

DAMAGES IN ACCIDENT CASES

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I. GENERAL CONSIDERATIONS

The principle of compensation

The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.¹ There are other traditional strains. Where the injury is intended, or involves a wrong more flagrant than negligence, exemplary or punitive damages are sometimes allowed (in addition to compensatory damages) for the purpose of deterrence, and perhaps for vindication.² Where the cause of action is complete without a showing of actual damage (as for breach of contract, assault and battery, or trespass to land), then nominal damages may be awarded even when the proof shows no actual damages.³ These other strains, however, play an insignificant part in accident law—at least theoretically.

The principle of nominal damages is actually insignificant here. The substantive law applicable in this field makes actual damage a prerequisite to plaintiff's right of action. This is true of the law of negligence,⁴ and also generally of modern strict liability whether derived from statute⁵ or common law.⁶

Exemplary or punitive damages play a somewhat greater role. In the first place the law allows them in some cases on the fringe of accident law

* See Contributors' Section, Masthead, p. 656, for biographical data.

¹ McCormick, *Handbook on the Law of Damages* §§ 20, 137 (1935) (hereinafter McCormick); 1 Sedgwick, *A Treatise on the Measure of Damages* § 29 (9th ed. 1912) (hereinafter Sedgwick); 1 Sutherland, *A Treatise on the Law of Damages* §§ 1, 12 (4th ed. 1916) (hereinafter Sutherland).

² McCormick c. 10; Sedgwick § 37, c. XVI; 2 Sutherland c. 9; Restatement, *Torts* § 903 (1939).

³ McCormick c. 3; Sedgwick c. VI; Sutherland c. II; Restatement, *Torts* § 907 (1939).

⁴ Harper, *Torts* § 129 (1933); Restatement, *Torts* § 430 (1934).

This notion is one of the obstacles to recovery in emotional disturbance cases. See Toelle, "The Urban Case," 27 *Conn. B.J.* 74, 79 (1953), and more generally Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 *Harv. L. Rev.* 1033 (1936).

⁵ Workmen's compensation acts typically provide for payment of medical expenses and part of the actual wage loss during incapacity brought about by industrial accidents, after an initial waiting period. "Temporary injury without incapacity is not compensable in most states." Horovitz, *Injury and Death under Workmen's Compensation Laws* 260 (1944). Death benefits are usually payable only to those who establish dependency in fact. See 2 Larson, *Workmen's Compensation Law* cs. X, XI (1952).

⁶ Harper, *Torts* §§ 155, 156 (rule in *Rylands v. Fletcher*), §§ 182, 191 (nuisance); Restatement, *Torts* § 519 (1938); *id.* § 822 (b) (1939).

Some of the older forms of strict liability (e.g. trespass to land) afforded a remedy without the showing of actual damage.

where the wrong of defendant, or his employee, has been something graver than negligence.⁷ More important than this, however, is the fact that notions of vindictiveness or deterrence may come in to influence, illicitly,⁸ the fixing of damages that are supposed to be compensatory, especially in those areas where, as we shall see, the jury is given wide discretion in determining their amount.

In spite of all this, it is probably still true that the cardinal principle of damages in accident cases is—in fact as well as theory—that of compensation. We shall confine ourselves here to an analysis and appraisal of this principle.

What then is compensation? The primary notion is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money.⁹ The "remedy [should] be commensurate to the injury sustained."¹⁰ "[W]hoever does an injury to another is liable in damages to the extent of that injury."¹¹ Sometimes this can be accomplished with a fair degree of accuracy. But obviously it cannot be done in anything but a figurative and essentially speculative way for many of the consequences of personal injury. Yet 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,"¹² or other intangible loss.

The principle of compensation is a natural enough corollary of the fault principle. If defendant is a wrongdoer and he is to pay damages to an innocent plaintiff, it seems eminently fair that these damages should (at least) put the plaintiff, as nearly as may be, in the same position he would have been in if defendant's wrong had not injured him. So deeply does this correspond to our natural feelings that the basic principle has been taken pretty much for granted. Its validity in a system of liability based on the personal moral shortcoming of him who pays the judgment may well be conceded. Today, however, the trend in accident law is running heavily towards diluting the requirement of fault for liability and the defense of the victim's fault.¹³ Increasingly the personal participants in

⁷ See note 2 *supra*.

⁸ See James, "Functions of Judge and Jury in Negligence Cases," 58 *Yale L.J.* 667, 680 *et seq.* (1949).

⁹ Sources cited note 1 *supra*.

¹⁰ *Rockwood v. Allen*, 7 *Mass.* 254, 256 (1811) (Sedgwick, J.).

¹¹ *Dexter v. Spear*, 7 *Fed. Cas.* 624, No. 3867 (C.C.D.R.I. 1825) (Story, C.J.).

¹² *Restatement, Torts* § 903, comment a (1939).

¹³ See Ehrenzweig, *Negligence without Fault* (1951); Feezer, "A Circle Torn Through Negligence," 27 *N.Y.U.L. Rev.* 647 (1952); Gregory, "Trespass to Negligence to Absolute Liability," 37 *Va. L. Rev.* 359 (1951); James, "Inroads on Old Tort Concepts," 14 *NACCA L.J.* 226 (1954), 15 *id.* 281 (1955); James, "Accident Liability: Some Wartime Developments," 55 *Yale L.J.* 365 (1946); Leflar, "Negligence in Name Only," 27 *N.Y.U.L. Rev.* 564

the accident—even where their fault is clear—do not pay the judgments awarded. These are paid by absentee employers or by insurance companies and through them distributed widely over a large segment of society.¹⁴ Accident law is approaching—perhaps by faltering steps¹⁵—an enterprise liability without fault. If such a system is to be justified, it cannot be in terms of the personal ethical evaluation which gave rise to the compensatory theory of damages. Justification must come, rather, from the kind of considerations of social morality which led to workmen's compensation. In this view the ethical evaluation of the conduct of participants in an ordinary accident situation is overshadowed in importance by these outstanding facts: some classes of accidents are the inevitable by-product of enterprises which can distribute such accident losses efficiently and broadly among the beneficiaries of the enterprises. These accident losses fall initially on those who are ill-equipped to meet them; and if the losses are not shifted from the initial victims, ruin and dislocation with widely unfortunate social repercussions will result. Social morality and expediency therefore demand that these losses be met and distributed by the enterprises which caused the hazards that brought on the losses, *but only to the extent that this is necessary to obviate the evils that call for the system of strict liability*. After all, the payment and distribution of losses are burdens to all concerned in the process, and these burdens should not be imposed on persons or classes of persons without some reason, nor to an extent beyond that which the reason calls for. The reason for strict liability here is to provide assurance that accident victims will be rehabilitated, and that they and their dependents will be cared for during the period of disability without imposing on the victims or their families a crushing burden. The amount of damages measured by this functional standard may be less than the compensatory damages provided by the common law, especially since compensation is presently attempted for many speculative nonpecuniary items. Even when we consider the victim's pecuniary loss, we must remember that accidents bring a net pecuniary loss to society as a whole—the social wealth and income is thereby diminished—so that if the victim is made entirely whole, he will fare better than society and will not himself share the economic burden he is asking society to distribute. If social need is invoked to justify strict

(1952); Nixon, "Changing Rules of Liability in Automobile Accident Litigation," 3 Law & Contemp. Prob. 476 (1936); Searl, "Automobile Liability Law Development and Trend," 39 Bests Ins. News 583 (F. & Cas. ed. 1938).

¹⁴ See James, "Accident Liability Reconsidered: The Impact of Liability Insurance," 57 Yale L.J. 549 (1948).

¹⁵ The most complete integration of this thesis (with considerable emphasis on the faltering nature of the steps) appears in Ehrenzweig, *Negligence without Fault* (1951). See also Ehrenzweig, *Full Aid Insurance* (1954).

liability without regard to moral fault, then the demands of that need should measure the extent of the liability. In that context, what is fair is only what is needed, though here as elsewhere in life too stingy a view of the need might frustrate the meeting of it.¹⁶

We have not of course altogether abandoned the fault principle in accident cases. The administration of accident losses is in a transitional phase marked on the one hand by very large occasional recoveries¹⁷ and on the other hand by inadequate recoveries for the many.¹⁸ This is unsatisfactory and inefficient loss administration. The problem calls for greater assurance of the functionally necessary award but also for keeping all awards within hailing distance of what is needed. If this is to be accomplished within the framework of common-law development, judicial decisions will have to recognize not only the need for progressively broadening the basis for liability but also the importance of progressively adopting a functional view of the amounts to be recovered.

The principle of single recovery

The common-law system provides a single lump-sum judgment in the typical accident case,¹⁹ although in some tort situations (continuing nuisance and continuing trespass) plaintiff may recover periodically for continuing damage as it accrues.²⁰

There are two important practical consequences of the single recovery rule. For one thing it means that all damages, future as well as past, must be taken account of at the time of trial. This in turn faces the tribunal with the difficult and uncertain task of prophecy, with no chance for second-guessing where the prophecy turns out to be mistaken or where the parties have failed to present all items of their claims.

¹⁶ See Jaffe, "Damages for Personal Injury: The Impact of Insurance," 18 *Law & Contemp. Prob.* 219 (1953) (an analysis to which the present author is heavily indebted). Cf. James, "Social Insurance and Tort Liability," 27 *N.Y.U.L. Rev.* 537 (1952).

¹⁷ NACCA L.J., official publication of the National Association of Claimants' Compensation Attorneys, reports in each volume all verdicts or awards exceeding \$50,000 currently brought to their attention. See, e.g., 15 *NACCA L.J.* 415-28 (1955) (listing 3 verdicts in excess of \$300,000, one of which was reduced on appeal to \$168,000. *Id.* at 417, 423).

¹⁸ See Corstvet, "The Uncompensated Accident and its Consequences," 3 *Law & Contemp. Prob.* 466 (1936); James and Law, "Compensation for Auto Accident Victims; A Story of Too Little and Too Late," 26 *Conn. B.J.* 70 (1952); McNiece and Thornton, "Automobile Accident Prevention and Compensation," 27 *N.Y.U.L. Rev.* 584 (1952); Columbia University, Council for Research in the Social Sciences, Report by Committee to Study Compensation for Automobile Accidents (1932); U.S. Railroad Retirement Bd., *Work Injuries in the Railroad Industry 1938-40* (1947).

¹⁹ *Fetter v. Beal* (*Ferrer v. Beale*) 1 *Ld. Raym.* 339, 692, 91 *Eng. Rep.* 1122, 1361 (K.B. 1699, 1702); *McCormick* § 13; *Sedgwick* §§ 83(b), 84.

²⁰ *McCormick* § 13; *Clark*, *Code Pleading* 486-88 (2d ed. 1947).

Another important aspect of a single recovery is the burden it casts on the successful plaintiff of wise investment and of providence, wherever the recovery must be relied on to take care of future needs. In 1947 the Railroad Retirement Board published the results of a study of work injuries in the railroad industry for the years 1938-40. As part of that study some 1700 employees and survivors were interviewed on how they disposed of their settlement payments, which had been by way of lump sum. The report concluded (on this point) that as to such settlements "their disposition is not generally such as to offer assurance of a stable substitute for the loss of wages incurred in the severe and fatal injuries."²¹

These features mean that the single recovery rule is often both capricious and inflexible in its operation so that damages in accident cases, even where they are awarded and actually paid, often fail to do the job they should if accident law is to perform its function of administering accident losses efficiently in the public interest.

The obvious alternative to lump sum recovery is an award for periodic payments such as those made under workmen's compensation laws, which are tailored to fit continuing needs.²² But such a solution, if desirable, must come through legislation.

The rule of certainty

We have examined elsewhere²³ questions as to the sufficiency of proof. There we saw that a plaintiff must adduce evidence upon each element of his cause of action which (if believed) indicates more probably than not the existence of a state of facts favorable to recovery upon that issue. If he fails in that respect, plaintiff is not entitled to have that issue go to the jury. He loses on it, as a matter of law. This rule is generally applicable

²¹ U.S. Railroad Retirement Bd., *Work Injuries in the Railroad Industry 1938-40* at 176 (1947). This was a report to the Senate Committee on Interstate and Foreign Commerce, pursuant to S. Res. 128, 77th Cong., 1st Sess. (1941).

This conclusion is particularly significant in view of the stable and conservative character of railroad employees. I know of no other study into this question.

²² See Shulman & James, *Cases & Materials on Torts* 454-55 (2d ed. 1952).

The periodic payment also has its pitfalls—e.g., its tendency to induce prolongation of disability, either consciously or unconsciously. See, e.g., Shulman & James, *supra* (citing medical authorities advising lump sum settlements for certain types of traumatic neuroses). Cf. *Kowalski v. New York, N.H. & H.R.R.*, 116 Conn. 229, 164 Atl. 653 (1933), and Note, 86 A.L.R. 961 (1933).

In order to provide flexibility in meeting this and similar problems, most workmen's compensation laws give the board or commission discretion to commute periodic payments into a lump sum award.

²³ See James and Perry, "Legal Cause," 60 *Yale L.J.* 761, 762-74 (1951); James, "Proof of the Breach in Negligence Cases (Including *Res Ipsa Loquitur*)," 37 *Va. L. Rev.* 179, 185-93 (1951); James, "Functions of Judge and Jury in Negligence Cases," 58 *Yale L.J.* 667, 668-75 (1949).

in the present field, both as to the fact of damage and as to the causal relationship between defendant's negligence and each item of damage claimed.²⁴ Certain peculiar aspects of the rule of certainty, however, as it is applied to questions of damages, deserve special attention here. Some of these are restrictive; others tend to ameliorate the harshness of restrictive rules; still others are more lenient towards the plaintiff than are general canons of proof.

Foremost among the restrictive notions are those governing the question of lost profits. Originally the speculative and contingent nature of profits was regarded as a complete bar to their recovery in any case.²⁵ Gradually, however, came recognition that difficulties of proof and the speculative nature of profits were not uniform for all situations; and the rigid prohibition has given way to a more flexible requirement of "reasonable certainty."²⁶ But there are still rules of thumb. Many states forbid an estimate of such damages for new businesses,²⁷ or for certain kinds of businesses.²⁸ Many refuse to put any value on a lost chance.²⁹ Some exclude consideration of events after the accident but before the trial which remove much of the uncertainty that existed at the earlier date.³⁰

Another application of the rule of certainty, frequently invoked in practice but less often noted, may be called "the rule of the floating sub-

²⁴ See James and Perry, *supra* note 23; McCormick c. 9.

²⁵ McCormick § 25; Notes, 64 Harv. L. Rev. 317, 318 (1950); 7 Stan. L. Rev. 97, 111 (1954).

²⁶ Sources cited note 25 *supra*.

²⁷ Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 252 Pac. 780 (1927); States v. Durkin, 65 Kan. 101, 68 Pac. 1091 (1902); Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918); Walter Box Co. v. Blackburn, 157 S.W. 220 (Tex. Civ. App. 1913); American Oil Co. v. Lovelace, 150 Va. 624, 143 S.E. 293 (1928). But cf. note 30 *infra*.

²⁸ See Note, 64 Harv. L. Rev. 317, 320 (1950) (specifying "entertainment" and "liquor sales"). Baumer v. Franklin County Distilling Co., 135 F.2d 384 (6th Cir. 1943) seems to suggest such a broad rule for distillers. But the cases cited for the entertainment field probably deny recovery for lost profits on the particular facts. Todd v. Keene, 167 Mass. 157, 45 N.E. 81 (1896) (one night stand of Shakespeare play); Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 121 N.E. 756 (1919) (evidence of uniformity in greater yield of first run pictures held lacking on facts); Carnera v. Schmeling, 236 App. Div. 460, 260 N.Y. Supp. 82 (1st Dep't 1932) (single boxing match; Case analyzed in McCormick at 112). With the last case contrast Orbach v. Paramount Pictures Corp., 233 Mass. 281, 123 N.E. 669 (1919), allowing damages for loss of profits in similar situation on showing of receipts for year before defendant's breach, expenses of operation, and capacity crowds at competing theatre (which defendant supplied with films promised to plaintiff). Cf. also Narragansett Amusement Co. v. Riverside Park Amusement Co., 260 Mass. 265, 157 N.E. 532 (1927) (denying such damages on facts, and reviewing cases).

²⁹ See, e.g., Kuhn v. Banker, 133 Ohio St. 304, 13 N.E.2d 242 (1938); McCormick § 31.

³⁰ Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918) (profits for new business may not be based on profits made by it after period affected by defendant's breach).

But cf. Treat v. Hiles, 81 Wis. 280, 50 N.W. 897 (1891).

trahend." This comes in where a plaintiff has shown the gross amount of expense or loss, but where defendant is not liable (by substantive law) for all of the loss, or where it appears that certain credits or deductions should be made against the total expense. In such cases some courts are strict in requiring plaintiff to *prove affirmatively the amount that should be subtracted*, before he can recover anything on account of the loss or expense in question. Where, for instance, a negligent pedestrian was run down by a trolley and then further injured by the motorman's negligence in backing the car over him again, all recovery has been denied because of plaintiff's failure to show how much of his total injury resulted from the *second impact* for which alone defendant was liable.³¹ And where plaintiff has shown the rental value of a vehicle to replace that damaged by defendant he has been denied recovery for loss of use because he failed to show the cost of gasoline, oil, and depreciation which should have been credited against the rental value.³² Cases in which plaintiff has shown the total extent of a stream's pollution, but not the exact amount of each defendant's contribution to that pollution, present a variant of the present problem.³³

Also restrictive is the insistence in many situations upon expert testimony as to the extent of injury, the prognosis, and the causal relation between injury and accident.³⁴ It should be noted, however, that the artificial obstacles to producing such testimony in medical malpractice cases³⁵ are not present in other types of accident cases. In the nature of things restrictive requirements are apt to present more difficulties in proving future loss than in showing the extent of losses already incurred.

There are rules which tend to counteract the strict operation of the rule of certainty. One of these is the notion that the requirement will be relaxed where the *fact* of damage has been established and the question to be decided is the *extent* of that damage.³⁶ Another is the maxim that defendant will not be allowed to profit by his own wrong, so that if his conduct not only caused damage but also contributed to the difficulty of showing its extent he cannot complain if plaintiff comes forward with all the evidence practically available to him under the circumstances, even

³¹ *Deutsch v. Connecticut Co.*, 98 Conn. 490, 119 Atl. 891 (1923).

³² *New England Iron Wks. Co. v. Connecticut Co.*, 98 Conn. 609, 120 Atl. 281 (1923).

³³ See James and Perry, "Legal Cause," 60 *Yale L.J.* 761, 777 n. 61 (1951).

³⁴ *Id.* at 769-71. Cf. Small, "Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation," 31 *Texas L. Rev.* 630 (1953).

³⁵ Doctors, especially those of the locality, are notoriously reluctant to testify against a fellow doctor sued for malpractice. See, e.g., *Reynolds v. Struble*, 128 Cal. App. 716, 18 P.2d 690 (1933); *Johnson v. Winston*, 68 Neb. 425, 94 N.W. 607 (1903); *Simon v. Freidrich*, 163 Misc. 112, 296 N.Y. Supp. 367 (N.Y. City Ct. 1937); *Coleman v. McCarthy*, 53 R.I. 266, 165 Atl. 900 (1933).

³⁶ McCormick at 102; Restatement, Torts § 912, comment a (1939).

though it is less than would otherwise be required.³⁷ Other similar notions³⁸ reflect an increasing liberality in allowing reasonable inferences to be drawn where the proof falls short of literal "certainty." Naturally enough the tendency is greatest where the nature and impact of defendant's act is such as to make likely the kind of harm which plaintiff is claiming.³⁹

The requirement of certainty has relatively little application to non-pecuniary items of personal injury, such as pain and suffering.⁴⁰

Some minimum standards of proof as to the fact and extent of loss will always be required. This would appear to be inevitable and proper under any system for administering accident losses—or even under the broadest kind of social insurance for all disabling illness and injury. The present canons of proof which are broadly applied in civil actions do not on the whole seem unreasonable. Some of the special aspects of the rule of certainty in damages, however, appear to be unduly harsh and restrictive. Moreover they tend to discriminate *against* those items of damage (pecuniary loss) which have the greatest claim to recognition, and *in favor* of items which are harder to justify in terms of the modern social function of accident law, and which afford the greatest latitude for caprice.

Avoidable consequences

As we have seen a plaintiff may not recover for items of damage which are brought about by lack of reasonable care on his own part.⁴¹

There is also another side to this rule of avoidable consequences. The plaintiff may recover for expenses,⁴² or for property loss,⁴³ or for personal

³⁷ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); McCormick 102.

³⁸ See McCormick § 27; Restatement, Torts § 912, comment a (1939); Note, 64 Harv. L. Rev. 317 (1950).

³⁹ Note, 64 Harv. L. Rev. 317, 320 (1950).

⁴⁰ McCormick at 318; Restatement, Torts § 912, comment b (1939).

⁴¹ James, "Contributory Negligence," 62 Yale L.J. 691, 727-29 (1953); Restatement, Torts § 918 (1939).

⁴² *United States v. Chesapeake & O. Ry.*, 130 F.2d 308 (4th Cir. 1942) (expense of fighting fire); *Kleinclaus v. Martin Realty Co.*, 94 Cal. App. 2d 733, 211 P.2d 582 (1949) (expense of draining off water); *Goodwin v. Giovenelli*, 117 Conn. 103, 167 Atl. 87 (1933) (expense of plastic surgery to reduce scar allowed rather than damages for continuation of existing scar); *Smith v. Okerson*, 8 N.J. Super. 560, 73 A.2d 857 (Ch. 1950) (cost of feeding cattle when defendant's spray poisoned pasture); McCormick § 42; Restatement, Torts § 919 (1939).

As to the necessity or reasonableness of undergoing surgery to mitigate damages see *Johnston v. Long*, 30 Cal. 2d 54, 181 P.2d 645 (1947); *Goodwin v. Giovenelli*, supra; Ludlam, "Plaintiff's Duty to Minimize Defendant's Liability by Surgery," 17 Tenn. L. Rev. 821 (1943); Note, 88 U. Pa. L. Rev. 749 (1940); McCormick § 36. But cf. *Lange v. Hoyt*, 114 Conn. 590, 159 Atl. 575 (1932) (case of a Christian Scientist).

⁴³ *McKenna v. Baessler*, 86 Iowa 197, 53 N.W. 103 (1892); 1 Sedgwick § 266j. See *United*

injury,⁴⁴ incurred in reasonable attempts to minimize the loss from defendant's conduct. The most common example is the cost of medical treatment for an injury caused by defendant's negligence. Other examples come readily to mind. If plaintiff's clothing and person are burned in the course of reasonable efforts to check a fire negligently set by defendant, these items may be included in the recovery.⁴⁵

If attempts to minimize the loss were reasonable at the time they were made, they are a proper basis for assessing damages even though, in the event, the attempts turned out to be unsuccessful and so to aggravate rather than diminish the loss.⁴⁶

General and Special damages

In the law of contract there is a substantive rule excluding types of damage which were not within the contemplation of the party to be charged, at the time the bargain was made.⁴⁷ Within the meaning of this rule, general damages are such as would generally or normally flow from defendant's breach and they are assumed to be before the minds of the contracting parties. All other damages are "special," and for their recovery, some specific showing must be made that facts indicating that they might be incurred were brought home to defendant when the contract was made. There is no corresponding substantive rule in accident law generally,⁴⁸ although the restriction has been invoked in cases where defendant's negligent act or omission also constitutes the breach of a contract between him and plaintiff or a third person, especially where the duty of care with respect to that act or omission would not exist except for the contract. Thus some states allow no recovery for personal injuries where a landlord has negligently failed to perform a covenant to repair leased

States v. Chesapeake & O. Ry., 130 F.2d 308, 309 (4th Cir. 1942) (Court apparently sanctioned inclusion in possible recovery of "value of equipment destroyed in fighting the fire."); same case on later appeal, 139 F.2d 632 (4th Cir. 1944) (judgment for plaintiff affirmed without mention of this point).

⁴⁴ Illinois Cent. R.R. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907); see United States v. Chesapeake & O. Ry., 130 F.2d 308, 310 (4th Cir. 1942), aff'd, 139 F.2d 632 (4th Cir. 1944); McCormick at 154.

⁴⁵ Ibid.

⁴⁶ Southern Hardware & S. Co. v. Standard Eq. Co., 158 Ala. 596, 48 So. 357 (1909); Doolittle v. Otis Elevator Co., 98 Conn. 248, 118 Atl. 818 (1922); Ninth Ave. & 42d St. Corp. v. Zimmerman, 217 App. Div. 498, 217 N.Y. Supp. 123 (1st Dep't 1926); Central Texas Tel. Co. v. Allmand, 246 S.W. 676 (Tex. Civ. App. 1922); Restatement, Torts § 919, comments b and c and illustrations 1, 2, and 3 (1939).

⁴⁷ Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (Ex. 1854); 5 Corbin, Contracts §§ 1007 et seq. (1950); McCormick § 138; 1 Sedgwick §§ 144 et seq.

⁴⁸ 5 Corbin, Contracts 66 (1950).

premises.⁴⁹ And a few older cases denied recovery in warranty for personal injuries caused by defective products.⁵⁰ Although the restrictive rule is on the wane in the situations just described,⁵¹ it has greater continuing vitality where plaintiff complains of the failure to furnish telephone or other similar service, to make repairs,⁵² or to perform a construction or other similar contract.⁵³ With these diminishing exceptions, the substantive law of torts allows recovery for all damages, whether general or special, which are *proximately caused* by defendant's tort.⁵⁴ And while foreseeability plays a material part in limiting liability for negligence, yet, as we have seen, plaintiff may recover for damages greater in extent than appeared likely.⁵⁵

For the purposes of *pleading*, however, tort law does make a distinction between "general" and "special" damages.⁵⁶ But when this procedural rule is invoked the meaning of the words "general" and "special" is not synonymous with their meaning in the substantive contract rule described above. The test here is simply one of fair notice from the pleadings.⁵⁷ The rule is that special damages, while recoverable under substantive law, may be allowed only where specifically pleaded. In applying the rule the terms "general" and "special" do not altogether have fixed or uniform

⁴⁹ *Cavalier v. Pope* [1906] A.C. 482; *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931); 8 A.L.R. 765 (1920). See James, "Tort Risks of Land Ownership: How Affected by Sale or Lease," 28 Conn. B.J. 127 (1954); James, "Scope of Duty in Negligence Cases," 47 Nw. U.L. Rev. 778, 800-09 (1953).

⁵⁰ *Jones v. Ross*, 98 Ala. 448, 13 So. 319 (1893); *Birdsinger v. McCormick Mach. Co.*, 183 N.Y. 487, 76 N.E. 611 (1906).

⁵¹ 163 A.L.R. 300 (1946) ("... there is now a pronounced trend towards the view that the landlord is liable for personal injuries under the circumstances."); cf. *Busick v. Home Owners Loan Corp.*, 91 N.H. 257, 18 A.2d 190 (1941).

Recovery for personal injury or property damage consequent upon a breach of warranty of quality is now the rule, where other requirements of liability on warranty are met. 3 Williston, Sales §§ 614, 614a (Rev. ed. 1948).

⁵² See, e.g., *Buskey v. New England Tel. & Tel. Co.*, 91 N.H. 522, 23 A.2d 367 (1941), Note, 41 Mich. L. Rev. 185 (1942); *Emery v. Rochester Tel. Corp.*, 271 N.Y. 306, 3 N.E.2d 434 (1936), Note, 46 Yale L.J. 167 (1936).

⁵³ *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 Pac. 939 (1927). But cf. *Mooky v. Martin Co.*, 76 Ga. App. 456, 46 S.E.2d 197 (1948). See James, *Products Liability*, 34 Tex. L. Rev. 44, 192 (1955).

⁵⁴ 5 Corbin, Contracts 66 (1950); *McCormick c. 9*, § 377.

⁵⁵ *In re Polemis & Furness, Withy Co.*, [1921] 2 K.B. 560; *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926); James and Perry, *supra* note 23, at 785 et seq.

⁵⁶ Clark, *Code Pleading* 329-30 (2d ed. 1947); *McCormick* § 8; *Restatement, Torts* § 904 (1939).

⁵⁷ Clark, *Code Pleading* 330 (2d ed. 1947); *McCormick* at 34, 35. Foreseeability comes in here as it does in the contract rule but it is a different kind and must be judged from a different point of time. The inquiry here is whether defendant's lawyer could foresee that a certain line of proof would probably be offered at trial, from an examination of the allegations of the complaint, or amendment thereto, together with his knowledge of the local pleading rules and the judicial attitude towards procedural technicalities.

meanings. They are relative concepts and will often vary with the circumstances of different cases, depending on whether the item of damage sought to be proved is a natural and fairly uniform concomitant of what is alleged.⁵⁸ Thus if the complaint states that plaintiff's leg was cut off, the permanent quality of that injury is apparent, and may be shown though not specifically alleged. With respect to many types of allegations, however, permanency is treated as special damage, requiring specific allegation.⁵⁹

In spite of the relative and shifting meaning of the nature of these concepts, certain rules have been crystallized by the courts. The following items are commonly viewed as special damages: expenses incurred in efforts to minimize the loss;⁶⁰ loss of use of a chattel;⁶¹ past and future loss of income (wages, profits, salary);⁶² past and future medical, surgical, hospital, and like costs;⁶³ other expenses incurred because of personal injury or death (*e.g.*, hiring of a substitute, funeral expenses); the more unusual physical or mental consequences of the injury alleged, such as Jacksonian epilepsy,⁶⁴ disturbance of normal sex function,⁶⁵ insanity,⁶⁶ and the like.⁶⁷

Loss of value of injured property is general damage,⁶⁸ but in all other cases it is fairly safe to generalize by calling pecuniary loss special damages. In personal injury cases, pain and suffering is general damage.⁶⁹

⁵⁸ See the majority and dissenting opinions in *Keefe v. Lee*, 197 N.Y. 68, 90 N.E. 344 (1909).

⁵⁹ *Fournier v. Great A. & P. Tea Co.*, 128 Me. 393, 148 Atl. 147 (1929); *Gurmell v. Jefferson City Lines*, 239 Mo. App. 305, 192 S.W.2d 683 (1946); 68 A.L.R. 490 (1930). But cf. *Ehrgott v. City of New York*, 96 N.Y. 264, 277 (1884); *McCormick* 38.

⁶⁰ 2 *Sutherland* § 420.

⁶¹ *J. A. Mahlstedt L. & C. Co. v. Westchester El. R.R.*, 198 App. Div. 1021, 190 N.Y. Supp. 932 (2d Dep't 1921); cf. *Blakeslee Co. v. Rigo*, 94 Conn. 481, 109 Atl. 173 (1920).

⁶² *Tappin v. Rader Dairy Co.*, 119 Conn. 591, 178 Atl. 428 (1935); *Eckert v. Levinson*, 91 Conn. 338, 99 Atl. 699 (1917); *Honaker v. Crutchfield*, 247 Ky. 495, 57 S.W.2d 502 (1933); *Kennedy v. Van Horn*, 77 Okla. 100, 186 Pac. 483 (1920); *McCormick* 37; *Restatement, Torts* § 904, comment b (1939).

⁶³ *Honaker v. Crutchfield*, 247 Ky. 495, 57 S.W.2d 502 (1933); *McCormick* 37; *Restatement, Torts* § 904, comment b (1939).

⁶⁴ *Baldwin v. Robertson*, 118 Conn. 431, 172 Atl. 859 (1934) (but held allowable as "a manifestation of the injury to the brain and the loss of brain functioning which is alleged").

⁶⁵ *Kane v. New Idea Realty Co.*, 104 Conn. 508, 133 Atl. 686 (1926); *City of Hazard v. Combs*, 247 Ky. 728, 57 S.W.2d 669 (1933); *Powers v. Westchester El. R.R.*, 179 App. Div. 938, 166 N.Y. Supp. 1110 (2d Dep't 1917).

⁶⁶ *McCormick* at 37.

⁶⁷ *Galhaer v. Southern Harlan Coal Co.*, 247 Ky. 752, 57 S.W.2d 645 (1933) (aggravation of injury by malpractice of doctor).

⁶⁸ *Brodsky v. Red Raven Rubber Co.*, 111 N.J.L. 453, 168 Atl. 440 (Ct. Err. & App. 1933).

⁶⁹ *Smith v. Whittlesey*, 79 Conn. 189, 63 Atl. 1085 (1906); *McCormick* 35; *Restatement, Torts* § 904, comment a (1939).

II. PROPERTY DAMAGE

Depreciation in Value

Where personal property has been injured or destroyed, the fundamental measure of damages is the difference between the reasonable market value of the property immediately before and immediately after the injury, at the time and place where the damage was occasioned.⁷⁰ If the property is totally destroyed, there is nothing to be subtracted from its value before the accident, which will then measure the recovery.⁷¹ If repairs are not practicable, but there is a salvage value, then the latter is to be subtracted from the value before the accident, and the difference will measure the recovery.⁷²

Difficulties are encountered where the property can be restored by repair to substantially the condition in which it was before the accident. In this situation three rules have emerged.⁷³ Some courts still apply the diminution in value rule, but allow the cost of reasonable and necessary repairs to be shown as evidencing the amount of this diminution.⁷⁴ Other

⁷⁰ *Rosenblatt v. United States*, 112 F. Supp. 114 (E.D.N.C. 1953); *Insurance Co. v. Saltzman*, 111 F. Supp. 694 (W.D. Ark. 1953); *Adams v. Hazel*, 102 A.2d 919 (Del. Super. 1954); *Grant v. Dannalo*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Hayes v. Dalton*, 257 S.W.2d 198 (Mo. App. 1953); *Kopischke v. Chicago, M. & St. P. Ry.*, 230 Minn. 23, 40 N.W.2d 23 (1950); *Parilli v. Brooklyn City R.R.*, 236 App. Div. 577, 260 N.Y. Supp. 60 (2d Dep't 1932); *Pasadena State Bank v. Isaac*, 149 Tex. 47, 228 S.W.2d 127 (1950); *Stidham v. Boyd*, 258 S.W.2d 836 (Tex. Civ. App. 1953); *Cato v. Silling*, 137 W. Va. 694, 73 S.E.2d 731 (1952); *Notes*, 169 A.L.R. 1074 and 1100 (1947), and earlier annotations therein cited; *Note*, 7 Ark. L. Rev. 397 (1953); *McCormick* at 470. Cf. *Restatement, Torts* § 928 (1939).

See *Continental County Mut. Ins. Co. v. Ivy*, 256 S.W.2d 640 (Tex. Civ. App. 1953) (evidence of value of Texas owner's car in Texas not sufficient to show value in Alaska where car was damaged).

⁷¹ *Gass v. Agate Ice Cream Co.*, 264 N.Y. 141, 190 N.E. 323 (1934); *Southern County Mut. Ins. Co. v. Green Motor Co.*, 248 S.W.2d 959 (Tex. Civ. App. 1952); *McCormick* 470; *Annotations* cited note 70 *supra*.

⁷² *Kohl v. Arp*, 236 Iowa 31, 17 N.W.2d 824 (1945); *Anderson v. Morgan City Canning Co.*, 73 So. 2d 196 (La. App. 1954); *Dorn v. Sturges*, 157 Neb. 491, 59 N.W.2d 751 (1953).

⁷³ Cases are collected in the *Annotations* cited note 70 *supra*.

⁷⁴ *Hawkins v. Garford Trucking Co.*, 96 Conn. 337, 114 Atl. 94 (1921); *Kiely v. Ragali*, 93 Conn. 454, 106 Atl. 502 (1919); *Broadie v. Randall*, 114 Kan. 92, 216 Pac. 1103 (1923); *Robson v. Zumstein Taxicab Co.*, 198 Ky. 365, 248 S.W. 872 (1923); *Hayes v. Dalton*, 257 S.W.2d 198 (Mo. App. 1953); *Hintz v. Roberts*, 98 N.J.L. 768, 121 Atl. 711 (Ct. Err. & App. 1923); *Farrell v. Universal Garage Co.*, 179 N.C. 389, 102 S.E. 617 (1920); *Ripley v. C. I. Whitten Transfer Co.*, 135 W. Va. 419, 63 S.E.2d 626 (1951).

Variants of this rule are: (1) to allow the owner the diminution in value "subject . . . to the proviso that if [the property] can be entirely repaired at a less expense than the diminution in value . . . the measure of damages is the reasonable cost of repairs." *Rhodes v. Firestone Tire & R. Co.*, 51 Cal. App. 569, 197 Pac. 392 (1921); (2) To allow the owner to prove the cost of repairs as a substitute for diminution with the proviso that this cost "must not exceed the difference between the market value of the car before and after the injury." *Union City Transfer Co. v. Texas & N.O. Ry.*, 55 S.W.2d 637 (Tex. Civ. App. 1932); cf. *Stidham v.*

courts treat the reasonable and necessary cost of repairs as constituting the measure of damages, subject to correction either way if the value of the repaired article is greater or less than the value before the injury, and subject to the limitation that the cost of repairs and other allowable expenses may not in the aggregate exceed the value of the article before the accident.⁷⁵ The third rule, adopted by some courts⁷⁶ and the American Law Institute,⁷⁷ would give plaintiff an option to recover either the diminution in value or the reasonable and necessary cost of repairs. In many cases the rules will yield the same practical result, and partly because of this the reasoning of the cases is often confusing and the status of the rule uncertain.⁷⁸ But the different paths will not always lead to the

Boyd, 258 S.W.2d 836 (Tex. Civ. App. 1953); Chicago, R.I. & G. Ry. v. Zumwalt, 239 S.W. 912 (Tex. Comm'n App. 1922). Cf. Johnson v. Scholz, 276 App. Div. 163, 93 N.Y.S.2d 334 (2d Dep't 1949) (plaintiff may have diminution or cost of repairs, "whichever is the lesser.").

If cost of repairs is offered as evidence under this rule it should be coupled with evidence that: (1) the repairs were necessitated by the accident and their cost was reasonable; and that (2) either (a) the repairs restored the property to the same condition it was in before the accident, and no more, or (b) the difference between the value of the repaired article and value of the article before the injury. Merchant Shippers Ass'n v. Kellogg Express & D. Co., 28 Cal. 2d 594, 170 P.2d 923 (1946) (plaintiff allowed cost of repairs plus difference between value before injury and value after repairs); Gulan v. Gabriel, 349 Ill. App. 462, 111 N.E.2d 878 (1953) (evidence sufficient); Parilli v. Brooklyn City R.R., 236 App. Div. 577, 260 N.Y. Supp. 60 (2d Dep't 1932) (evidence insufficient); Hayes v. Dalton, supra (stating same rule as applied in Kellogg Express Co. case supra). Cf. Pflingsten v. Westenhaver, 39 Cal. 2d 12, 244 P.2d 395 (1952) (if plaintiff shows cost of necessary repairs, defendant has burden of showing any enhancement over pre-accident value of article); Pasadena State Bank v. Isaac, 149 Tex. 47, 228 S.W.2d 127 (1950). In New York apparently if the repairs restore an automobile to a physical condition like that before the injury, plaintiff may recover nothing for depreciation in value of the repaired article—a completely unjustifiable limitation. See Johnson v. Scholz, supra; Horne v. Johnston, 220 App. Div. 170, 221 N.Y. Supp. 516 (4th Dep't 1927).

⁷⁵ Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824 (1945); McAlister v. McNowen, 174 Kan. 608, 258 P.2d 309 (1953); Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931).

⁷⁶ Kopschke v. Chicago, M. & St. P. Ry., 230 Minn. 23, 40 N.W.2d 834 (1950); Copadio v. Haymond, 94 N.H. 103, 47 A.2d 120 (1946); Herr v. Erb, 163 Pa. Super. 430, 62 A.2d 75 (1948); Holt v. Pariser, 161 Pa. Super. 315, 54 A.2d 89 (1947). Cf. Parilli v. Brooklyn City R.R., 236 App. Div. 577, 260 N.Y. Supp. 60 (2d Dep't 1932) (suggesting the existence of alternative methods. But other New York cases would make plaintiff take the smaller amount. Note 74 supra); and the California and Texas cases cited note 74 supra (suggesting alternative methods with similar limitation).

⁷⁷ Restatement, Torts § 928 (1939). The option rule is and should be limited to cases where "after the harm it appears to be economical to repair the chattel." Presumably this would not usually be the case where restoration was physically possible but would cost "more than the exchange value of the chattel before the harm." *Id.* comment a. But there should be no hard and fast rule. If repairs turn out to be more expensive than the estimate because of unforeseen difficulties, the owner should get full compensation for his reasonable outlay though it exceeds the pre-accident value of the article. Cf. note 81 *infra*.

⁷⁸ Gass v. Agate Ice Cream Co., 264 N.Y. 141, 190 N.E. 323 (1934); Parilli v. Brooklyn

same end. Where, for instance, the diminution in value is greater than the cost of repairs (a common situation) the first rule will allow greater recovery than would the second, if narrowly applied.⁷⁹ Where the cost of repairs exceeds the diminution in value, the second rule is more generous than the first.⁸⁰ And where the cost of repairs, loss of use, and incidental expenses together exceed the value of the property before the accident, the limitation usually found in the second rule will keep the recovery below what it would be under any rule which did not have such limitation.⁸¹ The third rule seems best calculated both to afford an owner full compensation for the pecuniary loss he actually incurs and to encourage him to take active reasonable steps to minimize the loss. The adoption of either the first or the second rule, on the other hand, throws on the injured owner "the risk of reasonable but unsuccessful attempts to repair."⁸² Thus it would discourage such attempts wherever there was a

City R.R., 236 App. Div. 577, 260 N.Y. Supp. 60 (2d Dep't 1932); *Howe v. Johnston*, 220 App. Div. 170, 221 N.Y. Supp. 516 (4th Dep't 1927).

In a recent case the majority of the court read these precedents one way, a concurring justice another way, a dissenting justice still a third way. *Johnson v. Scholz*, 276 App. Div. 163, 93 N.Y.S.2d 334 (2d Dep't 1949).

⁷⁹ If, for instance, plaintiff is limited to the cost of repairs which restore the article to its former physical condition even where the repaired article has suffered a depreciation in market value because of the repair, the owner has suffered an uncompensated loss which he would not under the first rule. See New York cases cited note 74 supra.

If, on the other hand, this depreciation in value is added to the cost of repairs, this difference between the rules tends to disappear. See, e.g., *Merchants Shippers Ass'n v. Kellogg Express & D. Co.*, 28 Cal. 2d 594, 170 P.2d 923 (1946) (Cost of repairs measures damage only where article "can be entirely repaired This . . . rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value."); *Chicago, R.I. & G. Ry. v. Zumwalt*, 239 S.W. 912 (Tex. Comm'n App. 1922); Note, 7 Ark. L. Rev. 397, 398 (1953).

⁸⁰ See *Union City Transfer Co. v. Texas & N.O. Ry.*, 55 S.W.2d 637 (Tex. Civ. App. 1932); *White v. Beaumont Implement Co.*, 21 S.W.2d 559, 561 (Tex. Civ. App. 1929) (" . . the bill for the repairs must not exceed the difference in the market value of the car before and after the accident"). The court's citation of authority, *Robson v. Zumstein Taxicab Co.*, 198 Ky. 365, 248 S.W. 872 (1923), suggests that it may have confused the rule stated with the different rule which forbids a plaintiff recovery for any increase over pre-accident value which the repairs may have given the property. Even where repairs do not enhance the article's former value, their cost may still exceed the diminution in value caused by the injury. See, e.g., *Gass v. Agate Ice Cream Co.*, 264 N.Y. 141, 190 N.E. 323 (1934); Notes, 169 A.L.R. 1074, 1086 (1947); Notes, 169 A.L.R. 1100, 1114 (1947).

The second rule refuses recovery for the cost of repairs in excess of the article's total pre-accident value, but will allow the repair cost to exceed the diminution in value.

⁸¹ *Doolittle v. Otis Elevator Co.*, 98 Conn. 248, 118 Atl. 818 (1922) (Damages for injury to car plus loss of use might "exceed the reasonable market value of the car."); *Holt v. Pariser*, 161 Pa. Super. 315, 54 A.2d 89 (1947) (cost of repairs and loss of use properly allowed even though pre-accident value not shown).

This rule is and should be limited by the rule forbidding recovery of reasonably avoidable consequences.

⁸² See Restatement, Torts § 928, comment a (1939).

chance they might involve the plaintiff in loss. Such a restrictive rule is at variance with principles generally applied to efforts to avoid injurious consequences of a defendant's conduct.⁸³ These general principles do, however, warrant limiting a plaintiff's option where he has actually fully restored the article, both as to condition and value. In such a case the cost of repairs (plus loss of use and other proper expenses) should limit his recovery.⁸⁴

Under all the rules described above, reasonable *market* value is the general standard.⁸⁵ But it is not always the starting point for measuring damages. "While the market value of the property is generally found to provide adequate compensation to the owner, yet there are cases in which such market value does not indicate the real value to the owner, and others where the property has no real 'market value.'"⁸⁶ "Household goods, such as furniture, bedding, and wearing apparel, kept for use and not for sale"⁸⁷ fall within the first of these exceptions. So, under some cases, would property devoted to a special use by the owner where there was no market for the property for that use.⁸⁸ In such cases the owner will be allowed to show other factors, such as replacement cost and depreciation which tend to indicate its economic (but not its sentimental) value to him.⁸⁹

Loss of use and other expenses

Where repairs to the damaged chattel are practical and are in fact made, the majority of American courts allow damages for loss of use during the time reasonably required to make such repairs.⁹⁰ Where the article is wholly destroyed or where repairs are not practicable, however, most courts refuse to allow any recovery for lost use.⁹¹ Such blanket

⁸³ *Id.* § 919, comment b, illustrations 2 and 3, comment c.

⁸⁴ *Cf. Rhodes v. Firestone Tire & R. Co.*, 51 Cal. App. 569, 197 Pac. 392 (1921).

⁸⁵ McCormick § 44; Sedgwick c. XIII; 4 Sutherland §§ 1098-99; Restatement, Torts, § 911 (1939).

⁸⁶ *Alfred Atmore Pope Foundation v. New York, N.H. & H. R.R.*, 106 Conn. 423, 432, 138 Atl. 444, 447 (1927); *cf. Restatement, Torts* § 911, and comments e and f (1939).

⁸⁷ *Birmingham Ry., L. & P. Co. v. Hinton*, 157 Ala. 630, 632, 47 So. 576 (1908).

⁸⁸ In *Alfred Atmore Pope Foundation v. New York, N.H. & H. R.R.*, 106 Conn. 423, 138 Atl. 444 (1927), the owner was allowed the value of forest land for school purposes for which it had actually been purchased, and was not limited to its value for ordinary purposes, namely for timber, cordwood, fuel and for conservation of the soil, ponds, and streams.

Other examples, suggested by Restatement, Torts § 911, comment e (1939), are "a personal record or manuscript, an artificial eye or a dog trained only to obey one master. . . ."

⁸⁹ McCormick p. 170; Restatement, Torts § 911 comments e and f (1939).

⁹⁰ See cases collected in 169 A.L.R. 1074, 1087 et seq. (1947) (commercial vehicles); 169 A.L.R. 1100, 1117 et seq. (1947) (pleasure automobiles); and earlier annotations therein cited; Restatement, Torts § 928(b) (1939).

⁹¹ *Kohl v. Arp*, 236 Iowa 31, 17 N.W.2d 824 (1945); *Helin v. Egger*, 121 Neb. 727, 238 N.W. 364 (1931); *Missouri P.R.R. v. Qualls*, 120 Okla. 49, 250 Pac. 774 (1926).

refusal scarcely seems justified. The plaintiff loses the use of property during the time it takes to get a replacement just as surely as he does while it is being repaired. The principle of compensation demands recompense in the one case as in the other, subject (in both cases) to the rule of reasonably avoidable consequences.⁹²

Other limitations are also occasionally placed on attempts to recover for loss of use. Some courts refuse to allow this item where plaintiff seeks to measure his recovery by diminution in value (rather than cost of repairs) even where the article has been repaired.⁹³ Others allow the item only where the article is used in business or for profit.⁹⁴ Arkansas refuses to allow recovery for loss of use in any cases.⁹⁵ The weight of American authority rejects all the limitations listed in this paragraph.⁹⁶

Where damages for loss of use are allowed, they may be proven by showing: what plaintiff actually paid for a substitute vehicle;⁹⁷ what the fair rental value of such a vehicle was;⁹⁸ or what profit or income was actually earned by the damaged vehicle before the accident.⁹⁹

Where damages for loss of use are allowed, they will be measured by the time reasonably necessary for repairs, including the time needed to get parts for the job.¹⁰⁰

Various other items of expense, such as telephone charges and hotel bills necessitated by the injury to property, ought to be allowed in addition to damages for the loss in value of the article itself and for loss of

⁹² See Notes, 169 A.L.R. 1074, 1094 (1947). Cf. *Glass v. Miller*, 51 N.E.2d 299 (Ohio App. 1940) (where truck repairable, but owner turned it in on new one, he is entitled to damages for loss of use for time for repairs or for time to get new one, whichever should be the shorter period).

⁹³ *Johnson v. Scholz*, 276 App. Div. 163, 93 N.Y.S.2d 334 (2d Dep't 1949); *Howe v. Johnston*, 220 App. Div. 170, 221 N.Y. Supp. 516 (4th Dep't 1927).

⁹⁴ *Hunter v. Quaintance*, 69 Colo. 28, 168 Pac. 918 (1917).

⁹⁵ *Insurance Co. v. Saltzman*, 111 F. Supp. 694 (W.D. Ark. 1953); *Kane v. Carper-Dover Merc. Co.*, 206 Ark. 674, 177 S.W.2d 41 (1944); Note, 7 Ark. L. Rev. 397 (1953) ("Apparently damages for such loss can be recovered in all jurisdictions except Arkansas.").

⁹⁶ For cases allowing recovery for diminution of value and loss of use, see *Anderson v. Gengras Motors*, 141 Conn. 688, 109 A.2d 502 (1954); *Adams v. Hazel*, 102 A.2d 919 (Del. Super. 1954); *Kopischke v. Chicago, M. & St. P. Ry.*, 230 Minn. 23, 40 N.W.2d 834 (1950); Notes, 169 A.L.R. 1074, 1095 (1947); Notes, 169 A.L.R. 1100, 1117 (1947) and its predecessors collect cases wherein loss of use was allowed for pleasure vehicles.

⁹⁷ *Bauer v. Armour & Co.* 84 Pa. Super. 174 (1924); cases collected in 169 A.L.R. 1074, 1092 (1947) and 169 A.L.R. 1100, 1119 (1947).

⁹⁸ *Anderson v. Gengras Motors*, 141 Conn. 688, 109 A.2d 502 (1954).

⁹⁹ *Kopischke v. Chicago, M. & St. P. Ry.*, 230 Minn. 23, 40 N.W.2d 834 (1950).

¹⁰⁰ *Brooks Transportation Co. v. McCutcheon*, 154 F.2d 841 (D.C. Cir. 1946); *Kohl v. Arp*, 236 Iowa 31, 17 N.W.2d 824 (1945) (where unusual time required to get parts); *Hermes v. Markham*, 78 N.D. 268, 60 N.W.2d 267 (1953); cases collected in 169 A.L.R. 1074, 1090 (1947) and 169 A.L.R. 1100, 1119 (1947) (general treatment).

use.¹⁰¹ Where an item is properly a part of the cost of repairs, however, e.g., towing charges, it should not be added to the diminution in the article's value (where that is taken as the measure), but it should be added to the cost of repairs (where that is accepted either as the measure itself or evidence of diminution in value).¹⁰²

Some states allow interest on the amount representing diminution in value or cost of repairs, from the time of injury.¹⁰³

III. PERSONAL INJURIES

Loss of earnings or earning capacity

Compensatory damages for personal injury are allowed for pecuniary losses and also for such non-pecuniary losses as mental and physical distress. Pecuniary losses include loss of earning capacity or earnings, other specific harm resulting to property or business, and reasonable medical and other expenses.

The simplest case is that of a plaintiff who was earning wages or a salary when he was injured. If injury resulted in total or partial incapacity to work, plaintiff is entitled to recover the amount of earnings lost for this reason up to the time of trial plus the present value of probable future lost earnings during the estimated period of disability resulting from the injury. If plaintiff's incapacity is or probably will be partial (rather than total) for any or all of its duration, defendant is entitled to have deducted the amounts which plaintiff earns or reasonably could earn during the period of partial disability.¹⁰⁴

For reasons that are not entirely satisfactory, defendant is *not* entitled to any deduction for wages or salary actually paid plaintiff during his total disability (whether voluntarily or pursuant to contract), for the proceeds of accident insurance, or for disability benefits payable under a private or governmental scheme. The rule forbidding such deductions is often called the "collateral source" rule. With the increase of social insurance schemes it will pose increasing problems, and its re-evaluation deserves separate treatment.¹⁰⁵

In determining past and future loss of earning capacity the question is not whether plaintiff would have worked, by choice. He is entitled to

¹⁰¹ See broad statements in *Universal Carloading & Dist. Co. v. McCall*, 107 Ind. App. 479, 25 N.E.2d 253 (1940); *Chattanooga Ice Del. Co. v. George F. Burnett Co.*, 24 Tenn. App. 535, 147 S.W.2d 750 (1940). But contrast *Insurance Co. v. Saltzman*, 111 F. Supp. 694 (W.D. Ark. 1953).

¹⁰² Notes, 169 A.L.R. 1074, 1098 (1947); Notes, 169 A.L.R. 1100, 1120 (1947).

¹⁰³ McCormick at 220, 221; Restatement, Torts § 913 (1939).

¹⁰⁴ Restatement, Torts § 924 (1939); McCormick §§ 86, 87; 2 Sedgwick c. XX.

¹⁰⁵ See James, "Social Insurance and Tort Liability; The Problem of Alternative Remedies," 27 N.Y.U.L. Rev. 537 (1952).

compensation for his lost *capacity*¹⁰⁶ to earn, whether he would have chosen to exercise it or not. On the other hand factors which would bear on actual capacity such as plaintiff's probable health (without the injury), his habits and skill, the condition of the labor market, the chance of advancement or of being laid off, and the like, are all entitled to consideration.¹⁰⁷

If incapacity has persisted to the time of trial, its probable future duration must be taken into account.¹⁰⁸ If it is permanent, then the hypothetical duration of plaintiff's lost earning capacity will be the proper measure.¹⁰⁹ And in all cases of present allowance for future loss the defendant is entitled to a discount for the advance payment.¹¹⁰

If the plaintiff was not actually earning anything at the time of his injury, or if his earnings then fell demonstrably short of his earning capacity, the matter is necessarily speculative. Yet in such cases courts have often allowed juries to use their judgment (in effect, that is, to speculate) on the basis of whatever evidence is available. They regularly

¹⁰⁶ There is some authority for regarding the recovery of earnings as such as an alternative basis of recovery. Often it would make no difference which theory is adopted since the loss of actual earnings is accepted as evidence of loss of earning capacity. Where the plaintiff's actual earnings, however, are shown to exceed the reasonable value of his services, then the actual earnings theory would allow greater recovery than the earning-capacity theory. See *McKenna v. Citizens' Natural Gas Co.*, 201 Pa. 146, 50 Atl. 922 (1902). If such earnings were real and bona fide, they would appear to represent the amount of plaintiff's actual loss. See *McCormick* p. 310; *Articles 6 Okla. L. Rev.* 289, 367 (1953); *7 Stan. L. Rev.* 97, 101 (1954).

¹⁰⁷ *Nelson Creek Coal Co. v. Bransford*, 201 Ky. 778, 258 S.W. 289 (1924); *Norris v. Elndale Elevator Co.*, 216 Mich. 548, 185 N.W. 696 (1921); *Bartlebaugh v. Pennsylvania R.R.*, 78 N.E.2d 410 (Ohio App. 1948), modified, 150 Ohio St. 387, 82 N.E.2d 853 (1948); *Restatement, Torts* § 924, comment to clause (b) (1939).

¹⁰⁸ See page 585 *supra*.

¹⁰⁹ This would have been terminated by retirement rather than death. *Wetherbee v. Elgin J. & E. Ry.*, 191 F.2d 302 (7th Cir. 1951); *Southern Pac. Co. v. Guthrie*, 180 F.2d 295 (9th Cir. 1949).

If the injury shortens plaintiff's life expectancy, the weight of American authority nevertheless computes future earning loss on the basis of the life expectancy plaintiff would have had without the injury. *Prairie Creek Coal Co. v. Kittrell*, 106 Ark. 138, 153 S.W. 89 (1912); *Borcherding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952); *West v. Boston & M. R.R.*, 81 N.H. 522, 129 Atl. 768 (1925); *McCormick* at 303. *Contra*, *Hughes v. Chicago, R.I. & P. Ry.*, 150 Iowa 232, 129 N.W. 956 (1911); *Harris v. Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395 (Q.B.), which compute such losses on the life expectancy as shortened by the accident. The prevailing American rule tends to over-compensate plaintiff, since no deduction is made for his living expenses between the time of his death and the time he would have died if he had not been injured. The contrary rule, however, leads to undercompensation since plaintiff's dependents will suffer a loss of support during the years cut off the plaintiff's life. If a choice must be made between these alternatives, the prevailing American rule offers the lesser evil. For suggestion of an intermediate solution see *Note*, 22 U. Chi. L. Rev. 505 (1955).

¹¹⁰ *Restatement, Torts* § 924, comment d (1939).

do so as to the probable future earning capacity of a child¹¹¹ and probably most courts do in the case of a housewife,¹¹² even without specific evidence of the value of such capacity. The fact that plaintiff was not actually employed when injured does not preclude recovery for loss of earning capacity if he can show some basis for a finding that he probably could have been gainfully employed during the period he was incapacitated and for estimating his probable earnings.¹¹³ Moreover a plaintiff may have damages for impairment of his ability to take care of himself.¹¹⁴

Where plaintiff is self-employed, so that his earnings depend on fees or profits, he is more apt to run afoul of the "rule of certainty," as we have seen.¹¹⁵ Today, however, his obstacles are not severe if his professional standing or his business is a fairly well established one.¹¹⁶ He is then generally allowed to prove loss of earnings (or earning capacity) by showing his income before and after the injury. There is an exception to this where the profit from a business is substantially due to the capital invested or to the labor of others, rather than to plaintiff's own efforts.¹¹⁷

¹¹¹ *Girard v. Irvine*, 97 Cal. App. 377, 275 Pac. 840 (1929); *Jackiewicz v. United Illuminating Co.*, 106 Conn. 310, 138 Atl. 151 (1927); *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577 (1931); *Zimmerman v. Weinroth*, 272 Pa. 573, 116 Atl. 510 (1922); Notes, 6 U. Fla. L. Rev. 563, 565 (1953); 7 Stan. L. Rev. 97, 100-01 (1954).

¹¹² *Davis v. Renton*, 113 Cal. App. 561, 298 Pac. 834 (1931); *Florida Greyhound Lines v. Jones*, 60 So. 2d 396 (Fla. 1952), Noted 6 U. Fla. L. Rev. 563 (1953); *Metropolitan St. R.R. v. Johnson*, 90 Ga. 500, 16 S.E. 49 (1892); *Consol. Coach Corp. v. Wright*, 231 Ky. 731, 22 S.W.2d 108 (1929); *Matloff v. City of Chelsea*, 308 Mass. 134, 31 N.E.2d 518 (1941); *Wolfe v. Kansas City*, 334 Mo. 796, 68 S.W.2d 821 (1934); *Bliss v. Beck*, 80 Neb. 290, 114 N.W. 162 (1907). Cf. 151 A.L.R. 479 (1944).

Cf., *Zimmerman v. Weinroth*, 272 Pa. 573, 116 Atl. 510 (1922), refusing to allow such damages without proof of value of her services, and distinguishing therefrom the child's case.

¹¹³ Thus in *Germ v. San Francisco*, 99 Cal. App. 2d 404, 222 P.2d 122 (1950), plaintiff was held entitled to damages for such loss on the basis of evidence showing his earnings for eight years before the injury, although he was not working at that time, had recurring trouble with alcoholism and had worked only intermittently. See also *Cincinnati, N.O. & T.P. R.R. v. Perkins*, 205 Ky. 798, 266 S.W. 652 (1924) (fact that his own firm had no work for plaintiff-salesman during incapacity did not preclude damages since he might have worked for another firm); *Pawlicki v. Detroit United Ry.*, 191 Mich. 536, 158 N.W. 162 (1916) (retired shoemaker who was healthy and intended to set himself up in business held entitled to show earnings when last employed and to recover for loss of earning capacity); *Missouri, K. & T. R.R. v. Flood*, 35 Tex. Civ. App. 197, 79 S.W. 1106 (1904) (not working when injured); Notes and Comments, 6 Okla. L. Rev. 289, 370 (1953); Restatement, Torts § 924, comment c on clause (b) (1939).

¹¹⁴ *Kline v. Santa Barbara Consol. Ry.*, 150 Cal. 741, 90 Pac. 125 (1907); *Marshall v. Smith*, 131 Cal. App. 258, 21 P.2d 117 (1933).

¹¹⁵ Page 587 *supra*.

¹¹⁶ *National Soda Prod. Co. v. Los Angeles*, 23 Cal. 2d 193, 143 P.2d 12 (1943); *Orbach v. Paramount Pictures Corp.*, 233 Mass. 281, 123 N.E. 669 (1919); *McCormick* at 107; Notes, 64 Harv. L. Rev. 317 (1950); 7 Stan. L. Rev. 97 (1954).

¹¹⁷ *Chicago R.I. & P. Ry. v. Hale*, 186 Fed. 626 (8th Cir. 1911); *Pretzer v. California Transit Co.*, 211 Cal. 202, 294 Pac. 382 (1930); *La Schiavo v. Northern Ohio Tr. Co.*, 106

In such a case damages may be based on the reasonable cost of hiring a substitute.¹¹⁸ Where the business is new or of a speculative character, courts have been reluctant to admit evidence of its estimated yield,¹¹⁹ although even here there should be no ironclad rule of exclusion and some courts have allowed a showing to be made where the evidence is strong.¹²⁰ Other types of evidence besides past operating experience have been received from time to time to show lost profits, including: the experience of the trade or industry as a whole;¹²¹ opinions of experts acquainted with the situation;¹²² the fact that during the period in question competitors had to turn away business;¹²³ the experience of similarly situated firms during the same period,¹²⁴ etc.

Medical and other expenses

Plaintiff is entitled to recover the reasonable cost of medical, surgical, nursing, hospital, and other similar expenses incurred as a result of plaintiff's injury. This is true of such expenses already incurred at the time of

Ohio St. 61, 138 N.E. 372 (1922); McCormick at 311-12 (criticizing rule); 2 Sedgwick § 42a; 4 Sutherland 4692-96.

¹¹⁸ Lombardi v. California St. Ry., 124 Cal. 311, 57 Pac. 66 (1899); McCormick at 313; Note, 7 Stan. L. Rev. 97, 107 (1954).

¹¹⁹ See, e.g., Restatement, Torts § 912 comment d, and illus. 10 (1939).

¹²⁰ Thus in Treat v. Hiles, 81 Wis. 280, 50 N.W. 897 (1891), defendant breached his agreement to open up and work a stone quarry on joint account with plaintiff. The evidence showed that between the time of breach and the trial (about four years) the price of stone had remained constant and the quarry had in fact been worked at a profit. The court held this warranted a substantial verdict for loss of profits. But cf. Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918).

Damages have been allowed for preventing the expansion of an established business. In Hoag v. Jenan, 86 Cal. App. 2d 556, 195 P.2d 451 (1948), plaintiff was allowed recovery for loss of profits for breach of an agreement to build an extension on plaintiff's garage, measured by the probable increase in profits which the extension would have yielded. Plaintiff showed that he was working to capacity and turning away business, the profit he made on existing facilities for the period of default, and what extra volume and expenses the extension would have involved.

See also Stott v. Johnston, 36 Cal. 2d 864, 229 P.2d 384 (1951) (damages allowed for probable increased profits painting contractor would have made during continued post-war building boom); Jegen v. Berger, 77 Cal. App. 2d 1, 174 P.2d 489 (1946) (damages allowed for probable increased profits from new laundry machinery).

¹²¹ In the Hoag and Stott cases, supra note 120, the general business conditions during and following the war played a part. See Osterode v. Alnquist, 89 Cal. App. 2d 15, 200 P.2d 169 (1948); also Skupen v. Imperial Irrigation Dist., 33 Cal. App. 2d 392, 91 P.2d 910 (1939); Notes, 64 Harv. L. Rev. 317, 320 (1950); 7 Stan. L. Rev. 97, 106 (1954).

¹²² Ellis v. Tone, 58 Cal. 289 (1881); Note, 7 Stan. L. Rev. 97, 106 (1954). Cf. Lester v. Fox Film Corp., 114 S.C. 533, 104 S.E. 178 (1920).

¹²³ Orbach v. Paramount Pictures Corp., 233 Mass. 281, 123 N.E. 669 (1919); cf. Hoag v. Jenan, 86 Cal. App. 2d 556, 195 P.2d 451 (1948).

¹²⁴ Osterode v. Alnquist, 89 Cal. App. 2d 15, 200 P.2d 169 (1948); Orbach v. Paramount Pictures Corp., 233 Mass. 281, 123 N.E. 669 (1919); Note, 7 Stan. L. Rev. 97, 106 (1954). Cf. Weinglass v. Gibson, 304 Pa. 203, 155 Atl. 439 (1931).

trial¹²⁵ and of estimated future expenses.¹²⁶ As to past expenses, "the proper measure is the reasonable value of such services, not the amount paid or incurred therefor, although the amount paid or incurred would be some evidence of value,"¹²⁷ at least in the view of many courts.¹²⁸ Other courts, however, hold that plaintiff has the burden of showing the charges to be reasonable but proof of this can easily be supplied.¹²⁹ As to future expenses, both their need and amount will usually have to rest on expert opinion testimony.¹³⁰

Here again, as with loss of earnings,¹³¹ the question may arise whether plaintiff may recover for the expense of medical services which he has neither paid for nor become obligated to pay for. Suppose, for instance, they have been rendered by a member of the family, or their expense has been met by the proceeds of an accident insurance policy or a medical insurance plan, or they have been rendered at public expense. Many courts lump all these situations together and apply the questionable and indiscriminating "collateral source" rule so as to enable the plaintiff to get more than compensation in these cases.¹³² Such a result is defensible

¹²⁵ *Alabama Freight Lines v. Thevenot*, 68 Ariz. 260, 204 P.2d 1050 (1949); *Rigley v. Prior*, 290 Mo. 10, 233 S.W. 828 (1921); *McCormick* § 90; *Restatement, Torts* § 924(c), and comment f (1939).

¹²⁶ *Weadock v. Eagle Indemnity Co.*, 15 So. 2d 132 (La. App. 1943). See also cases and material cited supra note 25.

¹²⁷ *Guerra v. Balestrieri*, 127 Cal. App. 2d 511, 520, 274 P.2d 443, 448 (1954).

¹²⁸ *Dewhirst v. Leopold*, 194 Cal. 424, 229 Pac. 30 (1924) (paid); *Harris v. Los Angeles Transit Lines*, 111 Cal. App. 2d 593, 245 P.2d 35 (1952) (paid or incurred); *Oliver v. Weaver*, 72 Colo. 540, 212 Pac. 978 (1923) (paid); *Carangelo v. Nutmeg Farm*, 115 Conn. 457, 162 Atl. 4 (1932); *Williams v. Matlin*, 328 Ill. App. 645, 66 N.E.2d 719 (1946) (paid); *Miller v. Mills*, 257 S.W.2d 520 (Ky. 1953) (incurred).

¹²⁹ *Oliverius v. Wicks*, 107 Neb. 821, 187 N.W. 73 (1922); *Garafola v. Rosecliff Realty Co.*, 24 N.J. Super. 28, 93 A.2d 608 (App. Div. 1952); *Richardson & Holland, Inc. v. Owen*, 148 Wash. 583, 269 Pac. 838 (1928).

The conflict is noted and cases collected in Note, 13 Minn. L. Rev. 151 (1928); Note, 82 A.L.R. 1325 (1933).

¹³⁰ *Dickey v. Jackson*, 1 S.W.2d 577 (Tex. Comm'n App. 1928) ("... what might yet be needed and the amount of expense reasonably necessary to get it is a familiar subject of expert estimation.").

¹³¹ See page 598 supra.

¹³² *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954) and *Plank v. Summers*, 203 Md. 522, 102 A.2d 262 (1954) (recovery allowed to include value of medical and hospital services rendered without charge to veteran and serviceman respectively by naval hospital). *Denver & R.G. R.R. v. Lorentzen*, 79 Fed. 291 (8th Cir. 1897); *Roth v. Chatlos*, 97 Conn. 282, 116 Atl. 332 (1922), noted, 31 Yale L.J. 776 (1922); *Clark v. Berry Seed Co.*, 225 Iowa 262, 280 N.W. 505 (1938); Notes, 24 Minn. L. Rev. 280 (1940); 128 A.L.R. 686 (1940) (such services rendered as gratuity). *Dempsey v. Baltimore & O.R.R.*, 219 Fed. 619 (E.D. Pa. 1915); 95 A.L.R. 577 (1935) (accident insurance proceeds); 18 A.L.R. 678 (1922). *Gersick v. Shilling*, 97 Cal. App. 2d 641, 218 P.2d 583 (1950); cf. *Michigan Hosp. Service v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954); 13 A.L.R.2d 355 (1950) (medical and hospital expenses defrayed by blue cross plan).

where the services represent a gift which the donor intended to be in addition to compensation. Otherwise the double recovery smacks more of punishment to the wrongdoer than of efficient loss distribution in the public interest.¹³³ It is probably allowed by a majority of courts¹³⁴ although the results in several cases support the more restrictive view.¹³⁵

In addition to expenses usually thought of as medical, plaintiff may have reasonable compensation for such expenses as that of hiring a housekeeper¹³⁶ or taking a trip for health,¹³⁷ if the need for such expense is sufficiently related to the injury.

Another kind of loss which has a pecuniary aspect—although its measurement in those terms is pretty speculative—is diminution of the chance to get married, especially in a girl or young woman. Where an injury is disfiguring or in some other way likely to impair this chance, the jury will be allowed to take this into consideration in awarding damages.¹³⁸ The impairment of a woman's ability to bear children may also be considered.¹³⁹

Pain, suffering, mental distress

All courts allow damages for conscious pain and suffering in personal injury cases.¹⁴⁰ These damages do not represent a pecuniary loss, yet in theory they are "compensatory."¹⁴¹ It is a little hard to tell just what that

¹³³ See James, "Social Insurance and Tort Liability; The Problem of Alternative Remedies," 27 N.Y.U.L. Rev. 537 (1952).

¹³⁴ See note 132 supra.

¹³⁵ *City of Englewood v. Bryant*, 100 Colo. 552, 68 P.2d 913 (1937) (medical expenses furnished gratuitously either by county or hospital not to be included); *DiLeo v. Dolinsky*, 129 Conn. 203, 27 A.2d 126 (1942) (similar); *Sedlock v. Trosper*, 307 Ky. 369, 211 S.W.2d 147 (1948) (medical expenses met by contributory company plan something like blue cross, not includable); Restatement, Torts § 924, comment f (1939).

¹³⁶ If the injured person is a housewife, this item will be recoverable either in her own suit or in her husband's, depending on local law. *Astles v. Quaker City Bus. Co.*, 158 F.2d 979 (2d Cir. 1947) (Connecticut law); *Rosenblatt v. United States*, 112 F. Supp. 114, 120 (E.D. N.C. 1953); *Berl v. Rochester States Corp.*, 14 N.Y.S.2d 516 (City Ct. Rochester 1939). Cf. Note, 37 A.L.R.2d 364 (1954) (cost of hiring substitute).

¹³⁷ *McCormick* 323. Cf. *Tomey v. Dyson*, 76 Cal. App. 2d 212, 172 P.2d 739 (1946) (maintenance in convalescent home after discharge from hospital); *Woodman v. Peck*, 90 N.H. 292, 7 A.2d 251 (1939) (where injured child was removed to hospital in other town, traveling expenses of parents to visit son held properly allowable).

¹³⁸ *Hunter v. Stewart*, 47 Me. 419 (1859) (but such a consequence of injury not allowed because not specially pleaded).

¹³⁹ Cf. Note, 46 A.L.R. 1230, 1399 (1927); *Bucktrot v. Partridge*, 130 Okla. 122, 265 Pac. 768 (1928); Note, 102 A.L.R. 1125, 1516 (1936); Note, 16 A.L.R.2d 3335 (1951) (collecting decisions passing on questions of excessiveness of verdicts involving injuries which interfere with ability to bear children).

¹⁴⁰ *McCormick* § 88; Restatement, Torts §§ 905, 924 (1939).

A critical and provocative treatment of the present problem appears in Zelermyer, "Damages for Pain and Suffering," 6 Syracuse L. Rev. 27 (1954).

¹⁴¹ *Ibid.* See also Restatement, Torts § 912, comment b (1939).

word means in this context. All agree that it does not mean the sum which the plaintiff—or anyone else—would be willing to suffer the injury for.¹⁴² Pain and suffering have no exchange value and there is no attempt to equate them to anything like that. The matter is frankly committed in the first instance to the sound discretion of the jury and the language of compensation has real significance only in framing instructions which are calculated to put the jury in a proper frame of mind to exercise self-restraint,¹⁴³ and in furnishing an appropriate frame of reference for supervisory action by the court in cutting down verdicts felt to be excessive.¹⁴⁴

Damages are allowed not only for past pain and suffering, but also for that which is reasonably likely to result in the future from the injury.¹⁴⁵

There is no clear line of distinction between physical pain and mental suffering, nor does the law insist on drawing one.¹⁴⁶ Where there is no physical impact or trauma the problem of liability itself may become complicated.¹⁴⁷ Given a bodily injury, however, damages will be allowed for many forms of mental distress which result from or accompany the injury, such as fear,¹⁴⁸ worry,¹⁴⁹ humiliation,¹⁵⁰ and functional mental disturb-

¹⁴² See, e.g., *Alabam Freight Lines v. Thevenot*, 68 Ariz. 260, 204 P.2d 1050 (1949); *Standard Oil Co. v. Shields*, 58 Ariz. 239, 119 P.2d 116 (1941).

¹⁴³ See *McCormick* at 318.

¹⁴⁴ See, e.g., *Standard Oil Co. v. Shields*, 58 Ariz. 239, 119 P.2d 116 (1941); *St. Louis Southwestern Ry. v. Brummett*, 201 Ark. 53, 143 S.W.2d 555 (1940); *Willis v. Atchison, T. & S.F. Ry.*, 352 Mo. 490, 178 S.W.2d 341 (1944); *Burr v. Kansas City Pub. S. Co.*, 276 S.W.2d 120 (Mo. 1955).

¹⁴⁵ *Cunningham v. Pennsylvania R.R.*, 55 F. Supp. 1012 (E.D.N.Y. 1944); *Standard Oil Co. v. Shields*, 58 Ariz. 239, 119 P.2d 116 (1941); *Purdy v. Swift & Co.*, 34 Cal. App. 2d 656, 94 P.2d 389 (1939) (permanent loss of senses of smell and taste); *Burr v. Kansas City Pub. S. Co.*, 276 S.W.2d 120 (Mo. 1955) ("pain, personal inconvenience and handicap" from permanent injuries).

¹⁴⁶ *Birch v. United States*, 220 F.2d 165 (2d Cir. 1955); *Purdy v. Swift & Co.*, 34 Cal. App. 2d 656, 94 P.2d 389 (1939); *Boston v. Chesapeake & O. Ry.*, 223 Ind. 425, 61 N.E.2d 326 (1945); *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 98 S.W.2d 969 (1936); *Berg v. New York Society for Relief*, 136 N.Y.S.2d 528 (Sup. Ct. N.Y. County 1954); *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955).

¹⁴⁷ See James, "Scope of Duty in Negligence Cases," 47 Nw. U.L. Rev. 778, 789-96 (1953).

¹⁴⁸ This may consist of fear accompanying the injury itself, as in *Boston v. Chesapeake & O. Ry.*, 223 Ind. 425, 61 N.E.2d 326 (1945) and *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955), or of fear of the consequences, as in *Berg v. New York Society for Relief*, 136 N.Y.S.2d 528 (Sup. Ct. N.Y. County 1954); *Halloran v. New England T. & T. Co.*, 95 Vt. 273, 115 Atl. 143 (1921).

But cf. *Chicago R.I. & P. Ry. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944) (no recovery for fear of injury before it happens).

¹⁴⁹ *DeLoach v. Lamier*, 125 F. Supp. 12 (N.D. Fla. 1954) (pregnant mother's worry lest injury to her also injure foetus, which turned out to be groundless). Cf. *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955) (anxiety neurosis after second accident in which ground collapsed under plaintiff).

¹⁵⁰ *Cunningham v. Pennsylvania R.R.*, 55 F. Supp. 1012 (E.D.N.Y. 1944); *Abelmann v.*

ances.¹⁵¹ Questions have arisen as to whether the jury should be told to consider distress from inability to pursue vocations which enrich life spiritually but not materially.¹⁵²

Effect of inflation

For the most part damages will naturally be assessed in terms of the value money has at the time of those events, which become significant in a lawsuit. If no particular attention is paid to the matter, the evidence of past pecuniary loss will be related to wages when they were lost and expenses when they were incurred. The jury will estimate the compensation for pain and suffering in terms of current dollars at the time of trial. Future loss will represent a straight-line projection of contemporary values. If the economy is marked by gradually rising costs, verdicts based on today's wages and costs and ideas of the value of money will naturally tend to exceed verdicts of a decade or more ago. On the whole this sort of thing will take care of itself. But there are several possible sources of difficulty:

- (1) If a long period has elapsed between the accident and the trial and a material change in living costs has occurred during that time, plaintiff may get paid in dollars that are worth less or more than those he lost when he lost them, unless some adjustment is made.
- (2) Where damages are awarded for future loss, there is the chance of similar discrepancies between dollars awarded today and the value of those dollars when they are drawn upon to fill future needs, unless the future course of living costs is charted and the award adjusted to it.
- (3) There is likely to be a cultural lag so that some jurors are not think-

Ormond, 53 Ga. App. 753, 187 S.E. 393 (1936); *Panjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 98 S.W.2d 969 (1939).

¹⁵¹ *DeLoach v. Lanier*, 125 F. Supp. 12 (N.D. Fla. 1954) (neurotic condition and "the punishment she takes in attempting to correct the assumed injuries."); *St. Louis Southwestern Ry. v. Brummet*, 201 Ark. 53, 143 S.W.2d 555 (1940) ("neuritis and neurosis"); *Loewenthal v. Mortimer*, 125 Cal. App. 2d 636, 270 P.2d 942 (1954) (nervousness and disturbances of nervous system); *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955) ("anxiety neurosis").

Compare cases holding similar disturbances compensable under workmen's compensation acts where they produce disability. *Eaves v. Blaenclydach Colliery Co.*, [1909] 2 K.B. 73; *Stride v. Southampton G.L. & Coke Co.*, 85 L.J. K.B. (n.s.) 1449 (C.A. 1916).

¹⁵² Variant decisions appear in *Winter v. Pennsylvania R.R.*, 68 A.2d 513 (Del. Super. 1949); *King's Indiana Billiard Co. v. Winters*, 123 Ind. App. 110, 106 N.E.2d 713 (1952); *Northern Indiana P.S. Co. v. Robinson*, 106 Ind. App. 210, 18 N.E.2d 933 (1939), 38 Mich. L. Rev. 97 (1939); *Hogan v. Santa Fe Trail Trans. Co.*, 148 Kan. 720, 85 P.2d 28 (1938), 13 So. Calif. L. Rev. 152 (1939); *Greenwalt v. Nyhnis*, 335 Mich. 76, 55 N.W.2d 736 (1952); Note, 120 A.L.R. 535 (1939).

ing in terms of today's values but often in terms of those with which they grew up.

(4) There is danger that courts will use outdated verdicts as standards of comparison in performing their supervisory function.¹⁵³

The last problem mentioned has had frequent recognition by the courts. As far back as 1878 a New York court noted that "in making comparisons of other cases with the present," it should consider "that the relative value of money has diminished in recent times," and refused to set aside as excessive a verdict of \$14,000 for a broken leg resulting in permanent injuries.¹⁵⁴ Frequently since that time courts have noted prevailing high¹⁵⁵ or low¹⁵⁶ price levels and distinguished verdicts rendered at other times (when different price levels prevailed) which were urged on the courts as comparisons in attempts to upset or sustain the amount of verdicts in the cases being adjudicated.

The third problem has also been noted by the courts and there is well-nigh universal recognition that both courts and juries should take account of well known and apparently more or less permanent changes in the purchasing power of money.¹⁵⁷ Many courts would sanction a charge to the jury in general terms to this effect.¹⁵⁸

Decisions dealing with the specific implications of such general notions have been rarer. In a few cases the change in living costs between the

¹⁵³ See analyses of the general problem in McCormick § 49; Notes, 7 Ark. L. Rev. 140 (1953); 48 Colum. L. Rev. 264 (1948); 26 Neb. L. Rev. 651 (1947); 2 Okla. L. Rev. 224 (1949).

¹⁵⁴ *Gale v. New York Central & H.R.R.*, 13 Hun 1, 4 (3d Dep't 1878), aff'd, 76 N.Y. 594 (1879).

¹⁵⁵ Especially during the periods of inflation following the two world wars, the latter continuing through the present time. See, e.g., *Illinois Cent. R.R. v. Johnston*, 205 Ala. 1, 87 So. 866 (1920); *Posch v. Chicago Ry.*, 221 Ill. App. 241 (1919); *Barnett v. Furst*, 99 Cal. App. 2d 767, 222 P.2d 470 (1950); *Roeder v. Erie R.R.*, 164 N.Y. Supp. 167 (Sup. Ct. Westchester County 1917); *Swanson v. J. L. Shiely Co.*, 234 Minn. 548, 48 N.W.2d 848 (1951); Notes, 7 Ark. L. Rev. 140 (1953); 2 Okla. L. Rev. 224 (1949); cases collected in Note, 12 A.L.R.2d 611, 625 et seq. (1950).

¹⁵⁶ *Johnson v. St. Paul City Ry.*, 67 Minn. 260, 69 N.W. 900 (1897); cases collected in Note, 26 Neb. L. Rev. 651, 652 (1947).

¹⁵⁷ See, *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952); *King's Indiana Billiard Co. v. Winters*, 123 Ind. App. 110, 106 N.E.2d 713 (1952); *Morgan v. Krepplier*, 60 So.2d 139 (La. App. 1952); cases cited in Note, 12 A.L.R.2d 611, 636 (1950). Contra, *Palmer v. Security Trust Co.*, 242 Mich. 163, 218 N.W. 677 (1928).

¹⁵⁸ *Halloran v. New England T. & T. Co.*, 95 Vt. 273, 115 Atl. 143 (1921); *Dabareiner v. Weisflog*, 253 Wis. 23, 33 N.W.2d 220 (1948); cases collected in Note, 12 A.L.R.2d 611, 638 (1950). Cf. *Louisville & N.R.R. v. Scott's Adm'r*, 188 Ky. 99, 220 S.W. 1066 (1920); *Fort Worth & D.C. Ry. v. Gifford*, 252 S.W.2d 204 (Tex. Civ. App. 1952). But cf. *Hodkinson v. Parker*, 70 S.D. 272, 16 N.W.2d 924 (1944) (charge inviting consideration of "the present low value of money and the high cost of living in arriving at the amount of future losses" held properly refused). See note 159 infra.

time past losses were incurred and the time of trial has been taken into account, and the jury has been directed to award the present cash value of such losses.¹⁵⁹

Greater confusion surrounds present damages for future loss. Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the *status quo*;¹⁶⁰ or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm

¹⁵⁹ *Tennessee River Nav. Co. v. Woodward*, 18 Ala. App. 34, 88 So. 364 (1920) (requested charge concerning medical bills forbidding jury to consider "any difference . . . between the purchasing power of a dollar at the time plaintiff expended it and at the present time," held properly refused since it "does not correctly state the law."); *Talbert v. Chicago, R.I. & P. Ry.*, 321 Mo. 1080, 15 S.W.2d 763 (1929) (where trial takes place eleven years after death it is to be considered that: "Five thousand dollars in 1914 would have been worth much more to the estate . . . than \$10,000 would have been in 1927, both on account of the lapse of time and the decreasing value of the dollar."); *Rigley v. Prior*, 290 Mo. 10, 233 S.W. 828 (1921) (where injury in 1914 and plaintiff largely recovered at time of trial, charge upheld that damages would be "the present cash value of such sum in damages as . . . will fairly and reasonably compensate him for his mental and physical pain . . . his medical expense . . . and his pecuniary loss, if any, resulting from any impairment . . . of his earning power."). Cf. *Halloran v. New England T. & T. Co.*, 95 Vt. 273, 115 Atl. 143 (1921), in which argument of counsel and charge by the court invited the jury to consider "the present impaired purchasing power of the dollar." This was upheld, Watson, C. J., dissenting. It does not appear from the report in this case when the injury occurred.

In accord with view taken here see also Note, 48 Colum. L. Rev. 264, 267-69 (1948). Contra, *Palmer v. Security Trust Co.*, 242 Mich. 163, 218 N.W. 677 (1928).

¹⁶⁰ *Armentrout v. Virginian Ry.*, 72 F. Supp. 997 (S.D. W.Va. 1947), rev'd on other grounds, 166 F.2d 400 (4th Cir. 1948); *Alabam Freight Lines v. Thevenot*, 68 Ariz. 260, 204 P.2d 1050 (1949); *Weadock v. Eagle Indemnity Co.*, 15 So.2d 132 (La. App. 1943); *Henwood v. Moore*, 203 S.W.2d 973 (Tex. Civ. App. 1947). Cf. *Edwards v. Southern Ry.*, 52 Ga. App. 557, 184 S.E. 370 (1936); *Hodkinson v. Parker*, 70 S.D. 272, 16 N.W.2d 924 (1944).

In the *Armentrout* case, the district court said:

It is possible, of course, that values may cease to be affected by inflation of the currency. Economic conditions may conceivably cause the value of the dollar again to rise to the point where it stood before the World War H. On the other hand there is no assurance that its value may not become less as time goes on. This possibility balances, if it does not outweigh the contrary forecast.

72 F. Supp. at 1001. In the *Weadock* case the court foresaw a continuation of the present low purchasing power of money "with little or no prospect for any change, except probably further decrease, for many years." 15 So. 2d at 146.

The cases cited in this note all specifically mention the problem of future dollar value in relation to future losses. It should be noted that most of the cases cited note 109 *supra* involve future losses and tacitly invite computation of them in terms of current dollar values.

to which they think we shall rapidly return.¹⁶¹ It is not at all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part the problem—which is inevitably present in every case of future loss—is not analyzed and the present value of money is assumed to be the proper basis.

The problem is necessarily insoluble under the principle of the single lump sum recovery. It could be approached with intelligent flexibility under a system of periodic payments continuing for the duration of future needs,¹⁶² though such a system would pose other problems including a greater administrative burden on courts and defendants.

Income tax exemption

The Internal Revenue Code lists as an exemption from gross income: "The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ."¹⁶³ Thus all compensatory damages in personal injury accident cases are tax exempt though they often include compensation for loss of past and estimated future earnings which would have been taxable if plaintiff had not been injured and had been paid wages or salary. It has been suggested that "the treatment of lost earnings is rooted in emotional and traditional, rather than logical, factors."¹⁶⁴ We shall not here try to weigh the wisdom of the exemption. Rather we shall take the exemption as our starting point and try to see how it does and how it should affect the assessment of damages.

The first question is this: should the probable gross earnings, or estimated net income after taxes, be taken as the measure of recovery for loss of earnings? The argument for computing damages on estimated income after taxes is a clear one: this will measure the actual loss. If plaintiff gets, in tax-free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost.

Not many decisions treat this question explicitly. Most of those that do consider it refuse to deduct taxes on the ground that future tax rates and the way they may affect this particular plaintiff are too speculative.¹⁶⁵ It

¹⁶¹ Ill-starred guesses appear in *Spell v. United States*, 72 F. Supp. 731 (S.D. Fla. 1947) ("It is common knowledge that wages for unskilled labor . . . were . . . much higher than may be expected during normal times."); *Calihan v. Yellow Cab Co.*, 125 Cal. App. 649, 13 P.2d 931 (1932) (court noted "signs of the country's gradual emergence from the depths of the depression; we may expect a return to normal conditions.").

¹⁶² See suggestion in Note, 2 Okla. L. Rev. 224, 226 (1949).

¹⁶³ Int. Rev. Code of 1954 § 104(a).

¹⁶⁴ Harnett, "Torts and Taxes," 27 N.Y.U.L. Rev. 614, 626 (1952); Note, 40 Cornell L.Q. 345, 346 (1955).

¹⁶⁵ *Stokes v. United States*, 144 F.2d 82 (2d Cir. 1944); *Chicago & N.W. Ry. v. Civil*,

has also been suggested that the tortfeasor ought not to get the benefit of this exemption which comes from a "collateral source,"¹⁶⁶ but this argument overlooks the compensatory theory of damages.¹⁶⁷ It is more forthright to say, as the Missouri court has, that the rule of compensation here must yield to the practical difficulty of making a forecast.¹⁶⁸

Even in this form the argument is weak. In the first place it has no proper application to damages for *past* losses. In measuring them, the tax can be computed and should be deducted.¹⁶⁹ Moreover, future taxes are no more speculative than are many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child¹⁷⁰ or the future trends of the dollar's value.¹⁷¹ As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as "death and taxes," the courts are avoiding their responsibilities when they decline to make the best guess they can once all the reasonably available evidence has been brought before them.¹⁷²

The second question is whether the jury should be told about the exemption. Even if taxes are not to be deducted in computing earning loss, there is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it. One court, in recognition of this danger, sanctions an instruction to the jury that the

178 F.2d 497 (8th Cir. 1949); *Cole v. Chicago St. P.M. & O. Ry.*, 59 F. Supp. 443 (D. Minn. 1945); *Hall v. Chicago & N.W. Ry.*, 5 Ill.2d 135, 125 N.E.2d 77 (1955); *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952); *Texas & N.O. R.R. v. Pool*, 263 S.W.2d 582, 591 (Tex. Civ. App. 1953); Notes, 33 B.U.L. Rev. 114 (1953); 32 Neb. L. Rev. 491 (1953); 4 Syracuse L. Rev. 350 (1953); 32 Tex. L. Rev. 108 (1953); 9 A.L.R.2d 311 (1950).

¹⁶⁶ Notes, 51 Colum. L. Rev. 782, 783 (1951); 33 B.U.L. Rev. 114 (1953).

¹⁶⁷ See analysis in James, "Social Insurance and Tort Liability," 27 N.Y.U.L. Rev. 537 (1952).

¹⁶⁸ *Dempsey v. Thompson*, 363 Mo. 339, 345-46, 251 S.W.2d 42, 45 (1952):

. . . the general rule that an award of damages for loss of future earnings should be based strictly on actual pecuniary loss cannot be rigidly adhered to insofar as it may be impossible to compensate with reasonable accuracy the amount of income tax liability that may attach thereto.

See also *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951).

¹⁶⁹ None of the cases throws doubt on this proposition though none of them discusses it.

¹⁷⁰ See notes 111, 112 *supra*. A similar problem appears in cases where a child has been killed. See Note, 22 U. Chi. L. Rev. 538 (1955).

¹⁷¹ See pages 605-08 *supra*.

¹⁷² In a very recent decision, the House of Lords decided that a trial court should take probable income tax into account "in assessing that part of the damages attributable to loss of earnings actual or prospective." *British Transport Comm. v. Gourley* [1956] 2 Weekly L.R. 41 (H.L.).

award is not subject to tax, and that they “. . . should not consider such taxes in fixing the amount of any award made plaintiff. . . .”¹⁷³

IV. WRONGFUL DEATH AND SURVIVAL

Statutory basis

The statutory origin of all rights of action on account of injuries which result in death before a claim for them was compromised or reduced to judgment is too well known to need comment.¹⁷⁴ Many of the original statutes set a monetary limit on the amount to be recovered, and some of these limitations still persist, though most have been raised while some have been abandoned.¹⁷⁵

From the point of view of one designing a rational, integrated system for administering accident losses, limitations of this kind make no more sense in death actions than in actions for personal injury. The injury to survivors through death is just as real and at least as measurable as that from personal injury, and in many situations calls just as loudly for redress. Whatever lay behind the original denial of remedy for death has no continuing vitality—witness the wholesale repudiation of the original rule. Statutory limitations against death actions sprang from the inhibitions and suspicions that naturally marked the first break with the older view. They have no proper place on the modern scene. This does not mean that discussion of possible limitations upon damages, either as to amount or kind allowed, is out of place today. Much can be said, for instance, for rules which tend to restrict damages to those that represent pecuniary loss.¹⁷⁶ Then, too, the times may call for restraint upon the broad discretion of juries. But these needs, if they exist, warrant a broad re-evaluation of our entire system of damages. Discrimination against death actions can be justified, if at all, only on the basis that reforms that are equally needed in the field of personal injury may be more difficult of accomplishment there.

¹⁷³ *Dempsey v. Thompson*, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952). See Note, 21 U. Chi. L. Rev. 156 (1953). Contra, *Hall v. Chicago & N.W. Ry.*, 5 Ill.2d 135, 125 N.E.2d 77 (1955).

¹⁷⁴ Holdsworth, “The Origin of the Rule in *Baker v. Bolton*,” 32 L.Q. Rev. 430 (1916); Harper, Torts § 279 (1933); Prosser, Torts § 105 (2d ed. 1955).

¹⁷⁵ The statutes in effect in 1893 are listed and summarized in the Analytical Table, Tiffany, *Death by Wrongful Act* xvii (1st ed. 1893). The table shows restrictions on the amount of recovery in 22 states, the amounts under general statutes ranging from \$5,000 (a common provision) to \$20,000 (in Montana).

Contrast, 3 Martindale-Hubbell, *Law Directory (Law Digests)* (1955), showing that virtually all states which have retained a limitation, set it at a higher figure than they did in 1893, while many states (including Connecticut and New York) have abolished the limitation.

¹⁷⁶ See page 582-85 *supra*.

The statutory origin of all civil claims for death has meant considerable disparity among the patterns for measuring damages and we shall next take up the principal ones to be found in this country.

Wrongful death acts measuring recovery by loss to survivors

Under statutes of this type there are some variations as to items of damage allowable, though there is greater uniformity here than in the rest of the field.

Pecuniary loss to the beneficiaries is regularly allowed. The method of computing it is essentially similar to that used in cases of permanent injury, but probable future *contributions* to the beneficiaries by the deceased rather than his *gross earnings* are taken as the base. This brings into play all the factors that must be considered in estimating the future earning capacity of an injured living man. In addition it calls for weighing the probable length of life (or of dependency) of the beneficiaries and the decedent's probable future relationship towards them. As the Pennsylvania court has recently put it, the beneficiaries are entitled to the amount of "the pecuniary loss . . . suffered [by them], that is to say, the present worth of the amount they probably would have received from his earnings for their support during the period of his life expectancy and while the family relationship continued between them, but without any allowance for mental suffering, grief or loss of companionship."¹⁷⁷ If there is no reasonable likelihood that the decedent would have contributed anything to any of the designated survivors, then there can be no recovery on this basis.¹⁷⁸ If a beneficiary dies before trial, that event fixes the beneficiary's loss to that sustained between the wrongful death and the beneficiary's own death.¹⁷⁹ Funeral and medical expenses incurred by the decedent or his estate are not properly included as part of the survivors' pecuniary loss,¹⁸⁰ though they are sometimes specifically allowed by statute.¹⁸¹

¹⁷⁷ *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A.2d 104, 107 (1949).

¹⁷⁸ *Grasso v. State*, 289 N.Y. 552, 43 N.E.2d 530 (1942); *Liddie v. State*, 190 Misc. 347, 75 N.Y.S.2d 182 (Ct. Cl. 1947). In these cases the decedents were incurable inmates of mental institutions who would probably have made no pecuniary contribution to anyone.

Even if decedent had earnings or income, there could be no damages under this type of statute if he was not likely to contribute anything to any member of the classes designated by statute either by way of money or money's worth, or by way of advice, help, instruction, and guidance. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139 (1896); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 321-22, 3 P.2d 105, 112-13 (1931); see *St. Louis, I. M. & S. Ry. v. Craft*, 237 U.S. 648, 658 (1915).

¹⁷⁹ *Cooper v. Shore El. Co.*, 63 N.J.L. 558, 44 Atl. 633 (Ct. Err. & App. 1899); *Dibble v. Whipple*, 281 N.Y. 247, 22 N.E.2d 358 (1939); *Sider v. General El. Co.*, 238 N.Y. 14, 143 N.E. 792 (1924).

¹⁸⁰ *Gallup v. Sparks-Mundo Eng. Co.*, 43 Cal. 2d 1, 271 P.2d 34 (1954). At least unless they are actually paid by the beneficiary and, according to some cases, only when he is under

Statutes of the type described afford an eminently sound basis of recovery in the case of an adult, or one who "is old enough to have given a clear indication of his pecuniary value to the beneficiaries."¹⁸² The measure of recovery corresponds to the needs of living people which result from the death and are capable of being met by money awards and it involves as little in the way of speculation as the nature of the case allows. Nothing is provided where there are no surviving dependents¹⁸³ or where the survivors would have received nothing from the deceased had he lived.¹⁸⁴ A more troublesome problem is presented by the death of a child who is not employed and makes no present contributions to anyone. Although children were once no doubt economic assets to their parents, the hard facts show that this is not generally so today. Moreover the annual expense of rearing children tends to increase as they approach majority.¹⁸⁵ When earning capacity is finally realized, children become independent and rear their own families. From a purely economic point of view the young child of today is a net liability to his parents, however great a potential economic asset he may be to society and to some family of the future which has not yet come into being. The loss to the parents is inestimably great but it is not pecuniary. Nevertheless most courts permit the award of substantial damages in such cases,¹⁸⁶ and the statutes of several states make specific provision for recovery in case of a child's death.¹⁸⁷ The stated justification is that juries may find the probable

a legal duty to make such payment. McCormick § 102; Tiffany, *Death by Wrongful Act* § 157 (2d ed. 1913).

¹⁸¹ *Dibble v. Whipple*, 281 N.Y. 247, 22 N.E.2d 358 (1939); *Ferne v. Chadderton*, 363 Pa. 191, 69 A.2d 104, 107-08 (1949).

¹⁸² Comment, 22 U. Chi. L. Rev. 538, 541 (1955).

¹⁸³ *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 Pac. 276 (1902); *Vander Wegen v. Great No. Ry.*, 114 Minn. 118, 130 N.W. 70 (1911) (applying Montana law); *Smelser v. Missouri, K. & T. Ry.*, 262 Mo. 25, 170 S.W. 1124 (1914); *Brown v. Chicago & N.W. R.R.*, 102 Wis. 137, 77 N.W. 748 (1898); *Legislation*, 44 Harv. L. Rev. 980, 981 (1931).

¹⁸⁴ See note 178 *supra*.

¹⁸⁵ Comment, 22 U. Chi. L. Rev. 538, 541 et seq. (1955).

¹⁸⁶ See, e.g., *Taylor v. Riggan*, 40 Del. 149, 7 A.2d 903 (1939) (6 year old child); *Blanchette v. Miles*, 139 Me. 70, 27 A.2d 396 (1942) (12 year old child); *Atkeson v. Jackson Est.*, 72 Wash. 233, 130 Pac. 102 (1913) (2 year old girl whom parents intended to educate through period of minority).

In many of the older cases the evidence shows a real basis for finding pecuniary loss by the parents. See, e.g., *Southern Indiana R.R. v. Moore*, 34 Ind. App. 154, 72 N.E. 479 (1904). And wherever there is such evidence, there is a basis for damages even under the strictest attitude. Occasionally damages are refused in the absence of such a foundation in the evidence. *Wilson v. Consol. Dressed Beef Co.*, 295 Pa. 168, 145 Atl. 81 (1929).

There is an extensive collection of cases in Note, 14 A.L.R.2d 485 (1950).

¹⁸⁷ Fla. Stat. Ann. § 768.03 (1944) (recovery may be for loss of services and "such sum for the mental pain and suffering of the . . . parents . . . as the jury may assess."). Ore. Rev. Stat. § 30.010 (1953); *Upchurch v. Hubbard*, 29 Wash. 2d 559, 188 P.2d 82 (1947).

value of the child's services (either for the balance of his minority or for the balance of his life expectancy) though the nature of the case prevents proof on the issue from being satisfactory.¹⁸⁸ This reasoning would be sound enough if there generally were such net value. Since there is not, the justification is a fiction which simply conceals the fact that damages here are awarded for emotional distress under the guise of pecuniary loss.

Some courts allow damages for the diminution caused by death in the amount which the beneficiary would probably have received from the decedent by will or intestate succession.¹⁸⁹ If it can be proven, this is strictly a pecuniary loss.

Some courts, under statutes of the Lord Campbell's Act type, also allow damages for the loss of the advice, help, instruction, and guidance (in matters material, moral, and spiritual) which was reasonably to have been expected by the beneficiaries from the decedent.¹⁹⁰ While such items are not, perhaps, strictly pecuniary, their allowance seems fully justified even under a functional view of damages, since this is the kind of loss for which money can supply some sort of a practical substitute.

Strictly non-pecuniary losses are not, generally, sought to be redressed by this kind of statute. Most courts do not allow damages for the grief and emotional distress of the survivors, nor for their loss of the companionship, society, and affection of the decedent.¹⁹¹ It is hard to distin-

¹⁸⁸ *Ihl v. Forty-Second St. & Grand St. Ferry R.R.*, 47 N.Y. 317 (1872); *Kurn v. Youngblood*, 193 Okla. 299, 142 P.2d 983 (1943); *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620 (1894); Comment, 22 U. Chi. L. Rev. 538, 542 et seq. (1955); Note, 14 A.L.R.2d 485, 516-19 (1950).

¹⁸⁹ *Pym v. Great Northern Ry.*, 2 Best & S. 759, 121 Eng. Rep. 1254 (Q.B. 1862), aff'd, 4 Best & S. 396, 122 Eng. Rep. 508 (Ex. Ch. 1863); see *Meeking v. Brooklyn Hts. R.R.*, 164 N.Y. 145, 152, 58 N.E. 50, 52 (1900) ("... the reasonable expectation of pecuniary benefit, by inheritance or otherwise. . ."); *Tiffany, Death by Wrongful Act* §§ 159, 171 (2d ed. 1913); Note, 14 A.L.R.2d 485, 512 (1950).

¹⁹⁰ *Munro v. Pacific Coast D. & R.R.*, 84 Cal. 515, 24 Pac. 303 (1890); *Butler v. Townsend*, 50 Idaho 542, 298 Pac. 375 (1931); *Evans v. Oregon S.L. R.R.*, 37 Utah 431, 108 Pac. 638, 641 (1910); *Pearson v. Picht*, 184 Wash. 607, 52 P.2d 314 (1935); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931).

¹⁹¹ Generally no allowance may be made for the mental anguish and distress caused to the survivors by the death. *Munro v. Pacific Coast D. & R.R.*, 84 Cal. 515, 24 Pac. 303 (1890); *Caldwell v. Abernethy*, 321 N.C. 692, 58 S.E.2d 763 (1950) (Colorado law); *Ferne v. Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949); *Blake v. Midland Ry.*, 18 A. & E. (n.s.) 93 (Q.B. 1852); *Tiffany, Death by Wrongful Act* § 154 (2d ed. 1913); Note, 14 A.L.R.2d 485, 495 (1950).

There is a fine line between advice, help, instruction, and guidance (which some courts disallow) on the one hand, and some of the more nearly tangible aspects of solatium; yet all the cases cited in note 190 supra seek to draw such a line. See also Note, 14 A.L.R.2d 485, 498-500 (1950).

A few states frankly allow damages for the "mental pain and suffering" of survivors. Fla. Stat. Ann. § 768.03 (1944) (see note 187 supra); *Baltimore & O. R.R. v. Noell's Adm'r*, 73 Va. 394 (1879); *Morris' Adm'x v. Baltimore & O. R.R.*, 107 W. Va. 97, 147 S.E. 547 (1929).

See full discussion of various rules in *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931).

guish such very real and deep losses from the physical pain and mental distress of the plaintiff with bodily injury,¹⁹² or the loss of consortium by the spouse of a living but badly injured accident victim.¹⁹³ Under a compensatory view of damages perhaps all should be allowed; under a functional view perhaps none should be. At a time when our underlying philosophies of liability are in a state of flux, it is not surprising that the line here is a ragged one. If the judicial trend is towards stricter liability this should be accompanied by increasing recognition of a functional theory of damages. This in turn would mean increasing reluctance to extend notions of full compensation into new and questionable fields.

Quite consistent with the views here set forth is the refusal of most courts to allow damages to the beneficiaries for the deceased's pain and suffering, under the kind of statute here considered.¹⁹⁴

Wrongful death acts measuring recovery by loss to the estate

There are three different rules for measuring damages under this kind of statute.¹⁹⁵ Some acts are construed as providing recovery for the probable *net* earnings of the deceased after subtracting the amount he would probably have spent on himself, all reduced to present worth.¹⁹⁶ This method most nearly approximates that under Lord Campbell's Act and its progeny. Often the results will be the same, but there may be differences. The statutes presently being considered will, for instance, permit recovery where there are no survivors dependent on the deceased or likely to have received any contribution from him.¹⁹⁷

Other statutes of this type have been held to measure recovery by the probable *gross* earnings of the deceased.¹⁹⁸ Obviously this method pro-

¹⁹² See page 603-05 *supra*.

¹⁹³ See *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950).

¹⁹⁴ *Oldfield v. New York & H. R.R.*, 14 N.Y. 310 (1865); *Dimitroff v. State*, 171 Misc. 635, 13 N.Y.S.2d 458 (Ct. of Claims 1939); *Virginia Iron C. & C. Co. v. Odle's Adm'r*, 128 Va. 280, 105 S.E. 107 (1920); *Tiffany, Death by-Wrongful Act* § 156 (2d ed. 1913); Note, 14 A.L.R.2d 485, 500-02 (1950).

¹⁹⁵ Such statutes are *Ariz. Code Ann.* §§ 31-101, 31-102 (1939); *Fla. Stat. Ann.* § 768.02 (1944) (when there are no surviving dependents); *Ky. Rev. Stat.* § 411.130 (1953); *Ore. Rev. Stat.* § 30.020 (1953) (where there are no surviving dependents).

¹⁹⁶ *Dimitri v. Cienci & Son*, 41 R.I. 393, 103 Atl. 1029 (1918). See Note, 39 Iowa L. Rev. 494 (1954).

¹⁹⁷ *Florida East Coast Ry. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); *Perham v. Portland Gen. El. Co.*, 33 Ore. 451, 53 Pac. 14 (1898). Cf. *Hansen v. Hayes*, 175 Ore. 358, 154 P.2d 202 (1944).

¹⁹⁸ *Davis v. Michigan Cent. R.R.*, 147 Mich. 479, 111 N.W. 76 (1907); *Olivier v. Houghton County St. Ry.*, 134 Mich. 367, 96 N.W. 434 (1903). But cf. *Baker v. Slack*, 319 Mich. 703, 30 N.W.2d 403 (1948).

The approved charge in Kentucky is ambiguous on the point, viz.: the jury should award

vides more than compensatory damages.¹⁹⁹

Still other statutes are construed as measuring recovery by the amount deceased probably would have "earned and saved"²⁰⁰ had he lived, that is, by his probable accumulations.²⁰¹ This perhaps most accurately reflects the value of continued life to the decedent's estate, but it will fall far short of providing compensation to the living dependents for their loss, and this is the loss that calls loudest for redress. Moreover the gap will prove greatest where the need is most acute—the typical case of the breadwinner who spends most of his earnings on his dependents and therefore is able to save little.²⁰²

Under the theory of these statutes expenses incurred by the deceased before his death are not properly included in an award of damages, since these are to redress the injury caused by the death.²⁰³ By the same reasoning, funeral bills are properly included.²⁰⁴

These statutes, like those patterned more closely after Lord Campbell's Act, allow no damages for the deceased's pain and suffering,²⁰⁵ and none for the survivors' emotional distress.²⁰⁶

Survival statutes that supplement death acts

As we have seen, statutes like Lord Campbell's Act give no recovery on account of the deceased's own interest in bodily integrity and continued existence.²⁰⁷ For that reason many states also have survival statutes to provide damages measured by the deceased's own loss,²⁰⁸ viz.,

"such damages as [they] may believe from the evidence will reasonably and fairly compensate decedent's estate for the destruction of his power to earn money. . . ." *Louisville & N. R.R. v. Kenney's Adm'r*, 162 Ky. 403, 172 S.W. 683, 686 (1915).

¹⁹⁹ Gross earnings represent a proper basis of recovery in cases where the injured man survives but is permanently disabled (see page 599 supra) for there his expenses continue.

²⁰⁰ *Florida East Coast Ry. v. Hayes*, 67 Fla. 101, 105, 64 So. 504, 505 (1914).

²⁰¹ *Arizona Binghamton Copper Co. v. Dickson*, 22 Ariz. 163, 195 Pac. 538 (1921); *Perham v. Portland Gen. El. Co.*, 33 Ore. 451, 53 Pac. 14 (1898).

²⁰² This was pointed out by the New Hampshire court in rejecting this measure. *Imbriani v. Anderson*, 76 N.H. 491, 84 Atl. 974 (1912).

²⁰³ *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 210 S.W.2d 340 (1948); *West v. Nantz's Adm'r*, 267 Ky. 113, 101 S.W.2d 673 (1937).

²⁰⁴ *Potts v. Mulligan*, 141 Fla. 376, 193 So. 305 (1940); *Hansen v. Hayes*, 175 Ore. 358, 154 P.2d 202 (1944). But cf. *International Shoe Co. v. Hewitt*, 123 Fla. 587, 167 So. 7 (1936).

²⁰⁵ *Florida's East Coast Ry. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 210 S.W.2d 340 (1948); *Dimitri v. Cienci & Son*, 4 R.I. 393, 103 Atl. 1029 (1918); but cf. *Ellis v. Brown*, 77 So. 2d 845 (Fla. 1955); *Hooper Constr. Co. v. Drake*, 73 So. 2d 279 (Fla. 1954); Fla. Laws, 1951, c. 26541 § 1.

²⁰⁶ *McCabe v. Narragansett El. L. Co.*, 26 R.I. 427, 59 Atl. 112 (1904). But cf. *Triay v. Seals*, 92 Fla. 310, 109 So. 427 (1926); *Southern Utilities Co. v. Davis*, 83 Fla. 366, 92 So. 683 (1922).

²⁰⁷ See page 614 supra.

²⁰⁸ See Analytical Table, *Tiffany, Death by Wrongful Act* xix (2d ed. 1913).

his pain and suffering, the impairment of his earning power, and medical and other expenses resulting from the injury, during the period between the injury and death.²⁰⁹ Where death was instantaneous there can be no recovery under such a statute.²¹⁰ Recovery is for the benefit of the estate, as such, and it does not matter whether there are surviving dependents.²¹¹

These items do not duplicate those for which recovery may be had under a wrongful death act. The latter provide recovery for the pecuniary loss to survivors because of the death, and are measured from the time of death; survival statutes afford remedies for losses during the period which terminates with death. Only the survivors designated by statute receive the fruits of an action for wrongful death; all beneficiaries of the estate, including deceased's creditors, are entitled to the proceeds of an action under survival statutes. Both classes of beneficiaries have been harmed by the death in different ways. For these reasons many states which have both types of statutes allow separate recovery under each.²¹² A few such jurisdictions, however, require an election between the remedies.²¹³ Such a rule is hard to justify. While there may be some danger of duplicating damages here, it can be avoided if care is used.

A more serious question is whether the social interest calls for full compensation of the loss redressed by survival statutes. As for the pecuniary part of it, there seems little question. If there are surviving dependents, they are themselves adversely (albeit indirectly) affected by the impairment of earning power and the expenses incurred before death. If there

²⁰⁹ *Ellis v. Brown*, 77 So. 2d 845 (Fla. 1955); *Ferne v. Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949); Livingston, "Survival of Tort Actions—A Proposal for California Legislation," 37 Calif. L. Rev. 63 (1949); Leg. Doc. No. 60(E) at 448-58, N.Y. Report of Law Rev. Comm'n 204-14 (1935).

²¹⁰ *Great Northern Ry. v. Capital Trust Co.*, 242 U.S. 144 (1916); *Tiffany*, Death by Wrongful Act § 74 (2d ed. 1913).

²¹¹ See *Davis v. St. Louis, I. M. & S. Ry.*, 53 Ark. 117, 126, 13 S.W. 801, 803 (1890) (Under the survival statute "the administrator sues, as legal representative of the estate for what belonged to the deceased. . . ." Under the wrongful death act "he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."); *Stewart v. United El. L. & P. Co.*, 104 Md. 332, 65 Atl. 49 (1906) (The survival action ". . . is . . . devolved upon the executor or administrator, and, when ripened into a judgment, becomes an asset of the decedent for the benefit of his creditors, if he has any, or for the benefit of his legatees and distributees."); *Brown v. Chicago & N.W. Ry.*, 102 Wis. 137, 142, 77 N.W. 748, 750 (1898) (both rights of action "are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute."). But cf. *Hopp's Est. v. Chesnut*, 324 Mich. 256, 36 N.W.2d 908 (1949) (under survival provision of F.E.L.A. proceeds are for benefit of named survivors).

²¹² Livingston, "Survival of Tort Actions—A Proposal for California Legislation," 37 Calif. L. Rev. 63 (1949).

²¹³ *Id.* at 68; *Chesapeake & O. R.R. v. Bank's Adm'r*, 142 Ky. 746, 135 S.W. 285 (1911); *Hackett v. Louisville, St. L. & T. P. Ry.*, 95 Ky. 236, 24 S.W. 871 (1894); Livingston, 44 Harv. L. Rev. 980 (1931).

are no dependents, the deceased's creditors and perhaps other potential beneficiaries of his estate are so affected. This is a pecuniary loss to the living caused by the original injury, and one that is capable of being met by money awards. The deceased's pain and suffering stand differently. It has been urged: "The deceased bore the pain and suffering and he is the only one who should be compensated. He can't take it with him."²¹⁴ And indeed it is hard to justify a rule which "compensates" the living for a loss they never had, and yet refuses to compensate them for their own emotional distress. A functional view of damages would preclude any award for either item.²¹⁵ Nevertheless most survival statutes are construed to allow damages for deceased's pain and suffering.²¹⁶

Survival statutes which stand alone

In some states the only basis of recovery for wrongful death is the survival or revival statute.²¹⁷ In these states this statute is generally construed to permit recovery for damages resulting from the death itself—even where instantaneous²¹⁸—as well as those for the loss sustained by deceased during his lifetime.²¹⁹ Such statutes therefore afford a remedy

²¹⁴ Livingston, *supra* note 212 at 74.

²¹⁵ See Jaffe, "Damages for Personal Injury: The Impact of Insurance," 18 *Law & Contemp. Prob.* 219, 226 (1953).

In line with Livingston's suggestions (*supra* note 212) the California survival statute excludes "damages for pain, suffering or disfigurement." Cal. Civ. Code § 956 (Deering 1949).

²¹⁶ *St. Louis, I. M. & S. Ry. v. Craft*, 237 U.S. 648 (1915); *Davis v. St. Louis, I. M. & S. Ry.*, 53 Ark. 117, 13 S.W. 801 (1890); *Stewart v. United El. L. & P. Co.*, 104 Md. 332, 65 Atl. 49 (1906); *Prudential Ins. Co. v. Laval*, 131 N.J. Eq. 23, 23 A.2d 908 (Ch. 1942); *Murray v. Philadelphia Tr. Co.*, 359 Pa. 69, 58 A.2d 323 (1948); *Johnson v. Eau Claire*, 149 Wis. 194, 135 N.W. 481 (1912); Schumacher, "Rights of Action Under Death and Survival Statutes," 23 *Mich. L. Rev.* 114, 117, 134 (1924).

A recent listing of survival statutes appears in Livingston, *supra* note 212 at 65-66 n.11.

²¹⁷ Conn. Gen. Stat. § 2428(c) (Supp. 1951), abolishing monetary limitation on action formerly provided by Conn. Gen. Stat. § 8296 (1949); Iowa Code § 611.20 (1954); cf. N.H. Rev. Stat. Ann. §§ 556.0 et seq. (1955) (particularly § 556.12); Tenn. Code Ann. §§ 20-607 et seq. (1955). See Note, 39 *Iowa L. Rev.* 494 (1954). The history of New Hampshire legislation is recounted in *Pitman v. Merriman*, 80 N.H. 295, 117 Atl. 18 (1922); *Piper v. Boston & M. R.R.*, 75 N.H. 453, 75 Atl. 1041 (1910).

²¹⁸ *Broughel v. Southern N.E. Tel. Co.*, 73 Conn. 614, 48 Atl. 751 (1901) (containing also a history of Connecticut legislation); *Hough v. Illinois Cent. R.R.*, 169 Iowa 224, 149 N.W. 885 (1914); *Nashville & C. R.R. v. Prince*, 49 Tenn. 580 (1870).

²¹⁹ *McKirdy v. Cascio*, 142 Conn. 80, 111 A.2d 555 (1955); *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946); N.H. Rev. Stat. Ann. § 556.12 (factors to be considered in measuring damages include mental and physical pain suffered by deceased, reasonable expenses "occasioned to the estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money. . ."); Tenn. Code Ann. § 20-614 (1955) (mental and physical suffering, loss of time, expenses, of deceased; also damages resulting to parties for whose use and benefit the right survives).

In Iowa the pain and suffering of the deceased are not elements of damage in an action

very much like that afforded by a combination of a wrongful death and a survival statute (where recoveries under both are allowed).

Damages for the death under such statutes are measured by one of the above described methods applicable to wrongful death acts that measure the recovery by the loss to the estate.²²⁰

Statutes providing recovery by way of a penalty

While several of the earlier statutes involved the notion of a penalty,²²¹ the tendency on the part of courts²²² and legislatures²²³ has been away from this notion. Massachusetts is the outstanding exception.²²⁴ There,

. . . all the death statutes have this common, uniform and unaltered characteristic that the amount recoverable is fixed, not on the theory of compensating the surviving relatives of the deceased, but solely on the basis of the quantity of guilt of the defendant under the circumstances of the killing.²²⁵

The purpose of these statutes is "to punish those who through negligence cause the death of a human being. . . ."²²⁶ Whatever can be said for the desirability and effectiveness of punishment ought not, it is submitted, to

begun by his administrator after his death. *Van Wie v. United States*, 77 F. Supp. 22, 47-48 (N.D. Iowa 1948); *Boyle v. Bernholtz*, 224 Iowa 90, 275 N.W. 479 (1937).

²²⁰ Thus the damages to the estate are measured in Connecticut and New Hampshire by the probable net earnings of the deceased but for the death, *McKirdy v. Cascio*, 142 Conn. 80, 111 A.2d 555 (1955); *Pittman v. Merriman*, 80 N.H. 295, 117 Atl. 18, 26 A.L.R. 589 (1922), reduced to present worth. *Chase v. Fitzgerald*, 132 Conn. 451, 45 A.2d 789 (1946). In Iowa the measure is the "present worth or value of that which the decedent would reasonably be expected to save and accumulate if he had lived out the natural term of his life." *Jettre v. Healy*, 245 Iowa 294, 60 N.W.2d 541, 546 (1953).

Analyses of the measure of damages in Iowa may be found in Jones, "Civil Liability for Wrongful Death," 10 Iowa L. Bull. 169 (1925) and 11 Iowa L. Rev. 29 (1925); Note, "Measure of Damages for the Wrongful Death of the Head of a Family in Iowa," 39 Iowa L. Rev. 494 (1954). An analysis of the situation in Tennessee may be found in Gamble, "Actions for Wrongful Death in Tennessee," 4 Vand. L. Rev. 289 (1950).

²²¹ See Tiffany, *Death by Wrongful Act xvii et seq.* (Analytical Table) c. IX (1st ed. 1893) listing as providing forfeitures the statutes of Alabama, Colorado, Maine, Massachusetts, Missouri, and New Mexico.

²²² See, *Pitman v. Merriman*, 80 N.H. 295, 117 Atl. 18 (1922); *Piper v. Boston & M. R.R.*, 75 N.H. 453, 75 Atl. 1041 (1910).

²²³ Compare note 221 supra with Quill, "A Note on the Advisability of Changing the Massachusetts Death Statute," 23 B.U.L. Rev. 434 (1943), noting that only Alabama and Massachusetts still regarded their statutes as punitive.

²²⁴ Mass. Gen. L. c. 229 (1932), as amended Mass. Acts & Res., 1949, c. 427; Mass. Acts & Res., 1951, c. 250.

Alabama has from the beginning construed her statutory language (viz. "such damages as the jury may assess," in a statute passed for the express purpose of preventing homicide) as punitive so as to be proportioned to the degree of culpability. *Brown v. Southeastern Greyhound Lines*, 255 Ala. 308, 51 So. 2d 524 (1951); *Richmond & D. R.R. v. Freeman*, 97 Ala. 289, 11 So. 800 (1892); *Savannah & M. R.R. v. Shearer*, 58 Ala. 672 (1877).

²²⁵ *Porter v. Sorell*, 280 Mass. 457, 460, 182 N.E. 837, 838 (1932).

²²⁶ *Id.* at 461, 182 N.E. at 839.

confuse and obfuscate the question of how accident victims should be compensated.²²⁷

²²⁷ See Quill, "A Note on the Advisability of Changing the Massachusetts Death Statutes," 23 B.U.L. Rev. 434 (1943); "New Statutes," 34 Mass. L.Q. No. 4 at 3 (1949). The latter citation refers to a brief excursion made by the Massachusetts legislature into the fields of a compensatory wrongful death act. See Mass. Acts & Res. 1946, c. 614; Mass. Acts & Res., 1947, c. 506. The act of 1946 was "passed in a hurry about midnight on the last day of the session." It added to the "degree of culpability" clauses the words "and with references to the pecuniary loss. . ." of beneficiaries, thus making two "concurrent and consequently vague and confusing standards of damages." 34 Mass. L.Q. No. 4, at 3 (1949). The 1947 act struck out the "degree of culpability" language and left only the reference to compensation. The language at this point was capable of intelligent interpretation along the lines of Lord Campbell's Act. See Note, 28 B.U.L. Rev. 368 (1948). In 1949, however, the legislature beat a hasty retreat, jettisoning all reference to compensation and returning to the old familiar standard of "degree of culpability." Mass. Acts & Res., 1949, c. 427.