Unmeasurable Damages and a Yardstick

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By JACK H. WERCHICK

DAMAGES for pain and suffering have been incorrectly termed “unmeasurable damages.” Since the issue involving such damages is present in all personal injury litigation and since it must be conceded that the law requires compensation for pain and suffering where proved to exist as the proximate result of defendant’s tortious conduct, this discussion will examine the reasons for the erroneous designation of pain and suffering as “unmeasurable damages,” the results of applying this erroneous concept to the trial of a personal injury case, techniques for proving and arguing these damages to the trier of fact, and the most effective methods by which the trier of fact can place a value upon them. In this analysis, attention will focus upon pertinent law and current and preferred practices of determining damages, in the expectation that certain modifications may be made in both law and procedure in this vital but unnecessarily mysterious area.

While, for the sake of convenience, only pain and suffering are referred to herein, the factors to be considered would be applicable to other forms of damages, such as loss of comfort, society and protection.

While the terminology adopted in this article has broad and general usage, the demand for uniformity necessitates the use of certain work-
ing definitions. Fundamentally, "damages" is used in its economic sense and not in a manner descriptive of injury or destruction. It is used to designate a sum of money awarded to a person injured by the tortious conduct of another by way of "compensation for detriment from the unlawful act or omission of another." "Compensatory damages" denote those damages "awarded to a person as compensation, indemnity or restitution for harm sustained by him." "Detriment" is defined as "a loss or harm suffered in person or property," i.e., the injury or destruction itself.

The search for an appropriate definition of "pain" presents greater semantic difficulties. As an example, "pain" has been defined as "a more or less localized sensation of discomfort, distress or agony resulting from the stimulation of specialized nerve endings." Such a definition constitutes a rather unsatisfying analysis and manifestly would tend to heighten rather than diminish the perplexity of the judge or attorney confronted with this phenomenon. "Pain," more comprehensively, albeit more technically, has been described as

a psychobiologic phenomenon with both physical and emotional components. This dual aspect of pain is linked to the distinction between perception of pain and reaction to pain. Perception of pain may be evaluated in terms of quality and intensity, while reaction to pain is manifested by such symptoms as tachycardia (excessively rapid heart beat), anxiety, fear, panic and prostration.

"The rigid dichotomy of organic pain versus psychogenic pain has become obsolete, and pain must be considered and approached clinically as a Gestalt problem." Pain may alternatively be referred to as lancinating, sharp, dull, smarting, exquisite, shooting, severe, mild, local, generalized, tormenting, agonizing or intense.

"Suffering" is a more comprehensive expression denoting a broader

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5 This usage is compelled by the Anglo-American practice of pecuniary compensation for injury in the form of "damages" which theoretically equal and offset the detriment suffered by the victim. Since the element of pain and suffering is practically never absent from personal injury litigation, it is vital that this semantic distinction ultimately be eliminated by minimizing the uncertainty of the transition from destruction to indemnity.
6 Restatement, Torts § 902 (1939).
8 Restatement, Torts §§ 901, 903 (1939).
11 Finneson, Diagnosis and Management of Pain Syndromes 15 (Saunders ed. 1962).
concept than pam, since it lacks the rigidity which comes from inclusion in a standard scientific vocabulary. In the field of torts, "suffering" includes such conditions as worry, anxiety, embarrassment, humiliation, mental anguish or torment, shock, fright, fear, apprehension, terror, grief, sorrow, ordeal, nervousness and the like. This concept is properly used in the courtroom, despite its broad scope, for it is descriptive of matters which will be in issue under varying circumstances.

There is complete agreement with regard to the propriety of awarding damages for pam and suffering arising out of tortious conduct. This is simply illustrated by the following axioms:

"[W]hoever does an injury to another is liable in damages to the extent of that injury."\(^{14}\)

"A person injured by the tort of another is entitled to recover damages from him for all harm, past, present and prospective, legally caused by the tort."\(^{16}\)

The plaintiff may recover damages for physical pain and for mental suffering which result from or accompany the physical injury.\(^{16}\)

"The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering; nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injury."\(^{17}\)

The jurors may estimate such damages from the facts and circumstances in evidence and by considering them in connection with their own knowledge and experience in the affairs of life.\(^{18}\)

However, there is an absence of uniformity in the procedures for determining and in the amount of damages awarded for pam and suffering, even where there are qualitatively and quantitatively comparable injuries, regardless of whether comparisons are made within a given state or between various states. How does this occur in light of the universal recognition of the right to compensation? The obvious answer is diversity in interpretation of the law by judges and in application of the law by triers of fact because of variations in trial procedures, proof, argument, and instructions, complicated by the absence of a fixed value for a given non-pecuniary detriment. With an im-

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\(^{14}\) Ibid.

\(^{15}\) RESTATEMENT, TORTS § 910 (1939).


\(^{17}\) 1 CALIFORNIA JURY INSTRUCTIONS, Civil 174-in (4th ed. 1956).

\(^{18}\) Wiley v. Young, 178 Cal. 681, 687, 174 Pac. 316, 318 (1918).
creasing number of compensable injuries and deaths in our society have come injustices afflicting the victim whose compensation may depend upon the random factors of geography, obsolete or provincial interpretations of the law, or the haphazard, "by guess and by golly" effort of inadequately instructed juries.19

The law is silent as to any uniform method for valuation by the judge or jury of damages for pain and suffering. Since personal injury cases occupy the greatest amount of the courts' time on the civil side,20 and since the valuation of damages for pain and suffering presents one of the greatest and most unique challenges to the successful administration of justice, it is necessary that our judicial system adopt a uniform solution. This would conform to the trend in the United States of eliminating vagaries, disparities and injustices among the various jurisdictions by adopting uniform codes, court rules and procedures. Such trends toward uniformity are remedial rather than restrictive and seek to assure the same quality of justice to all litigants. This same type of uniformity can be and must be provided in this area of damages for pain and suffering, either under existing laws, which are broad enough to permit a satisfactory, uniform solution, or by legislative fiat21 if the courts of any jurisdiction disagree with the uniform solution selected.

Methods of Proof

The uncertain state of the law, differences in experience and training among lawyers, differences between jurisdictions with respect to rules, varying beliefs and practices of trial judges, and varying fact patterns and injuries combine to produce great variance in the methods of proving and evaluating damages for pain and suffering. Sometimes, the effect of pain and suffering is so obvious that no additional proof is required.22 The behavior of the plaintiff at trial may be sufficient evidence to support an award.23 However, this is an infrequent situation.

20 This conclusion was reached from an investigation by the author as President of the California Trial Lawyers' Association and from the fact that 14 out of 22 superior court judges in San Francisco during 1965, along with extra-session judges assigned by the Judicial Council to preside over trials in San Francisco, were assigned, for the most part, to the trial of jury cases. See CONARD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 225-55 (1964) (reporting the experiences in Michigan).
21 In 1960, the Georgia Legislature enacted a law expressly authorizing use of the per diem argument in jury trials. 81 GA. CODE ANN. § 1015 (Supp. 1962).
23 "It appears, therefore, that it was not necessary that the award for pain and
tion. Absent such conspicuous injury, it is still possible to prove damages for pain and suffering with the degree of certainty required by law. An obvious source of evidence is the direct examination of the plaintiff.

Q. How did the accident happen?
A. I was stopped at a stop light and my car was struck from behind.

Q. What happened to your body at the time of the impact?
A. I was thrown back against the seat, my head went back over the top of the seat and seemed to be coming off my neck; then I was thrown forward and hit the steering wheel with my chest and then my head hit something and that is all I remember until I woke up in the hospital.

Q. Do you know how you got to the hospital?
A. No, I don’t.

Q. Do you remember being removed from your automobile?
A. No, I don’t.

Q. Do you remember being taken into an ambulance?
A. No, I don’t.

Q. Do you remember being taken into the emergency room at the emergency hospital?
A. No, I don’t.

Q. Do you remember being moved from that hospital to the University of California Hospital?
A. No, I don’t.

Q. What is your first recollection about being in the hospital?
A. I heard someone say, “He’s waking. Shall we start the anesthetic?” And someone answered, “No, we’d better not take a chance yet.” Then I passed out again.

Q. How did you feel during that conscious period?
A. I felt like I was completely paralyzed but with a terrible pressure in my head and my chest.

Q. What is your next recollection about being in the hospital?
A. I woke up in a darkened room. I didn’t know where I was. I saw shadows moving and for a little while thought I was dead. Then my head cleared a little more and I could see a nurse on the side of the bed, I had a tube in my nose and a needle in my arm connected to a tube in a bottle. I tried to move and felt a tube connected to my male organ. My head was being held by some kind of holder that I later saw, they looked like the iceman’s tongs, and they pulled on my head toward the top of the bed. I had bandages around my body very tight under my arms and down to my stomach and I couldn’t breathe much but I didn’t want to because with every breath I took, it seemed like a knife was being stuck into my lungs. I was a mess.

Q. What care and treatment did you get then?

A. I had wonderful doctors and nurses. They really took care of me. The nurses were in my room every hour with medicines, pain injections, caring for the tubes, moving me from side to side, giving me sleeping pills so I could get a little rest, feeding me, because it hurt for me to move or to try to do anything for myself for about two weeks. If it hadn't been for those doctors, I would have died. They operated on me twice and saw me twice a day while I was in the hospital.

Q. How long were you in the hospital?
A. Six weeks.

Q. Were you put to sleep for the operations?
A. Yes.

Q. How did you feel after the operations?
A. I was very sick— I don't know if it was from the anesthetic or my injuries. I had nurses around the clock for a week after each one.

Q. How did you feel between the operations?
A. Well, I was in pain all the time, but I tried to keep my mind off the pain by reading the Bible. It was tolerable most of the day, with the help of the pain shots, but some days and every night, it was horrible, just lying there waiting for the pain to go away. I prayed for a little relief, but after the effect of the pain shots wore off, I couldn't get another for a while. But after about the third or fourth week, it seemed like four years, there was less pain, and it gradually went away from my chest, and my neck and I had pain around my head for a while. But the body cast bothered me very much.

Q. Describe the body cast that was put on you at the hospital.
A. It went from under my arms, over my chest and upper back, over my shoulders and over my neck and over my head. It had openings for the top of my head, my ears, eyes and mouth.

Q. When did they put the cast on?
A. After the second week, when they took the traction off.

Q. How long did you have the cast on?
A. Three months.

Q. How did you get along in the cast?
A. That was almost as bad as the worst pain, because I couldn't open my mouth very wide, because it held my jaw up, and I had to turn my body to look to the side. And I itched. It seemed that someone had turned loose a million fleas inside that cast and I couldn't scratch. It was torture.

Q. How long were you confined to bed in the hospital?
A. I had this traction on for about two weeks. I was in bed for two weeks.

Q. Did you have any bathroom privileges?
A. No, I had to have continuous traction, so I couldn't move away from the bed until they put the cast on.

Q. After the two week period in bed, how active were you?
A. I could get up, with help, and had bathroom privileges. I sat up in a chair for an hour at a time, except I kept getting dizzy, and had to lie down sooner sometimes, and the cast bothered me.

Q. How many doctors did you have while you were in the hospital?
A. Not counting the interns and residents, five doctors were on my case.

Q. Tell us about them.
A. Well, there was the neurosurgeon, Dr. Black, and the skin doctor, Dr. White, and the lung doctor, Dr. Green and the bone doctor, Dr. Brown, and the intestine doctor, Dr. Gray

Q. What did Dr. Black do for you?
A. He took care of my broken neck and my head injury. He operated on me once.

Q. What did Dr. Brown do for you?
A. He worked with Dr. Black on my neck and also he worked on my broken ribs.

Q. What did Dr. White do for you?
A. Well, I got bed sores from being in bed, and the cast caused skin irritation and rashes, and he treated that. One time, while Dr. White was visiting me, I itched so bad I started to cry. He got a clothes hanger, wrapped a towel around it and put it under the cast and scratched.

Q. What did Dr. Green do for you?
A. He worked on my lungs in the operation when they fixed my ribs and treated me for the lung condition after that.

Q. What did Dr. Gray do for you?
A. I don’t know how to describe it, except I had trouble with my intestines, they stopped working right after the accident, and he had to get them started again.

Q. Did you see the doctors after you left the hospital?
A. Yes, I don’t remember the dates, but I kept going to their offices after.

Q. Did you see any other doctors after you left the hospital?
A. Yes, I got so nervous and depressed, that Dr. Black sent me to Dr. Tan.

Q. What is his field of medicine?
A. Dr. Tan is a psychiatrist.

Q. How many times did you go to see Dr. Tan?
A. I don’t know. I went every day the first few weeks, then twice a week for about three months and now I go once every week.

Q. What kind of treatment do you receive from Dr. Tan?
A. Psychotherapy

Q. When did you first see Dr. Tan?
A. About two months after I left the hospital.

Q. Did you have cast changes?
A. Only one after I left the hospital.

Q. Did you have any pain after leaving the hospital?
A. Only occasionally while I was in the cast, but continuously after

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the cast was removed. They prescribed a Thomas collar, to hold my head and neck in a fixed position, but even then, I had pain with it. That's why they suggested a fusion of the spine of my neck. But they were afraid of the cord and wouldn't do the operation because I might come out of the operation completely paralyzed.

Q. Did you receive pain medication?
A. Yes, I had to have some pain medication all the time. But the danger of becoming a dope addict was so great, they have to change the medicines and leave me off them for a while.

Q. How do you feel without them?
A. I suffer.

Q. How long did you wear the Thomas collar?
A. I wear it all the time when I move around very much. I can remove it when I'm inside, like now, but not for long.

Q. How do you feel when you go without it?
A. I have more pain.

Q. How do you feel now?
A. Well, as you can see, I try to avoid moving my head or neck because every slight movement causes a twinge of pain.

Q. Do you have any difficulty with any other part of your body now?
A. No, my chest has recovered completely as far as I can tell. The doctor told me that I would have to have continuous observation for the rest of my life—periodic examinations, because of the scars and blebs left on my lungs. My head is much better except for occasional dizziness and some headaches. But my neck is troublesome and my nerves are shot.

Q. Did you have any trouble with your head, neck or chest before this accident?
A. No.

Q. Have you done any work since this accident?
A. Well, I can't hold down a cook's job anymore. I have gone to the State Rehabilitation Center and asked them if they could help to rehabilitate me so that I could find some job to help me earn something. But they put me through all the tests and examinations and couldn't do anything for me.

Q. How is the condition for which you went to the psychiatrist?
A. I am still a nervous wreck. I can't ride in an automobile anymore without being terrified. I have lost my sense of judging whether cars are too close or too far and I worry all the time. I am embarrassed with the brace and with my inability to move normally. I'm so depressed at not being able to work and earn a living. I've never taken a cent of charity in my life and it almost kills me to have to be helped around like an invalid at my age. I cry often now, without any reason that I know about, just like a child. I can't sleep much at night. I get up and read or just walk around the house. Sometimes, so I won't wake up the
rest of the family, I get dressed and go out and just walk around until I get tired.

Q. Have you noticed any change or improvement with your psychotherapy?

A. No, it just keeps me going, but I haven’t noticed any improvement. If I was just able to do some kind of work, but they’ve tried everything. I tried working with my hands, but I couldn’t do that for longer than a few minutes at a time, and it made me so nervous, I had to give that up. Then I tried reading to sick people, but I made them nervous and they made me nervous, I couldn’t do that. The thought that I can’t provide for my family and myself haunts me every minute.

It is obvious that such testimony supports argument for compensation for pain and suffering by the day, hour, minute or second. The only remaining question would pertain to the value for each unit of time to be selected by the jury.

Another method of proving the effect of pain and suffering is the introduction of the testimony of those who knew the plaintiff prior to the injury and who have observed him following the injury so as to be able to report changes resulting from the injury. For example, in one case, plaintiff’s fellow worker, his son and his clergyman testified to this effect.

Plaintiff’s fellow worker testified:

Before the accident he was the best worker in the plant. He always did more than was expected of him. He came to work early and left late. Everybody knew that he loved his work and the guys he worked with. If we had heavy work to do, he pitched in and did more than his share. If any of us ran into trouble with a piece of work, or were delayed in getting it out, he would offer to help and did. He always did a fine job. I never worked with a nicer guy or one who was better liked and respected by his boss and fellow workmen.

But after the accident, something happened. When he was in the hospital, everybody at work missed him and visited him in the hospital. When he first came back, we expected that he would have to take it easy and we all wanted to help him. But after a while, it was obvious that he just wasn’t recovering to his usual self like he was before the accident. He tired easily. He never complained, but we could see that when he tried to do heavy work, he couldn’t lift, without a groan or without the sweat pouring down over his face. He was slow in straightening up or getting up from a chair or a kneeling position. He always held his back when he did. He didn’t joke with the men like before and hardly ever smiled or laughed. We all knew from his slow walking and bending that it hurt him just to move. One time he was in such pain after being in a stooped
position, that when he straightened up he held on to me without moving for just a minute, saying "Oh, Holy Mary, Mother of God."

His son testified:

Before he got hurt, my dad was lots of fun. We went places and did things together. He liked to take me hunting and fishing. We played baseball together. We wrestled and boxed. He was my pal and fun to be with. But now, he doesn't feel good. He's so tired when he's not working, that he rests all the time. We haven't been able to play anymore or go fishing or hunting. He tries to pay attention to me, but his face looks like he hurts.

Plaintiff's clergyman testified:

Tom was one of the leaders in our church. He and his family were always in church on Sundays and participated in the meetings and socials at the church. He was a happy man, but not anymore. Since this accident, he is a different man. The pain he is suffering is obvious on his face and in his movements. It is very sad to see the terrible effect of this accident on this man.

Expert testimony most often is necessary to assist in evaluating given types and amounts of pain and suffering with given results or effects upon the particular plaintiff. Experts can present evidence as to the character of the pain, its past history, its fluctuations, its expected duration, its potential changes, and the effect it has had and will have on the plaintiff. The latter testimony can include the amount of disability which will be caused and the loss of normal living which will result. On this basis, medical opinions are available as to units of time by which each particular type of pain and disability can be measured, and the loss suffered by plaintiff can thus be established.

Q. Doctor, why does plaintiff still have pain two years after he sustained this fracture into his ankle joint?
A. The ankle joint bears weight. The lining of the joint is cartilage which became roughened as a result of the fracture. It is no longer a smooth joint or socket. Weight bearing and movement cause pain.

Q. How much pain will plaintiff have from this condition in the future?
A. He will continue to have this pain for the rest of his life every time this joint bears weight or is moved.

Even if it be assumed that the particular injuries, although painful or debilitating, are uncommon or are difficult to describe in terms of

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24 See Appendix D infra.
psychological and somatic effects, the physician can offer analogies within the ready comprehension of the jury. In any event, the medical expert can be asked to explain the mechanics of the particular injury and the effects of that injury on the nervous, mental, and somatic state of the plaintiff. Comparison with the commonly experienced disabilities is then possible.

For example:

A. Plaintiff sustained a blow to his left kidney which ruptured it, causing pyelonephritis and later renal calculus. It was necessary to perform a nephrectomy. The patient suffered lancinating and fulgurant pain.

Q. Doctor, please explain that statement in simpler terms.
A. The injury to his kidney broke it open and caused infection to set in because of the retention of urine, due to impaired drainage. The recurrent infection, over a period of time, developed stones in the kidney. This condition required removal of that kidney. The patient suffered sharp, darting and shooting pains. The loss of one kidney requires him to refrain from any physical activity which may subject him to back injury, which might injure his only remaining kidney.

The objective of the introduction of evidence as to the damages caused by pain and suffering is, of course, to show the full measure of the injury involved, which will always depend upon the total effect of the particular damage caused upon the individual plaintiff.

Summation

In arguing to the jury about damages for pain and suffering, the practices of attorneys will vary between states and even within a given locality, reflecting the uncertain and diverse state of the law. Some jurisdictions prohibit counsel from suggesting any valuation for pain and suffering on a formula or per diem basis and instruct juries to determine the damages as their discretion dictates and as under all the circumstances may be just and proper. Attorneys in other jurisdictions will discuss the subject in great detail, using charts, diagrams or blackboards for the computation of periods of time of pain and suffering. Using this method, plaintiffs' counsel will suggest a valuation to be placed on each unit of time of pain and suffer-

26 See, e.g., Seffert v. Los Angeles Transit, 58 Cal. 2d 498, 15 Cal. Rptr. 161, 364 P.2d 337 (1961); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944), affd, 300 Ky. 817, 190 S.W.2d 562 (1945); ABC Storage & Moving Co. v. Herron, 138 S.W.2d 211 (Tex. 1940).
mg under the theory that if the jury can infer a dollar equivalent from the evidence before it, counsel should be able to do the same. Advocates of this practice argue that "the very absence of a fixed rule or standard for any monetary admeasurement of pain and suffering as an element of damages supplies a reason why counsel for the parties should be allotted, on this item of damages, their entitled latitude in argument—to comment on the evidence, its nature and effect, and to note all proper inferences which reasonably may spring from the evidence adduced."

In following this method of argument counsel for plaintiff computes the number of seconds, minutes, hours, days, weeks, months or years for which the particular injury has produced and will produce pain and suffering. The selected unit of time is then assigned an estimated, comparable economic value, expressed in cents or dollars per unit, in a sum or sums selected by the attorney. He may inform the jury that the sum he selects is chosen for illustration purposes only and that the jury must actually make the selection, or he may suggest this figure to be the correct, fair valuation.

The jury is then urged to multiply this sum by the number of time units to determine the amount of the damages. This method, which is the nearest approach to a scientific or mathematical formula currently in common use, is referred to as the "mathematical formula" or the "per diem" method of computation.

A number of objections to this method of argumentation have been expressed. The foremost publication expressing such disapproval is Jaffe's article, "Damages for Personal Injury: The Impact of Insurance." Jaffe argues that pain and suffering involve no economic loss and are of indeterminate valuation, so that a defendant without insurance should not be liable for plaintiff's experience of pain. Even if there is insurance, he argues, such an uncertain amount should not be assessed against the "pooled social fund of savings" when the "compensation performs no specific economic function."

The outstanding judicial rejection of the per diem method of calculation of damages for pain and suffering is Botta v. Brunner. The court held it improper for counsel to (1) suggest to the jury

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28 Ratner v. Arrington, 111 So. 2d 82, 89 (Fla. 1959).
29 See Appendix C infra.
30 18 LAW & CONTEMP. PROB. 219 (1953).
31 Id. at 225.
by mathematical formula the amount to be awarded per minute, hour or day of conscious pain and suffering; (2) use blackboards or charts exhibiting to the jury calculations of specific amounts which in the view of counsel should be awarded for pain and suffering; or (3) state in argument that amount for which the suit is brought by referring to the *ad damnum* clause in the complaint.

In order to examine the *Botta* reasoning, it is worthwhile to quote directly from the opinion:

As had been indicated, pain and suffering have no known dimensions, mathematical or financial. There is no exact correspondence between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this reason the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation [citing cases].

Neither the plaintiff in the case nor anyone else in the world has ever established a standard of value for these ills. The only proof ever received to guide the jury in determining the amount of the allowance they should make is, broadly stated, the nature and extent of the injury, its effect and results. They are instructed to allow a reasonable sum as compensation, and in determining what is reasonable under the evidence to be guided by their *observation, experience and sense of fairness* and *right*. At the best the allowance is an estimated sum determined by the intelligence and conscience of the jury and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value. The arbitrariness and

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33 Author's Note: This statement is incorrect because pain can be measured as to its character, severity, duration and effect on the patient, by mechanical devices, physical and medical tests, the observations and measurement by physicians and even observations of laymen. "The facial expression of true pain—the pinched features, the pallor, the clammy skin, the dilated pupils, the knotted brow—cannot be imitated by the malingerer; these, with the intermittent involuntary cry or groan and the characteristic writhing or bodily contortions, present an unmistakable picture of suffering." *MacBryde, Signs and Symptoms* 10-11 (1952). Prolonged, intense pain may affect the heart and thus alter the T-wave of an electrocardiogram. *Bonacci, The Management of Pain* 980 (1953). Blood pressure variations, either sharp rise or sharp drop, may be caused by deep pain. *Beecher, Measurement of Subjective Responses: Quantitative Effects of Drugs* 7 (1959). Generally, respiration rate, metabolic rate and temperature increase with pain. *Finneson, Diagnosis and Management of Pain Syndromes* 15 (1962). Limitation of movement helps to evaluate the amount of pain. Gratz, *Attorney's Textbook of Medicine* § 11.43 (1960). While there is no exact, accurate measurement of pain, the effects of pain on the individual can be accurately determined and measured. *Hardy, Wolff & Goodell, Pain Sensations and Reactions* (1952) (using the dolorimeter to measure pain thresholds and reactions).
artificiality of such a method is so apparent that to require a jury to apply it would, we think, be an absurdity.\(^8\)

This is a reversal of an earlier opinion by a lower court on the same case, in which it was said:

Counsel may argue from the evidence to any conclusion which the jury is free to arrive at, and we perceive no sound reason why one of the most vital subjects at issue, the amount of recovery, should not be deemed within the permitted field of counsel's persuasion of the jury by argument. This, within reasonable limits, includes his supporting reasoning, as in the present case, whether soundly conceived on the merits or not.\(^5\)

A number of state and federal jurisdictions have rejected the Botta rule,\(^6\) some unqualifiedly while others require a cautionary instruction to be given advising the jury to distinguish between evidence and argument.\(^7\) The Colorado Supreme Court, for example, said that, if the total amount claimed by the plaintiff and plaintiff's


life expectancy may be argued, there is no logical reason to forbid
the argument of the per diem formula. Ohio followed the weight of
authority when its Supreme Court promulgated the most recent
rejection of Botta by allowing counsel to argue in terms of a math-
ematical formula.

In California, some trial judges permit the per diem argument,
even against objection by defense counsel; others prohibit the use
of the formula only in the face of an objection by defense counsel;
and some prohibit the per diem argument in all cases. Many of those
in the latter category bar the mathematical formula in the mistaken
belief that such argument was prohibited by the State Supreme Court
in Seffert v. Los Angeles Transit Lines. However, California appellate
courts have never taken a stand on the Botta rule. For example, the
majority opinion in Seffert refused to pass on the question:

Defendant next complains that it was prejudicial error for plaintiff's
counsel to argue to the jury that damages for pain and suffering could
be fixed by means of mathematical formula predicated upon a per
diem allowance for this item of damages. The propriety of such an
argument seems never to have been passed upon in this state. In
other jurisdictions there is a sharp divergence of opinion on the sub-
ject. (See Annot., 61 A.L.R.2d 1331.) It is not necessary to pass on
the propriety of such argument in the instant case because, when
plaintiff's counsel made the argument in question, defendant's coun-
sel did not object, assign it as misconduct or ask that the jury be
admonished to disregard it. Moreover, in his argument to the jury,
the defendant's counsel also adopted a mathematical formula type
of argument. This being so, even if such argument were error (a
point we do not pass upon), the point must be deemed to have been
waived, and cannot be raised, properly, on appeal. (State Rub-
bish, etc. Ass'n v. Siliznoff, 38 Cal. 2d 330, 340 (240 P.2d 282).)

Perhaps the misinterpretation of the Seffert decision stems from
the dissenting opinion which did follow the reasoning of Botta:

[T]his state has long recognized pain and suffering as elements of
damages in negligence cases (Zibbel v. Southern Pacific Co., supra,
160 Cal. 237, 250; Roeder v. Rowley, supra, 28 Cal. 2d 820, 822);

39 See Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964); Annot., 60
40 3 Ohio St. 2d 96, 209 N.E.2d 442 (1965).
42 See Sangunetti v. Moore Drydock Co., 36 Cal. 2d 812, 823-35, 228 P.2d 557,
564-77 (1951) (Carter, J., dissenting).
43 Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 509, 15 Cal. Rptr. 161, 168,
any change in this regard must await re-examination of the problem by the Legislature.\(^4\)

Counsel may argue all legitimate inferences from the evidence, but he may not employ arguments that tend primarily to mislead the jury [Citations.] A specified sum for pain and suffering for any particular period is bound to be conjectural. Positing such a sum for a small period of time and then multiplying that sum by the number of days, minutes or seconds in plaintiff's life expectancy multiplies the hazards of conjecture. Counsel could arrive at any amount he wished by adjusting either the period of time to be taken as a measure of the amount surmised for the pain for that period.

The absurdity of a mathematical formula is demonstrated by applying it to its logical conclusion. If a day may be used as a unit of time in measuring pain and suffering, there is no logical reason why an hour or a minute or a second could not be used, or perhaps even a heartbeat. If one cent were used for each second of pain this would amount to $3.60 per hour, to $86.40 per twenty-four-hour day, and to $31,536 per year. The absurdity of such a result must be apparent, yet a penny a second for pain and suffering might not sound unreasonable. The use of the formula was prejudicial error. [Citations]\(^5\)

In so arguing, the Honorable Chief Justice did not consider a unanimous opinion of the intermediate appellate court which had decided Botta, wherein it was stated:

> Counsel may argue from the evidence to any conclusion which the jury is free to arrive at, and we perceive no sound reason why one of the most vital subjects at issue, the amount of recovery, should not be deemed within the permitted field of counsel's persuasion of the jury by argument. This, within reasonable limits, includes this supporting reasoning, as in the present case, whether soundly conceived on the merits or not.\(^6\)

**Critique**

Let us re-examine the premises of the Botta decision. The reader will recall that the New Jersey court started from the position that pain and suffering have "no known dimensions, mathematical or financial."\(^7\) The validity of this statement must be subjected to a two-stage analysis.

First, the statement assumes that pain and suffering are incapable of measurement. It is true that it is impossible to measure these forms of damage directly. No one can stand the plaintiff in front of a ma-

\(^{4}\) Id. at 511, 15 Cal. Rptr. at 169, 364 P.2d at 345.
\(^{5}\) Id. at 514, 15 Cal. Rptr. at 171, 364 P.2d at 347.
\(^{7}\) Id. at 95, 138 A.2d at 720.
chime and calculate the intensity of his pain. However, it is possible to measure the pain and suffering indirectly. Pain and suffering manifest themselves in physiological results. The most common manifestation is the involuntary cry or groan obvious to the most inexperienced layman. However, the physician can detect less conspicuous symptoms. Generally, the rate of respiration, the pulse rate, the metabolic rate and the body temperature will all rise with an increase of pain. Prolonged and intense pain may affect the heart and thus alter the T-wave of an electrocardiogram. Pallor, clammy skin and dilated pupils may become noticeable. Inhibition of body functions such as the motion of a limb may aid the evaluation of pain. Nervous and emotional effects are identifiable and measurable. Thus, while there is no direct, exact measurement of pain, the effects of pain upon the individual can be accurately determined. These dimensions may be communicated to the jury by expert witnesses.  

Second, the statement assumes that pain and suffering cannot be converted into dimensions capable of translation into monetary terms. Obviously, it is impossible to produce a formula by which a given intensity of pain may accurately be equated with a fixed number of dollars. However, the character, severity, duration, and effect upon the particular patient may be compared with concepts with which the trier of fact is familiar. In addition to the measurement of the physiological effects of the pain, the expert witness can interpret given reactions to pain in terms of commonly understandable sensations and disabilities. Lay witnesses may be called upon to point out the changes which the plaintiff's pain and suffering have wrought upon his personality, habits, and abilities.

Furthermore, it is not necessary to prove the extent of pain and suffering with the exactitude which the critics of the majority position would require. There are many instances in which the law recognizes that to require such positing of evaluation would preclude any remedy at all and, for that reason, permits the use of an inexact method. Certainly the reasonable man test is far from specific. One

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48 See note 33 supra.
49 The fact that exact transmutation is not possible is no valid objection to compensation for pain and suffering because (a) the standard suggested by the Botta court contains no exactness—allowing the jury to determine a lump sum for pain and suffering; (b) many other judicial problems are resolved by inexact methods—the reasonable test, fair value of services, works of art, or heirlooms; (c) the law neither expects nor requires such precision of evaluation as to preclude the availability of a remedy. Stott v. Johnston, 36 Cal. 2d 864, 299 P.2d 348 (1951); Harris v. National Union of Marine Cooks & Stewards, 88 Cal. App. 2d 733, 221 P.2d 136 (1950); Monroe v. Owens, 76 Cal. App. 2d 23, 172 P.2d 110 (1946).
may wonder what the "fair value" of services exactly is, and the value of an heirloom is indeterminable. Thus, if it is conceded that pain and suffering are part of the injury which a plaintiff may suffer, it is anomalous to make of them a special exception to other standards of compensation.

The rule precluding the recovery of uncertain and speculative damages applies only to situations wherein the fact of damage is itself uncertain.\(^5\) Pain and suffering in their various forms are elements of the damage which, if proved, is compensable. While it is the aim of the law to attain at least a rough correspondence between the amount awarded as damages and the extent of the suffering, it is a general principle that recovery for injuries will not be denied on the ground that the amount of damages cannot be ascertained with certainty, even though the award only approximates that amount.\(^5\)

It is even more desirable that an injured person shall not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations where there cannot be any real equivalence between the harm and compensation in money, as in case of emotional disturbance.

The requirements vary with the possibilities for making a reasonably exact estimate of the amount of harm measured in terms of money.\(^5\) One whose wrongful conduct has rendered difficult ascertainment of damages cannot complain because loss occasioned by such conduct cannot be established with complete mathematical precision.\(^5\)

Moreover, the measure of damages for pain and suffering can be removed from the realm of pure speculation. In recoveries for the loss of such items as antiques, heirlooms, and works of art, it has been necessary to establish a market value for these assets even though they may never have been traded in the market place. Expert testimony is used to demonstrate the amount a willing buyer would pay and a willing seller would accept for such an article.\(^5\) Similarly, freedom from pain is a valuable asset. Although it, too, is not traded in the market place, it can be appraised. Expert testimony may be used to show what potential sufferers would pay and what physicians would charge for services and medications to relieve similar pain.

\(^{50}\) Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).


and suffering. For example, if a person would willingly pay five dollars for freedom from pain for one hour, as in the case of dental anesthesia, or fifty dollars for freedom from pain for several hours, as in the case of appendectomy anesthesia, it might indicate a reasonable compensation for similar pain and suffering. Certainly it is indicative of the value which society places upon the relief from the fear of pain, its worry which precedes the onset of pain, the anguish of the presence of pain, and the worry caused by the prospect of continuing pain and disability. The kind and duration of this pain and suffering can be established with the reasonable probability which the law requires through evidence which is available and acceptable for proof.

Another potential manner of proof is the demonstration of the value which plaintiff places upon his leisure or recreational time. Enjoyment of the pleasures of living is a precious commodity. A major goal of our civilization is to bring good health, enjoyment, and leisure time to our people. Implicit in this goal is enjoyment of pleasures free from pain. Thus, an indication of the value of freedom from pain for a given period of time may be the willingness of the plaintiff to spend a given amount of money for a particular leisure activity, such as bowling rates or green fees. Such evidence would have the benefit of being within the “experience of the daily lives” of the jurors. Such a benefit is most desirable.

As a matter of logic, once a reasonable valuation for the compensation of pain and suffering for a given period of time has been established, the award must be limited by the anticipated duration of the pain and suffering. A person who suffers such great pain for one day that it causes him to cry, writhe, perspire, walk the floor, and be unable to sleep or eat well should be compensated for that one day of pain and suffering. Another person who suffers such great pain for three months that it causes him to cry, writhe, perspire, walk the floor, and be unable to sleep or eat well should be compensated for ninety times as much pain and suffering, assuming all other factors to be equal.

It is not sufficient to rely upon a statement that “the varieties and degrees of pain are almost infinite” to bar an extrapolation of the

55 "Those who contend that there can be no reasonable relation between pain and suffering and any mathematical computation are unconvincing in a society where people are constantly choosing between bearing pain or spending more to assuage it.” Comment, 41 B.U.L. Rev. 432, 435 (1961).

pain and suffering of a particular time span to the anticipated duration of the damages. Proof of the particular variety and degree of pain and its effect upon the particular plaintiff in a given case may be introduced. If "all other factors" are not equal, the differences can be proved and argued by lawyers on both sides, and the jury can consider these differences under the supervision of the judge. The infinitude of the types and degrees of pain and suffering is immaterial in view of the fact that it is the effect of the pain and suffering upon the individual which is being compensated. No objective concept of the value of pain and suffering in general is required, for plaintiffs are not being paid for having pain. They are being compensated for the effects of the pain.

It is interesting to note that Botta criticized the per diem rule for its inexactness while abandoning a reasonable guideline which a jury might use for the determination of "unmeasurable" damages. Instead of allowing the opposing counsel to argue to the jury the pros and cons of a particular measurement of the award, the court would have the jury be guided by "their observation, experience and sense of fairness and right." It would seem to be the height of "absurdity," to borrow a term from the court, to say that a sum determined by the intelligence and conscience of the jury is less arbitrary, less artificial, and less accurate than to allow the adversaries to establish guidelines by argumentation.

The most recent pronouncement rejecting the Botta rule was on July 9, 1965, in Grossnickle v. Village of Germantown, by the Ohio Supreme Court. Even New Jersey has apparently retreated from the rule of the second Botta decision by holding that plaintiff's attorney may list on the blackboard, under the heading of pain and suffering, the number of days since the accident and the life expectancy of the plaintiff.

In the final analysis it is necessary to face the true issue directly: should the "per diem argument for pain and suffering" be allowed, permitting higher verdicts to be returned, or should it be prohibited, restricting the size of verdicts? It must be conceded that the law

59 2 Ohio St. 2d 96, 96 N.E.2d 442 (1965).
61 Professor Kalven, in The Jury, the Law and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 170 (1958) reports from his investigation of juries, that they think in terms of total sum in personal injury awards rather than compensation for specific
uniformly requires compensation for pain and suffering where proved to exist. Ethical reason and the moral judgment of the community influence the law as it develops by legislative or judicial process. Thus, while damages for pain and suffering are said to have originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged, the changing tenets of our society now hold it to be right that "for the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby." Detriment includes pain and suffering. The natural right of man to be secure in his person and property protects us from political, criminal and civil wrongs. Our law demands compensation for the property wrongfully taken or damaged; it can be justly contended that it should equally require compensation for the wrongful deprivation of good health and the enjoyment of normal living.

In the last analysis it has been contended that the Botta rule is unenforceable. This contention is demonstrated in Bower v. Pennsylvania R.R. Co. The procedure followed by counsel for plaintiff in the Bower case has many possible variations which could be and are followed in other cases. For example, counsel could argue that the evidence proved the number of minutes or hours of the particular suffering or disability of the plaintiff resulting from the accident and remind the jury that it ought to compensate plaintiff for every second of detriment suffered so the jury should decide how much to allow. He could then point out to the jury that when plaintiff played golf for two and a half hours he was happy to pay six dollars green fees components and, therefore, award little, if anything, for pain and suffering. He suggests that a change in the law to deny such damages would have little significant effect on awards.

65 182 F. Supp. 756 (D. Del. 1960), aff'd, 281 F.2d 953 (3d Cir. 1960). In this case, counsel for plaintiff argued to the jury:

"Let me just say this, too. It is awfully difficult to give a jury a guide as to what pain and suffering is. We can't really give you a guide as to what pain and suffering is worth, but we do know this from the evidence: We know that Mr. Bowers, when he was working for the railroad, got $2.77 an hour. Now, $2.77 an hour is what Mr. Bowers was paid in the present market for doing what he liked to do. Now, I can't tell you what Mr. Bowers should be paid per hour, per day, per week, per month, for doing something that he doesn't like to do, for going through pain, going through suffering, but just consider what he did get paid for doing what he wanted to do." Id. at 758-59.

A similar argument was allowed in Edwards v. Lawton, 138 S.E.2d 708 (S.C. 1964). South Carolina follows the Botta rule, but the court held the argument acceptable.
and six dollars for the caddy. A jury could of its own volition apply the formula method and thereby reach a verdict without anyone else knowing about it.

Fear has been expressed that permitting the per diem argument for pain and suffering will mislead the jury, will lead to a verdict based on something other than evidence, and will allow counsel to invade the province of the jury. On the other hand, it is pointed out that juries already have, even in Botta jurisdictions, the right to adopt a "formula" method for determining damages for pain and suffering without any suggestion of amount by any counsel, if the evidence indicates the period of time of suffering or disability. Furthermore, juries usually reach the correct result, probably ninety-five per cent of the time according to Erle Stanley Gardner and ninety to ninety-five per cent of the time according to the late Federal Judge Louis F. Goodman. A survey of jury cases in the Bay Area definitely indicates that juries are not often swayed or misled.

The primary purpose of argument by counsel is to enlighten the jury. The scope of the trial lawyer's summation has always been held to be broad. Under the proper instruction by the court the jury can be properly cautioned about such argument. Some suggested instructions may be found in Appendix B to this article.

Conclusions

From the viewpoint of uniformity in awards, the only true enforceable alternatives to allowing the per diem argument are either legislation eliminating compensation for pain and suffering or substitution of a "commission" or "master" or "referee" system for court and jury trials in determining awards in tort cases. The former would be contrary to our American sense of justice and fair play because innocent victims of tortious conduct would have something valuable taken from them without compensation, as in the case of an unemployed housewife who suffers a severe traumatic neurosis which drastically curtails her activities and enjoyment of life; or a victim who derives epilepsy from the injury, is able to function between seizures, but

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67 See text accompanying note 55 supra.
68 Gardner, The Court of Last Resort 121 (1952).
70 See Appendix B infra.
suffers horribly during them and between them suffers from fear and limitation of many activities; or a victim who is made extremely nervous on a permanent basis by the injury, or who suffers from headaches or backaches to the extent that his enjoyment of life is greatly curtailed. Society must decide if the wrongdoer should not be required to provide some compensation for the result of his negligent conduct.

The Commission system, which would award compensation to every injured person, regardless of fault, but would make no award for pain and suffering, is criticized for the same reasons stated above; it is contrary to our mores and sense of fair play and, according to a scholarly study reported in the American Bar Association Journal, the results of trials by jury were reported to be more equitable and satisfactory than those in trials by commission.\(^3\)

The solution to the increasing cost of accidents lies in better driver education and licensing requirements, safer highways, safer construction of automobiles, more effective law enforcement on the highways and prevention of inflationary costs of medical services and automobile repairs. The charge that "high verdicts" are the sole or chief cause of increased rates for public liability coverage has not been supported by facts.\(^4\) The contention that the casualty insurance industry loses money on public liability and property damage coverage is incorrect.\(^5\)

Finally, it is necessary to have greater confidence in our judicial system and in our trial judges. They can control conduct and procedures during trial to avoid the misleading of juries, to avoid appeals to bias or prejudice, and, in case of unjustified and excessive verdicts, to see that justice is done. The argument that jurors may mistake the arguments of plaintiff's counsel for evidence is not persuasive; the law presumes that jurors have sufficient mental capacity to discriminate between evidence and argument.\(^6\) Until the law governing damages is changed, we must forthrightly strive to enforce uniform application of existing law in order to provide equal justice to litigants in every court in the land.

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\(^5\) The Spectator, an authoritative insurance magazine, reported in its October, 1963, issue that, during the decade 1953-62, 100 insurance companies, representing the entire casualty industry, have shown a total $2.7 billion profit from underwriting and investing.

Appendix A

"The general rule in wrongful death cases denies recovery for the value of society and companionship of the deceased on the ground that it cannot be deemed a pecuniary loss, although recovery is permitted for the pecuniary loss of advice, training and guidance. In California, however, the jury may consider the pecuniary benefits which might reasonably have been expected from the continuance of the society, comfort and protection of the deceased."77

"When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death ."78

"The theory of the California wrongful death statute79 is that the heirs of the decedent may recover for the pecuniary loss of the present and probable future benefits of any kind. These include (a) the present value of future contributions; (b) the value of any personal service, advice or training that would probably have been given; (c) the value of the deceased's society and companionship.80

"In [a wrongful death case] general damages are measured [in part] by the monetary equivalent of loss of comfort; society and protection."81

"The death of a mother or father also causes a special loss to the children, who may recover the value of advice and services in their training and education."82

The elements of such damages are determined by considering “the

78 CAL. CODE CIV. PROC. § 377.
79 Ibid.
82 2 Witkin, SUMMARY OF CALIFORNIA LAW 1617 (1960); Johnson v. Southern Pac. R.R., 154 Cal. 285, 97 Pac. 520 (1908); Redfield v. Oakland Consol. St. Ry., 110 Cal. 277, 42 Pac. 822 (1889). In Newton v. Thomas, 137 Cal. App. 2d 748, 291 P.2d 503 (1955), the court approved this instruction: “Another factor to be considered in cases involving damages for loss of a member of a family, is that although damages must be measured by the pecuniary loss to the plaintiffs, in fixing such loss the trier of fact is not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of the loss of such non-economic interests of a family as loss of comfort, society and protection.” Id. at 769-70, 291 P.2d at 516.
disposition of the deceased, whether it was kindly, affectionate or otherwise; it does not include "sorrow, mental distress and grief." In the death of a minor, the law permits compensation to the parents for "pecuniary loss . . . suffered (past and future) by being deprived of the comfort, society and protection of the child."
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This appendix is compiled from recent San Francisco Bay area personal injury judgments.
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<td>—</td>
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<td></td>
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<td>to Robert)</td>
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## Appendix B (Continued)

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<td>1,395 Med mother</td>
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<td>4,844 10 (in Interven)</td>
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## Appendix B (Continued)

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<td>Trip &amp; Fall and</td>
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<td>10,000</td>
<td>S F</td>
<td>D</td>
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<td></td>
<td>Malpractice</td>
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<td>5,000</td>
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<td>S F</td>
<td>4,000</td>
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</table>
Appendix C

ARGUMENT

Ladies and gentlemen of the jury:

The law gives the lawyer the privilege of assisting you by permitting him to discuss the evidence and the law and to suggest to you answers to problems which might perplex you and impede your work as jurors.

One of the most important and difficult phases of your duties requires you to consider and weigh the evidence and to determine the nature and extent of the detriment imposed upon plaintiff by the negligence of the defendant. His Honor will define "detriment" for you and you will find that the law says that "detriment" is a loss or harm suffered in person or property. The law also provides that one injured through the negligence of another, as in this case, is entitled to be compensated for all the detriment proximately caused by such negligence.

You will note in the instruction of law which the judge will give that the law requires compensation be awarded to the plaintiff for "all" the detriment caused by the accident. This instruction will include information about the various elements which constitute the detriment. These elements are to be considered, measured, and compensated for if proved to exist and to result from the negligence of the defendant. These elements which constitute the detriment will include loss of earnings and earning capacity, medical expenses, and pain and suffering.

Pain and suffering will be defined to you by the judge and you will find that it includes mental anguish and emotional distress, decreases in body function and decrease in the enjoyment of living, worry, anxiety, embarrassment, fright, and the suffering that accompanies and follows injury and pain.

The evidence in this case clearly proves (evidence is reviewed on each of these elements).

The law requires that you measure this pain and suffering, as well as all other detriments, evaluate it and arrive at a lump sum award for the total verdict. Now you can go into the jury room and discuss the matter among yourselves, each one suggest some figure that, in your opinion would be fair, and then arrive at one figure upon which you all agree. However, a more accurate and scientific method would be for you to consider the evidence and determine what was the actual pain and suffering of the plaintiff, past, present and future. The undisputed evidence showed that plaintiff suffered pain when this ten-ton truck violated the law by going through the red traffic signal, ran into plaintiff and caused the injuries which were so clearly described to you by the three physicians who testified. Did the evidence show that he has recovered from these severe injuries? It is undisputed that he has not. Does the evidence show that he will be able to live a normal life in the future without pain and suffering? It is clear that he will not.

Therefore, you have uncontroverted evidence that plaintiff has suffered severe pain every waking moment since the accident, except when narcotics and opiates and anesthesia have been able to give him some little respite
from the torments of pain that have wracked his body. The evidence shows that every waking hour, yes, every waking minute and every waking second, plaintiff has suffered continuing pain until this very day, this very minute. You have seen him in court and on the witness stand, and you can judge for yourselves the ordeal that plaintiff is bravely enduring because of the pain that is wracking his body.

No one can deny that plaintiff is suffering detriment. No one has sought to deny that it was caused solely and proximately by the violation of law and the collision between the defendant’s truck and plaintiff’s body. No one could with any sincerity deny that plaintiff will have this same, unrelenting, pain and suffering for the rest of his life, unless he chooses to become an invalid and remain motionless for the rest of his life.

With these facts being proved, we have proved to you that plaintiff will suffer from pain for the rest of his life. He has a life expectancy of thirty years. These thirty years would have been years of work, pleasure, recreation, relaxation, fishing, hunting, golfing, bowling, playing with the children, dancing with his wife had it not been for the tragedy, the negligence and the collision. Instead they will be filled with pain and suffering, doctors, nurses, medicines, narcotics, sleeping medicines, pain medicines, and pain, humiliation, worry, fear, nervousness and wretchedness. For this the law requires that plaintiff, the innocent victim, be compensated.

Our system of fair play and American justice entitles us to preserve our body and its health and our abilities and our hope for the future. When these things are wrongfully taken from us by a wrongdoer, and the law labels a negligent driver who violates the law by going through a red traffic signal such a wrongdoer, we are entitled to be compensated for the loss.

The loss to plaintiff is a loss in living capacity. People live by the second, minute, hour or day, therefore, the computation of his damages must necessarily be accomplished by considering those units of time if you are to do justice and compensate him for all the detriment caused to him by this collision.

To do this, you need to go to the jury room and figure out how many seconds, minutes, hours or days of pain and suffering were proved by the evidence to have been suffered by the plaintiff: (1) From the time of the accident up to the present time; and (2) how many seconds, minutes, hours or days more pain and suffering must be endured from the present and for the remainder of his life. Do not choose the moments of his worst pain and suffering. Choose the moment of the least pain and suffering. (Review the evidence.) (Computation may be on a prepared chart, placed on the blackboard or left to the jury.) When you compute this figure you must arrive at a fair and just sum to award for each second, minute, hour or day of pain and suffering. How do you decide this? The law says you shall determine this from the evidence, your own knowledge of human affairs and your own experiences in life. However, there was no witness who suggested an amount to award for the pain and suffering of the plaintiff because the law neither permits nor requires such testimony. But each of you has had some experience with pain or with avoiding pain, and you know the cost of avoiding
pam. For example, when you have a tooth which needs to be extracted, a
dentist might charge 3 to 5 dollars for administering anesthetic. Or the
anesthetist may charge 35 to 50 dollars for anesthesia for an appendectomy,
giving freedom from pain for one day. No one would elect to suffer the
pam to avoid the charge.

In this case, applying the yardstick you have in your own experiences in
life and your own knowledge of human affairs, you can agree that ten dollars
a day is certainly not excessive for twenty-four hours, 1440 minutes of pam
and suffering. That isn’t even one cent per minute. But, you the jury must
select the figure that is fair compensation for each second, minute, hour, day,
year for the pam and suffering that plaintiff will endure for the rest of his
life.

Appendix D

Medical Testimony on Pain and Suffering

What indications did you find to indicate the presence of pam?
Where was the pam located?
How large an area did it affect?
Did it come on suddenly or gradually?
In your medical opinion what caused the pam?
Did it remain in one place or radiate?
Why did it radiate (if it did)?
To what parts did it radiate?
Can doctors determine the character and severity of pam?
Describe the different character of pam.
Describe the difference in severity of pam.
Were you able to determine the character and severity of pam in this
case?
Describe it.
How did you determine it?
Was the pam treatable?
What treatment did you perform or prescribe for it?
Did the pam require analgesics, opiates or sedatives?
Did these relieve the feeling of pam?
To what extent?
What was the duration of the different levels of pam? (The severe pam;
the moderate pam; the mild pam; no pam.)
When did each occur?
What time of day did each occur?
Was the pam related to activity or other symptoms?
Describe the present condition of plaintiff as to pam.
What is prognosis for plaintiff in regard to future pam?
What was the effect of this pam on plaintiff’s working and living activities
in the past?
What will be the effect of pam on plaintiff’s working ability in the future?
What will be the effect of pam on plaintiff’s living ability in the future?
Will he be able to play golf, fish, hunt, bowl, hike, etc.?
Appendix E
INSTRUCTIONS

I instruct you that the Opening Statements and Arguments or Summation of Counsel are not evidence in the case. It is their duty to assist the jury by discussing the evidence and the law. In doing so they may cite examples or illustrations which were not proved in the case, solely for the purpose of assisting you to analyze the evidence in this case and to reach a fair and just verdict based solely upon the evidence received in this court from the witnesses and exhibits.

If either counsel has made any statement during the trial which is not supported by the evidence, directly or by inference, you must disregard such statement and be bound only by the evidence under the law as I state it to you.

The attorneys have (plaintiff's attorney has), in their (his) summation or argument, discussed amounts to be awarded as damages in this case. Except where the attorney was citing evidence, or drawing an inference which you find was supported by evidence in the case, such argument is not evidence in the case and was suggested to you only by way of illustration. You must distinguish between such argument and evidence in the case and you may not use the argument unsupported by evidence as the basis for deciding any issue or any matter in this case.

If your verdict is for the plaintiff, it shall be your duty to assess his damages in an amount that will fairly and justly compensate him for all the detriment he sustained as a result of the negligence of the defendant. Your determination of this amount must be based on the evidence in the case, in the light of your own experience and knowledge of human affairs. As to that detriment which you find to be compensable in this case about which there is no direct evidence regarding a valuation thereof, you must decide this valuation by considering all the evidence in the case which relates to this subject and determine what amount will fairly and justly compensate plaintiff for the damage caused him by that detriment.

The law recognizes pain, suffering, impairment, disability and disfigurement as separate elements of compensable damages, where you find them to exist as a result of the negligence of the defendant.87

If your verdict be for the plaintiff, the law requires that he be awarded compensatory damages for all detriment caused him by the negligence of the defendant. The purpose of compensatory damages is to make the plaintiff whole again, to put him in the same position that he was in immediately prior to the accident in this case as far as a money judgment can do that. Included in the elements of compensatory damages are the following elements of detriment, provided you find from the evidence that they occurred or exist or will be reasonably probable to exist in the future as a result of this

87 The word "proximate" is intentionally omitted, and it is hoped that California courts will follow the example of the Illinois courts in this regard, since this word carries no cognizable significance to lay juries. See ILLINOIS PATTERN JURY INSTRUCTIONS, Civil §§ 30.01-30.06 (1961).
accident: physical pain, mental distress or suffering, impairment of health, impairment of bodily function and efficiency, loss of earnings, profits or earning power, loss of time, the reasonable value of sums expended or obligations incurred for medical care, examinations, treatment, in or out of hospitals, and other elements which I shall mention later in my instructions.

No element of damage may be evaluated on the basis of guess, conjecture or speculation. However, this does not mean that any witness should have expressed a sum to be awarded for a particular element. In some cases no testimony is allowed and the determination of the value to be placed upon that given element of detriment is left to your determination from a consideration of the evidence which is related to that subject and provides any information about it, and in the light of your own experience and knowledge of human affairs.88

I instruct you that the burden of proof rests on the plaintiff to prove his damages as I have previously instructed you regarding the burden of proof.

I instruct you that the burden of proof in the amount of damages rests on the plaintiff also. This does not mean that he must prove the amount of damages to a mathematical certainty because such proof is not possible in this type of case as to all elements of damage which the law recognizes to be compensable. It does mean that the plaintiff must produce evidence from which you can arrive at a figure which is fair and just and reasonable under all of the circumstances of the case.89

If your verdict is for the plaintiff, then in assessing damages for the plaintiff, you should take into consideration the character of the injuries sustained by him; the nature, extent and severity of any such injuries, and if temporary or permanent in nature. In estimating the amount of such damages, you may consider the physical and mental pain suffered; the extent, degree and character of suffering, mental or physical; and its duration and severity; also physical or mental pain which you believe from the evidence he is reasonably certain to suffer in the future from the same cause.90

While the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as "physical pain." It includes the numerous forms and phases that mental suffering may take, which will vary in each case with the nervous temperament of the individual, his ability to stand shock, the nature of his injuries, whether permanent or temporary; mental worry, distress, grief, mortification, where they are known to exist, are proper component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.91

You are instructed that in considering the damages for pain and suffering, you are to take into consideration not only pain and suffering caused at the

time of the accident, but also the pain and suffering reasonably probable to be endured in the future, which are the result of the accident.

You are further instructed, that in order to award the plaintiff damages to compensate him for pain and suffering, heretofore suffered or reasonably probable to be suffered by plaintiff in the future and caused by the accident, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages for pain and suffering, but you the jurors may make such estimate of the damages from the facts and circumstances in evidence and by considering them in connection with your own knowledge and experience in the affairs of life.

You are further instructed that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just and proper.

You are instructed that it is not necessary for the plaintiff to have introduced evidence as to the monetary value of any pain, suffering, or disability suffered by him, but it is only necessary that he should prove to you the nature and extent of such injury, pain, suffering, disability, impairment and disfigurement, and it is for you the jury, using your own judgment, sense and experience, to estimate the monetary value of such pain, suffering, disability, impairment and disfigurement.

Such sum as will compensate him reasonably for any pain, discomfort, fears, anxiety, and other mental and emotional distress suffered by him and resulting from the injury in question and for such like detriment as he is reasonably probable to suffer in the future from the same cause.

You will consider not only the elements of damage heretofore mentioned, but you will award plaintiff also such sum as will compensate said plaintiff reasonably for any loss of earning power occasioned him by the injury in question, and from which he is reasonably probable to suffer in the future. In fixing this amount you may consider what said plaintiff’s health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably probable to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity.

Bibliography


64 Source: 1 California Jury Instructions Civil § 174-M (4th ed. 1956). The author believes the word “probable” is properly substituted for the word “certain” in the last phrase to avoid confusion as to the degree of proof required.

65 Source: 1 California Jury Instructions Civil § 174-N (4th ed. 1956). “Reasonably certain” has been changed by the author to “reasonably probable” because he believes this more properly conforms to the degree of proof required by law. Reduction to present value has not, in this author’s opinion, been held to be a requirement in California.
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