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FEAR OF FUTURE DISABILITY — AN ELEMENT OF DAMAGES IN A PERSONAL INJURY ACTION

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I. INTRODUCTION

“The various forms of mental suffering are as numberless as the capacities of the human soul for torturing itself.”¹ Within the almost infinite variety of mental suffering, the courts have expressly recognized certain categories of suffering which are compensable elements of damages in an action for personal injuries. Along with the mental distress that accompanies pain, the courts have permitted compensation for fright and shock at the time of injury, humiliation caused by disfigurement, anxiety over the inability to make a living and fear of future incapacity, disability, or death.² Recovery for fear of future illness or disability is the topic of this article. Anxiety over future consequences of an injury is an element of mental suffering that is

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1. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88, at 315 (1935)[hereinafter cited as MCCORMICK].

2. *Id.* at 316-317. See generally, J. STEIN, DAMAGES AND RECOVERY IN PERSONAL INJURY AND DEATH ACTIONS §§ 34-44 (1972 & Supp. 1984) [hereinafter cited as STEIN].

compensable.³ The development of the feared future consequence need not be reasonably certain or probable.⁴ Instead, a plaintiff is entitled to recover for anxiety over the merely possible occurrence of future disability.⁵ Fear or anxiety over future complications arising out of an injury caused by the tortfeasor is not only compensable, but can be a substantial element of a plaintiff's damages.

II. DAMAGES

Before discussing the issue of compensation for fear of future disability, the purpose of damages in a personal injury action must be considered. The objective in any personal injury action is to compensate the person injured by a tortfeasor's wrongdoing. A monetary award for damages is given to the plaintiff in an attempt to restore the injured person to his condition before he was injured.⁶ Thus, damages serve as compensation for the injury sustained by the plaintiff.

The elements of damages recoverable in a personal injury action include pain and suffering, loss of earnings and impairment of earning capacity, and reasonable costs of medical treatment.⁷ The determination of damages in a personal injury action is peculiarly a function of the jury.⁸ The jury has broad discretion in awarding damages: a jury award will be left alone unless there is a clear abuse of discretion or improper behavior that is prejudicial.⁹

Recovery for loss of earnings and earning capacity and for medical treatment is easily understood; recovery for pain and suffering is not. The category of pain and suffering contains two separate elements: pain is the immediate physical effect of an injury, whereas suffering concerns the resulting mental distress.¹⁰ Although not directly connected to bodily injury, mental suffering accompanies pain and the two are difficult to distinguish.¹¹ Thus, one who sustains bodily inju-

3. STEIN, *supra* note 2, § 33, at 53.

4. *Id.* at § 41.

5. *Id.*

6. 2 F. HARPER AND F. JAMES, THE LAW OF TORTS, § 25.1 (1956)[hereinafter cited as HARPER AND JAMES]; M. MINZER, DAMAGES IN TORT ACTIONS, § 1.02, at 1-6, n. 1 and cases cited therein. (MB 1982)[hereinafter cited as MINZER].

7. HARPER AND JAMES *supra* note 6, at §§ 25.8 - 25.10.

8. *Mansfield v. Company of New Haven*, 174 Conn. 373, 374-75, 387 A.2d 699, 699 (1978). Other jurisdictions have explained the role of the jury in determining damages in a similar fashion. See MINZER, *supra* note 6, § 1.00, at 1-4.

9. See A. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, § 1325 (9th ed. 1912)[hereinafter cited as SEDGWICK].

10. MCCORMICK, *supra* note 1, § 88, at 317.

11. *Id.*

ries is entitled as a matter of law to recover not only for pain caused by the injury, but for the mental suffering as well.¹²

While damages for loss of earnings or medical expenses are to some extent susceptible of calculation, the same is not true of damages for pain and suffering.¹³ Pain and suffering is a peculiarly personal element of a plaintiff's damages and, as such, is nebulous and indeterminate. As explained by one commentator: "The law has no standard by which to measure pain and suffering in money. This must be done by the jury in their discretion"¹⁴ Because of its nature, recovery for pain and suffering is often the largest portion of an award in a personal injury action.¹⁵ In a recent decision by the high court of Kentucky, in which a jury verdict of \$390,000 was reinstated, \$224,500 of the total award was for the plaintiff's pain and suffering.¹⁶ As this case illustrates, pain and suffering can be an important basis of recovery.

III. DISCUSSION

An early Connecticut supreme court decision permitted the jury to consider the fact of increased susceptibility to illness and the resulting anxiety as a distinct element of damages. In *Figlar v. Gordon*,¹⁷ the court upheld a jury verdict awarding damages to a sixteen year old plaintiff for injuries including a depressed skull fracture and laceration of the brain which she sustained when she was struck by the defendant's motor vehicle.¹⁸ Medical evidence was presented establishing a

12. SEDGWICK, *supra* note 9, § 47, at 92. See *Ramson v. N.Y. and Erie R.R.*, 15 N.Y. 415, 421-22 (1857) ("That pain and suffering [are] a real and substantive injury cannot be disputed."); *accord* *Merrill v. L.A. Gas & Elec.*, 158 Cal. 499, 512, 111 P. 534, 540 (1910).

13. SEDGWICK, *supra* note 9, § 41, at 46-47.

14. MCCORMICK, *supra* note 1, § 88, at 315.

15. *E.g.*, *Esteves v. Somco Fuel, Inc.*, (N.Y. Sup. Ct. 1980) as reported in *Personal Injury Newsletter* 317 (May 11, 1981), in which the plaintiff, a 70 year old apartment building superintendent, received second and third degree burns over half of his body when an apartment building boiler exploded. The plaintiff, who was hospitalized for 77 days and had permanent nerve damage, was awarded \$1,098,000; \$900,000 of the total award was for pain and suffering. See also *Martin v. New Orleans*, 678 F.2d 1321 (5th Cir. 1982), in which the plaintiff was shot, causing a bullet to become lodged in his neck near the spinal cord, creating the risk of life-threatening future complications. A jury award of \$500,000 was not excessive "in light of this emotional burden and the serious physical risk" the plaintiff would always have. *Id.*

16. *Davis v. Gravis*, 672 S.W.2d 928 (Ky. 1984).

17. 133 Conn. 577, 53 A.2d 645 (1947).

18. *Id.* at 584, 53 A.2d at 648. The plaintiff also sustained a comminuted fracture of the right tibia and fibula. At the time of trial, the plaintiff walked with a limp and had a ten percent loss of use of the lower right leg. *Id.* at 584-85, 53 A.2d at 648.

possibility that the plaintiff might develop epilepsy within 10 to 15 years following the accident.¹⁹ In discussing the plaintiff's injuries, the court stated that:

While the evidence would not justify an award of damages based upon the occurrence of epilepsy in the future because it went no further than to deal with this as a possible result, the danger that it might ensue was a present fact and the jury was entitled to take into consideration anxiety resulting therefrom.²⁰

Based upon the plaintiff's injuries, including anxiety over the possibility of developing epilepsy, the jury verdict was upheld.²¹

Interestingly, the only authority cited by the Connecticut court in support of permitting recovery for anxiety as to future disability was earlier Connecticut law permitting recovery for pain and suffering in general.²² With little explanation the Connecticut court made a leap from permitting recovery for mental suffering in general terms to permitting recovery for a distinct element of mental suffering: mental suffering caused by fear of possible future illness or disability.

Although not expressly explained by the court, recovery for fear of a future disability is a separate element of damages, distinguishable from recovery for the future illness or disability itself.²³ Recovery for fear or anxiety over future complications arising out of an injury is allowed when there is only a possibility that the feared complication will occur.²⁴ There is no requirement of certainty or probability as to

19. *Id.* at 585, 53 A.2d at 648.

20. *Id.*

21. *Id.* at 585-86, 53 A.2d at 648.

22. *Id.* at 585, 53 A.2d 648 (*citing* Orlo v. Connecticut, 128 Conn. 231, 21 A.2d 402 (1941), a case of first impression permitting recovery for negligently inflicted emotional distress where no physical injury was sustained). The first Connecticut decision permitting recovery for mental suffering related to physical injury was *Seeger v. Barkhamstead*, 22 Conn. 290 (1853), in which the court stated that the plaintiff was entitled to recover for his actual injuries and that his injuries included mental suffering. The court explained:

His mind is no less a part of his person than his body: and the mental suffering of the former are often times more acute and also more lasting than those of latter. . . . The dismay, and the consequent shock to the feelings which is produced by the danger attending a personal injury, not only aggravates it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say, that it does not enter into the character and extent of the actual injury, and for a part of it would be an affront to common sense.

Id. at 299. See also *Maisenbacker v. Society Concordia*, 71 Conn. 369, 377, 42 A. 67, 69 (1899)(mental suffering is a natural and direct result of an assault and may be proved as an element of actual damages).

23. *MCCORMICK*, *supra* note 1, § 88, at 315. See also *STEIN*, *supra* note 2, §§ 41, 42.

24. See e.g., *Murphy v. Penn Fruit Co.*, 274 Pa. Super. 427, 418 A.2d 480 (1980), discussed *infra* note 51.

the development of the future consequence which is the source of the plaintiff's mental suffering.²⁵ In contrast, recovery for the future complication or disability itself is, in most jurisdictions, predicated upon a showing that the future disability is medically probable or reasonably certain.²⁶ Both the courts and commentators have criticized the inadmissibility of evidence of the less than certain or probable consequences of an injury. Wigmore notes that: "The courts have . . . proceeded upon a confused apprehension of a legitimate doctrine of Torts, namely, that recovery may be had for such injurious consequences only as are fairly certain or probable, not for merely possible harm."²⁷ Wigmore concludes that the exclusionary rules should not be applicable to recovery of personal injury damages, inasmuch as the application precludes any testimony as to future illness or disability.²⁸

Notwithstanding such criticism and even though there has been a judicial movement toward a less strict standard of proof,²⁹ most jurisdictions continue to require medical certainty or reasonable probability in order for any future disability to be compensable. This, in part, illustrates the importance of recovery for the mental suffering caused by anxiety resulting from an injury. One commentator criticized the reasoning of the *Figlar* court in permitting an award for anxiety over future consequences as "semantical shadow-boxing to escape the harshness of the reasonable certainty standard."³⁰ Escaping the certainty standard, however, is not the reason for permitting recovery for anxiety. Anxiety is a separate element of a plaintiff's damages. Its importance rests on its nature as a peculiarly personal element of damages. Such mental suffering is clearly compensable apart from its relationship to the actual disability feared. Thus, whether or not a future

25. See e.g., *Bowley v. Duca*, 80 N.H. 548, 120 A. 74 (1923)(damages recoverable for mother's apprehension that child would be born deformed despite scientific evidence to the contrary).

26. For a discussion of the related issue of recovery for future consequences of an illness, see Brachtenbach, *Future Damages In Personal Injury Actions - The Standard of Proof*, 3 GONZAGA L. REV. 73 (1968)[hereinafter cited as Brachtenbach]. An early Connecticut court discussing recovery for future pain and suffering stated that: "When a plaintiff has by a fair preponderance of the evidence satisfied the jury that future pain and suffering in consequence of his injur[ies] is reasonably likely, or probable, or to be expected, he should be compensated for these as well as for those which are certain to occur." *Johnson v. Connecticut Co.*, 85 Conn. 438, 441, 83 A. 530, 531 (1912).

27. 2 WIGMORE, EVIDENCE, § 663 (Chadbourn rev. 1979).

28. 7 WIGMORE, EVIDENCE, § 1976 (Chadbourn rev. 1979).

29. See e.g. *Feist v. Sears Roebuck & Co.*, 267 Or. 402, 517 P.2d 675 (1973); *Schwegel v. Goldberg*, 209 Pa. Super. 280, 228 A.2d 405 (1967).

30. Brachtenbach, *supra*, note 28 at 87. Interestingly, contrary to the author's description of the *Figlar* court's reasoning as a forerunner to an outright repudiation of the probability or certainty requirement, the requirement has to date retained its validity.

injury can be established absent probability or certainty, recovery for fear of the possibility of future consequences remains a viable and important element of pain and suffering.

Recovery for present anxiety over possible future illness is justified on the grounds that the plaintiff must bring an action for damages within the time limits fixed by law. All damages, past, present and future, must be determined in a single action.³¹ Fear of the possible future consequences of an injury is considered as a matter of law in order to make the plaintiff whole.³² As explained by one commentator: "So where one was bitten by a dog suspected of being bad, he was allowed to recovery for his fear of evil results . . ."³³ Thus, the plaintiff is entitled to present evidence establishing fear of future consequences and is entitled to a jury charge on the subject.³⁴ The defendant, in turn, has the right to move for a new trial on the grounds that a resulting jury award may be excessive.³⁵

A leading argument against permitting recovery for future damages generally, and fear of future damages specifically, is that such damages cannot be accurately determined by the trier of fact. An early decision³⁶ stated in regard to pain and suffering: It "is intangible, incapable of test or trial."³⁷ In a divided New York decision permitting damages for fear of future illness,³⁸ the dissenting opinion argued that "recovery would depend upon the subjective mind of the

31. 1 J. SUTHERLAND, LAW OF DAMAGES (4th Ed. 1916); See also *Filer v. N.Y. Central R.R.*, 49 N.Y. 42, 44-45 (1872); *Schwegel v. Goldberg*, 209 Pa. Super. 280, 287, 228 A.2d 405, 409 (1967) ("[T]he plaintiff was entitled to recover not only the damages which had been actually sustained . . . but also compensation for future damages. . .").

32. E.g. *Feist v. Sears Roebuck & Co.*, 267 Or. 402, 517 P.2d 675 (1973) (condition of being susceptible to a disease is compensable, even absent any present harm caused by the possibility); *Schwegel v. Goldberg*, 209 Pa. Super. 280, 287, 228 A.2d 405, 409 (1967) (nothing "evidentially improper" about admitting evidence of the plaintiff's possible development of epilepsy after sustaining a fractured skull).

33. SEDGWICK, *supra* note 9, § 47 at 76-77. Sedgwick also stated that "Mental anxiety and distress, which, though the direct and natural result of the injury, are independent of it, are subjects of compensation." *Id. Accord*, MCCORMICK, *supra* note 1, § 88, at 316; RESTATEMENT (SECOND) OF TORTS, § 905, comment e ("as an element of damages for a tort, one may be entitled to recover for a feeling of anxiety . . . if this is the expectable result of the defendant's tortious act . . .").

34. 2 WIGMORE, EVIDENCE, § 663 (Chadbourn ed. 1979). See also *Schwegel v. Goldberg*, 209 Pa. Super. 280, 281, 228 A.2d 405, 405.

35. MCCORMICK, *supra* note 1, § 18, at 71.

36. *Southern Pacific Co. v. Hetzer*, 135 F. 272 (8th Cir. 1905).

37. *Id.* at 274. The court added that evidence of pain and suffering, "like that which convicted the alleged witches, rests entirely in the belief of the sufferer and . . . is not susceptible of contradiction or rebuttal." *Id.* at 274.

38. *Ferrara v. Galluchio*, 5 N.Y. 2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958). See discussion of the *Ferrara* decision *infra* notes 63 & 64 and accompanying text.

litigating plaintiff and speculation by the physician."³⁹

Those courts permitting recovery for present fear of future illness have done so based upon common sense, which is the basis for recovery for pain and suffering in general. As noted by one commentator: "The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury" ⁴⁰ Similarly, as explained by the Oregon Supreme Court⁴¹ in holding that the condition of being susceptible to a disease is a compensable form of mental suffering:

We believe, as a matter of common sense, that the jury can properly make a larger award of damages in a case involving a skull fracture of such a nature as to result in a susceptibility to meningitis than in a case involving a skull fracture of such a nature as not to result in such danger or risk or susceptibility.⁴²

So too a jury can use common sense in making a larger award for damages which include fear or anxiety over a future illness.

Recent decisions have evidenced a growing acceptance of permitting recovery for varied forms of mental suffering, including present fear of future illness.⁴³ A plaintiff has been found to be entitled to damages for pain and suffering in a tort action when the pain and suffering is evidenced only by the plaintiff's subjective complaints.⁴⁴ A claim of mental suffering need only be proven by a fair preponderance of the evidence.⁴⁵ The fields of medical science and mental health have advanced sufficiently to permit a trier of fact to determine the extent of mental suffering to the same degree as physical suffering.⁴⁶ The judicial trend toward acceptance of recovery for mental suffering is evident from other areas of recovery in tort actions, including recov-

39. *Id.* at 23, 152 N.E. 2d at 254, 176 N.Y.S. 2d at 1001 (Froessel, J., dissenting). The dissenting opinion argued further that "legal suffering does not include mental suffering in contemplation of injury which may never develop." *Id.*

40. MCCORMICK, *supra* note 1, § 88, at 319.

41. *Feist v. Sears Roebuck & Co.*, 267 Or. 402, 517 P.2d 675, (1973) (four year old was struck on head by falling cash register at the defendant's store, fracturing the child's skull).

42. *Id.* at 412, 517 P.2d at 680. *See also* *Smith v. Boston & Maine R.R.*, 187 N.H. 246, 258, 177 A. 729, 738 (1935) (that there is a possibility of illness only does not alter mental suffering "unless the jury found the fear so fantastic as to make them believe that it was not in fact entertained.").

43. *See* STEIN, *supra* note 2, §§ 40-42.

44. *See e.g.*, *Delott v. Roraback*, 179 Conn. 406, 409, 426 A.2d 791, 793 (1980).

45. *E.g.* *Buckley v. Lovallo*, 2 Conn. App. 579, 589, 481 A.2d 1286, 1292 (1984) (finding error with jury charge requiring a stricter standard of proof for claims of mental suffering; mental suffering need only be shown by a fair preponderance of the evidence).

46. *Id.* *See also*, *Culbert v. Sampson*, 444 A.2d 433, 436 (Me. 1970).

ery for negligently or intentionally inflicted mental suffering absent physical injury,⁴⁷ bystander recovery,⁴⁸ and recovery for traumatic neurosis.⁴⁹

IV. RECOVERY FOR POSSIBLE FUTURE MEDICAL CONDITIONS

Many medical conditions are known to occur with increased frequency after trauma even though they are not certain to develop. These include meningitis and epilepsy following injury to the head, sympathetic eye loss, and cancer. One of the earliest permitted grounds for recovery for anxiety was fear of hydrophobia resulting from a dog bite.⁵⁰ Several courts have permitted recovery for anxiety over developing these possible medical conditions following an injury even though the plaintiff has not established that the condition will develop.⁵¹

A. *Cancerophobia*

One important area of recovery is for fear of cancer, or cancerophobia. As early as 1912, a North Carolina court recognized fear of cancer as a source of mental suffering.⁵² Fear of cancer may occur when the plaintiff is overexposed to radiation from an x-ray or some other source that causes burns which in turn may result in cancer at some time in the future.⁵³ Also common is the fear of cancer after a

47. For a general discussion of recovery for mental distress absent physical injury, see W. PROSSER & W. KEETON ON THE LAW OF TORTS, § 54, at 359-62 (5th ed. 1984).

48. *Id.* at 365-67.

49. *E.g.*, *Murphy v. Penn. Fruit Co.*, 274 Pa. Super. 427, 418 A.2d 480 (1980) (\$450,000 verdict for injuries arising out of a stabbing incident in the defendant's parking lot included damages for psychiatric changes of a permanent nature); *Rennick v. Freuhauf Corp.*, 82 Wis. 2d 793, 264 N.W.2d 264 (1978) (chronic anxiety reaction caused by accident was compensable); *Lalonde v. Weaver*, 360 So.2d 542 (La. 1978).

50. *See e.g.*, *Warner v. Chamberlain*, 12 Del.(7 Houst.) 18, 30 A. 638 (1884).

51. *See* text accompanying notes 54-69 *infra*.

52. *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E. 885 (1912)(testimony by physician that cancer would likely follow severe molten metal burn admissible as tending to prove acute mental suffering). *Id.* at 331, 74 S.E. at 886.

53. *See e.g.*, *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 179 A.2d 401 (1962), in which the plaintiff, a physician, was awarded \$25,000 for injuries to his hands resulting from his opening a metal cylinder containing a bottle of ethyleneimine, causing chronic ulceration and breakdown of the skin. The court noted that it was not clear whether the jury accepted the suggestion of probable future cancer or awarded compensation for the plaintiff's fear of developing cancer. *Id.* at 76, 179 A.2d at 411. *See also* *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351 (La. 1974), in which expert testimony showed that plaintiff was likely to develop cancer 20 to 30 years after his injury caused by handling a radioactive pill. In reinstating the trial court's award, which had been reduced by the appellate court, the supreme court noted that:

While to a scientist in his ivory tower the possibility of cancerous growth may be

traumatic injury to a part of the body.⁵⁴ In one case, a female plaintiff who was injured in an motor vehicle accident was compensated for anxiety over a resulting bruise on the breast bone which she feared would result in cancer.⁵⁵

A recent federal decision highlights the significance of recovery for cancerophobia. In *Weatherill v. University of Chicago*,⁵⁶ two female plaintiffs sought damages for injuries caused by their exposure in utero to diethylstilbestrol, DES, which was administered to their respective mothers as part of an experiment conducted by the defendant university. At the time of trial neither plaintiff suffered from any cancerous or pre-cancerous condition. They alleged, however, that their prenatal exposure to DES significantly enhanced the likelihood of contracting cancer in the future. The plaintiffs sought damages for their fear of developing cancer, not for the increased risk of cancer itself.⁵⁷ The court held that the plaintiffs need only establish reasonable fear of developing cancer and were not required to establish with reasonable certainty that cancer would in fact develop.⁵⁸

Compensation for fear of future complications is especially appropriate in actions involving prenatal exposure to DES, radiation exposure, and actions for damages for asbestosis and related diseases. In a recent decision, the court of appeals for the fifth circuit permitted recovery for fear of the possibility of cancer where the plaintiff, an insulation worker, had been exposed to asbestos in the course of his employment.⁵⁹ In such instances it is possible that cancer may develop in the future, although the illness may not occur for some time and its development is often not certain. The knowledge that cancer may occur at some future time is clearly a source of worry and, as

so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to the worrying workman, faced every minute of his life with a disabled and sometimes painful hand to remind him of his fear.

Id. at 353.

54. *East. Ala. Express Co. v. Dupes*, 271 Ala. 504, 124 So.2d 809 (1960).

55. *Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Pa. 1951).

56. 565 F. Supp. 1553 (N.D. Ill. 1983).

57. *Id.* at 1556.

58. *Id.* at 1559. The court rejected the defendant's argument that the plaintiffs were required to establish that the feared future injury was reasonably certain to develop from a present injury. *Accord Ferrara v. Galluchio*, 5 N.Y.2d 16, 19-20, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) (In order to recover for mental anguish a basis for "mental anxiety" must be established, but the plaintiff need not prove certainty of the development of the illness feared.).

59. *Dartez v. Fibre Board Corp.*, Docket No. 83-2504 (5th Cir. July 15, 1985).

such, is compensable.⁶⁰

Often a plaintiff's fear of susceptibility to future medical disability is based upon a physician's disclosure of the increased susceptibility or possibility of illness. A physician's disclosure has been found to be a reasonable basis for anxiety by the injured person.⁶¹ In a New York case of first impression, the court noted the novelty of the wrongdoer's liability for "purely mental suffering arising from the information the plaintiff received from a doctor to whom she went for treatment of the original injury."⁶² In that case the treating physician suggested that radiation burns received by the plaintiff and caused by the defendant's negligence in taking x-rays should be checked periodically because the burns might become cancerous. The doctor's recommendation was the basis for the plaintiff's cancerophobia. The court, in a divided opinion, found that the second doctor's advice increased the plaintiff's mental anguish. Increased mental anguish is compensable to the same extent that subsequent physical aggravation of an injury is compensable. The New York court concluded: "[F]reedom from mental disturbance is now a protected interest in this state."⁶³

B. *Epilepsy*

Epilepsy and meningitis frequently develop following trauma to the head. The chances of either developing are often slight, but the possibility may continue for a number of years.⁶⁴ In a Louisiana action, the plaintiff sustained a cerebral concussion as a result of a motor vehicle accident.⁶⁵ Medical testimony was presented to the effect that there was a two percent to a five percent chance that the plaintiff would develop epilepsy in the future.⁶⁶ In upholding the jury award, the court explained: "While we agree . . . that Mrs. Heider has not proved the existence of epilepsy, we certainly concur with the trial judge in his conclusion that she has proved the existence of her fear of

60. See e.g., *Wetherill v. Univ. of Chicago* 565 F. Supp. 1553, 1561 (E.D. Ill. 1983).

61. STEIN, *supra* note 2, § 42.

62. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 19-20, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958). See also *Baylor v. Tyrrell*, 177 Neb. 812, 824-25 131 N.W.2d 393, 402 (1964) (disclosure by physician that in the five years following a hip fracture, the 77-year-old plaintiff's hip may deteriorate, coupled with actual deterioration, was a reasonable basis for the plaintiff's fear of future disability).

63. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

64. B. Jennett, *Epilepsy After Blunt Head Injuries*, found in LATE EFFECTS OF HEAD INJURY (1969).

65. *Heider v. Employers Mutual Liability Ins. Co. of Wis.*, 231 So.2d 438 (La. 1970).

66. *Id.* at 441-442.

becoming an epileptic and its adverse effects on her."⁶⁷ In a recent Kentucky decision, the court reinstated the jury's verdict which included an award for pain and suffering in the amount of \$224,500.00.⁶⁸ As a result of a motor vehicle accident, the plaintiff in that case suffered a fractured skull which caused leakage of cerebral spinal fluid, which in turn created a possibility of future complications including meningitis.⁶⁹ The plaintiff's constant fear that she might develop meningitis and the effect of that fear upon her life justified the large award for pain and suffering.⁷⁰ Other jurisdictions have likewise permitted recovery for fear of epilepsy or meningitis following head trauma.⁷¹

C. *Sympathetic Eye Loss*

The loss of an eye is clearly a cause for anxiety, not only because of the injury itself, but also because of the possible loss of the remaining eye. In a recent Texas decision, a 44 year old plaintiff suffered the loss of his right eye during the course of surgery for reattaching the retina.⁷² At trial, the plaintiff testified that he would continue to have anxiety over the injury for the remainder of his life.⁷³ The plaintiff stated that he "constantly worries about something happening to his left eye and about what would happen if he lost his present job."⁷⁴ On appeal the court found that the \$500,000 jury verdict was not excessive, considering the evidence of the plaintiff's mental anguish, which included worry concerning his well-being.⁷⁵ In *Walsh v. Brody*, the

67. *Id.* at 442.

68. *Davis v. Gravis*, 672 S.W.2d 928 (Ky. 1984).

69. *Id.* at 929-30. The plaintiff was advised by one physician that she should undergo an operation to stop the leakage of fluid in order to avoid the possibility of meningitis. A second physician warned the plaintiff against the operation because of the life-threatening complications involved. *Id.* Thus, the plaintiff suffered from anxiety over the fear of meningitis, as well as anxiety about whether or not to undergo the dangerous operation. *Id.* at 930.

70. *Id.* at 933.

71. *See also* *McCall v. United States*, 206 F. Supp. 421 (E.D. Va. 1962) (\$40,000 award to minor plaintiff for head injuries upheld, in part because of possibility of future epilepsy); *Armour & Co. v. Cartledge*, 176 So. 334 (1937) (jury entitled to consider possibility of future epilepsy as evidence of the plaintiff's present condition); *Davis v. Gravis*, 672 S.W.2d 928, 933 (Ky 1984).

72. *Cezeaux v. Libby*, 539 S.W.2d 187 (Tex. 1976). This was a malpractice action against the anesthesiologist for failure to administer an adequate dosage of anesthesia to insure immobility during the operation. The plaintiff moved while a doctor had a needle in his eye, resulting in injury to the eye.

73. *Id.* at 189.

74. *Id.* The plaintiff's testimony was supported by the testimony of his physician.

75. *Id.* at 189-90.

appellate court found error in the trial court's refusal to permit medical testimony concerning the effect of the plaintiff's eye injury caused by the tortfeasor on future surgery she required for a pre-existing cataract.⁷⁶ The appellate court ruled that the medical testimony was needed to establish the plaintiff's damages, including the effect of the injury on her anticipated cataract surgery and her claim of mental anxiety resulting from the injury.⁷⁷ A new trial was ordered to enable the plaintiff to establish the effect of the eye injury on her mental state.⁷⁸

D. *Injury to Unborn Child*

A somewhat specialized area of recovery is for the anxiety of a pregnant mother for fear of injury to her unborn child arising out of injuries to the mother herself.⁷⁹ In a number of decisions, the apprehension of a pregnant woman that her child may be born injured or dead as a result of injury to the mother has been found to be an element of damages.⁸⁰ As one court reasoned, since any mental suffering that is a natural result of a physical injury is recoverable, the anxiety of an injured pregnant woman for the well-being of her unborn child is a natural result of the mother's injury and compensable.⁸¹ In *Nomey v. Great American Indemnity Co.*,⁸² the court increased the jury's award of damages to a woman, who was more than eight months pregnant at the time she was injured, for mental pain and anxiety caused by the possibility of injury to her unborn child. The court found the jury award inadequate on the grounds that, though the normal delivery occurred eight days after the accident, the mother's anxiety continued for some weeks.⁸³

76. 220 Pa. Super. 293, 286 A.2d 666 (1971).

77. *Id.* at 297, 286 A.2d at 669. The court stated that "(w)ithout this proof of the increase in hazards attendant to the cataract surgery, the jury could not properly assess plaintiff's claim for mental anxiety." *Id.*

78. *Id.* at 298, 286 A.2d at 669.

79. MCCORMICK, *supra* note 1, § 88, at 315: "[I]n case of injury to a pregnant woman, the apprehension that the child will be born disfigured" is compensable.

80. *E.g.*, *Atlanta Veterans Transportation, Inc. v. Cagle*, 106 Ga. App. 551, 127 S.E.2d 702 (1962); *Davis v. Murry*, 29 GA. App. 120, 113 ED 827 (1927); *Prescott v. Robinson*, 74 N.H. 460, 69 A. 522 (1908); *Feheley v. Senders*, 170 Or. 457, 135 P.2d 283 (1943).

81. *Feheley v. Senders*, 170 Or. 457, 460-61, 135 P.2d 283, 285 (1943).

82. 121 S.2d 763, 766 (La. 1960).

83. *Id.* The court increased the jury award for anxiety from \$500 to \$1,000. *Id. Cf. Johnson v. State Farm Mut. Auto Ins. Co.*, 136 S.2d 446 (La. App.1961), in which the court found adequate an award of \$200 for the anxiety suffered by a pregnant woman for the health of her unborn child. *Id.* at 448. The court found that the plaintiff's anxiety was

E. *Apprehension of Death*

Compensation may also be had for apprehension of death. In one Connecticut decision,⁸⁴ the appellate court found no error in a jury charge concerning mental suffering, including fear of death.⁸⁵ The decedent died during the course of delivery of her child. She was conscious for several hours prior to death, during which time she complained of pain and underwent therapeutic measures and unusual procedures, which "may well have resulted in an apprehension of death."⁸⁶ The court concluded that the jury could reasonably have inferred that the decedent suffered mental anguish because of the apprehension of death.⁸⁷ In a Louisiana action, recovery for apprehension of death was permitted where the decedent was hospitalized for 41 days prior to death, during which time he worried about whether he would live, walk again, or father children.⁸⁸ He also had dreams and premonitions of death.⁸⁹

V. REQUIREMENTS FOR RECOVERY

Some courts have permitted recovery where there is not even a possibility that the feared disability will develop. Unlike the case law discussed above, these are cases in which there is no medical evidence

mitigated by her status as an unmarried mother who was giving birth to her fourth child in as many years. *Id.*

In one instance, anxiety of the parents of a child born alive but potentially brain damaged was included as an element of damages in a case of obstetrical malpractice. *Friel v. Vineland and Obstetrical and Gynecological Professional Assoc.*, 166 N.J. Super. 579, 400 A.2d 147 (1979). But, damages are generally not recoverable for "loss of the unborn child" where injuries result in a miscarriage. *Webb v. Snow*, 102 Utah 435, 444, 132 P.2d 114, 119 (1942).

84. *Katsetos v. Nolan*, 170 Conn. 637, 368 A.2d 172 (1972). *See also* *Orlo v. Connecticut Co.*, 128 Conn. 231, 236, 21 A.2d 402, 404 (1941), for earlier decisions permitting compensation for apprehension of death.

85. The charge provided in part: "A person injured by the wrongdoing of another is just as much entitled to be compensated for mental suffering caused thereby as for physical suffering, including the fear that death will result." *Katsetos v. Nolan*, 170 Conn. 637, 655 n.3, 638 A.2d 172, 182 n.3 (1976).

86. *Id.* at 655, 638 A.2d at 182. *See also*, WRIGHT, CONNECTICUT JURY INSTRUCTIONS, § 226 (3d ed. 1981).

87. *Katsetos v. Nolan*, 170 Conn. 637, 655, 638 A.2d 172, 182 (1972). *Accord*, *Fairbanks v. State*, 143 Conn. 653, 660, 124 A.2d 893, 898 (1958)(reasonable inference that the plaintiff suffered mental anguish because of the apprehension of death).

88. *Roundtree v. Technical Welding & Fabrication Co.*, 364 So.2d 1325, 1331 (La. 1978)(jury awarded the plaintiff a total of \$668,157.32; \$125,000 of the award was for "conscious intense pain and suffering, emotional distress, abject fear of death and/or permanent paralysis." *Id.* at 1330-31.).

89. *Id.* at 1331. The decedent also complained of pain which he described as "hell on earth." *Id.*

that the disability feared is related to the injury sustained as a result of the tortfeasor's negligence. In *Murphy v. Penn Fruit Co.*, the plaintiff sought damages for injuries sustained as a result of a stabbing incident in the defendant's parking lot.⁹⁰ The plaintiff sustained severe injuries to the heart, left lung, and breast. The injuries healed.⁹¹ At trial the plaintiff complained of fear of heart attacks, cancer, and brain damage, none of which had any causal connection to her physical injuries.⁹² The jury was instructed that it could consider damages for pain and suffering and mental anguish and returned a verdict for \$450,000.⁹³ The judgment was affirmed by the appellate court which stated that "in appropriate cases the plaintiff can recover substantial damages for a psychic injury where she has only a minor physical injury."⁹⁴ Similarly, a New Hampshire court permitted a plaintiff struck by a train while walking on railroad tracks to recover for her mistaken fear of paralysis, which arose after she was injured.⁹⁵

More often there is a requirement that the plaintiff's anxiety have some reasonable basis. In one case, the court found no error in an instruction to the jury requiring reasonable basis for the plaintiff's mental suffering.⁹⁶ At least two jurisdictions, Wisconsin and New York, follow the rule that absent a reasonable basis for fear of future illness, it is against public policy to hold the original tortfeasor accountable.⁹⁷ In *Howard v. Mt. Sinai Hospital*,⁹⁸ the Wisconsin court overturned a plaintiff's verdict in a malpractice action, finding that the plaintiff's cancerphobia resulting from the alleged loss of a broken catheter in the plaintiff's arm was too remote and that compensation for such fear would go against public policy.⁹⁹ New York requires

90. 274 Pa. Super. 427, 418 A.2d 480 (Pa. 1980).

91. *Id.* at 435, 418 A.2d at 484.

92. *Id.*

93. *Id.*

94. *Id.* at 436, 418 A.2d at 485.

95. *Smith v. Boston & Maine Rail Co.*, 87 N.H. 246, 177 A. 729 (1935). The court explained that the plaintiff was entitled to recover for her fear that her legs might become paralyzed following injuries she sustained when struck by a freight train: "The fact of a fear so caused . . . would be an element of damages for their consideration, even though the fear was mistaken. That the fear regarded a possibility rather than a probability would not alter the reality of the mental suffering. . . ." *Id.* at 258, 177 A. at 738.

96. *E.g. Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964). *See also Heider v. Employees Mut. Ins. Co. of Wisc.*, 231 So.2d 438 (La. 1970) (in which the "possibility" of future epilepsy was well founded on medical evidence and the court held that the possibility could cause mental anguish). *Id.* at 441-42.

97. *E.g. Howard v. Mt. Sinai Hospital*, 63 Wis. 2d 515, 217 N.W.2d 383 (1974); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E. 2d 249, 176 N.Y.S. 2d 996 (1958).

98. 63 Wis. 2d 515, 217 N.W.2d 383 (1974).

99. *Howard v. Mt. Sinai Hospital*, 63 Wis. 2d 515, 217 N.W.2d 383, 385. *Cf.*,

something more than a tenuous causal connection between the original injury and the ultimate damage for which the tortfeasor will be held liable. The standard applied is that liability for damages caused by wrong ceases at a point dictated by public policy or common sense.¹⁰⁰ Thus, some courts limit recovery for anxiety by requiring some reasonable basis for the fear, whereas other courts permit recovery for anxiety even where it has no reasonable basis. With either approach, the plaintiff can be compensated for a fear of future complications that are only possible.

VI. CONCLUSION

The case law discussed in this article, though not exhaustive, does support the proposition that anxiety over the possible future consequences of an injury can be an important aspect of damages in a personal injury action. Because of the personal nature of pain and suffering and, in particular, anxiety over future disability, an award for these elements of damages will vary greatly from case to case. In the appropriate case anxiety over possible future disability may be constant and may continue for a long period of time. Such worry clearly affects the injured person's well-being. Anxiety can invade every aspect of an individual's life including his relationship to family and friends, employment, mental disposition, and outlook for the future. Anxiety over possible future disability is an element of damages the jury will consider and the damages awarded will reflect the plaintiff's anxiety. Because of the significance of the plaintiff's fear and its compensable nature, recovery for such fear can make up a substantial portion of a plaintiff's award. Accordingly, this element of damages should be explored and developed in all appropriate personal injury actions.

Dickerson v. St. Peter's Hospital, 72 Wash. 2d 196, 432 P.2d 293 (1967), in which the court permitted the jury to determine the amount of damages to which the plaintiff was entitled as a result of the loss of a catheter and the resulting possibility that the catheter might be in the plaintiff's body. The jury could award damages for the possibility that the catheter was in the plaintiff's body, but could not determine whether or not the catheter was actually in the plaintiff's body, since the latter was too speculative. *Id.* at 200, 432 P.2d at 295.

100. *Milks v. McIver*, 264 N.Y. 267, 269, 190 N.E. 487, 488 (1934), cited approvingly in *Ferrara v. Galluchio*, 5 N.Y. 2d 16, 20, 152 N.E. 2d 249, 251, 176 N.Y.S.2d 996, 1000 (1958).