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The Inadequate Award in West Virginia

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THE INADEQUATE AWARD IN WEST VIRGINIA

Actions involving personal injuries constitute a great majority of the cases placed on trial dockets in courts throughout the country. Due to the ever increasing number of automobiles being operated on the highways, it is only natural that a majority of all personal injury cases involve actions based on the negligent operation of these vehicles. In each of these cases the plaintiff is alleging that an injury or injuries has been inflicted upon him as a result of this negligence, and his sole objective is to recover money damages as compensation therefor.

"In theory personal injury damage law attempts to do two things: (1) put the plaintiff in the same financial condition he would have been in had he not been injured, and (2) award him sums of money as compensation for his past and future mental and physical pain and suffering."2

This statement is of the greatest importance, and the theories which it expounds should be kept foremost in mind throughout this article. It should be constantly remembered that the reason for awarding damages is an effort to return the plaintiff to the status quo; not to "give" him great sums of money to which he may not be entitled, but on the other hand to award him every penny which is owed him by the defendant by reason of the injury inflicted.3

This concept is of course not a new one. Almost two thousand years ago these same rules were set forth in the greatest book of laws ever compiled: "eye for eye, tooth for tooth, hand for hand, foot for foot;"4 "if a man dig a pit and not cover it and an ox or an ass fall therein, the owner of the pit shall make it good and give money unto the owner of them and the dead beast shall be his."5

The question of the proper amount of damages in personal injury actions has of late been afforded a prominent role. This is due largely to the relatively recent increase in the size of personal injury awards in many parts of the country.6 This increase has

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2 Daniels, Measure of Damages in Personal Injury Cases, 7 Miami L.Q. 171 (1952).
3 Fleming, Damages in Personal Injury Cases, 41 Cornell L.Q. 582 (1956).
4 Exodus 21:23.
5 Exodus 21:33-34.
been the cause for some great alarm to certain groups of persons—notably those lawyers who represent insurance companies, and the companies themselves. It may be of some interest to all lawyers in our state to examine the pertinent West Virginia cases in an effort to determine how personal injury verdicts during the last 13 years in our state compare (1) with those of past years, and (2) with those in other states.

There are generally three major groups or persons involved in the plaintiff's attempt to obtain a satisfactory recovery in a personal injury action: (1) the jury, (2) the trial judge, and (3) the appellate court. Each of these plays a distinct and important role in the recovery process, and each has a reasonably definite duty which must be discharged. Whether or not these duties are being properly performed is the issue under discussion.

In general, juries in circuit courts in West Virginia do not return verdicts of a sufficient amount to compensate the plaintiff for the injuries which have been inflicted upon him by the negligent act of the defendant. This statement and other conclusions herein, are necessarily based only on those cases reported in the West Virginia Reports, including all major reported personal injury cases in our state, as well as all reported personal injury cases in West Virginia from 1945 to January, 1958.

The largest reported jury verdict in a personal injury case from a circuit court in West Virginia is $93,800, rendered in Brewer v. Appalachian Construction Co. This verdict represents a great deal of money, but in order to determine its adequacy examine briefly the injuries suffered. Plaintiff was 49 years of age with a life expectancy of 20.6 years; following an explosion it took a four-hour operation to remove glass from his face, neck, and eye, requiring 144 stitches; his right eye was removed; the ulnar nerve was severed; most of the function of his right arm was lost; two other operations were later required; plaintiff suffers from fainting, sleeplessness and nausea; his wife must dress, bathe and shave him. His average yearly earning capacity before the injury was $3,168.35. In the light of these facts the jury verdict does not represent such a staggering amount. As a matter of fact there would appear to be considerable evidence here on which to base a proper objection to this verdict as being inadequate.

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7 Pierson, The True Adequate Award, 1 D.L.J. 275 (1957); Editorial, 3 D.L.J. v (1957).
8 138 W. Va. 437, 76 S.E.2d 916 (1953).
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Compare this verdict with one rendered in Miami, Florida, for $800,000⁹ where the injury suffered was the partial loss of one foot, with other rather serious consequences resulting therefrom. Compare also the case of a nine year old boy who lost both legs, suffered burns over most of his body, and received other injuries. The jury verdict, believed to be the largest single personal injury verdict in history, was a compensating $750,000.00.¹⁰ Another recent "largest" verdict to be compared with the five figure award in the Brewer case is an unreported Oklahoma award made in Edwards v. Missouri-Kansas-Texas R.R. The recovery was $850,000.¹¹ Other verdicts, not quite as substantial as this, but much larger than that which the jury returned in the Brewer case have been rendered in other states.¹²

It is not contended that the largest verdict in our state is the smallest top award of any of the states,¹³ but in view of the last four cited cases it is apparent that although the injuries suffered by the plaintiff in the Brewer case were probably as severe as those suffered in the other three cases, the jury in the West Virginia case did not render an adequate award either in comparison to those in the other states or in view of the serious injuries suffered.

In discussing the adequacy of jury action in personal injury cases in West Virginia more specifically, the following cases are in point. A head injury to a laborer who was in bed for three weeks and unable to do the hard labor he could perform previously was worth $10,000 in 1928.¹⁴ In Goshorn v. Wheeling Mold & Foundry Co.,¹⁵ the plaintiff, a thirty-five year old worker making thirty cents an hour, received a verdict of $16,777.75, for the loss of an arm. This verdict was affirmed by the supreme court, although recognized to be the largest verdict ever rendered at the time by a jury in this state for a like or similar injury.

¹¹ See Man's Worth, Time, April 28, 1958, p. 22.
¹² For an excellent discussion of a $420,000 verdict rendered in Maynard v. Milwaukee Rys., (unreported) see 18 NACCA L.J. 290 (1953). See also volumes 1-20 NACCA L.J., Verdicts or Awards Exceeding $50,000, for an extensive compilation of jury verdicts approaching the adequate award.
¹³ Belli, Verdicts or Awards Exceeding $50,000, 2 NACCA L.J. 183 (1948).
¹⁴ Webb v. Chesapeake & Ohio Ry., 105 W. Va. 555, 144 S.E. 100 (1928).
¹⁵ 65 W. Va. 250, 64 S.E. 22 (1909).
It is important to keep in mind that the actual worth or purchasing power of a dollar between 1900 and 1930 was considerably greater than it is today, and that this decrease to present value may properly be taken into account by the jury in reaching their verdict.16 "It is not the number of dollars, but the value of the dollars that counts."17 It has been estimated that in order to make an accurate comparison of verdicts rendered prior to World War II with those rendered since 1940, a period of extreme inflation, the earlier verdicts must be at least doubled.18 The verdict in the Goshorn case would therefore be represented by a verdict of at least $33,555.50 if rendered today.

An even better example is the case of Kirk v. Virginian Ry.,19 in which the plaintiff, a forty-five year old male earning between $2200 and $2500 a year received a verdict of $45,000. To compensate for the decreased value of the dollar since that date, a jury today would have to return a verdict of over $90,000.20 It is submitted that it would be almost impossible to obtain such an award today in West Virginia for the type of injury suffered in the Goshorn case, although it is further submitted that such a verdict in a particular case might well be warranted. Perhaps this much of an increase is more than can be expected, but it is almost appalling to note that since the Kirk case not only has there been no reasonable increase in verdicts for the loss of a limb to compensate for the increased cost of living, but that the highest verdict since the Kirk case for a similar injury was $23,416.00.21

A brief examination of several West Virginia cases will indicate that considering the actual worth of the award in terms of purchasing power, a plaintiff would be in a more compensated financial position if injured in West Virginia twenty to twenty-five years ago rather than today. It should be remembered that during the past ten or fifteen years verdicts in other states have been increasing, thereby keeping pace to some extent with the diminishing value of the award and therefore making the award more adequate.

18 Ibid. See also Kircher v. Atchison, T. & S. F. Ry., 195 P.2d 427 (1948).
19 103 W. Va. 335, 142 S.E. 434 (1928).
20 Newsweek, April 14, 1958, p. 95. The National Industrial Conference Board reports that in order to have the same buying power today after taxes as a man earning $25,000 in 1939, requires an income of $69,991.00.
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The loss of a leg was compensated by an award of only $20,000.00 to a fourteen year old boy who aspired to be a farmer; the loss of the use of an arm to a forty-four year old worker, $9,000.00; the loss of both legs above the knees plus other severe injuries was believed by the jury to be compensated by a $40,000.00 verdict, while in a California case a jury found no less than $60,000 to be just compensation for the loss of one hand. And as late as 1949, a West Virginia jury believed that a verdict of $7,500.00 was sufficient compensation for the loss of a testicle, suffered by a five year old boy, with all the attendant pain, suffering and injury involved. It should be noted perhaps that not all juries in the period prior to 1930 were as generous as the few noted, as evidenced by a verdict of $475.00 for a nine year old boy who suffered a permanent injury to his arm.

Other "large" verdicts (in comparison to others rendered in our state) prior to 1940, include a $30,000 verdict to a thirty-one year old man, earning $1500.00 a year, with a life expectancy of thirty-six years—the injury: loss of both an arm and a leg, a verdict of $50,000 to a six year old boy for the loss of an arm and a leg; and a verdict of $25,000 to a nineteen year old female for the loss of an eye and other very serious and disfiguring injuries.

From the verdicts rendered in the above cited cases, it is apparent that with the slight exception of the Brewer case, in "actual" dollar worth, jury verdicts in West Virginia since 1940 have in many instances been much lower than those awarded for comparable injuries prior to 1940, even though the cost of living, medical expenses, doctor bills, nursing care and everything else has risen to a present all-time high. The reason for this difference in jury attitude is not known to this writer. It would apparently have no

31 See Cost of Living Index, April, 1958; U.S. News & World Report, April 25, 1958, p. 95.
logical basis or explanation. Suffice it to say that it is an unfortunate economic fact.

Since 1945, a period of thirteen years, there are reported in West Virginia only 17 cases in which the jury returned a verdict for over $10,000. This compilation includes not only those cases in which the issue as to the size of the verdict was raised in the supreme court, but also all reported cases during that period in which the amount of the verdict was mentioned. It is admitted that no doubt there have been numerous other five-figure verdicts rendered by juries during that period; but, excluding death cases as this article does, and in view of the record of the West Virginia Supreme Court of Appeals in reversing verdicts of this size, as will be discussed later, it is believed that the seventeen cases do represent a large proportion of the five-figure verdicts rendered throughout the state during this period.32

These verdicts include: a $10,500 recovery for a compression fracture of the first lumbar vertebrae with sixteen days hospitalization, a heavy cast on the back and neck, then a lighter brace and loss of earnings and property damage;33 a $15,000 recovery by a seven year old boy for a fractured leg, a five degree shortening of the leg, three weeks hospitalization and a permanent scar on his knee;34 and a $30,000 recovery for a fractured pelvis, compound fracture of the leg, several operations of the right leg, failure of the bone in the leg to unite properly, multiple contusions on the body and inability to work.35

Of the seventeen cases just cited, it is interesting to note that thirteen of them were reversed by the supreme court; three because the damages were excessive, ten on other grounds, with no dis-

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32 During a comparable period, 1940-1954, unreported California cases showed 47 verdicts of $50,000 or more; 23 verdicts of $100,000 or more; 7 verdicts of $200,000 or more; and 3 verdicts of $300,000 or more. 3 BELL, MODERN TACTICS 2349-2359.
cussion of the amount of the verdict in nine of these. Of the four cases affirmed, only two discussed the verdict and specifically held it not to be excessive.

At this point therefore, the following conclusions appear to be inescapable, based on all of the foregoing facts: (1) jury verdicts in the United States are generally higher, as is practically everything else, than they were twenty years ago, (2) jury verdicts in West Virginia have not kept pace with this general increase, and have not been commensurate in most cases either with the injury in question or with the relatively constant decreasing value of the dollar.

The jury has a sworn duty to hear the testimony, arguments and instructions and determine liability therefrom. Once the question of liability has been decided in favor of the plaintiff, no matter how close the question may have been, that issue should be erased from the juror's mind and a determined attempt made to compensate the plaintiff for all the losses he has incurred and will incur.

The jury must consider a number of items in arriving at the size of their award. A serious question can be raised as to whether or not the following elements have been afforded proper consideration by West Virginia juries. "The elements generally allowed to enter into the amount of damages are the character of the employment, the earning powers of the employee, his age, and previous physical health and condition, and often his prospects for future advancement in his trade or calling... with something added for mental and physical pain suffered and to be endured and for loss of time, and the costs and expense of being cured."

It is submitted that from the afore-cited cases, with few exceptions, the juries in West Virginia have not met this responsibility in a manner which could be considered as furnishing adequate compensation to the injured plaintiff.

The reasons for this reluctance by the jury to return an adequate award are unknown. A partial explanation may lie in the assertion that there is a tendency for juries in more rural circuits in this state and in our less populated towns to return verdicts in smaller amounts. Perhaps this is proper in view of the allegations that a dollar is worth more in a rural community than it is in a

large city.\textsuperscript{38} But query: is the loss of an arm worth more to a
man in New York than it is to a man in West Virginia, the same age, earning the same amount? Do injured persons in Miami, or Chi-
icago, or San Francisco suffer more intense pain than a person similar-
ly injured in Morgantown or Williamson? Is a scarred face or a
crippled body more subject to ridicule in Detroit or Dallas than it is in Charleston or Wheeling?\textsuperscript{39}

The argument, therefore, that "the smaller the town the smaller
the verdict should be", is neither based on, nor can it be defended
on any reasonable basis when dealing with the amount of damages
to be awarded for pain and suffering.

The question of how much money to award a plaintiff for past
and future physical and mental pain, suffering and inconvenience
is a vital issue which must be considered most carefully by the jury
since the plaintiff is forced to recover all the damages he will ever
be entitled to in this one action. It appears, however, that in as-
sessing the amount recoverable for this proper element of damages,
the juries in West Virginia have been in many cases unreasonable in
their pitifully inadequate awards. The following cases attest to
this apparent lack of understanding the true value of human worth.

The largest jury award in West Virginia attributed to pain,
suffering and inconvenience was $30,296.30 in the Brewer case.\textsuperscript{40}
Compare this amount with a $40,000 award for pain and suffering
in a New York case;\textsuperscript{41} a $40,000 award for eleven hours of conscious
pain and suffering;\textsuperscript{42} and $20,000 for twenty minutes of conscious
pain and suffering.\textsuperscript{43} See also the case of Bartlebaugh v. Pennsyl-
vania R.R.,\textsuperscript{44} where the court approved a verdict which included
$92,383 for claimed damages other than loss of earnings.\textsuperscript{45}

A disgraceful example of our jury's unrealistic and almost in-
human approach to this problem is found in Billy v. Powell,\textsuperscript{46} in

\textsuperscript{38} Pierson, \textit{supra} note 7, at 278. See Bowman v. Illinois Central R.R.,
\textsuperscript{39} See Daniels, \textit{supra} note 2.
\textsuperscript{40} This award was held excessive by the West Virginia Supreme Court.
\textsuperscript{42} Naylor v. Isthmian S.S. Co., 187 F.2d 593 (2d Cir. 1951). See 8
NACCA L.J. 135 (1951).
\textsuperscript{43} Miller v. Southern Pac. Co., 256 P.2d 603 (Calif. 1953).
\textsuperscript{44} 150 Ohio St. 887, 82 N.E.2d 883 (1948).
\textsuperscript{45} For comparative West Virginia cases see \textit{e.g.}, Isabella v. West Virginia
Transportation Co., 132 W. Va. 85, 51 S.E.2d 818 (1918); Kelly v. Checker
White Cab Inc., 131 W. Va. 816, 50 S.E.2d 888 (1948); Elswick v. Charleston
\textsuperscript{46} 133 W. Va. 278, 55 S.E.2d 899 (1949).
which the plaintiff suffered a broken neck, was hospitalized eight-one days, wore a cast from his hips to the top of his head, and had to have his head held up off his shoulders by pins inserted into his skull and tied to ropes secured to the ceiling. His hospital expense was $1,652.00. The recovery was an unbelievably low $3,000, or a maximum of $1,348.00 for all of the attendant pain and suffering involved. The West Virginia Supreme Court of Appeals held that the injuries were such as would sustain the amount of the verdict.

As one judge has pointed out in reference to evaluating pain and suffering: “The verdict in a case like this is at best a feeble attempt to place the injured person back in the shoes he wore before the injury. In many cases...it cannot be done...The elements that enter into a judgment like this are so diverse that it often requires more of humility than it does of law properly to assess them.”

It is submitted that the juries in West Virginia have indeed made a “feeble attempt” to assess adequately these damages in most of the cases cited herein; and further that in the few cases in which reasonable awards for pain and suffering have been made by juries, our supreme court has not always given adequate recognition to this proper element of damages and has often refused to sustain the adequate result which is infrequently reached by the triers of fact.

It should be noted that injured plaintiffs receive somewhat more compensating treatment by juries in the federal courts in our state. The following verdicts and awards have been noted: $177,000; 1948; $160,000; 1950 and $140,000. The injuries in all of these federal cases were extremely severe; and while the jury verdict was not always the ultimate amount received by the plaintiffs, those amounts at least represent a more successful attempt to return a more ade-

48 See cases cited infra under the discussion of the duty of the appellate court when reviewing a personal injury award.
quate award to the injured plaintiffs than awards made by juries in our state circuit courts.

It would appear from all of these cases that West Virginia is not one of the states that have been allegedly taken over by members of the National Association of Claimants' Compensation Attorneys who have been accused of "fomenting 'excessiveness'" in verdicts to the point of creating a "Frankenstein which one day will take the form of legislation similar in concept to the Workmen's Compensation statutes."52

As a matter of fact, it would appear that even without the presence of a horde of "NACCA" attorneys, West Virginia verdicts unfortunately are in fact at present fairly comparable to those amounts awarded under our workmen's compensation statute.53

Since a conflict between plaintiff's attorneys and insurance company lawyers is inevitable in discussing the problem of adequate jury verdicts, perhaps it would be proper at this point to briefly inquire as to whether or not verdicts in this country are actually excessive at present to the point of endangering the continued existence of the entire liability insurance industry.

There is no better source in point than the facts compiled and statements made by the insurance attorneys themselves. For example, during 1954 and 1955, the defendant prevailed in 57.5% of all cases tried; the percentage rising in 1956 to 58.5%.54 There is also a statement by an insurance attorney that "research indicates that the day of the exorbitant verdict is passing."55 And perhaps the most notable fact of all, is that although 40,000 people were killed and 2,368,000 people were injured in automobile accidents during 1956, the NACCA Law Journal, which lists all reported and available unreported cases and settlements over $50,000, reported only four cases in that year in which verdicts of over $100,000 were secured, and all four of these were reversed.56

With the exception of a few extraordinary cases, some of which have been noted herein, jury verdicts in general, and in particular in West Virginia, have not increased to the point where we are on the brink of being forced to rely on socialized insurance for liability protection.

52 Pierson, supra note 7, at 276.
53 W. VA. CODE c. 23, art. 4, § 6 (Michie 1955).
54 Snow, supra note 6.
55 Pierson, supra note 7.
If these increased verdicts alone have put the liability insurance companies in a truly precarious financial position, then perhaps measures should be taken to scrutinize more carefully their weakened financial status by proper state officials; or else in an effort to alleviate this financial distress, perhaps their already privileged income tax rate should be further reduced or excluded altogether. It is evident without question that if a man receives a just $100,000 verdict for his injuries he should not be penalized by having to return half or any of his award in an effort to reduce insurance premiums or increase insurance policyholder's dividends. He is entitled to compensation for his injuries; and juries, who are led to believe by "information campaigns," or who base the amount of their verdict on a basis, not of compensating an injured human being, but of keeping their premiums at a lower rate, are violating their duty in the most flagrant manner.\(^{57}\)

As stated, it has been alleged that insurance companies were forced to raise their premiums in some parts of the country as a direct result of excessive verdicts in those areas.\(^{58}\) The limitations of this article prohibit an examination to determine whether insurance premiums remained at a constant rate in these areas from 1925 to 1940, the alleged birthdate of the high verdict era. From an examination of the verdicts in West Virginia during the last thirteen years, surely there were no increases in liability premiums in our state for the reason that such were necessitated by the awarding of excessive verdicts. If there were in fact such increases in premiums, they must have been required by other economic factors. It might be interesting to note that in those cases where insurance company attorneys received six-figure jury verdicts for their own personal injuries, or for those of their clients when representing a plaintiff, no case has been found through diligent research in which there was a voluntary remittitur offered in an effort to reduce insurance premiums or for any other reason.\(^{59}\)

As mentioned earlier, the reason for awarding damages to an injured plaintiff is to make him whole for the wrong which he has suffered. "A man is entitled to his limbs as nature gave them to him and with their natural strength."\(^{60}\) Therefore, while a plaintiff's

\(^{57}\) Belli, supra note 49, at 264.

\(^{58}\) Snow, supra note 6.

\(^{59}\) Belli, Verdicts or Awards Exceeding $50,000, 11 NACCA L.J. 228 (1953). See also note 49 supra.

\(^{60}\) Carter, Assessment of Damages for Personal Injuries or Death in the Courts of the Common-Law Provinces, 32 CAN. B. REV. 713 (1954).
Attorney is attempting to obtain a verdict to which he believes his client is entitled—whether it be one for $1,000 or $100,000—the defense attorney should not accuse his opponent of trying to destroy the financial structure of our nation by asking for too much, and at the same time base his defense on the application of the following standard suggested by an insurance company counsel: "We should lower or raise our evaluation [of a settlement] in accordance with personality, intelligence, personal appearance and character of the claimant. . . . Race, color and creed are touchy subjects but should, nevertheless, be considered. . . . With respect to the question of whether to settle or try a case, the answer is relatively simple, and that is: 'Can we save or make any money by trying the case.'" Is it terribly naive to ask whether or not there is a place reserved for an honest appraisal of the injury suffered by the plaintiff, regardless of what amount the jury or court may be expected to return or approve in a particular state or locale? Perhaps the answer is found in the fact that each side has a duty to his client which should be performed as well as possible in the client's interest. If this is true, then neither the plaintiff's attorney nor defendant's attorney has any right arbitrarily to accuse the other of trying to cheat one side out of a just award, or the other side of fomenting the economic destruction of our country.

If a plaintiff is fortunate enough to obtain a jury verdict in the first instance, and if this verdict should appear to be reasonably adequate, the next obstacle in the road to compensation is the trial judge who plays an exceedingly important role in the recovery process. "A person who comes to an appellate court with a verdict of a jury approved by the trial court, is in the strongest position known to the law." The trial judge is in a position to see the witnesses, understand the facts and observe the character of the jurors. For these reasons, mere approval by the trial judge of the jury verdict is given "due weight and consideration in the appellate court;" and on the other hand, "a verdict which has been disapproved by the trial judge is not entitled to the same weight as one which the trial judge has permitted to stand." And a statement by the trial judge

61 Pierson, supra note 56.
62 Smith, Evaluating Case-Settlement or Trial, 1 D.L.J. 71, 85 (1957).
that "had he been on the jury he would have been inclined to vote for the amount which it found in its verdict," is given great weight by the appellate court,67 although a judge's personal view as to the excessiveness of the verdict is not a sufficient ground for his setting it aside.68

In acting on a jury verdict, the trial court has some discretion, but it is confined within very narrow limits; and to warrant setting aside a verdict, the trial court must be convinced that improper motives affected the jury.69

If more adequate verdicts are to be obtained in West Virginia in the future, it is submitted that the plaintiff's attorney should devote more and more attention to the trial judge in an effort properly to convince him as well as the jury of the seriousness of the plaintiff's injuries. For once a definite inroad is made into the present miserly antiquated awards which are being rendered as compensation for modern injuries and living standards, and a trial judge will consistently affirm these larger verdicts, then the supreme court may more readily and sympathetically take cognizance of the poor plaintiff's predicament and realize that jury verdicts are a part of the economic structure of our nation and therefore must be equal to the other economic conditions with which the plaintiff must exist.

The trial judge, therefore, is a very important factor to the plaintiff after a favorable jury verdict has been returned. The plaintiff's chances for an ultimate affirmance of the verdict clearly depend to a great extent on the action of the trial court.70

The next obstacle confronting the plaintiff is the appellate court. The difficulty which the plaintiff encounters in obtaining an adequate jury award has heretofore been indicated. At this point, assuming a verdict in his favor, the plaintiff is now faced with the task of trying to keep it. Cases already cited have indicated that this is often more than a difficult task.71

It must be conceded, however, that in reviewing a jury verdict on the question of excessiveness, the appellate court also has a diffi-

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68 Vest v. Chesapeake & Ohio Ry., supra note 29.
71 See note 85 supra.
cult problem. "No question is ever presented, either to a trial court or to an appellate court, more difficult of determination than this. . . ."72 "It is never easy to determine in a particular case where the province of a jury ends and that of a court begins on a question of fact."73

There are various general rules which are utilized and applied by our Supreme Court of Appeals in reviewing a jury's damage verdict. The basic rule from which all others have been formulated when appropriate is that the question of damages is one of factual determination within the exclusive province of the jury.74 For this reason, therefore, the appellate court cannot interfere with the jury's finding of damages, which is conclusive,75 unless, and this "unless" has left many injured plaintiffs, who proved liability and damages to the satisfaction of twelve jurymen, little or nothing to show for their unfortunate encounter with a negligent defendant but a broken body, the appellate court decides that the amount awarded by the jury indicates that the verdict is the result of "partiality, prejudice or misconduct,"76 sympathy or lack of due consideration,77 bias, mistake78 or fraud.79

There can be no doubt but that the appellate court does possess the power to reverse a jury verdict where any of these reasons are clearly and unmistakably evident, but this authority may not be exercised arbitrarily.80 Nor is it proper for the appellate court to substitute its judgment for that of the jury in the absence of any of the aforesaid grounds for reversal,81 although there appears to be considerable belief that this is nevertheless done all too frequently in direct contradiction to every basic rule of law regarding the province of the jury in dealing with such matter.82 Judge Haymond in Raines v. Faulkner,83 correctly stated the applicable rule and

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80 Yuncke v. Welker, supra note 65; see Palmquist, An Inadequate Award, 25 Miss. L.J. 524 (1954).
82 See Note, 1 CLEV.-MAR. L. Rev. 23 (1952); Carter, supra note 60.
the reason supporting it, believing that it had been violated in that case. "Neither am I willing to substitute any personal view of my own, based solely upon a printed record, for that of the jury which observed the witnesses and heard them testify."

With these rules in mind, examine some of the decisions of our Supreme Court of Appeals on the question of excessiveness of damages. During the period between 1945 and January, 1958, our court examined the decisions of 63 personal injury cases in which the plaintiff had received a verdict by the jury. Of these cases, the issue of excessiveness was raised and dealt with in 23 cases. Of these cases, 8 verdicts were held to be excessive, and 15 verdicts held not to be excessive. Of the cases in this last mentioned group, 3 cases were nevertheless reversed on other grounds.

It may be of some interest to note that of all the 63 cases examined, 35 were reversed for one reason or another. This fact would indicate that even if a "large" verdict of $50,000 or more was affirmed once in awhile, the average verdict of all personal injury cases tried in which the plaintiff actually recovers the amount awarded would not be so large, for example as to abolish all monetary returns to liability company policy-holders. In support of this statement these facts are pertinent: the average verdict in West Virginia during the period 1945 to 1958, of all personal injury cases affirmed by our court was $8,677.80; and the average verdict of all personal injury cases examined during the thirteen year period was only $9,518.97.

It has been stated that there is little consistency in the action of juries in personal injury cases, and little more in decisions of courts on the question of damages.\(^4\) The general reason for this situation may be that generally the courts apply the rule that each case must stand on its own merits, on the ground that verdicts in other cases "furnish no reliable index as to the amount of damages which should be properly allowed."\(^5\)

A brief examination of some of the personal injury cases reported during 1945 to 1958 in which our Supreme Court of Appeals held the jury verdict to be excessive may reveal in part the reason

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\(^4\) Vance v. Logan Williamson Bus Co., 131 W. Va. 296, 46 S.E.2d 783 (1948).

for such action by the court, and an insight into the reasoning of the court on this problem of excessiveness.

In the Brewer case, the principal reason given by the court for reversing the verdict as excessive was that if the plaintiff invested the $93,800 awarded him at three per cent interest, he would receive yearly an amount almost equal to his annual earnings; and at the end of his life expectancy, if still living, he would still have the $93,800 intact.

This is a rather common argument used by appellate courts to justify a reversal, but query, is this a reasonable and justifiable basis for reversing a jury verdict? Does it take into consideration the possibility of an even higher cost of living in the future, which is certainly more than a mere possibility based on the relentless increase thereof in the past few years, or the possibility that the plaintiff had he not been injured may have increased his earnings in future years? Is proper cognizance taken of the income tax that must be paid on the dividends of the investment, or the uncertainty of keeping the money invested at a certain rate of return? Does the court properly assess the medical expenses that will be incurred in the future; the past and future element of pain and suffering; the inconvenience of having to rely, perhaps for life, on the constant care and attention of others for even the most basic and elementary functions of existence? Is full awareness taken of the humiliation and degradation suffered; of the constant mental anguish which an injured man deprived of his right to earn a livelihood must necessarily endure due to the uncertain future, health and welfare of his family? All of these factors and others combine to comprise that amount of the verdict not attributed to loss of wages and past expenses. In the Brewer case, the jury awarded the plaintiff approximately $30,000 to compensate him for all of these factors. And even though the plaintiff in that case was injured to the point of being a complete invalid, whose remaining twenty years held naught but pain for himself and burdening pity for his family, our court would not permit this figure, meagre though it was under the circumstances, to be recovered. It is submitted that the figure which the jury returned was not so excessive in view of all the facts as to warrant a reversal.

For an excellent discussion of the above views see Dumphy v. Norfolk & Western Ry., supra note 28, a case in which many of these factors were recognized and approved; and in which case the argument set forth by the court in the Brewer case was disapproved.
In *Vance v. Logan Williamson Bus Co.*, an eighteen year old boy, through the negligence of the defendant, had his leg broken in three places; his ankle was smashed; he was hospitalized for four weeks; it was painful for him to walk at the time of the trial; he was able to do but little work on his father's farm. No doctor testified in the case. The verdict was reversed primarily because there was no medical proof on which it could be based. The court also said that there was too much speculation as to the permanency of the injury. However, regardless of the actual permanency of the injury, how much was this injury worth at the time of the trial? What would it take to make this plaintiff whole? The jury awarded him $8,000 which the court decided was too much. As the court pointed out, however, a boy of eighteen is more likely to recover from an injury than an older person with a similar injury. This reasoning was doubtless of small comfort to the plaintiff in this case.

In *Frampton v. Consolidated Bus Lines*, the plaintiff, a female, suffered a deep cut on her cheek, separation of the septum of her nose, a lumpy deformity on the bridge of her nose, and a fractured knee. The court reversed the jury verdict saying that the condition of the plaintiff's nose and head (headaches, colds, pain in nasal passages) could be corrected by an operation; and because the fractured knee would unite properly and all her scars but one would become less noticeable or disappear. The court held the $7,500 award excessive because with the scar excepted, the "plaintiff has received no permanent or noncorrectible injuries."

This reasoning serves to add emphasis to the general attitude of the court, apparent from the cases noted heretofore, namely its seemingly unwarranted restrictive review of personal injury actions appealed on the grounds of excessiveness. It is alleged that any pain, suffering, anxiety, loss of wages, medical expenses, etc., which must be endured or incurred in an effort to correct these injuries should be a proper and recognized element of damages by the jury and the appellate court. The court, incidentally, mentioned that in the *Frampton* case the first jury had awarded the plaintiff only $4,000, but emphasized that they did not consider this fact.

A somewhat unusual case involving an alleged assault and battery in which the plaintiff, proving only $49.50 actual damages, received a jury verdict of $5,000, including $2,000 punitive damages,

87 Vance v. Logan Williamson Bus Co., *supra* note 84.
89 Raines v. Faulkner, *supra* note 83.
was reversed as excessive. In spite of these facts, there was a very vigorous dissent by Judge Haymond, with whom Judge Fox concurred. "This Court should not set aside a verdict so found simply because its members, if sitting as jurors, would not have been willing to assess [such] an amount. . . ."

Finally, note the case of French v. Sinkford. The plaintiff was an eleven year old girl. She received a severe cut on her leg; a compound comminuted fracture of her right leg with damage to the muscles and soft tissue. She was in the operating room for an hour; in the hospital for nineteen days; she wore a heavy cast from her toes to her thigh for two months and a lighter one for a similar period. She was in bed for six weeks, on crutches at the time of the trial. Doctors' testimony indicated that it would take at least a year for her recovery; and none would state definitely that there would be no permanent functional disturbance. The young girl was being schooled as an acrobatic dancer. The court set aside a jury verdict of $10,000 on the ground that the jury "took a mistaken view of the case." From the facts, this conclusion is perhaps subject to some considerable debate. Two members of the court dissented most strenuously from this decision.

It should be fairly evident from this somewhat cursory examination that our court has taken a rather limited view of the province of the jury in assessing damages in those cases, and has reversed verdicts which would appear to be fair, just and no more than adequate.

The review of each personal injury verdict in the plaintiff's favor which comes before an appellate court imposes a serious duty and grave responsibility on each member of that court. No judge should ever permit himself to become so calloused by the constant review of the impersonal printed record in commercial transactions, or the application of ageless legal principles necessary for a decision in a contract, sales or corporation dispute, that he cannot examine a personal injury award with a deep sense of humility and understanding, not only as a guardian of the law, but also as a human being who must, if justice is to be effectuated, take full cognizance of the true value of the body and mind of another human being whose right to enjoy life has to some extent been impaired through the careless action of a negligent defendant. The

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See also Miller v. Blue Ridge Bus Lines, 123 W. Va. 428, 15 S.E.2d 400 (1941); Snodgrass v. Charleston NuGrape Co., supra note 78.
cold recital in a printed record or brief that the plaintiff has undergone an operation should not even be considered by a judge in terms of compensation until he has been able to visualize the fear and pain and suffering which was necessarily endured by the injured party. Until this type of thought process is completed through every phase of the plaintiff's injury and recovery to date, it is respectfully submitted that a truly adequate and just decision cannot be made. If the jury has been convinced, by witnessing the physical condition of the plaintiff, and hearing the story of his painful medical and mental efforts toward recovery, and has seen fit to award this injured human a certain sum of money, then each member of an appellate court called upon to review such a verdict should search his conscience in the most diligent manner before casting a vote to reverse it.

The following quotation signifies the problem which exists today in West Virginia, which problem must be dealt with and overcome if just compensation is to be made in the future to those persons who have suffered injuries through the negligence of another:

"If as so many courts say, the question of damages is for the jury to decide and there is no standard of measurement for pain and suffering, it seems hardly consistent with these premises that in the majority of cases coming before appellate courts on the question of damages the amounts of verdicts are found to be excessive. It is also significant to note that the number of cases in which the courts find the amounts of verdicts inadequate is negligible.

"If appellate courts have so much respect for the decisions of juries and trial judges . . . why is it that so many decisions in which both judge and jury are in accord are overruled by appellate courts? . . . is not the appellate court acting contrary to principle in substituting its own opinion for those of the jury and trial judge?"9292

"The test of a verdict should be its adequacy in compensating the injured person for what he has suffered; not the size of the figures involved. One must look to the injuries suffered by the human being first; then to the amount."93 When this is done, then perhaps the plaintiff will begin to receive and keep adequate awards in West Virginia.

C. H. B., Jr.

92 Zelermyer, Damages for Pain and Suffering, 6 Syracuse L. Rev. 27, 81, 34 (1955).
93 Belli, supra note 70.