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General Damages for Pain and Suffering in a Personal Tort Action

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GENERAL DAMAGES FOR PAIN AND SUFFERING IN A PERSONAL TORT ACTION

I. INTRODUCTION

Although pain and suffering are only a portion of the damages recoverable in an action for a personal injury, they are one of the more important elements. Vague as these general damages are, without them there would be no justice. Therefore, it is the scope of this note to discuss the general concept of pain and suffering; the method of admeasuring pain and suffering in the trial court and in appellate practice; the establishment of pain and suffering; the legal general damages aspect of pain and suffering; and the applicable jury instructions pertaining to pain and suffering.

In North Dakota, damages and compensatory relief are a matter of statute.[1] Detriment caused by the unlawful act or omission of another shall be compensated for in money.[2] Detriment is defined by statute as "a loss or harm suffered in person or property."[3] In an action for detriment, damages resulting after the commencement thereof or *certain to result in the future* are recoverable.[4] "For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."[5] A person entitled to bring an action under the wrongful death statute shall be awarded damages proportionate to the injury resulting from the death.[7] All of the foregoing North Dakota damage statutes, with the exception of wrongful death, have been derived from the California Civil Code. Therefore, as much emphasis as possible has been placed on California and other jurisdictions with similar statutes.

General damages are those which the law presumes to flow from the tortious act and may be awarded without proof of

1. N.D. Cent. Code § 32-03 (1961).
2. N.D. Cent. Code § 32-03-01 (1961).
3. N.D. Cent. Code § 32-03-02 (1961).
4. N.D. Cent. Code § 32-03-03 (1961).
5. N.D. Cent. Code § 32-03-20 (1961).
6. N.D. Cent. Code § 32-21-02 (1961).
7. Alexander v. Holmes, 85 Ga. App. 124, 68 S.E.2d 242 (1951).

any specific amount to compensate the plaintiff for the injury done to him.[7] They may be proved under the *"ad damnum"* clause.[8] If the pleadings are not expressly limited to special damages, a petition setting forth a tort and claiming unspecified damages in a stated amount will be construed as seeking general damages so as to authorize their recovery.[9] General damages are damages not resting on any of the applicable exact methods of computation, but upon facts and circumstances that permit the jury or the court to estimate in a general, but in a sufficiently accurate way, the injury to plaintiff.[10] The defendant is charged with notice of the existence of general damages and must come into court prepared to defend in absence of any special pleading.[11] General damages are the same as compensatory or actual damages.[12]

II. THE GENERAL CONCEPT OF PAIN AND SUFFERING

A. *Physical pain and suffering* - Since pain and suffering are by their nature classified as either "physical" or "mental" they must be distinguished. "Physical" as defined by Webster's dictionary means "of or pertaining to the body as contrasted with the mind." Physical suffering is the suffering or pain that flows directly from the physical injury.[13] The words "physical pain" do not include mental distress, but mean bodily suffering, although a strong mental emotion may produce bodily injury and cause bodily suffering, so that an instruction allowing recovery for physical pain and also mental distress would be error, where there is evidence of mental distress but not of physical pain.[14] Nervousness and disturbances of the nervous system are physical injuries and are recognized elements of damage.[15] Unlawful touching of a person's body, although no actual physical injury ensues therefrom, constitutes physical injury to a person, since it violates personal right.[16] The term physical injury is the

8. Terrace Water Co. v. San Antonio Light & Power Co., 1 Cal. App. 511, 82 Pac. 562 (1905).
9. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).
10. Enterprise Mfg. Co. v. Shakespeare Co., 47 F. Supp. 859 (W.D. Mich. 1942).
11. Simon v. S.S. Kresge Co., 103 S.W.2d 523 (Mo. 1937).
12. Ringgold v. Land, 212 N.C. 369, 193 S.E. 267 (1937).
13. McGlone v. Hauger, 56 Ind. App. 243, 104 N.E. 116 (1914).
14. Walker v. Kellar, 218 S.W. 792 (Tex. Civ. App. 1920).
15. Lowenthal v. Mortimer, 125 Cal. App. 2d 636, 270 P.2d 942 (1954).
16. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928).

synonym of "bodily hurt" or "bodily harm". There must be some tortious act by which physical injury is occassioned in order to justify damages for mental distress and fright. Thus it has been held that there can be no recovery in any case of mental distress or fright resulting from negligence where there is no bodily injury contemporaneous therewith. Sickness resulting from fright and mental anger is not a physical injury within the meaning of this rule.[17] However, in *Southern Pacific Ry. v. Bailey,*[18] the rendering of a passenger on a train nervous almost to sickness, by threatened ejection, was deemed to constitute a physical injury. A neurosis, together with its attendant physical aches and pains, is a physical injury or illness for which recovery can be had.[19]

B. *Mental pain and suffering* - "Mental" as used to describe the condition of a person, should be construed to refer to his senses, perceptions, consciousness and ideas.[20] Mental disturbance and injury of feelings has been defined as "mental or emotional pain and suffering."[21] "Mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and includes fright, nervousness, grief, anxiety, shock, worry, mortification, humiliation and indignity, as well as physical pain."[22] Mental suffering will be implied from illness accompanied by physical pain.[23] Mental anguish is a high degree of mental suffering and must be real and with cause. It cannot be the result of mere disappointment, regret, a too sensitive mind, nor a morbid imagination.[24] A distinction must be made between "mental suffering" and "impairment of the mental faculties."[25] The

17. Dye v. Chicago & A.R.R., 135 Mo. App. 254, 115 S.W. 497 (1909).
18. 91 S.W. 820, 821 (1906).
19. Sutton Motor Co. v. Crysel, 289 S.W.2d 631 (Tex. Civ. App. 1956).
20. Mutual Life Ins. Co. v. Terry, 82 U.S. 580 (1872).
21. Allison v. Simmons, 306 S.W.2d 206 (Tex. Civ. App. 1957).
22. Deevy v. Tassi, 21 Cal. 2d 109, 130 P.2d 389, 396 (1942); Clay v. Lagiss, 143 Cal. App. 2d 441, 299 P.2d 1025 (1956); McGlone v. Hauger, 56 Ind. App. 243, 104 N.E. 116, 122 (1914) "An instruction that in assessing the damages the jury might consider the physical pain and suffering and also the mental pain and anguish and the shame and humiliation, did not violate the rule against the assessment of double damages, since, while physical suffering is in a sense mental, it is generally understood to mean the suffering or pain flowing directly from the physical injury, while mental pain and anguish relate more particularly to the contemplation of the consequences and result of the injury, and humiliation differs from both in that it is not wholly personal but is a state of mind generally induced by the consciousness of the injured party that others are aware of the insult and wrong suffered."
23. Galveston, H. & S.A. Ry. v. Rubio, 65 S.W. 1126 (Tex. Civ. App. 1901).
24. Southwestern Bell Tel. Co. v. Cook, 30 S.W.2d 497 (Tex. Civ. App. 1930).
25. Gagnier v. Fargo, 12 N.D. 219, 96 N.W. 841 (1903).

former are presumed and need not be either specially pleaded or proven while the latter must be both specially pleaded and proven. Also, to impair the mental faculties means to reduce the mental powers and this is not the case in mental suffering which naturally flows from the physical injury.

C. *Pain in general* - "Pain" and "anguish" are synonymous when applied to mental conditions; thus, an instruction limiting elements of damages to physical suffering and mental pain and anguish was not erroneous.[26] Webster defines "pain" as "mental distress; anxiety; grief; anguish." This does not necessarily mean physical pain; and will not be held to mean physical pain in an instruction in a breach of promise case that personal pain suffered by plaintiff might be considered by the jury.[27] In a personal injury action, the terms "pain" and "suffering" must not be so restricted as to exclude the mental phase in authorizing damages for past and future pain and suffering.[28] Damages for "pain" and "suffering" have been extended to compensate for a decrease in the ability to work or a decrease in earning capacity.[29]

> "Inasmuch as enforced idleness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects, and call it pain and suffering. Such deprivation or impairment can be classed pain and suffering and the jury may properly be instructed that the law fixes no other measure than the *enlightened conscience of the impartial jurors.*"[30]

D. *Suffering in general* - A charge to allow plaintiff a just, pecuniary compensation for bodily injuries and disabilities and suffering and distress of mind caused by the acts complained of is not subject to the objection of allowing one recovery for bodily injuries and another for disabilities, and one for suffering of mind and another for distress of mind. The term "suffering" as used in the charge is evidently intended to refer to physical pain, but, if construed to refer to mental distress, the charge only permits of one recovery for

26. Eisenbeiss v. Payne, 42 Ariz. 142, 25 P.2d 162 (1933).
27. Robertson v. Craver, 88 Iowa 381, 55 N.W. 492 (1893).
28. Prettyman v. Topkis, 3 A.2d 708 (Del. 1938).
29. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).
30. Atkinson v. Taylor, 13 Ga. App. 100, 78 S.E. 830, 831 (1913) (Syllabus by the court) (Emphasis added).

that element of damage.[31] Suffering in the future from injury should be distinguished from permanent injury, in that the former will persist after the trial, but may cease, while the latter will last throughout life.[32]

III. THE STANDARDS USED FOR MEASURING PAIN AND SUFFERING

A. *By the jury* - The admeasurement of "pain and suffering" is an important consideration in this note. Yet, to this date, not even the medical profession has developed a definite and proven method of measuring it. Section 32-03-20 of the North Dakota Century Code provides: "The measure of damages, except when otherwise provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." This has been specifically applied to "pain and suffering."[33] In the ascertainment of "pain" and "suffering" the jury must depend upon its common knowledge, good sense and practical judgement.[34] It is not susceptible of arithmetical calculation.[35] However, the problem is that pain and suffering are to be measured in money.[36]

In *McDonald v. Union Pacific Ry.*,[37] the following charge was upheld:

> "The value that shall be put upon pain and suffering is left to you, gentlemen; to your own good common sense and experience; you value that - that is - from your own knowledge and upon your own judgment, unaided by witnesses; for the law cannot call a witness to aid you."

What guides, then, are the jury to have? The attorney, it would seem, is under an obligation to assist the jury. It is felt that it is the duty of counsel on both sides in final argument to use those methods most persuasive in presenting his side of the case to the jury. Counsel should be permitted to make deductions *from the evidence or inferences reasonably*

31. St. Louis S.W. Ry. of Texas v. Highnote, 84 S.W. 365 (Tex. 1904).
32. Colby v. Thompson, 207 S.W. 73 (Mo. 1918).
33. Lake v. Neubauer, 87 N.W.2d 888 (N.D. 1958).
34. **Ibid.**
35. **Ibid.**
36. See N.D. Cent. Code § 32-03-01 (1961).
37. 42 Fed. 579, 582 (3d Cir. 1890).

adduced therefrom.[38] The North Dakota Century Code provides that: "It is the duty of every attorney and counseler at law to employ, for the purpose of maintaining the causes confided in him, such means only as are consistent with truth, and never seek to mislead the judges (or juries) by any artifice or false statement of fact or law."[39] It appears that the North Dakota Supreme Court has in *King v. Railway Express Agency, Inc.*,[40] seemingly restricted counsel in arguing pain and suffering to the jury. Other jurisdictions have restricted the pain and suffering argument of counsel to an even greater extent.[41]

B. *By the appellate courts* - There are various tests applied by the appellate courts on appeals from excessive damages. A great percentage of these appeals are taken from awards given for pain and suffering. The final decision, in all cases, lies within the discretion of the court. The classical test was established by Chancellor Kent when he said:

> "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."[42]

The modern tests have tended to liberalize this rule. Where an award of damages for personal injuries has been held as excessive, due to "passion and prejudice" any change in the cost of living or the purchasing power of money will be considered in fixing the amount of the remittitur.[43] In California, the test of reference to past cases of similar awards was tried. However, it was held that such a test is no

38. J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950).
39. N.D. Cent. Code § 27-13-01 (1961) (Words in parenthesis added).
40. 107 N.W.2d 509 (N.D. 1961).
41. Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Stassun v. Chapin, 324 Pa. 125, 188 Atl. 111 (1936). **Contra,** Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959).
42. Coleman v. Southwick, 6 Am. Dec. 253, 258 (N.Y. 1812).
43. Birmingham Electric Co. v. Howard, 250 Ala. 421, 34 So. 2d 830 (1948).

criteria where the yardstick, the dollar, is not constant.[44]

The jury verdict which includes an amount for pain and suffering will not be overturned "unless it clearly appears . . . the result of inadvertence or intentional or capricious disregard of the evidence, or was infected with bias, passion, or other improper motive."[45] It has also been said that the verdict must not be beyond the bounds of reason,[46] nor seem unduly high.[47]

"In a world so full of pain and suffering it is strange that no one has perfected a gauge that will accurately measure its value."[48]

IV. THE ESTABLISHMENT OF PAIN AND SUFFERING: TESTIMONY

A. *By plaintiff* - Because of their interest, parties to a civil suit have been held to be incompetent to testify under the common law.[49] A party to the record, if willing to do so, could testify if called by the opposing party, but not against his own consent.[50] Statutes have been passed specifically providing that parties, with certain exceptions, are not excluded as witnesses,[51] and are subject to the general rules of evidence.[52] Under a federal statute, the competency of a witness to testify in any civil action is declared to be determined by the laws of the state in which the court is held.[53]

A party to the action has been held to be an interested witness whom the jury is not bound to believe.[54] Either the jury or the court may rightfully consider the interest of the party as affecting his credibility; but the testimony of a party, as that of any other witness, should be believed if it is not inherently improbable and there is no reasonable basis for

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44. Buswell v. City and County of San Francisco, 89 Cal. App. 123, 200 P.2d 115 (1948); Kircher v. Atchison & S.F. Ry., 32 Cal. 2d 176, 195 P.2d 427, 434 (1948) "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral and the trier of fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered."
45. Birmingham Electric Co. v. Howard, **supra** note 43, at 832.
46. Virginia Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948).
47. Butts v. Ward, 227 Wis. 387, 279 N.W. 6 (1938).
48. Texarkana Bus Co. v. Carter, 301 S. W.2d 300 (Tex. Civ. App. 1957).
49. **Cf.,** Smyth v. Strader, 45 U.S. 404 (1846).
50. **Cf.,** Jones v. Perry, 30 Am. Dec. 430 (1836).
51. Texas v. Chiles, 88 U.S. 388 (1874); State v. Powers, 51 N.J. 432, 17 Atl. 969 (1889); Cockley Mill Co. v. Bunn, 75 Ohio 270, 79 N.E. 478 (1906).
52. People v. Morrison, 195 N.Y. 116, 88 N.E. 21 (1909).
53. 18 U.S.C. § 2506 (1954).
54. Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922).

doubting it.[55] This includes testimony of a party concerning his pain and suffering.

There is some conflict of authority as to whether a party, who is a lay witness, may give testimony as to suffering from which the jury might infer a causal connection between the reported condition and the incident or accident unless or until such causal connection is fully established by medical expert testimony. The better view is in favor of the admissibility of such evidence.[56] Thus, the rule permitting lay or non-expert witnesses to testify to the apparent physical condition applies to the plaintiff,[57] and the question of causal connection remains for the jury upon a consideration of the evidence, including that of the physician and that of all the other lay witnesses.[58] It is a good policy for plaintiff's counsel to have the plaintiff take the stand in most instances. However, all of the facts and circumstances would have to be considered in each individual case. The exceptions would be where the injured plaintiff might have had many prior accidents, or where he may just make a poor witness. Defense counsel may argue to and convince the jury that a plaintiff is "claims minded."[59]

B. *By other lay witnesses* - As a general rule, non-professional witnesses have been permitted to testify as to the severity of the pain suffered by one who has been under their observations.[60] The rule admitting such evidence is one of necessity,[61] and should be applied with liberality so as not to obstruct justice "by narrow and finical rulings."[62] A lay witness has been allowed to testify that the plaintiff suffered "very much" and "very greatly."[63] A nurse of the plaintiff can testify as to the extent of his suffering without qualifying as an expert.[64] Where the bodily and mental feelings of a

55. Kelly v. Jones, 290 Ill. 375, 125 N.E. 334 (1919).
56. Pepsi-Cola Bottling Co. v. McCullers, 189 Va. 89, 52 S.E.2d 257 (1949).
57. International Coal & Mining Co. v. Industrial Comm., 293 Ill. 524, 127 N.E. 703 (1920).
58. Missouri-Kansas-Texas R.R. of Texas v. Anderson, 258 S.W.2d 375 (Tex. Civ. App. 1953).
59. Mintz v. Premier Cab Ass'n, Inc., 127 F.2d 744 (D.C. Cir. 1942).
60. Baltimore & O.R.R. v. Rambo, 59 Fed. 75 (6th Cir. 1893); Sears Roebuck & Co. v. Griggs, 48 Ga. App. 585, 173 S.E. 194 (1954); Enos v. St. Paul Fire & Marine Ins. Co., 4 S.D. 639, 57 N.W. 919 (1894).
61. Village of Shelby v. Clagett, 46 Ohio 549, 22 N.E. 407 (1889).
62. WIGMORE, EVIDENCE § 568 (3d ed. 1940).
63. Heddles v. Chicago & N.W.R.R., 77 Wis. 228, 46 N.W. 115 (1890).
64. Kimball v. Northern Electric Co., 179 Cal. 225, 113 Pac. 156 (1911).

person are to be proved, the usual and natural expressions and exclamations of such persons which are the spontaneous manifestations of pain, and naturally flow from the pain being suffered by him at the time, are competent and original evidence, which may be testified to by any party in whose presence they are uttered.[65]

C. *By expert testimony* - An expert witness may properly show pain by expressing his opinion as to whether pain complained of by one whom he has attended or examined is real or feigned.[66] It is clearly competent for the expert to give an opinion as to pain from the general appearance, actions, and looks of the patient and what he says at the time in regard to his condition.[67] A doctor may testify to the severity of pain based upon his observations.[68] However, it has been held that, according to the better authorities, statements of a sick or injured person to his medical attendant as to his present pains and bodily condition are admissible only when the medical attendant is called upon to give an expert opinion based in part upon them.[69]

V. THE LEGAL GENERAL DAMAGES ASPECT OF PAIN AND SUFFERING

A. *Past pain and suffering* - Past pain and suffering incident to injury or surgical procedure and medical treatment is compensable as an element of damages for personal injury.[70]

> "Pain and suffering are substantive losses. . . . [A person is] guaranteed freedom from physical and sensory torment. Pain and suffering while existing can be as much a disability as a crippling rupture, or dismemberment. It is the jury's duty to appraise the pain and the agony of an anatomy in discord and to affix monetarily the responsibility of the person or legal entity which broke nature's harmony."[71]

B. *Future pain and suffering* - Future pain and suffering are compensable.[72] It is in this area that difficulties arise

65. Williams v. Great Northern R.R., 68 Minn. 55, 70 N.W. 860 (1897).
66. Quaife v. Chicago & N.W. Ry., 2 Wis. 234, 4 N.W. 658 (1880); see Hintz v. Wagner, 25 N.D. 110, 140 N.W. 720 (1913).
67. **Ibid.**
68. Indianapolis & M. Rapid Transit Co. v. Reeder, 37 Ind. App. 262, 76 N.E. 816 (1906).
69. Sund v. Chicago R.I. & P. Ry., 164 Minn. 24, 204 N.W. 628 (1925).
70. Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917). Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).
71. Burgan v. City of Pittsburg, 373 Pa. 608, 96 A.2d 889, 891 (1953).

since the law imposes upon the doctor's prognosis (future diagnosis) the test of reasonable certainty to what is at the most only a probability.[73] When such a test has been met, life expectancy tables may properly be introduced.[74]

The money for this phase of general damages may have to be reduced by the jury to present worth. In a wrongful death action, several states hold that the trial court in instructing as to the amount of recovery in respect to the loss of future pecuniary benefit should limit it to its present worth — cash value.[75] However, in other jurisdictions a distinction is drawn between the reduction to present worth of damages for impaired earning capacity and those awarded for future pain and suffering. Some courts hold broadly that the trial judge must[76] or may[77] properly instruct the jury to reduce all damages awarded for prospective loss to their present worth. However, many states are against reducing damages for prospective pain and suffering.[78] The better rule is that damages flowing from impairment of earning capacity should be reduced to present worth.[79] It has been held that the failure to instruct on present worth was not error where a reasonable verdict was returned.[80] Aggravation of the consequences of a personal injury by the use of opiates is compensable.[81]

C. *Mental pain and suffering* - The "mental pain and suffering" discussed herein is accompanied by physical injury. However, both past and future mental pain and suffering is a separate element of damages, and one need not sue for the physical suffering.[82] Under the "ad damnum" clause, or general allegation of damages, a plaintiff may prove and

72. Coppinger v. Broderick, 37 Ariz. 473, 295 Pac. 780 (1931); Varley v. Motyl, 139 Conn. 138. 90 A.2d 869 (1952).
73. **Ibid.** See also **infra** notes 92-97 and text.
74. LePage v. Theberge, 89 A.2d 534 (N.H. 1952).
75. Chesapeake & O. Ry. v. Kelly, Adm'rx, 241 U.S. 485 (1916); Andrews v. Y.M.C.A. of Des Moines, 226 Iowa 374, 284 N.W. 186 (1939); Brown v. Erie R.R., 87 N.J.L. 487, 91 Atl. 1023 (1914).
76. Gleason v. Lowe, 232 Mich. 300, 205 N.W. 199 (1925); Parker v. Roberts, 99 Vt. 219, 131 Atl. 21 (1925).
77. Ingebretson v. Minneapolis & St. L.R.R., 176 Iowa 74, 155 N.W. 327 (1915).
78. Chicago & N.W. Ry. v. Candler, 28 Fed. 881 (8th Cir. 1922); Georgia Power Co. v. Woodall, 43 Ga. App. 172, 158 S.E. 367 (1931); Louisville & N.R.R. v. Gayle, 204 Ky. 142, 263 S.W. 763 (1924); LeVan v. McLean, 276 Pa. 361, 120 Atl. 395 (1923).
79. St. Louis & S.F. Ry. v. Farr, 56 Fed. 994 (8th Cir. 1893); Clark v. City of Cedar Rapids, 129 Iowa 358, 105 N.W. 651 (1906).
80. Dierks Lumber & Coal Co. v. Tollett, 178 Ark. 199, 10 S.W.2d 5 (1928).
81. Pyke v. City of Jamestown, 15 N.D. 157, 107 N.W. 359 (1906).
82. Dimmick v. Follis, 11 N.E.2d 486 (Ind. 1953).

recover all damages naturally and necessarily resulting from the act complained of, and it is not necessary that these be pleaded.[83]

An interesting California case, *Merrill v. Los Angeles Gas & Electric Co.*,[84] considered the problem of the component parts compensable under the entire injury. The court stated:

> "We think that mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages. It is mere self-stultification to believe that it will do other than make up its verdict under the rule which, while not one of law, is one of well-nigh universal human conduct; the rule of 'put yourself in his place'. Each juror will consider how he would feel under like circumstances, and he will not narrow his contemplation to the mere matter of physical suffering under the direction of any court. So that in fact verdicts always have and always will be rendered from this point of view."

Other courts have denied recovery for distress of mind and mortification, because of their uncertainty and speculativeness.[85]

D. *Embarrassment, ridicule and humiliation* - Embarrassment, ridicule and humiliation are held to be separate items for damages in many cases wherein there has been physical and/or mental injury due to negligence on the part of the defendant. Compensation has been allowed for such injuries due to distress and anxiety from disfigurement, humiliation because of facial scars, annoyance from deformities, and for mortification.[86] Concerning humiliation, a consideration for the jury is whether or not one who has been deprived of a member in infancy is likely to feel as much humiliation from it as one who sustains the loss later in life. This is due to mechanical aids which are now so highly developed; and

83. Arenson v. Butterworth, 243 Iowa 880, 54 N.W.2d 557 (1952); Hendrickson v. New Hughes Jellico Coal Co., 172 Ky. 568, 189 S.W. 704 (1916).
84. 158 Cal. 499, 111 Pac. 534, 540 (1910).
85. Linn v. Duquesne Borough, 204 Pa. 551, 54 Atl. 341 (1903).
86. See, **e.g.**, Harrod v. Bisson, 48 Ind. App. 549, 93 N.E. 1093 (1911); Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943); Coombs v. King, 107 Me. 376, 78 Atl. 468 (1910); Sherwood v. Chicago & W.M. Ry., 82 Mich. 374, 46 N.W. 773 (1890).

which may enable the infant to overcome his humiliation over the years.[87]

E. *Conscious pain and suffering in a wrongful death action* Some jurisdictions allow an award for conscious pain and suffering in addition to the wrongful death damages from the same tort.[88] Others do not, reasoning that under the ordinary death statute, in which the award is to the parents or the next of kin of the deceased minor or the wife or husband of the deceased spouse, no award can be made for the decedent's pain and suffering resulting from the fatal injury.[89] The North Dakota statute states that: . . ." in an action brought for wrongful death, the jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to recovery."[90] Thus, in North Dakota, it seems that these elements of damage could be recoverable and should be included in the prayer, trial, and argument as it may warrent a considerable recovery. However, even where by statute, there may be a recovery for mental suffering *after the injury* and prior to the death, in a combined action for death and personal injuries, there can be no recovery for decedent's terror, fright or mental suffering *preceding the injury* that caused death.[91] When the death is instantaneous, there can be no recovery whatsoever for pain and suffering, fright or terror.

F. *Damages must be probable* - Most states have promulgated general statutory regulations for damages, such as California's provision: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future"[92] Under this statute the jury must be instructed that they may assess damages for only such pain and suffering as they are certain will result in the future; but the words "reasonably certain", "will", and "necessarily" are held to be a substantial com-

87. Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948).
88. Hines v. Johnson, 151 Ark. 549, 236 S.W. 835 (1922); Love v. Detroit J & C.R.R., 170 Mich. 1, 135 N.W. 963 (1912); Marinkovich v. Tierney, 93 Mont. 72, 17 P.2d 93 (1932).
89. Bond v. United R.R. of San Francisco, 159 Cal. 270, 113 Pac. 366 (1911); Sutherland v. State, 189 Misc. 953, 68 N.Y.S.2d 553 (1947); Tufty v. Sioux Transit Co., 69 S.D. 368, 10 N.W.2d 767 (1943).
90. N.D. Cent. Code § 32-21-02 (1961) (See annotations).
91. Chicago, R.I. & P. Ry. v. Caple, 207 Ark. 53, 179 S.W.2d 151 (1944) (Emphasis added).
92. Cal. Civ. Code § 3283 (1954).

pliance with the requirement of the statute. However, the use of such words as "may"[93] and "reasonably probable"[94] have been held to be erroneous.

In North Dakota, where our statute is phrased exactly the same,[95] the word "certain" therein has been construed to have been used not in its absolute sense, the statute being satisfied by the definite phrase "reasonably certain."[96] In contrast, an instruction on damages "the pain he has suffered or may be likely to suffer in the future" was held error.[97]

VI. CONCLUSION

It is to be noted that the facts of each particular case will determine the particular instructions that are to be given. Also, since the North Dakota damage statutes are mainly derived from the California Civil Code, a good source is the *Book of Approved California Jury Instructions.* This set provides annotations along with alternative instructions for varying fact situations.

The underlying reason for pain and suffering general damages is an attempt to place the injured party back into the position he was before he incurred his detriment. This is left entirely to the discretion of the jury, the trial court, and the appellate courts. I would conclude that this is a matter of good common sense, but I feel that every factor should be considered. One important consideration that is mysteriously missing is the attorney's fee. Except on rare occasions, the personal injury cases are always tried on the contingent fee basis. This automatically reduces the plaintiff's judgment by one-third. However, the jury bases its verdict on their concept of equity to the injured. For example, where the party is permanently injured and unable to work for the rest of his life, the money he receives will have to last him the rest of his life to support himself and his family unless, in the case of a married person, the other spouse can work; or there is some other income available. Here again, these are factors to consider. However,

93. York v. General Utilities Corp., 51 N.D. 137, 170 N.W. 312 (1918).
94. Richman v. San Francisco N. & C. Ry., 180 Cal. 454, 181 Pac. 769 (1919).
95. N.D. Cent. Code § 32-03-03 (1961).
96. Larson v. Russell, 45 N.D. 33, 176 N.W. 998 (1920).
97. York v. General Utilities Corp., **supra** note 93.

the present rules of law forbid the mentioning of either the attorney's fee or the personal financial worth of the plaintiff or the defendant during the course of the trial. Both of these rules are well founded and seem to stand on solid ground.

The conclusions, then, seem to be threefold. First, the attorney should be given the full latitude in his argument of pain and suffering to the jury. His conduct should be left to the discretion of the trial court based upon the evidence. Second, the trial court should include every *factor* in its considerations on the motions after trial. This should include the marital status of the plaintiff, the size of his family, his financial worth, the type of injury, and the attorney's fee, to name a few. Third, on appeal, these findings of the trial court should be submitted with the record for the consideration of the appellate court. Also, the appellate court should apply a very stringent test such as that laid down by Chancellor Kent.

RONALD SCHMIDT