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An Evaluation of the Rule of Comparative Damages

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AN EVALUATION OF THE RULE OF COMPARATIVE DAMAGES

Damages for personal injuries are intended to compensate a victim for injuries sustained through the fault of another party or parties.[1] The function of awarding damages is vested in the jury, under the supervision of the court, or is vested in the court itself in cases tried without a jury.[2] The court's supervision is contained in the trial judge's instructions which places "the jury in a proper frame of mind to exercise self-restraint, and . . . [furnishes] an appropriate frame of reference for supervisory action by the court in cutting down verdicts felt to be excessive,"[3] or in asking the defendant to submit to an additur in verdicts felt to be inadequate.

A jury determining the proper compensation to be awarded will consider the nature of the injury itself, its permanency and the victim's prior health.[4] These factors, combined with the victim's mental and physical pain and suffering and any pecuniary loss incurred,[5] represent the initial equation for determining reasonable compensation.[6] However, the precision of this equation is greatly reduced by an inability to accurately estimate future pecuniary losses or to properly appraise an item that is as subjective and relative to each individual claimant as pain and suffering. Although the proof of pain and suffering is relatively easy since "virtually every kind of evidence suggesting the existence of pain and suffering may properly be put before the jury for its consideration,"[7] the dollar amount that a jury attaches to the plaintiff's pain and suffering will ultimately depend on the jury's evaluation of the veracity of the plaintiff's testimonial evidence. This is especially true where there are no symptoms associated with the injury which the jury itself can observe.

The Theory Behind the Rule

One might rightfully conclude that damages, being the summation of numerous variables, which are relative to the time and place of the accident and personal nature of the victim, are beyond any real degree of certainty and must be determined on a case by case basis. Notwithstanding this uncertainty in the determination of damages, a strong impetus towards predictability in this area has resulted in the use, by some appellate courts, of the rule of comparative

1. See James, *Damages in Accident Cases*, 41 Cornell L.Q. 582 (1956).
2. See 22 Am. Jur. 2d *Damages* § 340 (1965).
3. See 2 Harper & James, Torts § 25.10 (1956).
4. See *id.* at § 25.8.
5. Pecuniary loss includes lost wages, expected loss of earning power (lost capacity to earn), medical and other expenses occured, and estimated future expenses. *Ibid.*
6. *Ibid.* In actuality the jury does not deal with each factor separately, but rather, searches for a single sum felt to be appropriate. See Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 161 (1958).
7. Plant, *Damages for Pain and Suffering*, 19 Ohio St. L.J. 200, 204 (1958). This evidence often consists of the plaintiff's testimony as to his prior health and the pain resulting from the accident; the testimony of lay witnesses corroborating the plaintiff's testimony or adding other observations relating to the plaintiff's condition; and medical testimony concerning causation in general, including the likelihood of a particular injury producing pain and suffering and the possible extent of the discomfort.

damages as a criteria when reviewing the amount of damages awarded. This rule, in either a pure or hybrid form, calls for the comparison of the injuries and other circumstances such as the age and earning capacity of the injured party, with prior cases in which similar circumstances were present. Based on such a comparison, the appellate court will decide whether the amount of damages awarded in the case before it is so inconsistent with awards given in comparable cases as to be unreasonable as a matter of law.[8]

If appellate court finds an award to be unreasonable,[9] it will then order a new trial or condition such order on the acceptance of an additur or remittitur.[10] However, the appellate courts generally will not disturb an award unless the error is great, since to do so would invade the jury's province.[11] Chancellor Kent stated the traditionally accepted criteria to be used in reviewing damage awards:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.[12]

As the criteria for reviewing the reasonableness of the quantum of an award, some appellate courts look only to the facts of the case before them, tempered by the experience of the presiding judge.[13] At the opposite end of the spectrum are those courts which look exclusively[14] to a prior case[15] or cases[16] to determine the reasonableness of an award.[17] Between these extremes are those courts which view the awards sustained in similar cases as only one of the factors to be considered in determining a reasonable award for the case on appeal.[18]

Apart from this concern with reasonableness of the amount is the application of the rule of comparative damages solely to achieve a uniformity of awards.[19] To distinguish this use of the rule from its use as a test of the reasonableness of an award, one must look at the purpose for applying the rule rather than the effect. In the usual case the rule of comparative damages is used as the standard

8. See, *e.g.*, Newman v. St. Louis-San Francisco Ry., 369 S.W.2d 583 (Mo. 1963).
9. See, *e.g.*, Hogg v. Plant, 145 Va. 175, 133 S.E. 759 (1926).
10. See, *e.g.*, Van Norman v. Illinois Cent. R.R., 320 S.W.2d 512 (Mo. 1959).
11. See, *e.g.*, Rowe v. Rennick, 112 Cal. App. 576, 297 Pac. 603 (1931). See generally Comment, *Criteria Employed by Appellate Courts in Determining Adequacy of Damages*, 51 Ky. L.J. 762 (1963).
12. Coleman v. Southwick, 9 Johns. 44, 51 (N.Y. 1812).
13. See, *e.g.*, Roth v. Jelden, 118 N.W.2d 20 (S.D. 1962).
14. Courts are often reluctant to state they are using comparative damages as the exclusive criteria and therefore pay lip service to using the facts of the case as a basis for reviewing the award. See, *e.g.*, Harp v. Illinois Cent. R.R., 370 S.W.2d 387 (Mo. 1963).
15. See, *e.g.*, Houston v. City of Shreveport, 188 So. 2d 923 (La. 1966).
16. See, *e.g.*, Henson v. Powers, 384 S.W.2d 452 (Tenn. 1964).
17. *Ibid.*
18. See, *e.g.*, Springen v. Ager Plumbing & Heating, Inc., 19 Wis. 2d 487, 120 N.W.2d 692 (1963).
19. See, *e.g.*, Smiley v. St. Louis-San Francisco Ry., 359 Mo. 474, 222 S.W.2d 481 (1949).

to measure the reasonableness of an award. If the award is found unreasonable, it is adjusted to fall within a range of reasonable awards. However, where the rule is applied to achieve uniformity, the emphasis is not on the reasonableness of the present award as compensation for the victim, but whether it coincides with awards given for supposedly similar injuries.

Although appellate courts use the rule of comparative damages to varying degrees and for different purposes, they have almost always tried to take into account the varying value of the dollar.[20] For the most part the process of the courts has been very general in this regard[21] although some have referred to current price indices.[22]

The wisdom of using comparative damages in order to review the quantum of the award can accurately be viewed as a conflict between a policy of stare decisis and a policy of justly resolving what is essentially a fact issue purely on its own merits.[23] By using stare decisis, a degree of predictability presumably would be achieved and both tort-feasors and claimants would be treated equally from case to case. The other policy reflects the belief that the plaintiff should receive fair and reasonable compensation for the injury which he has sustained, without regard to what has been decided, as a matter of law, concerning injuries in other cases.

The proponents of the rule of comparative damages contend that the resulting predictability has facilitated the negotiation of out of court settlements, thus relieving the courts of burdensome litigation.[24] Also, an established range of awards for similar injury expedites the courts' determination of the reasonableness of an award.

The prime objection[25] to the use of the rule of comparative damages is that

20. See, *e.g.*, Hedges v. Neace, 307 S.W.2d 564 (Ky. 1957); Comment, *Fluctuating Dollars and Tort Damage Verdicts*, 48 Col. L. Rev. 264 (1948).

21. See, *e.g.*, Eichten v. Central Minn. Co-op. Power Ass'n, 224 Minn. 256, 28 N.W.2d 862 (1947).

22. See, *e.g.*, Armentrout v. Virginian Ry., 72 F. Supp. 997 (D. W. Va. 1947).

23. See Catalano, *Negligence Law: The Theory of Comparable Verdicts*, 45 A.B.A.J. 811, 812 (1959); Note, 38 Tul. L. Rev. 588 (1964).

24. See Robinson, *Inconsistency of Court Awards in Louisiana Death Cases*, 36 Tul. L. Rev. 471 (1962); *but cf.* Annot., 11 A.L.R.3d 9, 46 (1967).

25. A noted plaintiff's attorney has commented:

> The fallacy of attempting to compare verdicts in two different cases involving two different individuals who might suffer injury becomes apparent when one considers the infinite variations between individuals. If only one element of damages is considered, such as the right to physical integrity, the complexity of the problem which is to be resolved by an award of damages becomes obvious. Thus, rights of the "physical person" to integrity involve: 1. The immunity of the body from direct or indirect physical injuries; 2. The immunity of the nervous system from injuries; 3. The immunity of the mind from injuries; 4. The immunity of the will from direct and indirect coersion or warping; 5. The immunity of feeling, susceptibilities, etc.

Catalano, *supra* note 23, at 813.

> The Defense Law Journal is equally critical of applying the rule of comparative damages: Comparison with awards in similar cases . . . invariably involves the fallacy of comparing such dissimilar variables as the extent of disabilities, loss of earning capacities, and the extent and duration of pains not to speak of such economic

no two cases are ever exactly alike, especially where pain and suffering are a substantial part of the alleged damages.[26] There is no practical way to compare the testimonial evidence relating to pain and suffering from case to case. Altering an award consisting of damages for pain and suffering so that it conforms with awards given for similar injuries in prior cases, may usurp the right of the jury to evaluate the credibility of the witnesses appearing before it.[27] As a general rule the bare record is an inadequate basis from which to evaluate the numerous variables between similar cases.[28] These problems are magnified by the technicality of medical terminology and its possible misuse by the courts.

A correct application of the rule of comparative damages should require the comparison of elements of liability and damages between similar cases. Specifically, it should recognize that the jury verdict is often the result of compromise in the sense that it is a combination of liability and damages announced as a single dollar amount.[29] In practice, however, the theory of comparative damages assumes that each jury gave the same recognition to liability from case to case. Such an approach ignores the situation where the degree of liability is so great as to approach willful neglect in the minds of the jurors. In this type of case the jury will often award the victim far more than his injuries merit.[30] Since the award in this case represents the special equities which only the jury can take into account, an appellate court should not lower the amount because it is greater than awards given in prior cases for similar injuries.[31] There is also the converse situation where the plaintiff has suffered substantial injuries but, since the proof of liability is weak or insufficient, the jury has returned a relatively low award. The plaintiff should not be able to appeal this award its "insufficiency" on the rule of comparative damages.[32]

Applications of the Rule

The Louisiana appellate courts[33] have recently reversed their prior position that the rule of comparative damages must be used to achieve a uniformity of

elements as varying costs of medical care and sustenance between communities, and the effect of inflation or deflation on the value of money.
Comment, 11 Defense L.J. 415-16 (1962).

26. See Busch, *Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 Defense L.J. 521, 543-44 (1963).

27. See Coleman v. Southwick, 9 Johns 4, 50 (N.Y. 1812).

28. Gale v. New York C. & H.R.R., 13 Hun 1, 4 (N.Y. 1878).

29. See Kalven, *supra* note 6, at 165-67.

30. *Ibid.*

31. *Cf.* Fuentes v. Tucker, 31 Cal. 2d 1, 30, 187 P.2d 752, 769 (1947); Kalven, *supra* note 6, at 178.

32. See Annot., 11 A.L.R.3d 9, 51 (1967).

33. The function of Louisiana's appellate courts in reviewing damage awards is defined in both the Louisiana Constitution and the Civil Code. In prescribing the scope of review the constitution says in part: ". . . all appeals shall be both upon the law and the facts." La. Const. art. VII, § 29. The Civil Code provides: "In the assessment of damages . . . in cases of offenses, quasi-offenses . . . much discretion must be left to the judge or jury. . . ." La. Civil Code art. 1934(3) (1870). Thus, although the Louisiana appellate courts review the facts, the criterion for the review of quantum of damages is whether the trial court has gone so far as to have abused its broad discretion. This means that essentially the same criteria is used as in common-law jurisdictions where the appellate courts are not supposed to review the facts as such. See Annot., 16 A.L.R.2d 3, 20 (1951).

awards among cases involving similiar injuries. A brief look at the Louisiana experience reveals disenchantment with this procedure and a trend toward a more limited use of the rule of comparative damages.[34]

The classic example of the attempt to use comparative damages in order to achieve a uniformity of awards is found in the Louisiana case of *Cassreino v. Brown*.[35] The plaintiff had received "a moderately severe sprain of the cervical spine produced by a 'whiplash' injury"[36] and was awarded 1,200 dollars by the trial court. On appeal, the court stated that although they ordinarily do not disturb the trial court's discretion in making an award and that each case has its own particular facts, "awards should be made with some degree of uniformity in instances involving comparable cases, to the end that awards will not be all out of proportion with one another."[37] The court then described the plaintiff's pain, treatment and the like. While admitting that they are not making a detailed analysis, the court proceeded to set out in three broad categories the whiplash awards in Louisiana:

> (1) Awards in excess of $5,000 are common for those producing permanent disability or severe pain of prolonged duration. . . .
> (2) Awards in the area of $2500-3500 are common for those producing severe initial pain and with however only a short period of residual discomfort, or for those producing less severe pain but a relatively long period (*e.g.* a year or two) of residual discomfort or disability. . . .
> (3) Awards in lower amounts for whiplash injuries producing moderate or slight pain, which are cured without residual discomfort in a matter of weeks. . . .[38]

The court concluded that the plaintiff's injuries placed her in the second category, and hence raised her award to 3,000 dollars.

However, in *Gaspard v. LeMaire*,[39] decided in 1963 Louisiana's highest appellate court rejected the strict use of comparative damages aimed to achieve uniformity. As a result of injuries sustained in an automobile accident, the plaintiff had received a jury award of 19,500 dollars which the Louisiana Supreme Court had previously reduced to 8,500 dollars to keep it consistent with prior awards for similar injuries.[40] In reducing the award one justice dissented, protesting that it is improper for the judiciary to use the rule of comparative damages:

> Is this court to set up a schedule for compression fractures of the back like a workman's compensation schedule? In the absence of statutory

34. *Compare* Cassreino v. Brown, 144 So. 2d 608 (La. App. 1962), *with* Winfree v. Consolidated Underwriters, 246 La. 981, 169 So. 2d 71 (1964).

35. 144 So. 2d 608 (La. App. 1962).

36. *Id.* at 610.

37. *Ibid.*

38. *Id.* at 611.

39. 245 La. 239, 158 So. 2d 149 (1963); Comment, *The Effect of Gaspard v. LeMaire on Awards for General Damages*, 25 La. L. Rev. 545 (1965); Note, 38 Tul. L. Rev. 588 (1964).

40. *Id.* at 259, 158 So. 2d at 156.

> regulation, and there is none in cases of this kind, each case must stand on its own merits, with much discretion allowed to the court below.[41]

On rehearing, the dissenting opinion was adopted by the court and the jurys' award reinstated. The court's rationale was that the discretion vested in the trial court was being impaired by the emphasis placed on achieving uniformity of awards through the use of comparative damages.[42] Although this was not the first case to affirm the trial court's discretion,[43] the process over the years of using past cases as a point or reference without regard to the particular facts of the case on review, had effectively inhibited that discretion. The court stated on rehearing that although cases may involve similar injuries "such as a broken arm . . . [t]hereafter, however, the similarity ceases . . . , and the adequacy or inadequacy of the award should be determined by the facts and circumstances peculiar to the case under consideration."[44]

The Louisiana appellate courts in their recent decisions[45] have apparently adhered to the approach developed in the *Gaspard* and subsequent cases, that application of the rule of comparative damages is but one of many factors to be considered by the reviewing court.[46] Some have even completely disregarded prior awards and simply reviewed the facts of the case before them to determine if the award was an abuse of the trial court's discretion.[47]

Notwithstanding *Gaspard v. LeMaire*, some of Louisiana's intermediate appellate courts still persist in using comparative damages as the sole criteria to review an award. Typical is *Houston v. City of Shreveport*,[48] a wrongful death action where a widow was originally awarded 35,000 dollars for herself and 10,000 dollars as tutrix for her 10 year-old son. The deceased had been 34 years old with a life expectancy of 32.5 years and was earning 5,685 dollars per year as a mailman. The widow was 32 years old. The court compared these facts with those in another case where the deceased had been 43 years old with a life expectency of 28 years and had been earning 10,000 dollars per year.[49] Surviving the deceased in the prior case was his 41 year-old widow and a 15 year-old daughter. There the widow was awarded 100,000 dollars and the daughter 25,000 dollars. On this basis the *Houston* court held the awards to have been an abuse of discretion; hence, it raised the widow's award to 55,000 dollars and the son's award to 20,000 dollars.

Presently the prevailing opinion of the Louisiana appellate courts is that the use of the rule of comparative damages solely to achieve uniformity is

41. *Id.* at 263, 158 So. 2d at 157.
42. *Id.* at 271, 158 So. 2d at 160.
43. See, *e.g.*, McFarland v. Illinois Cent. R.R., 241 La. 21, 127 So. 2d 183 (1961).
44. Gaspard v. LeMaire, 245 La. 239, 264-54, 158 So. 2d 149, 158 (1963).
45. See, *e.g.*, Polk v. New York Fire & Marine Underwriters, Inc., 192 So. 2d 667 (La. App. 1966).
46. See, *e.g.*, Winfree v. Consolidated Underwriters, 246 La. 981, 169 So. 2d 71 (1964); Ballanga v. Hymel, 247 La. 934, 175 So. 2d 274 (1965).
47. See, *e.g.*, Clark v. Keller, 192 So. 2d 202 (La. App. 1966).
48. 188 So. 2d 923 (La. App. 1966).
49. Tison v. Fidelity & Cas. Co., 181 So. 2d 835 (La. App. 1965).

unequitable; it denies the individual claimant his right to a day in court, since the award given to a claimant is an individual matter designed to compensate *him* for his personal injuries. Uniformity should only be an incidental result of appellate review. More specifically, the function of appellate courts is to review a particular case and not to establish a quasi-workman's compensation schedule.[50] However, this is not to ignore the value of the rule of comparative damages. Error necessarily assumes some pre-existing standard, and it is the consultation of precedent which gives content to the determination of manifest error.[51] However, it is quite another matter to have the determination of error turn solely– or almost so– on the awards in prior cases and thereby ignore the particular facts and equities of the case under review.

Unlike Louisiana, the Missouri courts *strictly* apply the rule of comparative damages in order to maintain a uniformity of amounts awarded in similar cases.[52] In keeping with the rule of uniformity, it is questionable whether the Missouri appellate courts would have sustained many awards given in other jurisdictions.[53] Awards by the jury and trial court in Missouri have been approximately the same as in other jurisdictions for similar injuries. However, on appeal the Supreme Court of Missouri has substantially reduced these awards below those allowed in comparable cases in other jurisdictions.[54] Thus, "Missouri plaintiffs cannot hope to have their awards reviewed upon the basis of what would be 'fair and reasonable compensation' but will have to be content with having the award measured by the 'rule.' "[55]

The position of the Missouri courts becames tenuous if one accepts the thesis of the English courts that uniformity of damages cannot be realized under a jury system. By virtue of the Administration of Justice Act of 1933,[56] English trial judges have the discretion to grant or deny a jury trial for a personal injury action. However, in 1964 the English Court of Appeals ruled that unless exceptional circumstances exist, a trial judge has abused his discretion in ordering a jury trial.[57] According to the Master of the Rolls, this is because the juries do not know the usual scale of damages or the proper method of assessing them:

> It is now recognized that in these personal injury cases there should, as far as possible be some degree of uniformity. This is desirable so that there should be justice between plaintiff and plaintiff and between defendant and defendant. . . . The judges have therefore, over the

50. See Gaspard v. LeMaire, 245 La. 239, 263, 158 So. 2d 149, 157 (1963) (dissenting opinion). See also Zelermyer, *Damages for Pain and Suffering*, 6 Syracuse L. Rev. 27, 41 (1954) (suggestion that a schedule, similar to that in workman's compensation laws, be enacted into law by the legislatures, listing the various types of injuries and an allotted sum as damages for pain and suffering).

51. Note, 38 Tul. L. Rev. 588, at 590 (1964).

52. *E.g.*, Smiley v. St. Louis-San Francisco Ry., 359 Mo. 474, 222 S.W.2d 481 (1949).

53. Comment, *Just and Reasonable Compensation*, 25 Mo. L. Rev. 324, 351 (1960).

54. *Id.* at 352.

55. *Id.* at 351-52.

56. 23 & 24 Geo. 5, ch. 36, § 6.

57. Sims v. William Howard & Son Ltd., [1964] 2 Weekly L.R. 794 (C.A.); Note, 78 Harv. L. Rev. 676 (1965).

> years evolved a scale which is well known and is applied daily up and down the country. This scale can be applied on a trial by the judge alone, but never on trial by a jury. If a judge alone should seriously depart from it, it can be set right in this court; but not so with a jury.[58]

A concurring justice agreed with this approach, saying, "A jury simply does not know what the prevailing practice is and does not know what the prevailing scale is, and it is unlikely that any measure of uniformity will be obtained if trial by jury is ordered in cases such as this."[59]

The English attempt to achieve uniformity is exemplified in *Bastow v. Bagley & Co.*[60] where the plaintiff was awarded 1,500 pounds in general damages for the loss of all useful vision in one eye. On appeal, the court affirmed the award stating that it was too low but not quite low enough to be adjusted. Two days later another division of the Court of Appeals raised an award in a similar case from 850 pounds to 2,000 pounds. Following this authority, the *Bastow* court raised the award to 1,800 pounds:

> [I]f justice is to be done as between one victim and another and one tort feasor and another . . . when all proper allowance has been made for what may be widely differing circumstances of the individual victims, the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar physical injuries.[61]

In New York while the case law is uncertain as to whether the rule of comparative damages is applicable,[62] the Appellate Division has, when applying the rule, occasionally done so in a different manner than has heretofore been described. In *Flores v. E. W. Bliss Co.*,[63] the court reversed a judgment of 117,000 dollars and ordered a new trial subject to plaintiff's acceptance of a remittitur to 50,000 dollars. At a prior trial the plaintiff had received an award of 39,000 which was vacated on appeal and a new trial ordered because of technical deficiencies in the plaintiff's proof. In reviewing the award rendered at the second trial, the court compared the instant award with that of the first trial: "While plaintiff should not be restricted to the award of $39,000 on the prior trial, it is also true that the range of the two verdicts bears strongly on the excessiveness of the most recent verdict."[64] In support, the court cited *Beckhausen v. E. P. Lawson Co.*[65] where a new trial was ordered holding 125,000 dollars to be excessive and alluding "to the fact that upon a prior trial there was a verdict for

58. Sims v. William Howard & Son, Ltd., *supra* note 57, at 797-98.
59. *Id.* at 800.
60. [1961] 1 Weekly L.R. 1494 (C.A.)
61. *Id.* at 1498.
62. *Compare* Fried v. New York, N.H. & H.Ry., 183 App. Div. 115, 170 N.Y. Supp. 697 (2d Dep't 1918), *aff'd*, 230 N.Y. 619, 130 N.E. 917 (1921), *with* Reich v. Evans, 7 A.D.2d 765, 766, 180 N.Y.S.2d 159, 161 (3d Dep't 1958).
63. 18 A.D.2d 1058, 239 N.Y.S.2d 1 (1st Dep't 1963).
64. *Id.* at 1058, 239 N.Y.S.2d at 2.
65. 15 A.D.2d 455, 221 N.Y.S.2d 753 (1st Dep't 1961).

plaintiff in the sum of $25,000, which the plaintiff did not move to set aside as inadequate and which was not assailed by plaintiff on cross appeal."[66]

CONCLUSION

Although using the rule of comparative damages for the sole purpose of achieving a uniform system of awards is an unwarranted application, the rule has some merit if combined with other factors to establish the limits of a discretionary range of damage awards. While only the legislature, and not the judiciary, is equipped to establish a stable range of awards for each conceivable injury, the courts are capable of giving notice to an acceptable range of damage awards for a particular injury. Such a range would, when combined with other factors, lead to an appellate determination of whether an award is unreasonable.

In applying the rule of comparative damages as one of several criteria to determine reasonableness of a damage award, the weight given to the comparison by the appellate court should be reduced by the degree of uncertainty associated with the numerous variables to be compared. Such an application of the rule would combine the advantage of predictability[67] with the equities of allowing each claimant his rightful day in court.

In those courts which purportedly denounce the rule of comparative damages, it would appear that the rule is operating in a subtle form; namely, in the crystallization of the appellate court's experience with personal injury cases. In such jurisdictions, the practicing attorney knows that the amount of damages his client can recover will be confined to limits created by the courts' day-to-day experience and the facts of his case. While predictability is not emphasized in these jurisdictions, the evolution of many personal injury cases does in fact provide the attorney with some basis from which to judge the dollar amount of his case. Such experience facilitates bargaining leading to out of court settlements. Also, it may be assumed that in reviewing an award alleged to be excessive, if a court which did not apply the rule were faced with an impressive series of similar or higher awards for similar injuries, it could not realistically consider such an award to be excessive.

In the vast majority of jurisdictions which advocate the use of the rule of comparative damages in one form or another, the most serious difficulty is not with the rule as such but with the vague and inconsistent application of the rule by the courts. Rather than define the specific operation of the rule, the courts generally cite a series of prior awards and rule on the reasonableness of the award on review in light of the precedent.[68] This vague process hinders an attorney's analysis of the dollar value of his case as well as making constructive analysis of the rule difficult. Even more burdensome to the practicing attorney is the failure of a clear statement in most jurisdictions as to whether the appellate courts will apply the rule, and if so, to what extent. Thus, the attorney is often

66. *Id.* at 455, 221 N.Y.S.2d at 754.
67. See Annot., 16 A.L.R.2d 3, 28 (1951).
68. *E.g.*, Harp v. Illinois Cent. R.R., 370 S.W.2d 387 (Mo. 1963).

put to extensive efforts to collect and analyze prior awards not knowing whether the court will consider the collected precedents in the review of his case.[69]

It would be wise for the courts to eliminate the present confusion surrounding the rule of comparative damages by defining the form, if any; of the rule to which they will give notice and then consistently applying this definition. A modified and consistent use of the rule would balance the desireability of achieving justice in each case with the predictability necessary for both a stable legal system and an efficient allocation of our legal resources.

BRUCE D. DRUCKER

IS CRIMINAL NEGLIGENCE A DEFENSIBLE BASIS FOR PENAL LIABILITY?

In 1965 the New York Legislature enacted and the Governor of New York signed into law a Revised Penal Law to take effect September 1, 1967.[1] The New York Commission for the Revision of the Penal Law adopted the suggestion of the American Law Institute Model Penal Code[2] by including a general statutory provision defining four concepts of mental culpability: intention, knowledge, recklessness and criminal negligence.[3] The purpose of this Comment is to demonstrate the inadvisability of punishing negligence by penal sanctions. More specifically, the following will be disscussed; first, the interrelation of recklessness and negligence under the present New York Penal Law, and, second, the lack of justification for the inclusion of negligence within the scope of penal liability.

STATUTORY DEFINITIONS

The New York Revised Penal Law defines recklessness as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and *consciously disregards* a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware

69. The extent of preparation is exemplified in a case involving an automobile accident in Louisiana tried in the federal courts. In order to support its charge of excessive damages before the United States Court of Appeals, the defense analyzed in a brief "a resume of the 399 cases reported from 1941 through 1963 concerning facial disfigurement, some accompanied by emotional and psychic distress, and annotated 19 cases of awards exceeding the verdict in question (Appendix A); all cases in the United States except Louisiana (Appendix B); and all Louisiana cases (Appendix C)." 13 Defense L.J. 750 (1964).

1. N.Y. Rev. Pen. Law, ix.
2. Model Pen. Code § 2.02(2) (Proposed Official Draft 1962).
3. N.Y. Rev. Pen. Law § 15.05. Model Pen. Code § 2.02(2) uses the word "purposely" instead of "intentionally," in the New York Rev. Pen. Law.