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ASSISTING THE JURY IN ASSESSING GENERAL DAMAGES—*Gray v. Alanco Developments* REVISITED.—

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; he can only tell them to allow such amount as in their discretion they may consider reasonable . . . The chief reliance for reaching reasonable results in attempts to value suffering in terms of money must be the restraint and common sense of the jury. . . .

*McCormick on Damages**

The assessment of general damages in personal injuries litigation is one of the most difficult tasks faced by a court.¹ The basic problem is that such damages² do not lend themselves to any form of objective measurement in monetary terms. Judges sitting alone have come no closer than juries to a rational basis for determining damages for pain and suffering and for loss or diminution of the amenities of life.³ However, they have achieved some degree of consistency in their awards—a feature which is frequently considered to be lacking from jury verdicts,⁴—largely through the

* (1935), pp. 318-319.

¹ The consensus on this point is universal, see *e.g.*, *Bird v. Cocking & Sons, Ltd.*, [1951] 2 T.L.R. 1260, at p. 1263, per Birkett L.J.; *Beagle v. Vasold* (1966), 417 P. 2d 673, at p. 675 (Cal.); Fleming, *The Law of Torts* (3rd ed., 1965), pp. 210, 215-216.

² The problems discussed in this comment relate mainly, though not exclusively, to those *non-pecuniary* elements of general damages—for pain and suffering and for loss of the amenities of life—as to which no evidence directed towards quantification in monetary terms is permitted. Assessments of *pecuniary* general damages in personal injury cases, *e.g.*, for loss of future earnings and for damages under fatal accident legislation, while not free of difficulties present less of a problem because of the availability and use of actuarial evidence. Though even in these cases some of the problems here discussed can arise because of rules requiring the judge or jury to take into account contingencies not allowed for in the actuarial evidence, see *e.g.*, *Byron v. Williams* (1968), 67 D.L.R. (2d) 111 (S.C.C.).

³ McRuer, *The Motor Car and the Law* (1966), 4 Osgoode Hall L.J. 54, at p. 69, suggests that “the judgment of the court . . . must in respect of general damages be based largely on conjecture”. The reason why this is so is that: “There appears to be no rational way of articulating a relationship between the real loss which has occurred and the proposed remedy, which is monetary compensation.” Weiler, *Defamation, Enterprise Liability and Freedom of Speech* (1967), 17 U. of Tor. L.J. 278, at p. 336.

⁴ The Chicago Jury Project established, by trying the same case several times before different juries, that jury awards vary considerably, even when the evidence and arguments, *etc.*, are kept constant, see Kalven, *The Jury, the Law, and the Personal Injury Award* (1958), 9 Ohio St. L.J. 158, at pp. 172-173. This was also demonstrated at a recent Advocates' Society Workshop at Osgoode Hall Law School of York University, Toronto, January 16th-17th, 1970, when a case was tried before multiple juries and a wide range of awards resulted.

I will argue in this comment that allowing the judge to inform the jury of an appropriate damage range, as suggested by other similar cases, will increase the consistency of jury awards. This argument is not based upon

practice, express or covert, of being guided by previous awards in similar cases.⁵ So long as jury trials remain available in personal injury cases,⁶ a perennial problem is what assistance may a jury be given in arriving at a figure for general damages.

In recent years in Canada and England this problem has received judicial consideration. In Canada the focal point of this consideration was the Ontario Court of Appeal's decision in *Gray v. Alanco Developments Ltd.*⁷ The primary purpose of this comment

empirical evidence derived from experiments with juries—though such experiments would not be too difficult to carry out. Rather the argument is based upon logical inference from the "empirical evidence" that judges, who have knowledge of current award levels, appear to be more consistent in their damage awards than are juries. I am not suggesting that arming a jury with such information will produce absolute consistency in jury awards any more than it presently produces such a degree of consistency in judicial awards. I merely argue that such a change in our jury trial procedure will reduce the present degree of disparity in jury awards so that they will approach the degree of consistency apparent in judicial awards.

⁵ Through a line of cases beginning in 1951 this has become an express and condoned practice in England, see *Bird v. Cocking & Sons Ltd.*, *supra*, footnote 1; *Bastow v. Bagley & Co., Ltd.*, [1961] 3 All E.R. 1101 (C.A.); *Singh v. Toong Fong Omnibus Co., Ltd.*, [1964] 3 All E.R. 925 (P.C.). When a case is tried by a judge alone or heard on appeal by the Court of Appeal counsel is allowed to refer to awards in comparable cases: *Ward v. James*, [1965] 2 W.L.R. 255, at p. 272, [1965] 1 All E.R. 563 (C.A.).

In Canada the practice is less often an express one. While it is recognized that uniformity of awards, so far as that is attainable, is a desired goal, see *e.g.*, *Hossack v. Hertz Drive Yourself Stations*, [1966] S.C.R. 28, at p. 34, 54 D.L.R. (2d) 148, at p. 153, per Judson J., the practice of counsel referring the court, or the court referring itself, to comparable cases is not one firmly established by the case law as it is in England, though both aspects of the practice certainly occur to some extent in this country. The reason for this reticence in formalizing the practice is probably a desire on the part of both bench and bar to avoid the English "conventional award" doctrine—that certain established awards should be given for specified types of injury, *e.g.*, between £4,000 and £6,000 for the loss of a leg: see generally, *Ward v. James*, *supra*. In this regard it is interesting to note that in *Yorke v. Campbell* (1967), 53 M.P.R. 278, where the Nova Scotia Supreme Court, Appellate Division, looked at awards in other comparable cases they stressed that such a reference may serve "not as a criterion or standard of value—but as a guide".

In both England and Canada bench and bar are well served with publications indicating the quantum of damages in decided cases, classified by type of injury, *e.g.*, in England, Kemp and Kemp, *The Quantum of Damages in Personal Injury Claims* (1954); in Canada, Goldsmith, *Damages for Personal Injury and Death in Canada* (1959); *Canadian Current Law*; C.C.H. Insurance Law Reporter.

⁶ The availability and incidence of jury trials in civil actions in Canada is discussed in the Royal Commission Inquiry into Civil Rights (Ontario) (1968), Report Number One, Vol. 2, pp. 859-860. Only in British Columbia and Ontario does the jury still play a significant role in personal injury actions. Recently the Attorney General of Ontario announced (*Globe & Mail*, Tuesday, April 21st, 1970, p. 2) that he would seek legislation to end the use of juries in personal injury actions. This announcement produced a controversy in the Toronto press, fed by considerable opposition from some members of the legal profession. Subsequently the Attorney General announced (*Toronto Star*, Monday, June 15th, 1970, p. 8) that he would not at the present seek such legislation.

⁷ [1967] 1 O.R. 597, 61 D.L.R. (2d) 652 reversing [1965] 2 O.R. 144, 50 D.L.R. (2d) 17 (H.C.).

is to examine the major holding of the *Alanco* case—that the trial judge may not inform the jury of what, in his opinion, is an appropriate damage award range.⁸

The decision in Gray v. Alanco Developments Ltd.

The *Alanco Developments* case involved an action for damages for personal injuries arising out of an automobile accident. In the course of his charge Haines J. stated that if invited by the jury to do so, he would advise them of his view of the possible range of damages, having regard to awards given in other cases.⁹ Subsequently the jury returned and asked for some guidance as to the range of general damages. After carefully warning them that they were not bound by his opinion, Haines J. said:¹⁰

It is for you, but my opinion is that the lower limit would be in the neighbourhood of \$20,000.00, the upper limit in the neighbourhood of \$35,000.00.

It is clear that in rendering their verdict the jury gave little weight to the learned judge's opinion for they assessed the plaintiff's general damages at \$71,000.00. The defendant appealed and was granted a new trial, limited to the assessment of general damages, on the simple ground that on the evidence the award was so excessive as to warrant interference by the court. Though this adequately disposed of the appeal, the Court of Appeal took the opportunity to consider a number of questions, only one of which was directly raised by the case before them. They stated that:¹¹

As there appears to be some divergence of view among the trial judges of this Court as to whether it was within the province of either counsel or trial judges to express to the jury their personal views as to the proper quantum of general damages or to state to the jury the amount of such damages claimed in the statement of claim, we think it desirable that we should consider the question raised by the second ground of appeal.

Thus the court proceeded to consider these questions and concluded that it was improper for counsel to mention the amount of the damages claimed by the plaintiff or to mention awards in similar cases, or for the presiding judge to express any view as to the appropriate range of damages.

Informing the jury of the amount of general damages claimed in the statement of claim

Over the years there have been conflicting opinions by Ontario

⁸ Consideration will also be given to other aspects of the *Alanco Developments* case and to subsequent Canadian cases. In addition, some reference will be made to the American position on the issues here dealt with.

⁹ *Supra*, footnote 7, at pp. 599 (O.R.), 654 (D.L.R.).

¹⁰ *Ibid.*

¹¹ *Ibid.*, at pp. 598-599 (O.R.), 653-654 (D.L.R.). Not all of these matters were directly raised by the grounds of appeal, as to which see, *ibid.*, at pp. 597-598 (O.R.), 652-653 (D.L.R.).

judges on the propriety of counsel revealing the *ad damnum* clause to the jury.¹² In the *Alanco Developments* case the Court of Appeal made reference to these opinions and then pronounced that such disclosure was not permissible, for it:¹³

. . . does violence to the fundamental right of a litigant in a jury trial to have the quantum of his damages assessed by a jury in the course of a trial properly conducted. The jurors are sworn to reach a verdict solely on the evidence. The amount claimed in the statement of claim is not evidence. It is merely an opinion (frequently extravagant) of the draftsman of the pleading of his view of the maximum amount that a jury might award. It is not evidence properly before a jury. It is an unsworn, unsupported, and biased observation.

While the court's ruling appears on balance a desirable one, resting it on the ground that the amount claimed is not evidence hardly seems satisfactory. None of counsel's address to the jury is evidence in the action. The opening statements—which are not evidence—will frequently consist of a summary of the allegations in the pleadings. And yet this is not considered improper. Why not then allow counsel to disclose his major allegation—the amount of damages claimed? The answer, it is suggested, is not merely that the amount is not evidence, nor that it will be extravagant. Rather, it is that a real distinction can be drawn between the likely effect of the mention of the amount of damages claimed and the other aspects of counsel's address. The jury is warned that counsel's address is not evidence, that their decision must turn exclusively on the evidence, and that they should disregard anything said by counsel and not supported by the evidence. It can probably be assumed that this is not, in general, a difficult instruction for juries to understand and implement. Upon hearing the evidence they can tell whether or not counsel's submissions have been established. It is most unlikely, however, that one could assume that a similar admonition would be very effective regarding a reference by counsel to the amount of general damages claimed. In the latter case, the jury has no standard to determine in any objective or certain way whether there was or was not any evidence to support such a claim for damages of the stated amount. The only "standard" that exists, it is suggested, for measuring general damages, is the awards given in comparable cases within the jurisdiction. So long as this standard is concealed from the jury,

¹² In *Bradenburg v. Ottawa Electric R. Co.* (1909), 19 O.L.R. 34 (C.A.), *Misner v. Toronto & York R. Co.* (1908), 11 O.W.R. 1064 (C.A.) and *Stewart v. Speer*, [1953] O.R. 502, [1953] 3 D.L.R. 722. It was considered unobjectionable for counsel to mention the amount of damages claimed. In *Yachuk v. Oliver Blais Co. Ltd.*, [1944] O.W.N. 412, aff'd. [1945] O.R. 18 (C.A.), [1946] S.C.R., [1949] A.C. 386 (P.C.) it was held to be a sufficient reason for striking out the jury. In the *Stewart* case, *supra*, it was held to be objectionable for counsel to suggest to the jury a range of damages (as opposed to mentioning the figure claimed).

¹³ *Supra*, footnote 7, at pp. 601 (O.R.), 656 (D.L.R.).

they are in no position to cope with the datum of the amount of damages claimed by the plaintiff.

Of course the court's observation regarding the extravagance of the *ad damnum* clause is not unimportant. The existing practice limiting plaintiff's recovery to the amount of damages claimed even though the jury's assessment is higher¹⁴ already demands of counsel a degree of extravagance in naming the damage figure in the statement of claim. Further, it is almost certain that if counsel were to be allowed to inform the jury of the damage figure claimed, such figures would become much more extravagant.

Under our present rules for conducting litigation before a jury, revealing to them, without more, the amount of general damages claimed by the plaintiff, is likely to unduly influence them. Consequently, it seems preferable to prohibit the practice.

This position has received little acceptance in the United States. The majority of American courts take the view that a reference by the plaintiff's counsel during a jury trial to the amount of damages claimed by his client is not improper.¹⁵ The reasons given for permitting the practice have been numerous. Frequently it is supported as being within the reasonable latitudes to be afforded to counsel in addressing the jury: an attorney is permitted to discuss all reasonable inferences from the evidence (and the jury must base its determination of damages on the evidence) therefore, if any damages are recoverable, they must be at least inferred from the evidence, and counsel may comment by suggesting a figure supported by the evidence.¹⁶ In jurisdictions where established rules permit pleadings to be read to the jury, or taken by the jury to the jury room or both, the practice of mentioning the *ad damnum* clause rather automatically followed. In still other jurisdictions, the acceptance of the practice found its roots in the rule that it was proper or necessary for the court to instruct the jury that the plaintiff may not be awarded any more than the damages claimed in his pleading. One short (but unnecessary) step was to reason that, to be meaningful, this instruction required the jury to be told the amount claimed by the plaintiff.¹⁷ However, it should be noted that American courts which permit the mentioning to the jury of the amount of damages claimed, recognize that it is not evidence, but feel that this problem can be overcome by an instruction to the jury to that effect.

¹⁴ This is the effect of those decisions refusing plaintiffs leave to amend their claim for relief to conform to the (higher) award of the judge or jury. See e.g., *Van Den Heuvel v. Marchand*, [1968] 2 O.R. 185, *Kong v. Toronto Transportation Commission*, [1942] O.W.N. 163.

¹⁵ See Annotation (1965), 14 A.L.R. 3d 541.

¹⁶ E.g., *Missouri, K. & T. Ry. Co. v. Hibbitts* (1908), 49 Tex. Civ. App. 419, 109 S.W. 228.

¹⁷ E.g., *Phillips v. Fulghum* (1962), 203 Va 543, 125 S.E. 2d 835.

The major impact of the majority American rule on personal injuries litigation in that country has not, however, been the existence of the rule itself. Its real force has been its progeny! The existence of the rule permitting the mentioning to the jury of the total amount of general damages claimed has turned out to be the "toe in the door" and the cornerstone of arguments for the acceptance of the dream-child of the plaintiff's personal injuries lawyer—the "per diem" argument for damages for pain and suffering.¹⁸

¹⁸ The "per diem", or "unit of time", argument by counsel is one that suggests to the jury that, to arrive at a total damage figure, they consider the segmentation of damages into a stated amount of money representing a certain period of time, such as \$5.00 for each day of pain and suffering. In the *Alanco* case, *supra*, footnote 7, the court did not specifically direct itself to the permissibility of this type of argument. However the rejection of this form of argument would appear to be clear from the conclusion that under no circumstances may counsel express his views to the jury on the quantum of damages.

The subsequent Saskatchewan case of *Didluck v. Evans* (1968), 67 D.L.R. (2d) 411 (C.A.) is apparently the only reported Canadian case touching directly on the question of "per diem" argument. There, in an appeal by the defendant against the jury's damage award in a personal injuries suit, one ground of appeal was that plaintiff's counsel in his address had improperly attempted to quantify the general damages. Plaintiff's counsel, after stating that the female plaintiff would live for perhaps another fifty years, had used these words: (*ibid.*, at p. 415):

"If you look at fifty-one years you will find it comes out to something over 18,500 days; this is 18,500 days ahead of Mrs. Didluck in which she is going to be disabled.

Now, as you can imagine, there is no compensation adequate for personal injuries of really any type, no one is going to enter into a contract, for example, to have their hand cut off for say ten thousand dollars, I mean you can't look at it that way, it is ridiculous, we really have nothing to compare what the amount of damages should be. In this case no one, no sane person certainly, would have their neck broken if someone offered to pay them say two or three dollars a day for life, you just wouldn't do it."

The majority rejected the contention that this constituted a suggestion by counsel to the jury that they award the plaintiff \$2.00 or \$3.00 per day for fifty years. They were satisfied that in their entirety counsel's remarks made it clear that the jury should avoid any such method of computation. Hall J., dissented. He was of the opinion that the remarks had the effect of suggesting to the jury the amount of compensation which they should award by way of general damages and this he held, quoting from the *Alanco Developments* case, to be quite improper.

In recent years few issues in the area of tort law have evoked more controversy in the United States than the "per diem" argument. The technique appears to have its genesis in an address by Melvin M. Belli in (1951) (reproduced in (1951), 22 Miss. L.J. 284) advocating its use as a means of obtaining "more adequate" awards. See Gregory & Kalven, *Cases and Materials on Torts* (1969), p. 460. A landmark decision by the Supreme Court of New Jersey, *Botta v. Brunner* (1958), 26 N.J. 82, 138 A 2d 713, held this type of argument to be improper. In the eight years following that decision over sixty cases from more than thirty-eight jurisdictions considered the point with a preponderance finding the argument not to be improper (see *Baron Tube Co. v. Transport Insurance Co.* (1966), 365 F. 2d 858 (5th Cir.) and *Beagle v. Vasold*, *supra*, footnote 1, for a comprehensive listing of the decided cases). Some states have even legislated on the subject and the issue has produced a plethora of com-

Judicial expressions of opinion as to an appropriate range of damages and statements by the judge or by counsel as to awards in similar cases

As stated above, in the *Alanco Developments* case the court held that neither the judge nor counsel may express any opinion as to the quantum of general damages.

On the question of counsel expressing views as to the quantum of damages, the court felt that this was foreclosed by the general principles applicable to counsel's addresses. In addressing the jury, counsel is limited to reviewing and commenting on the evidence, and to the making of submissions which may properly be supported by the evidence adduced. Counsel are not entitled to express their personal opinion on the evidence. Although the court did not specifically so state, it is clear that they felt that in quantifying damages, counsel would be expressing a personal opinion on the evidence and not merely making comments on or submissions based upon the evidence.¹⁹

ment in legal periodicals. (The *Baron Tube* and *Beagle* cases, *ibid.*, cite the legislation on the subject and give comprehensive bibliographies of the periodical literature.)

While the American cases have produced a mass of arguments for and against the use of the "per diem" technique, a major starting point of the decisions sanctioning this form of advocacy has been the rule permitting counsel to inform the jury of the damages claimed by the client and thus to suggest to them an appropriate global figure. Such courts reason that if counsel is to be permitted to suggest a total figure he should be entitled to explain how that figure is arrived at. Courts taking this position point out that it is paradoxical and inconsistent to hold that damages in totality are inferable from the evidence (a major rationale for mentioning the damages claimed) but that when the sum is divided into segments representing days, months or years, the inference disappears (*e.g.*, *Beagle v. Vasold*, *ibid.*). It is in this way that the rule permitting counsel to mention the damage figure claimed by the plaintiff has become the "toe in the door" leading to the wide acceptance in the United States of the "per diem" argument. The New Jersey court in the *Botta* case felt the weight of the inconsistency described above and in rejecting the "per diem" argument overruled a long line of cases and held it improper for counsel to advise the jury of the total amount of damages claimed by the plaintiff or to suggest a total amount as reasonable compensation.

It is of interest to note that plaintiff counsel's address in the *Didluck* case, *supra*, might also have been challenged as employing (albeit "negatively" as was the "per diem" argument) the "Golden Rule" or "do unto others" form of argument—one suggesting to the jury that they put themselves in the plaintiff's shoes and ask themselves what compensation they would expect in return for enduring plaintiff's pain and suffering. Even in the United States the weight of authority holds this form of argument to be improper. See Annotation (1960), 70 A.L.R. 2d 935; *Baron Tube Company v. Transport Ins. Co.*, *ibid.*, at p. 862; *Beagle v. Vasold*, *ibid.*, at p. 681.

¹⁹ *Supra*, footnote 7, at p. 656 (D.L.R.).

As has already been pointed out, see text of footnote 16, *supra*, and footnote 18, *supra*, many American courts have rejected such reasoning. The rationale of those American decisions allowing counsel to mention the damages claimed or to use the "per diem" form of argument is that damages must be inferable from the evidence and, since counsel are per-

In ruling that the trial judge may not express an opinion on the quantum of damages, the court recognized that the scope permitted to the judge in his charge to the jury, is broader than that permitted counsel in argument:²⁰

The trial Judge, however, may not only review and comment on the evidence, but he may also, provided that he warns the jury that the facts are within their exclusive jurisdiction, that they do not have to accept his views, express his personal views on the evidence and the credibility of witnesses, but he may not go outside the evidence.

But this greater latitude did not entitle the judge to express an opinion on quantum:²¹

. . . to permit the trial Judge to express such an opinion would be to sanction opinion evidence unsupported by qualified evidence but based solely upon the Judge's personal experience derived from the evidence or verdicts in other cases.

As to this portion of the court's reasoning, one might question if there really is a logical distinction between permitting the judge to give his opinion as to the credibility of witnesses, as to which there may be no direct evidence, but not as to the range of general damages. In either case, the judge will be offering his opinion as to the conclusion that the jury might draw and in both cases that opinion will be based upon his judicial experience and upon what has been adduced or transpired before him at the trial.

However, the court did not base its rejection of the practice merely on the ground of such "legal objections". They felt that certain "practical considerations" put forward by Lord Denning in *Ward v. James*²² weighed against it. In that case, the Master

mitted to discuss all reasonable inferences from the evidence, they are entitled to express an opinion as to the question of damages.

However, most courts hold or recognize that it is improper for counsel to call to the attention of the jury the amount of verdicts in similar cases. See Annotation (1963), 15 A.L.R. 3d 1146.

²⁰ *Ibid.*, at pp. 601 (O.R.), 656 (D.L.R.).

²¹ *Ibid.*

The issue of the trial judge suggesting to the jury a possible range for damages, based on earlier similar cases, does not appear to have squarely arisen in the United States. However, the judicial attitude on related issues would seem to condemn such a practice. See Annotation (1948), 2 A.L.R. 2d 454, particularly at p. 481.

²² *Supra*, footnote 5.

The Ontario Court of Appeal also put forward as a further argument against the practice the known fact that judges vary considerably in their individual appraisal of the proper quantum of general damages. Hence, they reasoned, if Haines J.'s practice in the instant case were generally pursued juries might well be given varying ranges of figures from case to case depending upon the views held by the judge charged with the trial, *supra*, footnote 7, at p. 603 (O.R.). With respect, this argument is unconvincing. It loses sight of the problem Haines J. was attempting to overcome—the unpredictability of, and disparity in, jury awards. Certainly judges vary in their damage awards, but to a much lesser degree than do juries. Faced with the problem of overcoming the disparity in jury awards it hardly seems reasonable or desirable to reject judicial assistance to the jury on the ground that judges themselves are less than perfectly consistent.

of the Rolls, speaking for the English Court of Appeal, rejected the suggestion that the trial judge be permitted to apprise the jury of awards in comparable cases, or to express an opinion as to the appropriate range of damages. He reasoned that if judges were to be permitted such latitude, counsel must also have the same right, and the result would be the confusion of the jury—through the citation, and distinguishing, of other cases—and an unseemly auction with each counsel pitching “the figures as high and low as he dared”.²³

The *Alanco Developments* opinion is an intriguing one. The court’s final reason for concluding that the judge may not guide the jury by expressing his opinion as to an appropriate range for award, was that to hold otherwise would be to “water-down” the litigant’s right to a jury trial.²⁴

Surely any improvement is better than none; certainly at least, where the alternative is to leave the jury in its present position—without any guidance whatsoever in determining compensation for the “unquantifiable”!

²³ *Supra*, footnote 5, at pp. 472 (W.L.R.), 575 (All E.R.).

In a recent case, the Ontario Court of Appeal, citing the *Alanco Developments* case, applied the rule that counsel may not mention to the jury recent awards in other cases: *Allan v. Bushnell T.V. Co. Ltd.*, [1969] 2 O.R. 18 (C.A.). The circumstances of the case were somewhat unusual. It involved an action for libel against the owners of a television station which had broadcast inaccurate statements regarding certain criminal charges pending against the plaintiff. Similarly inaccurate statements had been published or broadcast by a number of newspapers and broadcast corporations, not parties to the instant action. In his jury address, defence counsel referred to a settlement of \$8,000.00 made by one such newspaper, and pointed out that if the plaintiff received a similar award in the instant case, and in the other pending actions, he could end up with a total recovery of about \$64,000.00, which he suggested would be “astronomic”. Plaintiff’s counsel, in his jury address, attempted to counter this argument. He did so by pointing out to the jury that in England recently a plaintiff who had brought separate actions against two newspapers which had published identical libels was awarded £100,000 in one action, and £117,000 in the other. He concluded by suggesting that, in view of these awards, the figure of \$64,000.00 mentioned by defendant’s counsel was not an “astronomical” one.

On appeal against the jury’s award of \$52,000.00 Schroeder J.A., speaking for the court, held that the defence counsel address was proper since the Libel and Slander Act, R.S.O., 1960, c. 211, s. 10, authorizes the offering of such proof in mitigation of damages, but, he ruled, the defence counsel’s line of argument did not justify “the serious irregularity of [plaintiff’s] counsel in referring to the two English decisions as to the facts and circumstances of which the jury were in complete ignorance”, [1969] 2 O.R. 612. After referring to the holding in the *Alanco Developments* case that counsel may not express their views as to the quantum of damages, Schroeder J.A. stated that “[t]he impropriety of what counsel did here is too plain for discussion”. Ultimately, the court held that, quite apart from whether the jury was or was not influenced by the improper observations by plaintiff’s counsel, the award was excessive and a new trial was ordered.

While this case undoubtedly borders on the “unseemly auction” it leaves unresolved the problem of how plaintiff’s counsel is to be expected to deal with this type of evidence, if used on behalf of the defendant in mitigation of damages.

²⁴ *Supra*, footnote 7, at pp. 601 (O.R.), 656 (D.L.R.).

. . . [it] would be tantamount to countenancing his usurpation of functions committed exclusively to the jury. Litigants exercising their right to have their cases tried by a jury are entitled to the jury's verdict, uninfluenced by anything extraneous to the evidence, proper submissions of counsel thereon, the instructions of the Judge as to the law, and his summing of the evidence, together with his comments thereon and the credit to be given to it.

On its face, the court's decision appears to be one "striking a blow" for the integrity of trial by jury. In the long run, however, the decision may well be a nail in the civil jury's coffin.

The civil jury is under attack.²⁵ One frequent criticism of the institution is the unpredictability of its damage awards. That this is so is not in the least surprising. The major guideline that judges have in determining general damages, is the knowledge of awards in similar cases. This guideline, rather naturally, produces relatively consistent awards.²⁶ The decisions of the Court of Appeal of both England and Ontario, if followed, guarantee that the civil jury will remain open to the criticism of inconsistency by ensuring the jury's ignorance of the only factor which could produce consistency.

Is there no possibility of a contrary conclusion on this matter? Are the arguments of the Court of Appeal irrebuttable? The arguments genuinely supporting their position are essentially two: (a) to permit judicial expression of opinion as to the possible range of damages is to countenance a usurpation by the judge of the jury's function; (b) if we allow the judge to refer to like cases or to express an opinion we must allow counsel to do so—to the jury—and this would only confuse and mislead the jury. Both these arguments, I believe, can be overcome.

The history of trial by jury is one of the development of devices for controlling the jury. Today, as the result of several hundred years of judge-made and statutory principles, we have a wide range of pre-verdict and post-verdict devices for controlling the jury. For example, the trial judge has a responsibility to make rulings on the relevance and admissibility of evidence; to enter non-suits, directed verdicts, or dismiss actions for lack of sufficient evidence; to take cases from the jury on the ground of complexity, or prejudicial conduct at the trial;²⁷ to comment on the weight

²⁵ *McRuer, op. cit.*, footnote 3; Royal Commission Inquiry into Civil Rights, *op. cit.*, footnote 6, documents the waning of the civil jury's role in England and the Canadian provinces and recommends the abolition of jury trial in Ontario in all civil actions other than those for defamation. As pointed out, *supra*, footnote 6, the Attorney General of Ontario recently announced his intention to seek legislation to implement the Royal Commission's recommendation but has subsequently stated that he will not do so at the present time.

²⁶ It is probably fair to say that, in the final analysis, the only test of the "correctness" of a general damage award in any given jurisdiction is its relative consistency with awards in like cases within that jurisdiction.

²⁷ *E.g.*, the mention of insurance.

of the evidence; to indicate his own opinion concerning the credibility of witnesses and the relative strength of competing inferences;²⁸ and to direct the jury, in appropriate cases, to answer questions of fact rather than permitting them to render a general or special verdict.²⁹ With the development of these devices, the jury has progressed from an almost autonomous decision-making body to a legal organism, largely subservient to the control of the bench.³⁰ Although generally referred to as devices for controlling the jury, these devices may just as properly be described as a means for guiding the jury in their deliberations.³¹ But however described, it is these devices that have made trial by jury tolerable to society. Whatever their description, these devices have been indispensable to the continued existence of juries. Without them, the quality of jury verdicts would have made the institution intolerable not only to the profession, but to the public at large. A jury without guidance or control would long ago have been abolished. It has been the gradual eroding of the jury's function, the continual redefinition of its role—indeed, the assumption by the judiciary of what were originally the sole responsibilities of the jury—that has saved the institution. To conclude, as the Court of Appeal did in the *Alanco Developments* case, that permitting the judge to express an opinion as to the possible range of damages would be “tantamount to countenancing his usurpation of functions committed exclusively to the jury” is to state a truism: at the same time, it is to overlook the history of the jury trial. Moreover, it is to stop short of confronting the basic issue—how can we best preserve, in a form acceptable to society, popular participation in judicial decision making? The history of jury trial, it is submitted, provides ample authority for a decision contrary to that arrived at in *Alanco Developments*. Furthermore, “freedom of the jury from judicial interference”, is not of itself a reason for decision, rather it is merely a statement of preference for one of the competing interests involved in the problem. Most significant judicial decisions require a reconciliation or choice between conflicting interests and values. A sound decision on a major question

²⁸ Provided always that he makes it clear to the jury that it is ultimately their province to decide such questions of weight, credibility and inference.

²⁹ As is provided, for example in the Judicature Act, R.S.O., 1960, c. 197, s. 64(1).

The post-verdict control devices are more limited in number—e.g., the granting of a new trial because the verdict is against the weight of the evidence, or is excessive or inadequate, or because of pre-judicial conduct at trial, or by reason of misconduct in the jury's deliberations—but nonetheless give the judiciary further control over the jury's disposition of the case.

³⁰ For a lengthy and excellent discussion of the development of controls on the jury see James, *Civil Procedure* (1965), § 7-6—722.

³¹ At least with respect to the pre-verdict devices.

raised by the *Alanco Developments* case requires reasons as to why one competing interest should be preferred over others.

Are there convincing reasons for choosing competing interests different to the one preferred by the Court of Appeal in its decision? Are there sound reasons for permitting the judge to express to the jury an opinion as to the appropriate range of damages? I believe that there are.

First, armed with the knowledge—as judges now are—of the current range of damages in like cases, juries will be more likely to produce more consistent verdicts. To achieve this would be to remove, or at least alleviate, a major criticism of the institution's performance. Secondly, such an innovation would remove a rather incongruous aspect of the present system of appellate review of jury awards. Appellate courts have, and exercise, the power of reviewing jury awards that are so excessive or low that no jury acting reasonably could have arrived at such a decision.³² When an appellate court sets aside an award on this basis, what in reality it does is to conclude that the award is so out of line with prevailing awards in similar cases, as to justify or require judicial interference. Surely this is a roundabout, and expensive, way to control the jury. In effect what we do is to say that in order to stand the jury award must meet a certain standard—that it be not too far out of line with prevailing awards in similar cases. However, we do not tell the jury what that standard is. They are required to make their determination, and then, if necessary, we have another hearing, at which a group of judges apply the relevant standard. It is reasonable to assume that a jury apprised of the standard its award must ultimately meet, will more often meet that standard than a jury kept in blissful ignorance. The end result will be not only a more rational system of determining and reviewing damage awards, but an almost certain reduction in the number of appeals regarding the quantum of damages assessed by the jury.³³

³² *E.g.*, as in the *Alanco Developments* case itself.

³³ As the *Alanco Developments* case itself demonstrates, judicial expressions of opinion as to the appropriate damage award will not *guarantee* jury awards that are consistent with prevailing standards.

Under the system here proposed, jury awards falling outside the damage range suggested by the trial judge, will most certainly produce a problem of appellate review. If appeal courts were to treat such a deviation as, *per se*, a ground for vacating the jury's award, we would of course deprive the jury of virtually any independent role in the assessment of damages. However, properly approached, such deviations could make for much sounder appellate review, and for more meaningful popular participation in damage assessment. Under the present system, if a jury returns, let us say, a very large award and this is appealed the appellate court has little if any, idea as to how the jury arrived at its figure. Whether the jury simply pulled a figure out of the air, or whether it knew of awards in similar cases and considered them inadequate, remains unknown to the appellate tribunal. Under a system in which the judge can instruct the

A final argument in favour of the judge apprising the jury of an appropriate range of damages is one that rests, at least in part, on conjecture. It stems from attempting to answer the question: How do we explain the degree of consistency *that does exist* in jury awards? Why is it that for a given type of case, for instance, whiplash injuries involving no likelihood of serious future disability, many juries in a given locality return verdicts which are roughly, or even vaguely, similar? Since, *ex hypothesi*, there is no formula for arriving at a figure for non-pecuniary damages, why should there be *any consistency* as between decision-making bodies who are, formally, kept ignorant of the awards in other similar cases? A number of explanations are possible, for instance, there exists in any given community a consensus among its members as to the appropriate award for varying degrees of pain and suffering, and for the loss of the amenities of life. While such explanations are difficult to disprove, they are also difficult to accept.

A more plausible explanation, for which there is some evidence, is that juries frequently have information—obtained extrajudicially—of damage awards in past cases. As Professor Kalven, Director of the Chicago Jury Project puts it:³⁴

... the jury does have an informal sort of precedent supplied by jurors with prior experience, by reading of cases in the newspapers, and by general gossip in the jury pool.

It is extremely likely that jurors frequently have knowledge—probably of an inadequate and imperfect kind—of the damage awards in past cases, and that they use this information in arriving at a figure in the case upon which they are sitting. The variation

jury as to an appropriate range of damages, based on other current awards, a jury award outside the suggested range can be logically interpreted as an expression of opinion that the current award level is unsatisfactory or inappropriate to the instant case. Under such a system it is suggested that appellate courts would, and should, be more deferential to these enlarged jury awards, than they are now. If appellate courts were to act in this way, and since it is often considered that jury awards better reflect inflation and the consequent decrease in the real value of money than do judicial awards, we might achieve an overall system of damage assessments that takes better account of our changing economic circumstances. In this regard the subsequent proceedings in the *Alanco Developments* case are of interest. A new trial, limited to the assessment of damages, did take place before a jury. On October 19th, 1967 this second jury assessed the plaintiff's general damages at \$60,000.00. Thus we have a situation of two juries assessing the plaintiff's damages considerably higher than the upper limit suggested by Mr. Justice Haines in the original trial. (However I should point out that Charles McKeon, Q.C., counsel for the defendants at both trials, has told me that he felt that the assessment of \$60,000.00 at the second trial was not unreasonable. In between the first and second trial the plaintiff's condition deteriorated considerably and Mr. McKeon felt that the plaintiff proved greater damage at the second trial.) No appeal was taken from this second assessment.

³⁴ Kalven, *op. cit.*, footnote 4, at p. 164.

of the level of awards from locality to locality, and from jurisdiction to jurisdiction, would be explicable on this basis.³⁵ In the United States, an organization of plaintiffs' lawyers have acted on the premise that juries use known past awards in arriving at their verdict. They worked towards raising the award "ceiling" in a given locale and achieved the desired effect of generally raising the level of damage awards through obtaining and publicizing a high award.³⁶

If juries do use information about previous awards, obtained extra-judicially, as a datum in assessing damages, surely it makes sense to give them this type of information judicially: and to give it to them in an accurate and relevant form—an expression of opinion by the judge, based on current damage awards, of the appropriate range within which they might assess the plaintiff damages.³⁷

What of the "practical considerations" referred to by the Court of Appeal as militating against the judicial expression of opinion as to the general damage range—the arguments that if this is permitted, counsel must also be permitted, in the presence of the jury, to express their opinion and if the judge refers to similar cases, counsel must be allowed to distinguish such cases and cite others. With respect, these arguments are not as compelling as Lord Denning and the Ontario Court of Appeal assumed them to be.

First, as to the argument that it would be "necessary" to give counsel the opportunity to express their opinion as to the range of damages, the necessity is not, with respect, apparent. Indeed, the closest analogy suggests otherwise. We give to the trial judge alone the right to express his opinion—his personal views—on the evidence and the credibility of witnesses. Despite the fact that such comments undoubtedly influence the jury's deliberations, we *do not* permit counsel to contradict such observations in the presence of the jury, or to make comments of their own on the subject. The legal system has made the policy decision that the judge

³⁵ Belli, *The Adequate Award* (1951), 39 Calif. L. Rev. 1, documents in great detail the differential level of damage awards in the various states of the United States (at the time of that article) and points out that there are clearly "high" and "low" states. Also, in Ontario it is generally accepted by trial counsel that there are clearly identifiable counties where juries regularly make large or small damage awards.

³⁶ Kalven, *op. cit.*, footnote 4.

³⁷ To speak of aiming for consistency in damage awards through appraising the jury of awards in past cases is not to argue that damages for various types of personal injuries should be conventional sums, identical from case to case for the consequences of the same injury are infinitely variable, see Haines, *Criminal and Civil Jury Charges* (1968), 46 Can. Bar Rev. 48, at p. 51. It is, however, to argue that it should be one of the goals of our legal system to achieve roughly equivalent damage assessments for plaintiffs whose injuries, complications and resulting circumstances are similar.

alone should be allowed to make such comments, in the belief that the jury's deliberations benefit therefrom and would not benefit if advocacy by counsel was permitted on these issues. The same decision, for the same reasons, should be taken with regard to expressions of opinion as to what would be a reasonable range within which to award general damages.

The objection that counsel must be allowed to make reference to like cases and distinguish those referred to by the judge, or opposing counsel, can be dealt with in either one of two ways. On this point, the legal system may take a similar position as that regarding expressions of opinion as to credibility—such a matter is one solely for the judge. A position more compatible with the adversary process, however, would be for the judge to hear argument on this point from counsel—but to overcome Lord Denning's objection that it would only confuse and mislead the jury—in the absence of the jury. In this way, the judge would have the benefit of counsel's assistance in determining what are similar cases and thus what range of damages might be suggested to the jury.

The *Alanco Developments* case has not, however, been the last word on the subject of judicial comment as to the possible range of damages. The subject was again raised in the subsequent case of *Byron v. Williams*.³⁸ There, a majority of the Supreme Court of Canada expressly reserved the decision in the *Alanco Developments* case "for further consideration when the occasion arises". But, despite this apparent express avoidance of the issue it is difficult, as an analysis of the Supreme Court's opinions reveals, to read into the decision genuine doubts as to the desirability of the *Alanco Developments* ruling.

In *Byron v. Williams* an actuary had given evidence at trial in respect of the plaintiff's claim as executrix of the estate of her deceased husband who had been killed in an automobile accident. The actuary testified that a capital sum of \$45,000.00 would be necessary to purchase an annuity to produce, for the period of the wife's expected life, an amount equal to the husband's annual income. Landreville J. in instructing the jury pointed out that the actuary's figure, while a guide, was "very far off"³⁹ because it failed to take into account a multitude of possible contingencies. However, he then went further and stated:⁴⁰

... any amount in that area, in my opinion, would be overly generous. Just as much as if you award this lady \$5,000.00 or \$10,000.00, I would say you are starting to be cheap and picayune on that score. So that there is a limit, but that I give you a very wide margin, depending on your appraisal of those facts, of these contingencies of

³⁸ *Supra*, footnote 2.

³⁹ *Ibid.*, at p. 117.

⁴⁰ *Ibid.*

which I have spoken, and then you can determine what might be a financial security for this woman, to replace the financial security which she had in her husband.

The defendant⁴¹ contended that the trial judge had acted improperly and misdirected the jury by mentioning such amounts "which might be called both a ceiling and a floor in relation to the amount to be awarded"⁴² and that this necessitated a new trial on the issue of damages.⁴³ The court rejected this contention. While observing that "it would have been better if the learned judge had not been as specific as he was in this instance"⁴⁴ they indicated that the real question on appeal was whether what he did say was misdirection of a nature requiring a new trial. Having regard to all the evidence before the jury and the judge's charge in relation to quantum as a whole⁴⁵ they were of the opinion that there was no substantial misdirection and certainly no error constituting a miscarriage of justice within the meaning of the Judicature Act.⁴⁶ Hall J., who wrote the majority opinion, stated that the court's decision proceeded solely on the basis that in this particular case the jury's assessment was reasonable⁴⁷ and ought to be supported. This case, he declared, was decided "without reference to the decision of the Court of Appeal of Ontario in *Gray v. Alanco Developments Ltd.*".⁴⁸ That case, he stated, "I would reserve . . . for further consideration when the occasion arises".⁴⁹

Ritchie J., delivered a separate opinion.⁵⁰ While expressing his full accord with the reasons of the majority and their disposition of the appeal he felt that the *Alanco Developments* case was

⁴¹ Who was respondent in the Supreme Court of Canada. He had successfully appealed, as to both liability and damages, to the Ontario Court of Appeal. The plaintiff then took a further appeal to the Supreme Court of Canada which reversed the Ontario Court of Appeal on both issues and restored the trial judgment.

⁴² The phrase is that of Hall J., *supra*, footnote 2, at p. 118.

⁴³ All three members of the Ontario Court of Appeal had been of the opinion that a new trial should be had on the question of quantum of damages, on the ground of misdirection by the trial judge. It is not clear from the Supreme Court of Canada's opinion on what basis the Court of Appeal held there was misdirection, see, *ibid.*, at p. 116. The decision of the Ontario Court of Appeal is not reported.

⁴⁴ *Ibid.*, at p. 116.

⁴⁵ Hall J., who wrote the majority opinion quoted at length from the trial judge's charge on quantum of damages in which Landreville J., set out in some detail the basis upon which they must be determined and stressing what the jury should and should not take into account. See *ibid.*, at pp. 117-118.

⁴⁶ *Supra*, footnote 29, s. 28, which limits the granting of a new trial to those cases where the omission or irregularity in the course of the trial occasioned some "substantial wrong or miscarriage".

⁴⁷ Though not mentioned in either of the reasons for judgment in the Supreme Court of Canada, the jury awarded the plaintiff \$27,000.00 under the Fatal Accidents Act, R.S.O., 1960, c. 138, for the husband's death.

⁴⁸ *Supra*, footnote 2, at p. 118.

⁴⁹ *Ibid.*, at pp. 118-119.

⁵⁰ *Ibid.*, at pp. 112-113.

clearly distinguishable from the instant case. The decision in that case, he reasoned, was limited to precluding a trial judge from expressing his personal opinion, based on figures awarded in other cases, as to the proper range of damages for such things as pain and suffering and loss of amenities of life.⁵¹ In the instant case, he continued, the judicial expression of opinion was given in the context of explaining how the actuary's figures were only a guide, and in using them the jury should take into account a range of contingencies unexpressed by the actuary. As such, he concluded, the trial judge's remarks did not appear to him to come within the category referred to in the *Alanco Developments* case.⁵²

It is not easy to interpret with any certainty either of the opinions in the *Byron* case. Ritchie J., seemed to imply that in cases where direct evidence quantifying damage is allowed, judicial statements as to the possible range of damages may be permissible. However, he refrained from expressly so stating and, like the majority, his ultimate ground for decision was that in all the circumstances of the case the mention of amounts was not a fatal defect requiring a new trial. The majority, on the other hand, stated that it "would have been better if the learned judge had not been as specific as he was in this instance" regarding the possible range of damages, implying that even in cases where direct evidence quantifying damages is allowed, the trial judge should refrain from himself mentioning actual figures. This statement by the majority makes its express reservation, for later consideration, of the *Alanco Developments* decision particularly difficult of interpretation. Had that reservation stood alone (or been coupled with approval of the trial judge's statements in the instant case) it might imply real doubt as to their willingness to accept the blanket prohibition on judicial statements of opinion as to the possible range of damages expressed in the *Alanco Developments* decision. However, if they objected to the mention of specific figures by the trial judge in cases where direct evidence is admissible as to quantities, it is difficult to see what reservations they could have about the *Alanco Developments* ruling itself.

Conclusion

The issues underlying the matters discussed in this comment

⁵¹ He considered the following quotation from the Ontario Court of Appeal's judgment as disclosing the limited effect of the decision:

"What has been stated is applicable to those headings of general damages where there can be no evidence as to the value in monetary terms of the loss sustained, for example damages, claimed for pain and suffering or the loss or diminution of the amenities of life."

Supra, footnote 7, at pp. 603 (O.R.), 658 (D.L.R.), quoted *ibid.*, at p. 112.

⁵² He added that he agreed with Hall J., that, reading the trial judge's charge as a whole, the mention of his opinion as to amounts to be awarded was in no way a fatal defect. *Ibid.*, at p. 112.

are several. Is it possible to give the jury meaningful guidance in carrying out their task of assessing general damages? If so, how can it best be done? In the background is, of course, the further issue: do we wish to maintain our tradition of popular participation in judicial decision-making in civil cases?

In the *Alanco Developments* case, the Ontario Court of Appeal answered the first and basic question negatively (as did the English Court of Appeal in *Ward v. James*). Subsequently the Ontario government has considered the possibility of the abolition of civil jury trials in all but defamation cases. This development might have been avoided had the court recognized its responsibility for continually tailoring the jury's role to society's needs.

The holding in the *Alanco Developments* case was not one dictated by any decisions binding on the Ontario Court of Appeal,⁵³ and the reasons given by the court for its ruling are less than persuasive.

The court's formulation of an "across the board" prohibition on any mention of damage figures by either judge or counsel may have been motivated by a fear that any intermediate position might open the door to the use of the American "per diem" argument in Canadian courts.⁵⁴ If this were so, then I suggest that denying the judge the power to inform the jury of an appropriate damage range was an act of "over-kill" and an unnecessary step. It is possible, and desirable, to formulate principles permitting the trial judge to give the jury greater assistance in assessing damages

⁵³ The Supreme Court of Canada's refusal, in *Queen v. Jennings*, [1966] S.C.R. 532, to follow the House of Lords' decision in *British Transport Commission v. Gourley*, [1956] A.C. 185 indicates that English decisions are not binding on Canadian courts.

⁵⁴ The history of the "per diem" argument in the American courts is discussed, *supra*, footnote 18. In the United States the use of the "per diem" argument has frequently been associated with very large and, it seems, ever increasing damage awards. Usually the argument is made with the assistance of a blackboard or chart setting out in detail the damages claimed by the plaintiff and the method by which counsel suggests the jury arrive at such a figure. The following chart, used to depict damages suffered by a plaintiff injured in an aircraft runway collision (*Ratner v. Arrington* (1959), 111 So. 2d 82 (Fla.)), is typical.

<i>Wendell Arrington</i>	
Age: 43	Expectancy: 28.8 years
<i>To Date</i>	
<i>Medical Expense</i>	\$ 9,244.19
<i>Pain and Suffering</i>	
12/8/55—1/30/58 783 days @ 15.	11,745.00
<i>Physical Disability and Inability to Lead a Normal Life</i>	
12/8/55—1/30/58 783 days @ 5.	3,915.00
<i>Loss of Earnings</i>	
111 weeks @ 125.	13,875.00
	\$ 38,779.00

without opening the door to an "unseemly auction" by counsel through the use of the "per diem" argument.

Whatever be the reasons underlying the court's decision, its unfortunate effect has been to leave the civil jury open to the criticism that its awards lack any reasonable degree of uniformity. To continue to deprive the jury of meaningful guidance in assessing general damages is to sound the death knell of the institution in the field of civil litigation.

What is the solution? I believe the courts should re-examine the *Alanco Developments* decision. They should permit the trial judge, after hearing argument from counsel on the subject in the absence of the jury, to express to the jury his opinion, based on similar past cases, as to what would be a reasonable range for the general damage award. An even better solution would be legislation—not, in effect, to abolish the civil jury—but rather to grant to the trial judge this power to bring meaningful guidance to the jury's deliberations.⁵⁵

GARRY D. WATSON*

* * *

<i>Future</i>	
10,220 days	28 years
<i>Medical Expense</i>	\$ 500.00
<i>Pain and Suffering</i>	
10,220 days	10,220.00
<i>Physical Disability and Inability to Lead a Normal Life</i>	
10,220 days @ 3.	30,660.00
<i>Loss of Earning Capacity</i>	
To age 70, 27 years	162,000.00
	\$242,159.00

(As used at the trial the chart itemized the medical expenses.)

In some instances plaintiff's counsel manage to persuade the jury to award their clients the *exact amount* suggested by the "per diem" argument. For two such cases which have been reported see, *Braddock v. Seaboard Airline Railroad Co.* (1955), 80 So. 2d 662, aff'd, 96 So. 2d 127 (Fla.) (award of \$248,439.00 general damages to a nine year old boy who had his leg amputated below the knee as a result of a railway crossing accident) and *Seffert v. Los Angeles Transit Lines* (1961), 364 P. 2d 337 (Calif.) (award of \$134,000.00 for pain and suffering to a forty-two year old woman who received a permanently disfiguring and disabling injury to her leg and foot).

⁵⁵ Such legislation or a judicial reversal of the *Alanco Developments* ruling is desirable even if the civil juries' role is reduced, in Ontario, to sitting on defamation cases. The difficulty of assessment of damages in defamation cases is at least as great, if not greater, than in personal injury actions. See Weiler, *op. cit.*, footnote 3.

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