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DAMAGES FOR PERSONAL INJURIES

FOREWORD

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This symposium marks the coming-of-age of the subject of damages for personal injuries. In the decade since the end of World War II, techniques of personal injury litigation have been revolutionized, with the revolution centering in large part on methods of proof and argument as to damages. The present symposium is the first systematic examination in legal literature of personal injury damages in the light of these new techniques.

McCormick's classic hornbook on damages, published in 1935, devoted only 36 of its 713 pages to damages for personal injuries, and an additional 40 pages to damages in death actions. The 84 page survey of *Developments in the Law—Damages* by which the Harvard Law Review, in 1947, brought the McCormick book up to date spent only six pages on death and personal injury actions. Patently these page allotments do not purport to correspond to the practical importance of injury and death actions. The answer must be that they represent the authors' judgment as to the intellectual content of the subject of damages in injury and death actions, as contrasted with damages in actions involving property or contracts.

The sad fact is that this evaluation, by Dean McCormick and by the editors of the Harvard Law Review, was strikingly sound. As recently as a decade ago, there was no well-developed law of damages for personal injuries. The decisions set out a few precepts, usually platitudinous, and occasionally ventured into such peripheral areas as admissibility of mortality tables, pleading rules about special damages, and recoverability of items for which the injured person had already been compensated by an insurer, his employer, or some third person. Even to the limited extent that doctrine had developed, it had done so in a manner intensely depressing to the scholar. The offhand generalization and the attenuated analogy to other areas of the law were almost always allowed to suffice on issues where careful analysis would have been rewarding. If the courts ever gave heed to the social purposes which an award of

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damages is intended to serve, they studiously avoided giving any hint of this in their opinions.

There were, I think, three main reasons for this discouraging state of affairs. First, and perhaps most important, was that it didn't make much difference what the law of damages was in personal injury cases: verdicts were generally small, while rigid concepts of "negligence" and "proximate cause," teamed up with such old judicial favorites as "assumption of risk" and the "fellow servant" doctrine, were a bar to liability in many cases. Defendants could well afford to pay the few verdicts which were entered against them, and did not need to be overly-concerned with the theoretical basis for the verdicts.

Second, judicial review on issues of damages was extremely limited. In federal court, as late as 1948, there was no review whatever of the size of verdicts in an injury or death action. Review in state courts, though more generally available, was typically inhibited by a rule, first formulated by Chancellor Kent, that the appellate court could interfere with the size of the verdict only where it was so large as to appear induced by passion or prejudice. It is true that both state and federal courts discussed damage issues where they involved admission of evidence or the correctness of instructions, but the type opinion so commonplace today, in which the court sets out at length the evidence bearing on damages and announces how much the jury could permissibly have allowed for each item, was totally unknown.

Finally, there was a feeling that awards of damages for personal injuries were essentially irrational. Who can say what the earnings of a 24 year old man, now permanently disabled, would have been at age 60? Or the extent to which earning capacity is impaired by the loss of an arm? Or the number of dollars which will compensate for a particular experience of pain? Since there is no single "right answer" to such questions as these, both courts and commentators usually were content to accept whatever guess the jury had made.

There have been drastic changes with regard to all three of these factors in the years since the war. The sums involved have become a matter of great importance: liability has been tremendously expanded, most notably in FELA cases, and the awards in particular cases are now frequently very large. Not long ago a verdict for $100,000 would have rated headlines around the country. Yet the latest issue of NACCA Law Journal lists, for the six month period it covers, nineteen reported decisions allowing verdicts of $100,000 or more, ranging all the way up to a death award of $400,000, affirmed on appeal. The game is now being played for big stakes, and it behooves both sides to press for a clear definition of the rules.

Perhaps as a consequence of the larger sums involved, appellate review is utterly transformed. In the last nine years 10 of the 11 Federal Courts of Appeal have overruled their old decisions, and held that they

can consider whether a personal injury verdict is too big. A similar trend has been apparent in the state courts. The consequence is that reported opinions discussing damage questions now appear in great volume, to provide grist for the law review mills.

Finally, though the issues involved in computing damages are as elusive as ever, modern techniques of proof of damage lend at least an air—and in some respects, a real substance—of precision and mathematical exactness. We still do not know the extent to which the earning capacity of a particular plaintiff is impaired by the loss of an arm; but tables are available, and used, which show the average impairment observed in a large group of persons so afflicted. There is still no price tag for pain; but in an era when lawyers are asking, and juries awarding, precisely $5 a day for life on this score, it becomes worthwhile to reconsider old cases which say that the award for pain and suffering need not be reduced to present worth, and indeed even to ponder whether a pecuniary award for a non-pecuniary loss is socially justifiable.

This symposium, then, stands as a symbol of the fact that for the first time we have a law of personal injury damages worthy of extensive discussion. This should not be an occasion of rejoicing, however, for those with a vested interest in the status quo. The reader will notice throughout the papers which follow an interest in, and criticism of, the theoretical justification for particular segments of this new body of law. The hard fact—inevitable in a subject which grew first carelessly and then explosively—is that a number of the existing rules cannot be justified in theory. For example, I think a good argument can be made for ignoring income tax in computing damages in a suit for personal injuries, but that it is completely unsound to use earnings before tax as a measure in a death action. Authoritative doctrine, to date, has made no distinction between the two kinds of suits. Problems such as this are brought into sharp focus by the papers collected here, and similar writing in this area which can be expected to follow. Those who are doing well with the existing rules are not likely to be pleased as the law changes in the direction of greater rationality—but perhaps this is the price they must pay for having made personal injury damages a subject of such importance that people are now writing about it.