there is ultimately only one person in the world who knows whether the alleged pain exists and that is the plaintiff himself. Even the most skillful doctor or psychologist can not testify with complete certainty that the pain is or is not present.

We are thus brought to the cases where proof of the basis for the jury's prediction of future pain and suffering must rest upon plaintiff's uncorroborated testimony as to subjective symptoms. Should a recovery be permitted on that basis? The answer of the courts seems to be in the affirmative. A number of recent decisions support this conclusion.

In *Orme v. Watkins*[32] a six year old school boy was struck by an automobile but was discharged from the hospital the very same day. The child complained "occasionally" that his knee bothered him and that he had headaches, but there were no objective symptoms of pain, injury, or dizziness. His mother and father testified that he was restless in his sleep, was wetting his bed, and was sleepy at school. A judgment for $5,000 was upheld. In *Brown v. Campbell*[33] plaintiff, who had been assaulted, testified to having headaches. His testimony impressed the court as "rather weak". No corroborating evidence was adduced. Nevertheless, a judgment for future pain and suffering was upheld. In *Sarik v. Pennsylvania R. Co.*[34] plaintiff was injured in what the court referred to as a trifling accident; a handle of an overturning two-wheel truck grazed her scapula. There was no physical sign of injury and x-rays revealed no damage to the bony structure. The court indicated that there was some basis for doubting her veracity; all plaintiff's physicians ascribed her suffering to a neurosis. Nevertheless the court upheld a judgment for $3,000. Similar results have been reached in a case involving a throat ailment with alleged difficulty in swallowing,[35] and one involving alleged headaches and dizzy spells.[36] Perhaps the most extreme illustration of this type of situation

[31] 28 A.L.R. 362 (1924); 97 A.L.R. 1284 (1935).

[32] 44 Wash. 2d 325, 267 P.2d 681 (1954).

[33] 240 Mo. App. 182, 219 S.W.2d 661 (1949).

[34] 68 F. Supp. 630 (D. Pa. 1946).

[35] Coca-Cola Bottling Co. of Fort Worth v. McAlister, 256 S.W.2d 654 (Civ. App. Tex. 1953).

[36] Mendoza v. Rudolf, 140 Cal. App. 2d 633, 295 P.2d 445 (1956).

concerned an injury alleged to have arisen out of the wrongful insertion of a hearing aid in plaintiff's ear. Plaintiff's testimony on the witness stand commenced in a flow of tears as he recalled the pain. The court said, "the physical act of crying is painful and . . . it is reasonably certain to occur again in the future." Damages of $3,000 were awarded.[37]

It seems clear from these and other cases, and it is borne out by the experience of personal injury lawyers on both sides of the table, that the existence of pain and suffering is one of the easiest elements to establish in plaintiff's case in a personal injury action. Despite the requirement that the jury must be instructed that in order to make any award for future pain and suffering they must find that such pain and suffering is reasonably certain to occur, the foundation for such a finding is fairly easily proved.

Standing alone, the foregoing aspect of a personal injury case would not be too disturbing. Its significance becomes great, however, when one considers it in relation to the second element mentioned above, namely, the absence of anything like a fixed standard for measuring the damages attributable to pain and suffering. The complete lack of any such standard has been freely admitted by scholars and courts for many years. In 1912 it was stated by Sedgwick,[38] "For pain and suffering . . . there can be no measure of compensation save the arbitrary judgment of a jury."

McCormick says, "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by."[39]

The courts have consistently acknowledged the validity of this assertion. They put it in various ways: "The rule for measuring damages for pain and suffering, past, present and future, is that there is no standard by which to measure it except the enlightened conscience of impartial juries";[40] "The award of damages for pain, suffering, shock, etc., for personal injury of necessity is somewhat arbitrary and depends upon the facts and circumstances of each case";[41] such damages rest "in the sound judgment of the trier of the facts";[42] "each case necessarily sets its own standard";[43] the amount of the award "must rest in the dis-

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[37]Sears, Roebuck & Co. v. Hartley, 160 F.2d 1019 (1947).

[38] 1 SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §171 (9th ed. 1912). See also Miller, *Assessment of Damages in Personal Injury Actions.* 14 MINN. L, Rev. 216, 222 (1929).

[39] MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, 318 (1935).

[40]Braddock v. Seaboard Air Line R. Co., 80 So.2d 662 (Fla. 1955); Western Atlantic R. R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949).

[41]Rhymes v. Guidry 84 So. 2d 634 (La. App. 1955).

[42]Vink v. House, 336 Mich. 292, 57 N.W.2d 887 (1953); Alley v. Koltz, 320 Mich. 521, 31 N.W.2d 816 (1948).

[43]Dowly v. State, 190 Misc. 16, 68 N.Y.S.2d 573 (1947); Clark v. Josephson, 66 N.W.2d 539 (N.D. 1954).

cretion of the jury guided by common sense";[44] such damages "cannot be measured by a mathematical rule."[45]

There is even a suggestion in some cases that damages for pain and suffering are really punitive in nature. In a federal case in Missouri,[46] plaintiff was negligently injured by defendant's truck and suffered disability estimated between 10 and 25 per cent. She also suffered headaches and backaches and experienced pain if she sat in one position for more than thirty minutes. She had expended about $5,000 for medical attention. In affirming an award of $10,000, the court quoted the following language with approval:

> While the fundamental rule of the law is to award compensation yet rules for ascertaining the amount of compensation to be awarded are formed with reference to the just rights of both parties, and the standard fixed for estimating damages ought to be determined, not only by what might be right for plaintiff to receive in order to afford just compensation, but also by what is just to compel defendant to pay.[47]

The uncertainty in the award of such damages is compounded when one takes account of the fact that pain and suffering vary greatly from one individual to another. The "threshold of pain" of a sensitive, high-strung individual is entirely different from that of a lethargic, phlegmatic person, as any dentist will testify. Thus, not only is there uncertainty in the means of measurement but there is also a variable in the damage to the individual of the subject matter to be measured.

Not to be overlooked in any catalogue of uncertainties in this field is the great liklihood of variation among judges in their decisions to permit a damage award to stand or to overturn it as "monstrous," "shocking to the judicial conscience," "indicative of bias or improper motives," or in violation of whatever other verbal standard is used to measure the validity of a jury verdict.

Occasionally efforts have been made to find some sort of a formula to minimize the uncertainties in this field. One notable example has been the attempt to put the evaluation of pain and suffering on a per diem basis. Thus in *Imperial Oil, Limited v. Drlik*,[48] an admiralty case not involving a jury, plaintiff was estimated to have a life expectancy of 9.25 years. The District Court awarded him $54,867 of which $20,400 was for pain and suffering. It was computed at the rate of $100 a day for the first month of suffering, $50 a day for the second month, $20 per day for the next four months, $100 a month for the next two years, and $100 a month for the rest of plaintiff's life, the last mentioned

[44]Butts v. Ward, 227 Wis. 387, 279 N.W. 6 (1938); Denco Bus Lines v. Hargis, 204 Okla. 339, 229 P.2d 560 (1951).

[45]National Fruit Product Co. v. Wagner, 185 Va. 38, 37 S.E.2d 757 (1946).

[46]Van Gordon v. United States, 91 F. Supp. 834 (D. Mo. 1950).

[47]25 C.J.S. 561, *Damages* §71 (1941).

[48]234 F.2d 4 (6th Cir. 1956), *cert. denied*, 352 U.S. 941 (1957).

sum being reduced to present value. The Court of Appeals cautiously affirmed saying:

> It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent with the evidence and to reach a result which does not appear to us to be manifestly unjust.

A distinct rejection of the per diem approach is found in *Ahlstrom v. Minneapolis, St. Paul and Sault Ste. Marie R. Co.*[49] Plaintiff had been rendered a paraplegic by a spinal cord injury. The jury awarded him $275,000, one of the major items being pain and suffering. They apparently computed this on the basis of $5 per day over a life expectancy of 40.75 years. The Supreme Court reversed unless the plaintiff would consent to a remittitur of $175,000. In rejecting the per diem method of computing damages for pain and suffering the court said:

> An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. Unlike loss of earnings or the cost of a medical attendant, pain, suffering, and disability recoveries cannot be reduced to mathematical formulae, and on this theory they have been exempted from deductions for present worth. Each day of suffering is a part of a whole and will vary and generally decrease as time goes on. To permit a per diem evaluation of pain, suffering, and

[49] 244 Minn. 1, 68 N.W.2d 873 (1955).

> disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork. This is especially true in plaintiff's case where his loss of sensory perception will limit his pain and suffering to mental reactions of embarrassment, humiliation, and frustration based upon his personality traits and which should greatly decrease as time passes. Certainly no amount of money per day could compensate a person reduced to plaintiff's position, and to attempt such evaluation, as in this case, leads only to monstrous verdicts. In view of the other elements of damage, it is apparent that the jury awarded plaintiff something over $70,000 for pain, suffering, and disability. It is our opinion that such an award for this element of damage is not justified by the evidence presented in the instant case.

The ultimate practical consequence of the absence of any certain method of evaluating pain and suffering is that in appraising the potential recovery in any personal injury case there exists a vast imponderable. No one, not even the experienced claim adjustor, can say with any reasonable degree of certainty what a jury is likely to do in awarding damages for pain and suffering. As suggested by the Minnesota case just discussed, it is entirely possible for a jury to exceed the bounds of reason. The following additional cases involving decisions of recent years demonstrate this propensity.

In *Musgrave v. Kitchen*,[50] plaintiff, a 27 year old unmarried woman, was injured through the alleged negligence of defendant. She lost the first and middle fingers of her right hand which necessitated plastic surgery transplants of skin from her thighs. She also suffered arthritis, laceration of face and forehead requiring a total of 21 stitches in two places, and residual scarring which at the time of trial involved "hardly any apparent disfigurement." Plaintiff also claimed a post brain concussion syndrome, testifying that since the accident she had had headaches and nightmares about runaway horses. The court found she had not suffered any loss of earnings or impairment of earning power, saying "The permanency of the injuries is cosmetic and the physical infirmity is in the loss of the two fingers." The court found further that there had been "undue" emphasis on the missing fingers at the trial by "flaunting" before the jury plaintiff's dummy hand made of rubber which was worn like a glove "and has two gracefully and partially extended simulated fingers over the stumps of her hand." This striking item of demonstrative evidence was produced at the trial before the jury from a translucent plastic bag and put in evidence. Thereafter throughout the trial it lay on counsel's table as "a constantly repelling reminder of the plaintiff's distressing loss" or was waved before the jury by plaintiff's lawyer. The

[50] 157 N.Y.S.2d 237 (1956).

special damages amounted to $1459.13 including medical expenses and "the prosthetic device." The jury brought in a verdict of $150,000. The court held that this verdict was excessive and set it aside.

In *Lange v. Kansas City Southern Ry. Co.*[51] plaintiff was 30 years old at the time of injury and was working for a wage of $10 a day. As a result of the accident his posture had deteriorated so that he gave "a bent-over or humped appearance," walked in a humped-over position, with an uncertain lurching gait and spoke slowly in an indistinct manner. He testified that he had earned nothing in the three and one half years which followed his injury, that he had suffered pain in his back and legs together with severe headaches, that both his legs were numb and generally weak, and that he was unable to perform the duties of a sweeper or to follow the trades he learned in school. He wore a brace most of the time. His difficulties were apparently caused by a herniated intervertebral disk and related complications. Apparently the medical expenses up to the time of trial were in the neighborhood of $14,000. The jury brought in a verdict of $76,000. The trial court entered a conditional order requiring plaintiff to remit $26,000 or submit to a new trial on damages. Plaintiff agreed to the remittitur. Defendant appealed alleging that $50,000 was still excessive. The Supreme Court of Missouri affirmed the action of the trial court, however, holding that it did not abuse its discretion in requiring a remittitur of $26,000.

In *Darnold v. Voges*[52] plaintiff was injured while milking a cow, which had been frightened by the flash of a photographer's bulb in the process of taking a picture of the cow being milked. Plaintiff's injuries involved herniation of an intervertebral disk. The disk was removed to effect a spinal fusion. The result of this was to cause pain radiating down the outer aspect of the left leg and a permanent limitation of motion in plaintiff's back for an indefinite period. The jury brought in a verdict of $72,813.90. The trial court required a reduction of $25,000. On appeal the court sustained the award as reduced.

A striking case is *Loftin v. Wilson.*[53] Plaintiff was a trainman who sustained serious injuries when the train on which he was working collided with a truck. He was drenched with chemicals being used to spray the railroad tracks, his right foot was crushed and mangled, bones in each hand were fractured, he lost several teenth and some of his hair temporarily. Skin grafts were made from his uninjured leg, he was hospitalized 131 days and had to use crutches for more than a year. At the trial he was wearing a specially built shoe designed to compensate for the loss of part of his foot. His medical expenses present and future, loss of earnings to date of trial, and together with the damages for his diminished earning capacity totaled $92,273.91. The jury brought in a

[51] 290 S.W.2d 71 (Mo. 1956).

[52] 143 Cal. App. 2d 230, 300 P.2d 255 (1956).

[53] 67 So.2d 185 (Fla. 1953).

verdict of $300,000, giving $207,726.09 for pain and suffering. The court held that this was excessive and ordered a new trial on the issue of damages.

A Proposal

The foregoing discussion underscores a reality well understood in the legal profession, namely that the law relating to damages for pain and suffering in personal injury cases is extremely uncertain and the outcome of its application by juries and courts is highly unpredictable. In a certain proportion of the cases, perhaps a substantial proportion, the ultimate result comports with general notions of justice. In many cases, however, a person studying the appellate reports gains the impression that the tendency of juries is to award disproportionately large amounts for pain and suffering and that such awards are difficult for the courts to control in view of the absence of definitive principles to guide them.

It is believed that a major contribution could be made to the general welfare and particularly to progress in personal injury law if a method could be found to establish a fair maximum limit on the award which a jury might be permitted to make for pain and suffering, or which a judge might permit to stand in such a verdict. The improvement would not only obtain in making this particular segment of the law more definite and certain but in the likely consequences of such definiteness and certainty. There are many areas of negligence law which need improvement. Without attempting to enumerate them all, let us take as an illustration the desirability of modifying the contributory negligence rule by some form of so-called "comparative negligence." A few states have accomplished this change but it has been a long and bitter battle. The liability insurance carriers are an effective, hard-working group with considerable influence in the legislatures. The prospect of eliminating one of their most potent defenses in negligence actions disturbs them deeply, for the effect of such a change in the law would be that a much higher percentage of negligence cases would go to juries in which the only problem for the jury would be to determine the amount to be awarded to plaintiff. In view of the elasticity of the law with respect to awards for pain and suffering, it is understandable why the carriers are reluctant to expose themselves to an inevitable and perhaps an enormous increase in liability. It is understandable also why many legislators look with sympathy upon their opposition to a comparative negligence statute.

It is believed that if a maximum limit was imposed on awards for pain and suffering, opponents of improvement in the law of negligence might be much more amenable to change. In the writer's own state (Michigan) the State Bar Association for some years has been engaged in a futile effort to bring about the adoption of a comparative negligence statute. Several representatives of important liability carriers have acknowledged to the writer privately that the proposed statute has merit

and that they would be much less prone to oppose its adoption if a rational method of limiting damages for pain and suffering were adopted. The liability insurers are not fearful of excesses in connection with awards for medical expenses, loss of past or even future earnings, and similar measurable elements of damage. Undoubtedly there are occasional excesses in these areas but they are susceptible of correction by fair-minded judges. But in the award for pain and suffering no such stability or predictability exists and this uncertainty is an important reason why opponents of improvement in the law of negligence steadfastly fight such improvements.

Precisely what the definitive limitation should be on awards for pain and suffering, the writer is not prepared to say with finality. As a point of departure for discussion, however, it is suggested that such award be limited to 50 per cent of the medical, nursing and hospital expenses proved at the trial. Admittedly, there is nothing magical about the figure 50 per cent, except that it seems to be a reasonable amount bearing a recognizable connection with pain and suffering. If the medical, nursing and hospital treatment is protracted, the pain and suffering is likely to be great, and vice versa.

Wherever the line should be drawn, or on whatever basis the maximum should be established, the desirability of a policy establishing such a maximum deserves careful consideration. Admittedly any maximum will be arbitrary but no more arbitrary than any award for pain and suffering in a specific case. With a fixed maximum in effect, the arbitrariness would at least be uniform. Such a limit would cut the ground from under much of the opposition toward changes in negligence law which are needed and which are recognized as desirable by judicious minded people. It would eliminate one of the principle reasons why many lawyers hesitate to join the movement for reform. In many respects the law of negligence is primitive and unsuited to the modern age, but not all of its deficiencies lie on the side of impeding the compensation of accident victims. One of its deficiencies lies in the danger of overcompensation of such victims on an irrational basis in the area outlined in this paper. Improvement in personal injury law should not be limited only to those changes which increase the possibility of recovery by plaintiffs. It should go forward on all fronts.