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1976

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#### Recommended Citation

Reed, John W. "Trends in the Law of Damages." *Litigation* 3 (1976): 8-11.

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# Trends in the Law of Damages

by John W. Reed

The law of damages deals with the process of translating harm into dollars. It is not, however, a coherent body of knowledge. Rather, it consists of an amalgam of many concepts and rules having to do with fundamental policy questions about loss-shifting, risk-spreading, and allocation of functions between judge and jury. Because damages is a “non-subject,” little attention is paid to it in law school curricula and there is little writing about it. As one commentator put it, the law of damages “plods its way, ignored by academicians and ‘accepted’ by the courts. . . . The ‘winds of change’ sweeping over other areas of law rarely stir the law of damages. There are a few ripples here and there, to be sure, but no one gets too excited.”

In 1935, Charles McCormick produced his famous hornbook on damages, and for lack of a superseding work, it remains the most recent general study. *Dobbs on Remedies*, a 1973 volume, provides excellent analysis of recent developments, but the practitioner continues to use McCormick as the benchmark. To appreciate the developments of the past 40 years, it is necessary first to refresh our recollections of the McCormick 1935 text.

McCormick identified four major questions that the law of damages seeks to answer. *First*, what elements of the party’s loss, injury, or grievance will be recognized as grounds of compensation? For example, in contract can one recover for disappointment due to the failure of the bargain? *Second*, what formula of measurement is to be used in fixing compensation for the elements of loss that are recognized. For example, market value or value in use? Value at what time? *Third*, what are the limits on the application of these formulas to the recognized elements? For example, certainty, contemplation of the parties, foreseeability. *Fourth*, what procedural rules regulate the manner in which counsel can plead and prove these things, and what procedural rules govern appellate courts in dealing with these issues? He employed 186 black-letter statements to enunciate the answers to these questions.

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After stating pleading requirements, with particular reference to general and special damages, and explaining the concept of nominal damages, McCormick identified five principles involved in determining compensatory damages. Most significant of these was the rule of certainty, “requiring a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage.” It was another way of saying that damages could not be remote, speculative, or contingent. As of 1935, the rule was applied primarily to cases involving loss of commercial profits.

The other general discussions dealt with the familiar rule requiring the person harmed to use reasonable means to avoid or minimize or mitigate his damage, the problems of determining value of property, the concept of interest as damages, and the American rules regarding counsel fees and other expenses of litigation.

The remainder of the book was divided into parts according to substantive law areas.

## Materials on Torts

The section on torts contained, as one might expect, material that could as well have been in a torts text. It stated, for example, various proximate cause rules: “The wrongdoer is liable for the consequences of negligent and unskillful treatment by the physician of the injured person, provided that he used reasonable care to select a reputable physician.” The discussion of exemplary damages was positioned here. In McCormick’s almost quaint language they were said “to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrongdoing. . . .”

In the section on damages for personal injuries—notable for its relative brevity—one finds little indication of dollar amounts in those days. There are figures of \$20,000, \$8,000, \$10,000. Hardly anything is in six figures, and then only to be set aside or reduced on remittitur. Although the use of annuity tables was recommended, there was no indication that economists might be employed.



In this day of Equal Rights Amendment concern, one is struck by the fact that in 1935 rules were stated governing the husband's right to damages to his marital interests from injury to the wife, but there was no mention of the possibility that a wife might recover for injury to her husband.

McCormick still found it necessary to explain Lord Campbell's Act and the concept of survival of actions. He reported that more than a third of the states still had ceilings on death recoveries. The usual limit was \$10,000; it was \$7,500 in Minnesota and Oregon, and only \$5,000 in Maine and Colorado. The other tort chapters dealt with malicious prosecution, false arrest, deceit, and the like, collecting cases—mostly unremarkable—in each field.

The contracts discussion began with *Hadley v. Baxendale*, which laid down the familiar rule that damages for breach of contract can be recovered for losses reasonably foreseeable by the party to be charged when the contract was made. McCormick said that, with the exception of actions for breach of promise to marry and for mistreatment of passengers by carriers and of guests by hotels, contract damages did not include compensation for mental distress, however foreseeable.

He stated the rule that liquidated damages constituting a good faith estimate of the probable injury to be suffered were enforceable but that an amount fixed merely as a deterrent, to prevent a breach, would not be enforced. He did not discuss the relationship, if any, between penalties on the one hand and bonuses on the other. Again, the remaining chapters dealt with particular kinds of

contracts, like employment contracts, construction agreements, sales of property.

In McCormick's hornbook there was little grappling with the economic and social values that, after all, underlie and give rise to these rules. An awareness of those values, often competing, is indispensable to the lawyer who seeks not merely to know yesterday's law and to state today's law, but also to predict tomorrow's law and therefore to serve his client more effectively and more responsibly.

An impression of the currents in damages is best gained by examining developments with respect to particular rules. A good first example is the certainty rule. For more than a century a plaintiff has been required to establish the amount of his damage with reasonable certainty. Stating the rule to express the policy base of limiting the jury's discretion, a trier of fact may not speculate but must have factual basis for fixing damages. (A theme of all damage law is supervision of the jury as it determines the amount required to make the plaintiff whole.)

This does not mean that an injured plaintiff is without relief simply because he cannot prove the precise sum involved. Mere uncertainty as to amount will not prevent recovery if the evidence is of such certainty "as the nature of the case permits." Obviously, wrongful death and personal injury damages fall into this category. To state the rule, however, is to suggest that there is a level of clarity or certainty below which a plaintiff may not fall and yet recover damages.

The question of what constitutes sufficient certainty has troubled judges and commentators over the years, and no firm formulation seems possible. There is variation not only between one time in history and another but also between one kind of claim and another.

### **A Helpful Principle**

The more recent cases, however, suggest a helpful principle: the more important it seems to vindicate a given interest or claim, the more willing a court is to accept incomplete evidence on the damage issue. Compare these two cases. First, there is an antitrust case awarding lost profits to a theater owner who is unable to get first-run pictures, even though he cannot prove how much the profits would have been. Yet another court refuses damages to a theater owner for a film distributor's breach of contract to supply first-run rights to "The Graduate," on the ground that the theater was new and had no profit record.

The difference between the two cases is probably not in the reasonable certainty of the profits (uncertain in both instances) but in the policy of the substantive law: strong in antitrust, only moderate in contract. The tort cases are to similar effect. The court avoids a damage award ostensibly on the ground that damages have not been proved with adequate certainty but in reality because the court doubted whether the substantive liability extended as far as the plaintiff contended. When a court is convinced an important value exists and finds the defendant's conduct violated that value, it will accept less certain proof of the amount of damages than where it faces no special pressure to vindicate the plaintiff's interest.

Foreseeability as a limitation on damages is subject to the same kind of analysis. That is, if the defendant's actions appear to violate a highly valued interest, a strong policy, the court will find foreseeable certain consequences that would not be so held in the case of less culpable or reprehensible activity. In some small part, foreseeability and certainty are two sides of the same coin; as one expands, so does the other. And one must not omit to mention no-fault concepts, which make foresight irrelevant.

A second area of development involves "psychological harm." Increasing awareness of mental and psychological phenomena has an inevitable effect on the law of damages. Rules governing recovery of damages for pain and mental suffering have persistently, if gradually, moved in the direction of greater legal cognizance of psychological injury as a compensable harm.

Originally, mental suffering was recognized as a simply parasitic element of damages that could be awarded only if it accompanied another more fully acknowledged cause of action. Gradually, however, the infliction of mental injury came to be regarded as the basis of an independent claim in certain situations. The evolution of the interest in mental tranquility as a legally protected right has followed a stereotypical pattern. It has moved through progressive stages of recognizing an interest not to be intentionally invaded, imposing a duty on participants in a common calling not to encroach on that interest, and finally safeguarding the interest from invasions by the general public.

### No Stopping Point

The expansion process has by no means reached a stopping point. Two areas in particular appear to be in transition: bystander recovery and mental harm unaccompanied by physical manifestations. The trend is away from the outdated impact rule and away from the zone-of-danger rule, toward a less restrictive standard of foreseeability of mental effect on the person injured.

With more and more sophisticated views of emotional status of individuals, the difficulty of proof and measurement and the consequent danger of fraudulent claims diminish. For example, a psychiatrist, by observing behavior, reactions, and attitudes, can discern effects of trauma that are very real and important though not physical. These detrimental effects are scarcely less certain in measurement than the phenomenon of physical pain, for which recovery in damages is well established.

A striking current development is the growing size of verdicts against insurers for suffering allegedly caused by their failure reasonably to negotiate and to settle. Also intriguing are the now-familiar recoveries for loss of life's pleasures. Still open is the question of damages for an injury that shortens one's life expectancy even though there is no limitation on activity and no absolute proof, of course, of a shorter life.

When new interests are recognized, new harms become possible. A current illustration is the "wrongful birth" case. Claims for a wrongful birth involve a paradox. The rule has long been that when a child is killed, the parents' loss of the pleasures that come from having the child in the family outweighs the economic liberation of the parents,

who no longer need support that child. What then is the rule when there is a "wrongful birth," for example in the aftermath of a negligently performed sterilization? The traditional view would deny damages, with the satisfactions of parenthood outweighing the cost of support. Yet the indications are that consistency will not prevail and that damages will be awarded, although principles of mitigating damages and offsetting benefits immediately come up.

There are other interests now protected and productive of damage claims that were only a gleam in someone's eye a decade or two ago. Last November, for example, a federal court awarded a large sum to an employee forced into early retirement in violation of the Age Discrimination in Employment Act. *Rogers v. Exxon Research & Engineering Co.*, 404 F. Supp. 324 (D.N.J., 1975). The judgment included compensation not only for his lost wages but also for the pain and suffering caused by the blow to his dignity and self-respect. Because of the illegal action he had experienced "a syndrome of severe abdominal pain, vomiting and impotency."

### Collateral Sources

Of the rules dealing with offsets to damages, the one most under attack is the collateral source rule, which permits an injured plaintiff to obtain full recovery from the tortfeasor even though he is also compensated by some independent source. He thus may receive double recovery or even a recovery for losses that he never suffered at all. Familiar illustrations are insurance proceeds, donated medical services, wage continuation plans, social security, employment benefits.

The reasons most often advanced to justify the rule are that the plaintiff has in many instances paid for these benefits or that the donor intended to benefit him, and that the wrongdoers should not get a windfall. But the commentators agree that the stated reasons are not the real ones, that the rule in truth is retained for its value in financing personal injury litigation. Padding a tort award because of collateral sources helps pay the contingent fee, just as damages for pain and suffering do. The rule probably will not be abolished until there are new methods of financing litigation or until no-fault legislation wipes out personal injury litigation. Meanwhile, however, the rule appears to be decreasingly effective in protecting plaintiffs as defendants increasingly succeed in getting around it by adroitly suggesting other sources of succor.

In 1935 McCormick reported that more than a third of the states still had ceilings on death recoveries—usually \$10,000. Today only a half-dozen states retain ceilings. But whenever there is concern about jury generosity in a particular field, as currently in professional malpractice cases, suggested remedies include not only remittitur but also ceilings and scheduling. With the substantive law becoming more generous in recognizing nonpecuniary harms, such as pain, mental suffering, and loss of life's pleasures, the danger of juror abuse grows. It is then that we begin to speak of the possibility of forcing these amounts into a workmen's compensation-like mold, to the anguish of some segments of the bar and the great joy of others. As noted above, the law of damages is in fact one aspect of the law of controlling juries.

No portion of the law of damages is more in transition than that dealing with punitive damages. Damages generally are thought to be compensatory, designed to place the offended party as he was before the event. That is quite possible with respect to dollars lost; it is even possible with regard to property that can be repaired or replaced; but it is not possible for emotional harm, pain, and mental suffering.

Even when compensation is possible, however, there are instances in which it somehow seems inadequate. In some of these instances, the law provides for punitive damages to give vent, as McCormick said, to the outrage of the jury, and to provide something for injury to so-called dignitary interests. As commonly stated, the purposes of punitive damages are deterrence, compensation (probably to pay attorneys' fees), bounty (to encourage a plaintiff to vindicate a right otherwise too small to pursue), and vindication.

Most jurisdictions do not require a fixed ratio between compensatory and punitive damages. The emphasis is on hurting the defendant. McCormick spoke of exemplary damages as "smart money"—designed to make the defendant hurt or smart. Accordingly, punitive damages have more to do with what it takes to hurt the defendant and to deter him than what it takes to help the plaintiff. Obviously, therefore, the defendant's financial situation is important. One reason for stating a claim for punitive damages, if there is any ground whatever, is that it gives the plaintiff leverage to discover the defendant's financial circumstance.

Traditionally, punitive damages have been considered a tort remedy, there generally being none in contract. (A contract involving fraud could sometimes carry punitive damages, in McCormick's time, because of the similarity to the tort of deceit; and punitive damages were awarded for an oppressive breach by a public utility. But the exceptions were few.)

### **Oppressive Breaches**

More recently the courts have begun to give punitive damages for oppressive breaches of insurance contracts. The California courts get around the conceptual problem straightforwardly by saying, in effect, that oppressive breaches of contract are torts. Other courts reach the result by redefining an existing tort, such as intentional infliction of emotional distress. Still others approach the problem head-on and simply declare that punitive damages are allowable for a sufficiently outrageous breach of contract. The thread in these cases is that in this age of consumerism, punitive damages may be awarded for an oppressive breach committed by someone with superior economic power. They will not be awarded, surely, in contract cases where the parties are on reasonably equal footing.

Translating pain into dollars, placing a value on a lost pleasure or opportunity, or even assessing the diminution in the value of damaged property requires effective, highly communicative language. The gifted, imaginative lawyer who not only communicates information but evokes emotional response will ordinarily obtain more for his client. There have always been lawyers with superior forensic talents, but the decades after McCormick's text

saw a surge of interest in the relationship between persuasion and what the plaintiffs' lawyers called "the more adequate award."

Imaginative and sometimes flamboyant trial lawyers made national reputations with their ability to convince jurors that intangible harms had great dollar value. The late William Lloyd Prosser, reviewing Belli's *Modern American Trials*, was critical of what he called an orchestrated approach to wringing every last cent out of a sympathetic jury. He said, "It is, after all, possible to give an injured plaintiff too much." Undoubtedly there have been emotional excesses as Prosser charged, but there is no doubt that the forensic art has matured in these years.

Some years ago at one of the Annual Advocacy Institutes presented by the University of Michigan, a trial demonstration dealt with the alleged malpractice of a physician in so applying a cast to a broken leg that gangrene set in and the leg had to be amputated. The fictitious plaintiff was a single woman in her late twenties, a dancer with aspirations to the professional stage, and currently a university graduate student and instructor. In his closing argument her lawyer made the obvious points of her loss of career options, her humiliation and consequent withdrawal from normal social intercourse, her terminated engagement and diminished marriageability, and the like.

### **'She Has To Hop'**

All of these had been testified to, and both the evidence and the argument were persuasive that her damages were considerable. But after listing these elements of damage he said, "And just think, when she gets up at night she has to hop to the bathroom." A ripple of laughter swept over the audience of a thousand lawyers, but it was not a sound of amusement. Rather, it was an involuntary response to embarrassment and to realization that he somehow had distilled into one phrase all the physical loss, the humiliation, and the suffering that were hers.

I had written the facts of the case and had created this fictitious file. I knew there was no such person. I knew that the plaintiff, who testified from her wheelchair, was hiding one leg under a blanket. In short, I knew that it was all role-playing. Yet I confess that even I had an aching in my throat, a sudden lump, in response to the phrase he used.

Yes, she could wear a prosthesis, and she could engage in some of the activities that had meant so much to her over the years. If she would simply accept life on its own terms and take an existential view of things, why, she might live a virtually normal life. Yes, she had been injured through defendant's negligence (a juror might say) but she does not need a large amount of money to make her life relatively normal. But the moment counsel said, "Just think, when she gets up at night she has to hop to the bathroom," all of us knew that she would not in fact ever be normal, or even nearly normal, again.

With persuasive techniques such as this it is not an overstatement to suggest that improvement in the quality of communication with jurors has had as much effect on the size of damages as have changes in the rules of substantive liability.