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Damages: A Call For Meaningful Precedents

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The process of settlement negotiations is an essential component of the contemporary administration of justice. Without some mechanism for disposing of most cases prior to trial, our courts would be unable to cope with the continual increase in their case loads. There simply are not enough trial parts or judges to try more than a small fraction of the cases filed each year.[1] Settlement negotiations, however, cannot take place unless there are some recognized standards or guidelines by which the parties, their attorneys and insurance company claims personnel can realistically assess the value of the case under consideration.

In personal injury and wrongful death actions, the process whereby a legally cognizable injury is translated into its monetary equivalent is particularly difficult with respect to the intangible pain and suffering element of general damages. The judicial decisions dealing with the subject of damages are generally so cryptic as to be of no assistance to anyone trying to price a case by looking to what the courts have done in analogous situations.

Justice Hopkins once noted that the "fulcrum" of an opinion, on which its value largely hinges, is the point at which the author "ends his discussion of the operative facts and law and begins his explanation of the decisions."[2] That explanation is what is needed in the decisions relating to the amount of permissible damages.

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1. "For the first 10 months of 1982, civil filings in New York City jumped 32% compared with the like period in 1980." Wall St. J., Feb. 11, 1983, at 1, col. 1.

2. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES J. 49 (1969), *reprinted in* R. LEFLAR, APPELLATE JUDICIAL OPINIONS 164, 166 (1974). Appellate lawyers as well as judges can benefit from Justice Hopkins' guides for clarity of expression.

It is recognized that "there is no magic or precise mathematical formula for computing damages."[3] Adding to the difficulty is the fact that no two cases are exactly alike and, even if they were, no two individuals experiencing pain stemming from a similar injury would describe it in the same way. Indeed, most people are totally unable to articulate the nature and full extent of their pain. Virginia Woolf, in her *Essay on Being Ill*, clearly recognized this point when she wrote: "English, which can express the thoughts of Hamlet . . . the tragedy of Lear, has no words for the shiver and the headache. Let a sufferer try to describe a pain in his head to a doctor and the language at once runs dry."[4]

The court of appeals, which because of its limited jurisdiction does not ordinarily review damage awards involving issues of fact and discretion,[5] recently had occasion to observe:

> In no two cases are the quality and quantity of such damages identical. As has been pointed out by pragmatists and theorists who have wrestled with the problem of how damages in such cases may justly be arrived at, evaluation does not lend itself to neat mathematical calculation.[6]

Because each case is necessarily different, with the outcome dependent on the application of discretion to always varying fact patterns, it has long been settled law in New York that the "fixation of damages in personal injury actions is peculiarly a function of the jury."[7] At the same time, our courts have always recognized that jurors should not be given unfettered license to give away other people's money, and that there is a need to maintain some measure of control over jury verdicts "as an exercise of public policy."[8] If permitted to stand, grossly excessive awards,

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3. Rinaldi v. State, 49 A.D.2d 361, 364, 374 N.Y.S.2d 788, 792 (3d Dep't 1975).

4. V. WOOLF, *Essay on Being Ill* in 4 COLLECTED ESSAYS 194 (1925).

5. *See, e.g.*, Tate v. Colabello, 58 N.Y.2d 84, 445 N.E.2d 1104, 459 N.Y.S.2d 422 (1983); Zipprich v. Smith Trucking Co., 2 N.Y.2d 177, 180, 139 N.E.2d 146, 146, 157 N.Y.S.2d 966, 967 (1956).

6. Caprara v. Chrysler Corp., 52 N.Y.2d 114, 127, 417 N.E.2d 545, 551, 436 N.Y.S.2d 251, 257 (1981).

7. Hallenbeck v. Caiazzo, 41 A.D.2d 784, 784, 340 N.Y.S.2d 947, 949 (3d Dep't 1973).

8. Miner v. Long Island Lighting Co., 47 A.D.2d 842, 847, 365 N.Y.S.2d 873, 881 (2d Dep't 1975) (Hopkins, J., dissenting) (mem.) *rev'd on other grounds*, 40 N.Y.2d 372, 353 N.E.2d 805, 386 N.Y.S.2d 842 (1976).

such as a recent $29 million verdict in a medical malpractice action tried in New York Supreme Court, Kings County,[9] would bankrupt many defendants and their insurers and cause serious dislocations in our society. Reviewing courts must take such factors into consideration. As one federal court noted:

> The subject of excessive verdicts has been one of great concern to the courts in recent years and the maintenance of verdicts at a reasonable level is essential to the systematic functioning of our economic and business system. Distorted figures, if persistently reached in jury verdicts, will result in grave maladjustments and gross injustices . . . . Judicial decisions must be rendered with a consciousness of all aspects of our society. Our law has been evolved for the purpose of regulating society.[10]

The point at which a court may interfere with a verdict was fixed by Chancellor Kent in *Coleman v. Southwick*[11] as follows:

> 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]

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9. Marcelin v. St. John's Episcopal Hosp., Nat'l L.J., Oct. 18, 1982, at 2, col. 3. (Sup. Ct. Kings County Oct. 1, 1982). Although subsequently settled for a fraction of this amount, the verdict in *Marcelin* exemplifies what is sometimes referred to as the "Game Show" mentality prevalent among some jurors.

10. Becksted v. Skelly Oil Co., 131 F. Supp. 940, 944 (D. Minn. 1955). *See also* Broder, *Trial Tactics and Techniques*, N.Y.L.J., Feb. 10, 1983, at 4, col. 2, where the author, a well known plaintiffs' attorney notes:

> However disturbed the Plaintiffs' Bar may be by such holdings, the most zealous advocate cannot forget that judges must consider the implications of jury verdicts for the larger society in which we function. Completely unfettered jury awards would have an adverse effect on the stability of our insurance system, and thus indirectly, e.g., on the safety and convenience of the motoring and pedestrian public, or on the smooth function of the health services industry. It is not only the right, but surely the responsibility of the courts to be ever vigilant to protect our system of justice against the possibility of destruction by such verdicts.

Id.

11. 9 Johns. 45 (1812).

12. *Id.* at 52. The opinion in *Coleman* contains the following additional observations as to the respective roles of the court and jury:

> The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and

Today, the customary phraseology adopted by our appellate divisions is that a reviewing court should not substitute its judgment on the issue of damages for that of the jury unless the amount of the verdict is so excessive, or inadequate, "as to shock the conscience of the court."[13] Another formulation of the applicable standard is that "[t]o avoid usurping the function of the jury, the power [of the reviewing court] should be used only if the verdict is so disproportionate to the injury as not to be within reasonable bounds."[14]

Justice Hopkins has called attention to a further consideration, and from society's standpoint perhaps an even more important one, than merely asking whether a verdict "shocks the conscience of the court."

> [W]here a verdict awarded by the jury is so large, as in this case [$2,000,000], the question of excessiveness is not so much whether the size of the verdict outrages the court's conscience, but *whether the verdict is clearly beyond what ought to be reasonable compensation to the plaintiff in terms of uniformity and community expectations.* In short, the court should not allow verdicts which are far above the average in similar cases to stand.[15]

> unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries.

Id. at 51.

13. *E.g.*, Petosa v. City of New York, 63 A.D.2d 1016, 1017, 406 N.Y.S.2d 354, 355 (2d Dep't 1978); Hofbauer v. Withey, 53 A.D.2d 926, 926, 385 N.Y.S.2d 200, 201 (3d Dep't 1976); Rice v. Ninacs, 34 A.D.2d 388, 390, 312 N.Y.S.2d 246, 249 (4th Dep't 1970).

14. Riddle v. Memorial Hosp., 43 A.D.2d 750, 751, 349 N.Y.S.2d 855, 859 (3d Dep't 1973).

15. Miner v. Long Island Lighting Co., 47 A.D.2d 842, 847, 365 N.Y.S.2d 873, 881 (2d Dep't 1975) (Hopkins, J., dissenting) (mem.) (emphasis added), *rev'd on other grounds*, 40 N.Y.2d 372, 353 N.E.2d 805, 386 N.Y.S.2d 842 (1976).

As to how a court ascertains the "community expectations," *see* Hopkins, *Public Policy and the Formulation of a Rule of Law*, 37 BROOKLYN L. REV. 323 (1971), where Justice Hopkins observed:

> The disclosure of public opinion by samplings obtained from the citizenry or by testimony either within or outside the record has not been attempted by the courts. Instead, intuition, which has hardened into certainty, is the manner in which the court's sense of "general and well settled public opinion" is gathered.

Id. at 332.

Such general statements as to when a court will interfere with a jury's verdict, however, do not give any practical guidance to attorneys who must advise their clients whether an offer or demand is fair and reasonable, or to the insurance company claims personnel who must set adequate reserves if they are to maintain the solvency of their company. These individuals need more than generalizations; they need tools to assist them in trying to predict in a particular case just what amount is likely to "shock the conscience of the court," or will exceed "what ought to be reasonable compensation to the plaintiff in terms of uniformity and community expectations." Meaningful settlement negotiations cannot take place unless there is some commonly understood and agreed upon basis whereby all interested parties can assess how the appellate division might be expected to react to the facts of their case.[16]

Unfortunately, the type of decision that is most often rendered by our appellate divisions in cases involving claims of excessiveness or inadequacy of awards gives no indication of either the facts or the factors that led the court to its result.[17] It, therefore, fails to furnish the necessary basis for comparison with other cases. For example, in *Bishop v. Metropolitan Transportation Authority*,[18] other than noting that the injuries to plaintiff, a twenty-three year-old housewife with two small children, "were extensive and will be permanent," the decision gives no clue as to the nature of the injuries or why the court reduced the jury's $1,500,000 verdict to $750,000. Most cases do not even say as much as *Bishop*.

The cryptic form of entry in *Lovaglio v. Chen*[19] is more typical of what anyone attempting to do legal research in this unmarked area of the law is likely to encounter:

> Judgment, insofar as it is in favor of the infant plaintiff . . . re-

16. "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

17. This is to be contrasted with decisions of the appellate division relating to the appropriate measure of damages, as distinguished from quantum of damages. *See, e.g*, the full discussion by Mr. Justice Hopkins in Kaval Constr. Corp. v. State Div. of Human Rights, 39 A.D.2d 347, 334 N.Y.S.2d 341 (2d Dep't 1972).

18. 60 A.D.2d 519, 519, 400 N.Y.S.2d 2, 3 (1st Dep't 1977).

19. 57 A.D.2d 859, 859, 393 N.Y.S.2d 1021, 1022 (2d Dep't 1977).

> versed, on the law, and as between the infant plaintiff and the appealing defendants, action severed and new trial granted with respect to the issue of damages only, with costs to abide the event, unless within 20 days after entry of the order to be made hereon, plaintiffs shall serve and file in the office of the clerk of the trial court a written stipulation consenting to reduce the verdict in favor of the infant plaintiff from $1,250,000 to $750,000, and to the entry of an amended judgment accordingly, in which event, the judgment in her favor, as so reduced and amended, is affirmed, without costs or disbursements. The findings of fact are affirmed. The amount of the verdict in favor of the infant plaintiff was excessive to the extent indicated herein.[20]

The decisions are no more illuminating when the appellate division concludes that the verdict was inadequate and that an additur is appropriate.[21] Although *Nour v. Nour*,[22] for example, was decided by a divided court, neither the relevant facts nor the basis of disagreement among the justices is revealed in the court's memorandum.[23]

An even more glaring example of the court's silence is found in *Quddus v. Colontonio*,[24] where the trial court set aside the jury verdict in favor of plaintiff and ordered a new trial on the issue of damages unless plaintiff stipulated to reduce the damages from $650,000 to $70,000. On appeal, the appellate division concluded that part of the award should be reinstated and modified the judgment by substituting the sum of $200,000 for the sum of $70,000 fixed by the trial judge. Although the two courts

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20. *Id.* at 859. Review of the record on appeal in *Lovaglio* discloses that plaintiff, an infant, approximately three years of age, underwent the amputation of her leg below the knew because of defendant's malpractice. Record at 31a-32a.

21. *See, e.g.*, Nour v. Nour, 88 A.D.2d 948, 451 N.Y.S.2d 384 (2d Dep't 1982); Wadler v. Wadler, 88 A.D.2d 639, 639, 450 N.Y.S.2d 768, 769 (2d Dep't 1982).

22. 88 A.D.2d 948, 451 N.Y.S.2d 384 (2d Dep't 1982).

23. The entry in *Nour* reads as follows:

> Judgment reversed, on the law, and new trial granted limited to the issue of damages only, unless within 20 days after service upon defendant of a copy of the order to be made hereon with notice of entry, he serves and files in the office of the clerk of the Supreme Court, Nassau County, a written stipulation consenting to increase the verdict in plaintiff's favor to the principal sum of $40,000, and to the entry of an amended judgment accordingly, in which event, the judgment, as so increased and amended, is affirmed. Plaintiff is awarded costs on the appeal. The damages were inadequate to the extent indicated.

Id. at 948, 451 N.Y.S.2d at 384.

24. 90 A.D.2d 789, 455 N.Y.S.2d 744 (2d Dep't 1982).

had widely differing views of the amount of damages that could be awarded without shocking their respective consciences, the appellate division's decision states no facts and provides no insight as to the court's reasoning.

The foregoing discussion shows that the prevailing practice is for appellate courts *not* to write informative opinions on questions relating to the amount of damages.[25] This practice, understandably, may be the product of the enormous case load which each justice of the appellate division is presently being asked to carry; in 1981, the four departments of the appellate division had a combined caseload of 9,255 cases.[26] If so, that calls for much needed and long delayed remedial measures, such as the proposal contained in the American Judicature Society's (A.J.S.) study, *Appellate Justice in New York,* to create a fifth department;[27] it does not lessen the need for more meaningful precedents.

It is significant that current practice rarely reflects the theory to which the appellate courts subscribe, and to which their opinions periodically refer. This theory was enunciated over sixty years ago in *Fried v. New York, New Haven & Hudson Railroad*[28] where an $85,000 verdict, at that time the largest verdict in an action for personal injuries, was held excessive compensation for the foreman of a gang of electric linemen who lost

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25. There are, of course, exceptions. Illustrative cases containing excellent discussions of the operative facts and the nature of the injuries involved include Warmsley v. City of New York, 89 A.D.2d 982, 454 N.Y.S.2d 144 (2d Dep't 1982); Juditta v. Bethlehem Steel Corp., 75 A.D.2d 126, 428 N.Y.S.2d 535 (4th Dep't 1980); and Zaninovich v. American Airlines, Inc., 26 A.D.2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).

26. See R. MACCRATE, J. HOPKINS, & M. ROSENBERG, APPELLATE JUSTICE IN NEW YORK 99 (1982).

27. *Id.* The authors of the A.J.S. study make the following pertinent observations:

> Predicated upon their study of intermediate appellate courts, the authors of *Justice on Appeal* [Carrington, Meador and Rosenberg (1976)] concluded that if the mix of cases in not more or less difficult than the usual mix of cases for state intermediate courts, about 100 dispositions per judgeship was the maximum that could be asked for without eroding the essential qualities of appellate justice.
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> In recent times, the staggering number of appeals that each justice and panel is called upon to decide exceeds the optimum 100/400 formula recommended by the authors of *Justice on Appeal* by vast margins. When motion calendars are included in the routine work of the justices, the acute problem evinced by these statistics is further exacerbated.

Id. at 100-101.

28. 183 A.D. 115, 170 N.Y.S. 697, 704, *aff'd,* 230 N.Y. 619, 130 N.E. 917 (1921).

both arms at the shoulder sockets and suffered other injuries as the result of burns sustained when he came in contact with a high tension wire. Although acknowledging that the injuries "were very serious, inflicting necessarily great pain and anguish, and resulting in total and permanent physical disability," the appellate division concluded "that $55,000 is all that could be properly awarded."[29] The court enumerated the considerations that led to its result as follows:

> A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, *decisions on the subject by appellate courts*, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded.[30]

It is only by comparison of the award under scrutiny with recent verdicts in cases involving comparable injuries that some standard of uniformity and predictability can be attained in this important area of the law.[31]

Generally the kind of decisions currently being handed down by the appellate divisions cannot be said to "furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded."[32] They

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29. *Id.* at 125.

30. *Id.* (emphasis added).

31. The *Fried* case was quoted recently in Senko v. Fonda, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851-852 (2d Dep't 1976), where the majority voted to reduce an award from $71,500 to $50,000, noting that "prior verdicts may guide and enlighten the court, and, in a sense, may constrain it." The court in *Senko* continued as follows:

> It was observed in one early opinion: "Long observation of the action of juries in cases of [similar] personal injury . . . affords a clue to the judgment of ordinary men as to the compensation that should be made for pain and suffering; and where a verdict is much above or much below the average, it is fair to infer, unless the case presents extraordinary features, that passion, partiality, prejudice, or some other improper motive has led the jury astray." (Jennings v. Van Schaick, 13 Daly 7, 8-9 (1884); Becker v. Albany Ry., 35 App. Div. 46). Recent verdicts in cases involving comparable injuries have been much lower than the $71,500 award in the case at bar.

Id.

32. Senko v. Fonda, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851 (2d Dep't 1978) (quoting Fried v. New York, New Haven & Hudson R.R., 183 A.D. 115, 125, 170 N.Y.S. 697, 704 *aff'd*, 230 N.Y. 619, 130 N.E. 917 (1921). There are, of course, exceptions. *Senko* is an example of the type of opinion that is very helpful to the bar.

are virtually useless as precedents[33] for only the litigants involved and those interested attorneys who have access to a law library containing the records on appeal will be in a position to know the facts underlying the decision; even they will never know which of those facts, singly or in combination, were instrumental in persuading the appellate court to reach its decision. Since "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts,"[34] it is not unreasonable to ask that the courts disclose those "special facts."

Even justices of the appellate division, unless they were on the panel that decided the case, may be unaware of a relevant decision or the facts and reasoning behind it. It is, therefore, possible for two panels of the same appellate division to arrive at vastly different evaluations of cases involving very similar injuries because a later panel may be unaware of a decision by an earlier panel.

Although periodic changes in the maximum amount of compensation which the appellate divisions will permit as a matter of public policy have been observed, the limits prevailing at any given time seem almost unrelated to the particular injuries of the case under consideration. If, in fact, some sort of understanding or informal agreement has been arrived at among the members of a court that no award should be permitted to exceed a certain sum, lawyers are entitled to know that so they may take it into consideration when advising their clients.

Thus, although there were a number of jury verdicts award-

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33. In one of his most caustic passages, Jonathan Swift charged the legal profession with taking "special care to record all the decisions formerly made against common justice and the general reason of mankind" and producing these "under the name of precedent . . . as authorities, to justify the most iniquitious opinions." GULLIVER'S TRAVELS, *Voyage to the Houyhnhnms*, Ch. V, at 256 (Universal Lib. ed.).

Swift's views notwithstanding, citation of cases and their use as precedents continue to be an important part of the preparation of appellate briefs. To aid the court in reaching a reasoned result, consistent with the results in similar cases, counsel should be able to look at meaningful decisions to find support for their arguments as to the excessiveness or inadequacy of an award of damages in personal injury actions.

34. Danaan Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 157 N.E.2d 597, 600, 184 N.Y.S.2d 599, 603 (1959). The same thought was expressed somewhat differently by Justice Jackson in Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944), where he noted that "it is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."

ing damages in excess of $1 million during the 1970's, it was not until the very end of the decade that the inflationary trend discernible in trial court judgments reached our appellate divisions. Prior to that time, verdicts in excess of $1 million were consistently reduced, without explanation, to amounts below $1 million.[35] In *Coleman v. New York City Transit Authority*,[36] involving the amputation of both legs of the twenty year-old plaintiff, the court reduced the jury verdict of $1,800,000 to $930,000; in *Passantino v. Board of Education*,[37] the appellate division reduced an award of $1,800,000 to an eighteen year-old quadriplegic to $1 million. Perhaps the result most difficult to understand was in *Calloway v. Dalton*,[38] where the appellate division reduced an award from $1,184,000 to $984,000.[39] One must assume the court did not want to create a precedent leading to a higher level of sustainable awards by affirming a judgment in excess of $1 million.

The unannounced, but generally perceived, $1 million barrier was finally shattered in 1979 by the appellate division, second department, in *Ukson v. City of New York*,[40] when the court reduced an award from $2.9 million to $1.5 million with no explanation other than that "[t]he verdict was excessive to the extent indicated herein." Although not stated in the decision, the plaintiff in *Ukson* was a fifty-seven year-old quadriplegic.

For a time, it seemed as though New York appellate courts would sustain only awards in excess of $1 million in catastrophic injury cases involving quadriplegics. Then, again without any

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35. The only exception, and the first New York appellate decision upholding an award in excess of $1 million, was King v. State, 56 A.D.2d 964, 393 N.Y.S.2d 93 (3d Dep't 1977), where an award of $1,035,000 to a 17-year old quadriplegic was affirmed.

36. 44 A.D.2d 673, 355 N.Y.S.2d 326 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 137, 332 N.E.2d 850, 371 N.Y.S.2d 663 (1975).

37. 52 A.D.2d 935, 383 N.Y.S.2d 639 (2d Dep't 1976), *rev'd and complaint dismissed*, 41 N.Y.2d 1022, 363 N.E.2d 1373, 395 N.Y.S.2d 628 (1977).

38. 63 A.D.2d 941, 406 N.Y.S.2d 983 (1st Dep't), *appeal dismissed*, 45 N.Y.2d 819, 381 N.E.2d 606, 409 N.Y.S.2d 208 (1978).

39. The record on appeal discloses that plaintiff in *Calloway* was a 29 year-old woman with two young children. Record at 1066. She suffered brain damage which rendered her totally unemployable as a nurse. Her devastating injuries included a spastic leg resulting in a permanent limp, hemiplegia of the arm, unclear and hesitant speech, loss of senses of smell and taste, loss of short term memory and inability to concentrate. Record at 1066, 1106-9.

40. 68 A.D.2d 926, 414 N.Y.S.2d 296 (2d Dep't 1979).

discussion, the appellate division, first department, in *Dukes v. Strand Auto Sales,*[41] allowed a young woman to retain $1.5 million of an original $5 million jury verdict, which the trial judge had already reduced as excessive to $2.1 million. The record in *Dukes* shows that the twenty-two year-old plaintiff was rendered totally disabled because of permanent pain and an inability to sit for prolonged periods following surgery on her back which resulted in scar tissue pressing on the spinal nerves. But she was still vastly better off than a quadriplegic. Thereafter, other awards for more than $1 million were upheld in a variety of cases. In *Sullivan v. Held,*[42] the court sustained a $1.1 million award to a thirty-four year-old brickworker who broke both ankles and was permanently disabled; in *Burton v. Brooklyn Doctors' Hospital,*[43] an RLF blindness case,[44] the court reduced a verdict of $2.8 million to $1.5 million; and in *Kijewski v. Jurgau,*[45] the court reduced an award to a ten year-old boy who lost an arm from $2 million to $1.25 million.

In light of this demonstrated willingness on the part of the appellate division to sustain such large awards for injuries which, while serious, did not approach the catastrophic dimensions of quadriplegia, it was inevitable that the next quadriplegic case would raise the maximum acceptable level of damages to new heights. *Caprara* v. *Chrysler Corp.*[46] was that case; there the court reduced a $3.6 million award to a twenty-one year-old quadriplegic to $2 million. The recent decision of the appellate division, second department, in *Warmsley v. City of New York,*[47] affirming a jury award of $2 million to a forty-three year-old woman who sustained a number of fractures and whose leg was finally amputated below the knee following eleven operations over a period of almost four years, seems to signal the

41. 74 A.D.2d 779, 426 N.Y.S.2d 966 (1st Dep't 1980).

42. 81 A.D.2d 663, 438 N.Y.S.2d 359 (2d Dep't 1981).

43. 88 A.D.2d 217, 452 N.Y.S.2d 875 (1st Dep't 1982).

44. *Id.* at 218, 452 N.Y.S.2d at 877. RLF (Retrolental Fibroplasis) is a progressive disease leading to total blindness. Until the early 1950's, when the method of treatment was changed, the disease was common in premature babies exposed to prolonged, liberal application of oxygen to enable them to survive. *Id.*

45. ___ A.D.2d ___, 457 N.Y.S.2d 533 (1st Dep't 1983).

46. 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979), *aff'd,* 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

47. 89 A.D.2d 982, 454 N.Y.S.2d 144 (2d Dep't 1982).

beginning of another round in this cycle which is sure to send the maximum sustainable limit spiraling upward.

If the pain and suffering of a plaintiff who has had multiple fractures and a leg amputated is now to be valued at $2 million, what sum will be considered fair compensation for a young man who is a double amputee such as in *Coleman*,[48] or for a young quadriplegic as in *Caprara*,[49] or for a totally brain damaged baby who will require custodial care for the rest of its life? The answer, of course, was that found in *Gretchen v. United States*,[50] where the dissent correctly noted that "[p]ain and suffering cannot be eliminated by money, and any attempt to compensate it by such must be held within reasonable limits."[51]

It would be unfortunate if the *Warmsley*[52] decision were to be read by other courts and judges as a green light for approving even greater verdicts in more serious injury cases. Borrowing once again Justice Hopkins' language, such awards would be "clearly beyond what ought to be reasonable compensation to the plaintiff in terms of uniformity and community expectations."[53]

Moreover, for the courts to sanction a process that will turn plaintiffs' attorneys into instant millionaires (or even multimillionaires if the verdict is large enough) upon collection of their one-third contingent fees, will bring discredit upon the bar and further deserved criticism of the administration of justice. If decisions on the quantum of damages are not to be viewed as purely arbitrary and capricious acts of the appellate courts, dictated by the fortuitous circumstances of which individuals happen to be on the reviewing panel and the sensitivity of their respective consciences, it is essential that there be guidelines and standards governing their exercise of discretion.[54] It was recog-

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48. Coleman v. New York City Transit Auth., 44 A.D.2d 673, 355 N.Y.S.2d 326 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 137, 332 N.E.2d 850, 371 N.Y.S.2d 663 (1975). *See supra* text accompanying note 37.

49. Caprara v. Chrysler Corp., 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981). *See supra* text accompanying note 47.

50. 618 F.2d 177 (2d Cir. 1980).

51. *Id.* at 182.

52. *See supra* note 47.

53. *See supra* note 15 and accompanying text.

54. The lack of meaningful precedents in this area may account for such statements

nized long ago that "[j]udicial discretion is a phrase of great latitude; but it never means the arbitrary will of the judge."[55] Or, as Justice Cardozo phrased it, "[d]iscretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing."[56]

The truism that "[l]awyers, judges and jurors can do no more than make an intelligent guess as to the extent of pain and losses consequent upon personal injury, as no slide rule is available to accurately gauge them," was noted in *Cole v. Long Island Lighting Co.*[57] This truism, however, merely reinforces the belief that an effort should be made at better articulation of the grounds for decision so as to afford the litigants, their attorneys, and the judges, both trial and appellate, some basis for arriving at a measure of predictability and uniformity in the law of damages.

It has been suggested that "[t]here is an ongoing but silent dialogue between the Justices of the Appellate Divisions and settling attorneys. Usually settlements are somewhat in advance of the courts' contemporary awards in recognition that if they had remained unsettled, these cases might have broken new ground in the appellate courts."[58] The portion of this dialogue emanating from our reviewing courts should no longer remain unspoken.

As it now stands, it is extremely difficult for most judges and lawyers to objectively evaluate cases. This unsatisfactory situation very often precludes or aborts meaningful settlement negotiations, compels judges to decide cases on an *ad hoc* basis (in much the same manner as a jury), and results in more appeals being taken by dissatisfied litigants. The time for change is

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as: "Each case must be assessed on its own peculiar facts and circumstances. Consequently, prior decisions involving somewhat different injuries and circumstances are of little assistance," Pratt v. Susquehanna Valley Cent. School Dist., 55 A.D.2d 713, 714, 388 N.Y.S.2d 726, 727 (3d Dep't 1976); or the court's reference in Batchkowsky v. Penn Central Co., 525 F.2d 1121, 1125 (2d Cir. 1975), to "the error frequently encountered in attempting to equate one personal injury award with another," and the limitation of the "precedential value of a court's treatment of awards in other apparently similar cases."

55. *In re* Superintendent of Banks, 207 N.Y. 11, 15, 100 N.E. 428, 429 (1912).

56. Panama Refining Co. v. Ryan, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

57. 24 Misc. 2d 221, 196 N.Y.S.2d 187, 195 (Sup. Ct. Kings County 1959).

58. Broder, *Trial Tactics and Techniques*, N.Y.L.J., Feb. 10, 1983, at 4, col. 1. *See supra* note 10.

long overdue.

Addendum

In *Cover v. Cohen*,[59] the appellate division, second department, in a decision rendered after this article went to print, reduced a jury award of $3 million given to a sixty-two year-old man whose legs were crushed when a car jumped the sidewalk and pinned him against a wall. Plaintiff was hospitalized for seventeen months following the accident. His left leg was amputated seven inches above the knee and, because of the injuries to his right leg, he is now virtually confined to a wheelchair and still suffers from "phantom pain" in his missing limb. The jury also awarded plaintiff's wife $1 million on her derivative cause of action for loss of services.

The appellate division reduced the awards to a total of $2.3 million, to be allocated $2 million to plaintiff and $300,000 to his wife. The appellate division's memorandum opinion graphically describes plaintiff's injuries and his pain and suffering at some length, and then concludes:

> Although the injuries sustained by plaintiff Astor Cover are severe, *in light of all the factors in this case*, including his age (62 years old at the time of the accident in 1974), the damages awarded were excessive to the extent indicated.[60]

The court's review of the facts is certainly welcome, and provides the necessary basis for comparing the decision to other cases. But the reader is still not given any clue as to what "factors in this case" persuaded the court that $2 million was the maximum sustainable award for plaintiff's injuries, rather than $1 million or $3 million or any other arbitrarily selected number. Nor are we told how the court arrived at $300,000 as the proper compensation for plaintiff's wife on her derivative cause of action.

Is there any significant difference in the value of the *Cover* and *Warmsley*[61] cases based on such obvious factors as plaintiffs' ages (62 vs. 43), sex (male vs. female), site of the amputation (high above the knee vs. below the knee)? Should there be

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59. N.Y.L.J., Mar. 30, 1983, at 15, col. 1 (Sup. Ct., App. Div. 2d Dep't).
60. *Id.* at col. 2 (emphasis added).
61. *See supra* note 47 and accompanying text.

any difference? Did the court intend there to be any difference? Did it equate the two injuries in terms of severity and simply reduce *Cover* to the amount it had previously allowed in *Warmsley*? Did the court consider the effect of its decisions upholding $2 million award in leg-off cases on awards in cases of even more serious injuries? These are the types of questions that we hope the courts will address in the future.