

Chapter 3

Damages

Introduction

This chapter is difficult (and long) in large part because it incorporates a number of different concepts within it. As the first selection in this chapter notes, most of the class time in Torts is spent in learning the rules that govern the assignment of liability. When the time comes to determine damages, it is difficult to formulate general rules. There are questions not only about how to calculate damages, but also whether certain kinds of damages qualify for any compensation at all. At times it appears that within the damages analysis we are reopening the question of liability.

(1) What kinds of damages are recoverable?

For example, in *Spade v. Lynn* (*infra*, § A.2.), the plaintiff was badly frightened when some men on her train car were negligently allowed to bump into her. Had she been knocked over and bruised, the court would have allowed her to recover not only for the bruising but for the "pain and suffering" (the emotional damages, including her fright) as well. However, because she suffered "only" emotional shock, without physical injury, the court did not let her recover anything. Is this a redetermination of the liability question? Not really, since we have decided that this kind of behavior (negligently knocking someone over) qualifies for an assignment of liability. However, the courts are setting a threshold requirement for what quantum of damage justifies the invocation of the judicial machinery.

(2) Who is Entitled to Compensation?

Similarly, in *Dillon v. Legg* (*infra*, § B.3.), the defendant ran over and killed a little girl in a crosswalk. Clearly the defendant must pay compensation for the death of the girl. But what about her sister, who was also in the intersection

but wasn't hit? Should she be compensated for *her* injuries? What about her mother, who witnessed the accident but wasn't in any physical danger? Similarly, in *First National Bank of Meadville* (*infra*, § B.1.), the defendant's negligence killed a lawyer. His widow and children sought recovery not only on behalf of his estate, but also in their own right. Death is the most obvious case where an injury to one person may require compensation for injury suffered by a related party. Should this extend to severe injury as well as to death cases? What about "wrongful birth" or even "wrongful life" cases?

(3) How is the Actual Amount Determined?

A final set of questions revolves around *how much* the defendant must pay for the kinds of injuries society decides to compensate. Although the actual calculation of awards may seem incapable of analysis, the tort student must have some idea of whether the award will be large or small; it makes no sense to spend hours and hours worrying about the prospect of liability without some conception of the size of the award if liability is found. The student must also be aware of limits that courts (or legislatures) place on the overall size of the award.

Jaffe, Damages for Personal Injury: The Impact of Insurance

18 LAW & CONTEMP. PROBS. 219, 221-222 (1953)

I suggest that the critical controversy in personal injury torts today is not in the area of liability but of damages. Questions of liability have great doctrinal fascination. Questions of damage —

and particularly their magnitude — do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration. Judges consign them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases. There is analogy for this situation in Jerome Frank's complaint that fact finding, though of paramount

importance is neglected by teachers who devote themselves too exclusively to appellate law. This may reflect not so much their judgment of relative importance (as Judge Frank supposes) as the relative adaptability of the subjects to conceptualization. And so it probably is with the subject of damages.

§ A. Types of Recoverable Damages

1. Property Damage

McCURDY v. UNION PAC. R.R.

68 Wash.2d 457, 413 P.2d 617 (1966)

COCHRAN, Judge.

In November of 1959, respondent read a newspaper article about a private railroad car named the "Spokane." Respondent was interested in the car for his own business and pleasure and, as a result, telephoned Otto Gray in Portland, Oregon, the then owner of the "Spokane," to inquire about its purchase. Mr. Gray offered to sell the car for \$2,500, and respondent immediately accepted the offer, sight unseen. This was within 2 months after Gray had made his purchase. This car, which had been originally built in 1909, had a living room, dining room, bedrooms and baths. The car had been rebuilt in 1927 and a new heating system was installed. In 1957, it had been refurbished.

The car had been purchased by Gray from the Spokane International Railroad, an almost wholly owned subsidiary of Union Pacific Railroad Company. In addition, Mr. Gray is the brother of Omar Gray, claims agent for the Union Pacific.

A Mr. Wallen, master mechanic of the Spokane International, had kept the car in condition for immediate use at all times. However, in 1954, in attempting to repair the independent auxiliary hot water heating plant, he found the circulating pipes so corroded that the heater was no longer used. The primary heating source for the car was a steam vapor circulating system, the steam being obtained from a locomotive or a stationary source. Mr. Wallen became concerned about this system as well and, as a result, would not permit more than 5

pounds of steam to be introduced into the car. This was accomplished by means of a reducing valve set for 5 pounds maximum pressure and attached to the station steam line leading to the car.

When respondent purchased the car, it was in Spokane, Washington, where it had been stored indoors except for the last 2 years. Respondent had no notice of the condition of the steam pipes. Mr. Wallen became an employee of the Union Pacific in 1959, when Union Pacific acquired the Spokane International and, with it, the car "Spokane." It was the Union Pacific which offered the car for sale at the time it was purchased by Gray. However, Mr. Wallen's department made a survey report indicating that the car was unfit for service.

After respondent purchased the "Spokane," he made arrangements to have the car moved from Spokane, Washington, to Seattle, and for that purpose he went to Spokane on January 2, 1960. Respondent had the car inspected by the Great Northern Railway Company prior to bringing it to Seattle. This report noted no defects in the steam heating system or in any other system inspected.

The car was moved from Spokane to Seattle by the Great Northern and was later taken to Tacoma and placed at the Milwaukee Railroad train yards and was kept locked while there. There were three keys to the "Spokane," one of which was in the possession of the Milwaukee.

In early March, 1960, respondent asked the Union Pacific to bring some school children to Seattle in the car on March 10th. No other instructions were given by respondent. The Milwaukee was informed and that railroad moved the car to an interchange track where Union

Pacific-Northern Pacific joint employees picked it up the afternoon of March 9th. Leonard Jacobsen, a joint employee, went to the "Spokane" at about 4:20 p.m. of that day for the purpose of putting it on steam. There was no reduction valve and the pressure on the line was about 60 pounds and the steam was 260 degrees Fahrenheit. After turning on the steam, Jacobsen looked in a window from the observation platform and walked around the car and left the area. Returning about 8:00 p.m. to service a passenger train, he noticed steam escaping from a kitchen vent. After servicing the passenger train, Jacobsen got a Mr. Cossins, a special agent, to accompany him to look at the car. Looking into the car, they saw that steam was escaping into it, but no damage was then apparent. They tried the door but, it being locked, and they having no key, could not open it. At that time, the doorknob was cold. The escaping steam was reported to a Mr. Ackley, who was in charge of operations that night, and who directed Jacobsen to turn off the incoming steam, which was done at about 8:30 p.m. Ackley said he would see if he could locate a key. Nothing else was done to ventilate the car.

The Union Pacific called and left a message for respondent at his home, and when he arrived home at about 11:00 p.m., he called the Union Pacific and was told to come to Tacoma with a key to the car because of some unspecified problem. When he arrived at the car some time between 12:30 and 1:00 a.m., the car was still closed up and steam was still escaping. The doorknob was so hot it could hardly be touched.

The steam had entered the interior of the car because of a broken steam pipe in the car, located in such a position that it could not be seen by a person walking through the car. Serious damage to the car resulted.

The jury returned a verdict in favor of the respondent in the sum of \$56,000 against the appellants, Union Pacific Railroad Company and Northern Pacific Railway Company, and dismissed the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The appellants make the following assignments of error:

* * *

4. Error in giving the court's instruction No. 14 relating to damages.

* * *

Assignment of error No. 4 is to the giving of instruction No. 14, relating to damages. This instruction is as follows:

It is the duty of the Court to instruct you as to the measure of damages in case you find a verdict for the plaintiff. By the giving of this instruction, the Court does not mean to suggest to you what your verdict should be or for which party it should be rendered.

If your verdict is in favor of the plaintiff, you should allow such sum as will fairly and justly compensate plaintiff for any loss sustained and will restore plaintiff as nearly as possible to his position had the damage in question not been sustained.

In assessing the amount of damages to the railroad car, you may consider all relevant evidence. You may take into account evidence as to the cost of restoring the car to its former condition. The total award for damages to the car itself may not exceed the difference between the actual or intrinsic value of the car or its value to the owner immediately prior to its being damaged and its salvage value immediately afterwards. This does not include sentimental value, if any. In determining this actual or intrinsic value or value to the owner, you may consider all of the relevant evidence, and are not bound by any particular item of evidence.

In addition, you may allow damages for the loss of use, if any, which you find established by the evidence. In measuring such damages, you may take into account any lost rental value and the reasonable value of any business or personal use to the owner which you find established by the evidence for a period of time following the damage which is reasonably necessary under all of the evidence for repair or replacement of this type of property under all of the existing circumstances as they reasonably appeared to the owner of the damaged property.

This is the only instruction given on damages.

Appellants' theory on damages at the trial was based upon this principle:

Ordinarily the measure of damages for the loss or destruction of personal property is

its market value, if it has a market value, and in such case no recovery can be had on the basis of its value to the owner individually, apart from its market value. 15 Am.Jur. Damages § 122, at 530.

An instruction embodying this principle was offered by the appellants but was refused by the trial court. * * *

The primary principles to be applied in awarding damages for negligent injuries to property is that the owner shall have actual monetary compensation for the loss sustained. If the property is a total loss the measure of damages is the value of the property destroyed or damaged. This is its market value, if it has a market value. If the property is damaged but not destroyed, the measure of damages is the difference between the market value of the property before the injury and its market value after the injury. (Again, if it has a market value.) If the property does not have a market value, then if a total loss, the measure of damages is the cost to replace or reproduce the article. If it cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages.

The term "market value" as that term is used, means that reasonable sum of money which the property would bring on a fair sale, by a man willing to sell, but not obliged to sell, to a man willing to buy, but not obliged to buy.

In order for it to be said that a thing has a market value, it is necessary that there shall be a market for such commodity--that is, a demand therefor and an ability from such demand to sell the same when a sale thereof is desired. 15 Am.Jur. Damages § 122, at 531.

No market value is generally attributable to such things as family photographs, writings, antiques, clothing, paintings, plans of architects, engineers, etc., and in some cases machinery used for a specific purpose.

Evidence from which a conclusion could be reached that a market price existed or could be established can be found in the testimony of respondent himself. He testified as follows:

Q. Have you attempted to determine whether any were available for purchase?

A. I have. Q. Are any available for purchase, or were they in the years 1960 through 1964? * * * A. Yes. Q. And

who had such a car? A. There were several that I determined. The Santa Fe Railroad had one which they sold. The West India Fruit & Steamship Company had one which they sold. And Lucius Beebe had one that he said he would sell and then withdrew it from the market. Q. Who is Lucius Beebe? A. He is probably known as the Dean of private car fanciers, I guess you could call him. * * * Q. (By Mr. Ehrlichman) Do you know of cars of comparable age and facility which have been sold during these four years, 1960 through 1964? A. Yes. Q. Can you say whether or not there is in fact a market in these cars in the United States? Do you know what I mean by "a market?" A. No. Q. Can you say whether or not--A. I mean, I don't know what you mean by "market". Q. I am going to try and explain it. Can you say whether or not there is a going price for cars of this kind in the United States during this period of time that we have been talking about? (Appellants objected to this line of testimony. The trial court overruled the objection with the following statement:) THE COURT: This question doesn't necessarily relate back to prior questions. It asks an owner whether or not there is a going price on a commodity he owns. Objection overruled. A. Yes. Q. Can you say what in your opinion the value of your car was on the 9th of March, 1960, before it was damaged? A. My appraisal? Q. Your own opinion, yes. A. \$20,000 to \$22,000.

Of course, the owner of a chattel may testify as to its market value without being qualified as an expert in this regard. *Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760; *Ingersol v. Seattle-First Nat'l Bank*, 63 Wash.2d 354, 387 P.2d 538.

In addition, there was other evidence on the market value of respondent's car: the original purchase of the car for \$550 from the Spokane International Railroad; the offer to sell the car for \$700 which Mr. Wallen rejected; and the subsequent purchase by respondent for \$2,500; all of which occurred within 6 months of the loss. Other evidence as to the condition of the car tended to show that it could not have been sold for more

than \$2,500.

The respondent's testimony, the evidence on negotiations for purchase of the car, the evidence on the condition of the car, convince us that appellants' theory on market value should have been presented to the jury. The court's failure to do so amounted to a finding by the court that there was no market value on disputed facts, thus usurping the province of the jury. If the jury, having been instructed on market value, nevertheless finds that there was no market value, then its actual or intrinsic value, including consideration of its value to the owner, may be used by the jury in fixing damages. *Covey v. Western Tank Lines, Inc.*, 36 Wash.2d 381, 218 P.2d 322; *Palin v. General Constr. Co.*, 47 Wash.2d 246, 287 P.2d 325.

There was also evidence in the case from which the jury could find that the car was totally destroyed for all practical purposes, and evidence as to cost of repairs if it were repaired; thus adding additional factors for the jury to consider.

If the jury should find that the car was totally destroyed, then respondent cannot recover for the loss of use, as the measure of damage in such a case is the value of the property destroyed. *Adams v. Bell Motors, Inc.*, 9 La.App. 441, 121 So. 345; *Helin v. Egger*, 121 Neb. 727, 238 N.W. 364; *Skinner v. Scott*, 238 La. 868, 116 So.2d 696. The reason for this rule is that in the recovery of the full value of the vehicle, as of the date of its destruction, the owner has been made whole. *Kohl v. Arp*, 236 Iowa 31, 17 N.W.2d 824, 169 A.L.R. 1067.

If the jury should find that the car could reasonably be repaired, then the owner may recover compensation for the loss of use of the car while the repairs are in progress.

The trial court erred, however, in its instruction No. 14 when it instructed the jury to consider reasonableness of time as it appeared to the owner. The reasonableness of the time for which loss of use is to be compensated is as it would appear to an ordinary prudent man under all the circumstances.

Since the trial court did not properly instruct on the issues to be considered by the jury in fixing damages, the case is remanded for a new trial on the issue of damages only, with the jury to be instructed in accordance with the views expressed in this opinion.

* * *

ROSELLINI, C.J., and HUNTER and HALE, JJ., concur.

OTT, Judge (concurring in part and dissenting in part).

I concur with the majority that appellants should be granted a new trial, limited solely to the issue of damages.

I do not agree with the majority that the respondent is entitled to have the jury consider the cost of repair of the railroad car and its loss of use as elements of damages, for two reasons:

(1) It was shown that the cost of repair, in the sum of \$36,226.40, was almost 15 times more than the full value of the car six months before the accident. The rule is that the cost of repair and loss of use are proper elements of damages only where the property is reasonably susceptible of repair. *McCormick*, Damages § 124 (1935). It cannot be said that this car is Reasonably susceptible of repair at a cost of \$36,226.40, when its value six months before the accident was shown as not to exceed \$2,500, and no sum whatever was expended in the interim to enhance its value.

Under similar circumstances, we held, in *West Coast Transport Co. v. Landin*, 187 Wash. 556, 60 P.2d 704 (1936), that, where the value of a truck was \$5,700 before the accident and only \$500 after the accident, it had been destroyed.

Applying this rule is the instant case, where the cost of repair is approximately 15 times the value of the property damaged, it must be considered to be destroyed.

(2) The majority hold that the term "market value" means that reasonable sum of money which the property would bring on a fair sale by a man willing to sell, but not obligated to sell, to a man willing to buy, but not obligated to buy. I agree with this definition of market value. Before the Spokane International Railway Company offered the car for sale on the open market, it had inspected this car, which was manufactured in 1909, and found that it would cost approximately \$36,000 to repair it for use as railroad rolling stock. The car was then offered for sale on the open market in an "as is" condition.

Six months before the accident, this car was sold by a person willing to sell to a person willing to buy for the sum of \$550. Thereafter, the car was offered for sale a second time in its same "as

is" condition and sold for \$2,500. Applying the willing seller and purchaser test, the car then had a market value of \$2,500.

In my opinion, the evidence established that the car in question, in its state of disrepair at the time of the accident, had an "as is" market value, and the respondent is entitled to receive as damages only the full market value of the car on the date of its destruction.

Upon retrial, the jury should be instructed that the measure of damages to which the respondent is entitled is limited to that fair market value which the evidence establishes the car had on the date it was destroyed.

2. "Economic" Losses

Introductory Note. The term "pure economic loss" is used to describe losses in which there has been no property damage, but only a loss of profits that would have been enjoyed by the plaintiff but for the defendant's negligence. For example, suppose the defendant negligently fails to deliver a critical item needed at the plaintiff's factory, and as a result the plaintiff suffers significant financial loss. May those damages be recovered? Most jurisdictions treat this as a question to be governed by the Uniform Commercial Code rather than by tort law. See Gary Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37 (1986).

What we consider here are economic losses that flow from a *personal injury* to the plaintiff.

a. Lost Wages

O'SHEA v. RIVERWAY TOWING

677 F.2d 1194 (CA 7, 1982)

POSNER, Circuit Judge

This is a tort case under the federal admiralty jurisdiction. We are called upon to decide questions of contributory negligence and damage assessment, in particular the question—one of first impression in this circuit—whether, and if so how, to account for inflation in computing lost future wages.

On the day of the accident, Margaret O'Shea was coming off duty as a cook on a towboat plying the Mississippi River. A harbor boat operated by the defendant, Riverway Towing Company, carried Mrs. O'Shea to shore and while getting off the boat she fell and sustained the injury complained of. The district judge found Riverway negligent and Mrs. O'Shea free from contributory negligence, and assessed damages in excess of \$150,000. Riverway appeals only from the finding that there was no contributory negligence and from the part of the damage award that was intended to compensate Mrs. O'Shea for her lost future wages.

* * *

The more substantial issues in this appeal relate to the computation of lost wages. Mrs. O'Shea's job as a cook paid her \$40 a day, and since the custom was to work 30 days consecutively and then have the next 30 days off, this comes to \$7200 a year although, as we shall see, she never had earned that much in a single year. She testified that when the accident occurred she had been about to get another cook's job on a Mississippi towboat that would have paid her \$60 a day (\$10,800 a year). She also testified that she had been intending to work as a boat's cook until she was 70—longer if she was able. An economist who testified on Mrs. O'Shea's behalf used the foregoing testimony as the basis for estimating the wages that she lost because of the accident. He first subtracted federal income tax from yearly wage estimates based on alternative assumptions about her wage rate (that it would be either \$40 or \$60 a day); assumed that this wage would have grown by between six and eight percent a year; assumed that she would have worked either to age 65 or to age 70; and then discounted the resulting lost-wage estimates to present value, using a discount rate of 8.5 percent a year. These calculations, being based on alternative assumptions concerning starting wage rate, annual wage increases, and length of employment, yielded a range of values rather than a single value. The bottom of the range was \$50,000. This is the present value, computed at an 8.5 percent discount rate, of Mrs. O'Shea's lost future wages on the assumption that her starting wage was \$40 a day and that it would have grown by six percent a year until she retired at the age of 65. The top of the range was \$114,000, which is the present value (again discounted at 8.5 percent) of her lost future wages assuming she would have

worked till she was 70 at a wage that would have started at \$60 a day and increased by eight percent a year. The judge awarded a figure —\$86,033 — near the midpoint of this range. He did not explain in his written opinion how he had arrived at this figure, but in a preceding oral opinion he stated that he was "not certain that she would work until age 70 at this type of work," although "she certainly was entitled to" do so and "could have earned something"; and that he had not "felt bound by (the economist's) figure of eight per cent increase in wages" and had "not found the wages based on necessarily a 60 dollar a day job." If this can be taken to mean that he thought Mrs. O' Shea would probably have worked till she was 70, starting at \$40 a day but moving up from there at six rather than eight percent a year, the economist's estimate of the present value of her lost future wages would be \$75,000.

There is no doubt that the accident disabled Mrs. O' Shea from working as a cook on a boat. The break in her leg was very serious: it reduced the stability of the leg and caused her to fall frequently. It is impossible to see how she could have continued working as a cook, a job performed mostly while standing up, and especially on a boat, with its unsteady motion. But Riverway argues that Mrs. O' Shea (who has not worked at all since the accident, which occurred two years before the trial) could have gotten some sort of job and that the wages in that job should be deducted from the admittedly higher wages that she could have earned as a cook on a boat.

The question is not whether Mrs. O' Shea is totally disabled in the sense, relevant to social security disability cases but not tort cases, that there is no job in the American economy for which she is medically fit. Compare *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1982), with *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037-38 (5th Cir. 1981). It is whether she can by reasonable diligence find gainful employment, given the physical condition in which the accident left her. See, e.g., *Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 644 (6th Cir. 1974). Here is a middle-aged woman, very overweight, badly scarred on one arm and one leg, unsteady on her feet, in constant and serious pain from the accident, with no education beyond high school and no work skills other than cooking, a job that happens to require standing for long periods which she is

incapable of doing. It seems unlikely that someone in this condition could find gainful work at the minimum wage. True, the probability is not zero; and a better procedure, therefore, might have been to subtract from Mrs. O' Shea's lost future wages as a boat's cook the wages in some other job, discounted (*i.e.*, multiplied) by the probability — very low — that she would in fact be able to get another job. But the district judge cannot be criticized for having failed to use a procedure not suggested by either party. The question put to him was the dichotomous one, would she or would she not get another job if she made reasonable efforts to do so? This required him to decide whether there was a more than 50 percent probability that she would. We cannot say that the negative answer he gave to that question was clearly erroneous.

Riverway argues next that it was wrong for the judge to award damages on the basis of a wage not validated, as it were, by at least a year's employment at that wage. Mrs. O' Shea had never worked full time, had never in fact earned more than \$3600 in a full year, and in the year preceding the accident had earned only \$900. But previous wages do not put a cap on an award of lost future wages. If a man who had never worked in his life graduated from law school, began working at a law firm at an annual salary of \$35,000, and was killed the second day on the job, his lack of a past wage history would be irrelevant to computing his lost future wages. The present case is similar if less dramatic. Mrs. O' Shea did not work at all until 1974, when her husband died. She then lived on her inheritance and worked at a variety of part-time jobs till January 1979, when she started working as a cook on the towboat. According to her testimony, which the trial judge believed, she was then working full time. It is immaterial that this was her first full-time job and that the accident occurred before she had held it for a full year. Her job history was typical of women who return to the labor force after their children are grown or, as in Mrs. O' Shea's case, after their husband dies, and these women are, like any tort victims, entitled to damages based on what they would have earned in the future rather than on what they may or may not have earned in the past.

If we are correct so far, Mrs. O' Shea was entitled to have her lost wages determined on the assumption that she would have earned at least \$7200 in the first year after the accident and that

the accident caused her to lose that entire amount by disabling her from any gainful employment. And since Riverway neither challenges the district judge's (apparent) finding that Mrs. O'Shea would have worked till she was 70 nor contends that the lost wages for each year until then should be discounted by the probability that she would in fact have been alive and working as a boat's cook throughout the damage period, we may also assume that her wages would have been at least \$7200 a year for the 12 years between the date of the accident and her seventieth birthday. But Riverway does argue that we cannot assume she might have earned \$10,800 a year rather than \$7200, despite her testimony that at the time of the accident she was about to take another job as a boat's cook where she would have been paid at the rate of \$60 rather than \$40 a day. The point is not terribly important since the trial judge gave little weight to this testimony, but we shall discuss it briefly. Mrs. O'Shea was asked on direct examination what "pay you would have worked" for in the new job. Riverway's counsel objected on the ground of hearsay, the judge overruled his objection, and she answered \$60 a day. The objection was not well taken. Riverway argues that only her prospective employer knew what her wage was, and hence when she said it was \$60 she was testifying to what he had told her. But an employee's wage is as much in the personal knowledge of the employee as of the employer. If Mrs. O'Shea's prospective employer had testified that he would have paid her \$60, Riverway's counsel could have made the converse hearsay objection that the employer was really testifying to what Mrs. O'Shea had told him she was willing to work for. Riverway's counsel could on cross-examination have probed the basis for Mrs. O'Shea's belief that she was going to get \$60 a day in a new job, but he did not do so and cannot complain now that the judge may have given her testimony some (though little) weight.

We come at last to the most important issue in the case, which is the proper treatment of inflation in calculating lost future wages. Mrs. O'Shea's economist based the six to eight percent range which he used to estimate future increases in the wages of a boat's cook on the general pattern of wage increases in service occupations over the past 25 years. During the second half of this period the rate of inflation has been substantial and has accounted for much of the increase in nominal

wages in this period; and to use that increase to project future wage increases is therefore to assume that inflation will continue, and continue to push up wages. Riverway argues that it is improper as a matter of law to take inflation into account in projecting lost future wages. Yet Riverway itself wants to take inflation into account—one-sidedly, to reduce the amount of the damages computed. For Riverway does not object to the economist's choice of an 8.5 percent discount rate for reducing Mrs. O'Shea's lost future wages to present value, although the rate includes an allowance—a very large allowance—for inflation.

To explain, the object of discounting lost future wages to present value is to give the plaintiff an amount of money which, invested safely, will grow to a sum equal to those wages. So if we thought that but for the accident Mrs. O'Shea would have earned \$7200 in 1990, and we were computing in 1980 (when this case was tried) her damages based on those lost earnings, we would need to determine the sum of money that, invested safely for a period of 10 years, would grow to \$7200. Suppose that in 1980 the rate of interest on ultra-safe (*i.e.*, federal government) bonds or notes maturing in 10 years was 12 percent. Then we would consult a table of present values to see what sum of money invested at 12 percent for 10 years would at the end of that time have grown to \$7200. The answer is \$2318. But a moment's reflection will show that to give Mrs. O'Shea \$2318 to compensate her for lost wages in 1990 would grossly undercompensate her. People demand 12 percent to lend money risklessly for 10 years because they expect their principal to have much less purchasing power when they get it back at the end of the time. In other words, when long-term interest rates are high, they are high in order to compensate lenders for the fact that they will be repaid in cheaper dollars. In periods when no inflation is anticipated, the risk-free interest rate is between one and three percent. *See* references in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 n.2 (2d Cir. 1980). Additional percentage points above that level reflect inflation anticipated over the life of the loan. But if there is inflation it will affect wages as well as prices. Therefore to give Mrs. O'Shea \$2318 today because that is the present value of \$7200 10 years hence, computed at a discount rate—12 percent—that consists mainly of an allowance for anticipated

inflation, is in fact to give her less than she would have been earning then if she was earning \$7200 on the date of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation. There are (at least) two ways to deal with inflation in computing the present value of lost future wages. One is to take it out of both the wages and the discount rate—to say to Mrs. O'Shea, "we are going to calculate your probable wage in 1990 on the assumption, unrealistic as it is, that there will be zero inflation between now and then; and, to be consistent, we are going to discount the amount thus calculated by the interest rate that would be charged under the same assumption of zero inflation." Thus, if we thought Mrs. O'Shea's real (*i.e.*, inflation-free) wage rate would not rise in the future, we would fix her lost earnings in 1990 as \$7200 and, to be consistent, we would discount that to present (1980) value using an estimate of the real interest rate. At two percent, this procedure would yield a present value of \$5906. Of course, she would not invest this money at a mere two percent. She would invest it at the much higher prevailing interest rate. But that would not give her a windfall; it would just enable her to replace her lost 1990 earnings with an amount equal to what she would in fact have earned in that year if inflation continues, as most people expect it to do. (If people did not expect continued inflation, long-term interest rates would be much lower; those rates impound investors' inflationary expectations.)

An alternative approach, which yields the same result, is to use a (higher) discount rate based on the current risk-free 10-year interest rate, but apply that rate to an estimate of lost future wages that includes expected inflation. Contrary to Riverway's argument, this projection would not require gazing into a crystal ball. The expected rate of inflation can, as just suggested, be read off from the current long-term interest rate. If that rate is 12 percent, and if as suggested earlier the real or inflation-free interest rate is only one to three percent, this implies that the market is anticipating 9-11 percent inflation over the next 10 years, for a long-term interest rate is simply the sum of the real interest rate and the anticipated rate of inflation during the term.

Either approach to dealing with inflation is acceptable (they are, in fact, equivalent) and we by no means rule out others; but it is illogical and

indefensible to build inflation into the discount rate yet ignore it in calculating the lost future wages that are to be discounted. That results in systematic undercompensation, just as building inflation into the estimate of future lost earnings and then discounting using the real rate of interest would systematically overcompensate. The former error is committed, we respectfully suggest, by those circuits, notably the Fifth, that refuse to allow inflation to be used in projecting lost future earnings but then use a discount rate that has built into it a large allowance for inflation. *See, e.g., Culver v. Slater Boat Co.*, 644 F.2d 460, 464 (5th Cir. 1981) (using a 9.125 percent discount rate). We align ourselves instead with those circuits (a majority, see *Doca v. Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 35-36), notably the Second, that require that inflation be treated consistently in choosing a discount rate and in estimating the future lost wages to be discounted to present value using that rate. *See id.* at 36-39. We note that in *Byrd v. Reederei*, 638 F.2d 1300, 1307-08 (5th Cir. 1981), a panel of the Fifth Circuit indicated misgivings over that circuit's position and that rehearing *en banc* has been granted. 650 F.2d 1324 (1981).

Applying our analysis to the present case, we cannot pronounce the approach taken by the plaintiff's economist unreasonable. He chose a discount rate—8.5 percent—well above the real rate of interest, and therefore containing an allowance for inflation. Consistency required him to inflate Mrs. O'Shea's starting wage as a boat's cook in calculating her lost future wages, and he did so at a rate of six to eight percent a year. If this rate had been intended as a forecast of purely inflationary wage changes, his approach would be open to question, especially at the upper end of his range. For if the estimated rate of inflation were eight percent, the use of a discount rate of 8.5 percent would imply that the real rate of interest was only .5 percent, which is lower than most economists believe it to be for any substantial period of time. But wages do not rise just because of inflation. Mrs. O'Shea could expect her real wages as a boat's cook to rise as she became more experienced and as average real wage rates throughout the economy rose, as they usually do over a decade or more. It would not be outlandish to assume that even if there were no inflation, Mrs. O'Shea's wages would have risen by three percent

a year. If we subtract that from the economist's six to eight percent range, the inflation allowance built into his estimated future wage increases is only three to five percent; and when we subtract these figures from 8.5 percent we see that his implicit estimate of the real rate of interest was very high (3.5-5.5 percent). This means he was conservative, because the higher the discount rate used the lower the damages calculated.

If conservative in one sense, the economist was most liberal in another. He made no allowance for the fact that Mrs. O'Shea, whose health history quite apart from the accident is not outstanding, might very well not have survived — let alone survived and been working as a boat's cook or in an equivalent job — until the age of 70. The damage award is a sum certain, but the lost future wages to which that award is equated by means of the discount rate are mere probabilities. If the probability of her being employed as a boat's cook full time in 1990 was only 75 percent, for example, then her estimated wages in that year should have been multiplied by .75 to determine the value of the expectation that she lost as a result of the accident; and so with each of the other future years. *Cf. Conte v. Flota Mercante del Estado*, 277 F.2d 664, 670 (2d Cir. 1960). The economist did not do this, and by failing to do this he overstated the loss due to the accident.

But Riverway does not make an issue of this aspect of the economist's analysis. Nor of another: the economist selected the 8.5 percent figure for the discount rate because that was the current interest rate on Triple A 10-year state and municipal bonds, but it would not make sense in Mrs. O'Shea's federal income tax bracket to invest in tax-free bonds. If he wanted to use nominal rather than real interest rates and wage increases (as we said was proper), the economist should have used a higher discount rate and a higher expected rate of inflation. But as these adjustments would have been largely or entirely offsetting, the failure to make them was not a critical error.

Although we are not entirely satisfied with the economic analysis on which the judge, in the absence of any other evidence of the present value of Mrs. O'Shea's lost future wages, must have relied heavily, we recognize that the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive. Therefore, we will not reverse

an award of damages for lost wages because of questionable assumptions unless it yields an unreasonable result — especially when, as in the present case, the defendant does not offer any economic evidence himself and does not object to the questionable steps in the plaintiff's economic analysis. We cannot say the result here was unreasonable. If the economist's method of estimating damages was too generous to Mrs. O'Shea in one important respect it was, as we have seen, niggardly in another. Another error against Mrs. O'Shea should be noted: the economist should not have deducted her entire income tax liability in estimating her future lost wages. *Cf. Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 495, 100 S. Ct. 755, 758, 62 L. Ed. 2d 689 (1980). While it is true that the damage award is not taxable, the interest she earns on it will be (a point the economist may have ignored because of his erroneous assumption that she would invest the award in tax-exempt bonds), so that his method involved an element of double taxation.

If we assume that Mrs. O'Shea could have expected a three percent annual increase in her real wages from a base of \$7200, that the real risk-free rate of interest (and therefore the appropriate discount rate if we are considering only real wage increases) is two percent, and that she would have worked till she was 70, the present value of her lost future wages would be \$91,310. This figure ignores the fact that she did not have a 100 percent probability of actually working till age 70 as a boat's cook, and fails to make the appropriate (though probably, in her bracket, very small) net income tax adjustment; but it also ignores the possibility, small but not totally negligible, that the proper base is really \$10,800 rather than \$7200.

So we cannot say that the figure arrived at by the judge, \$86,033, was unreasonably high. But we are distressed that he made no attempt to explain how he had arrived at that figure, since it was not one contained in the economist's testimony though it must in some way have been derived from that testimony. Unlike many other damage items in a personal injury case, notably pain and suffering, the calculation of damages for lost earnings can and should be an analytical rather than an intuitive undertaking. Therefore, compliance with Rule 52(a) of the Federal Rules of Civil Procedure requires that in a bench trial the district judge set out the steps by which he arrived at his award for

lost future earnings, in order to assist the appellate court in reviewing the award. *Cf. Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1183-84 (7th Cir. 1982). The district judge failed to do that here. We do not consider this reversible error, because our own analysis convinces us that the award of damages for lost future wages was reasonable. But for the future we ask the district judges in this circuit to indicate the steps by which they arrive at damage awards for lost future earnings.

Judgment affirmed.

Questions and Notes

1. Awards for lost income due to personal injuries have traditionally not been subject to income taxes, stretching back to a federal law passed in 1919. However, as the bite taken out for taxes has increased to a larger and larger percentage, pressure has mounted to allow juries to take this into account when figuring lost income. A majority of jurisdictions still recognize a gross income rule in which evidence of the amount of income tax the plaintiff would pay is excluded — lost earnings are based on gross, not net income. Of the minority jurisdictions, most allow or require evidence of what income tax would have been owed on the salary when figuring lost earnings. However, there is a movement toward allowing judges to use their discretion in giving such information to the jury. *See generally* Burke, *Tax Treatment of Employment — Related Personal Injury Awards: The Need for Limits*, [50 MONT. L. REV. 13](#) (Winter 1989).

b. Medical Expenses

Medical expenses are often a substantial part of the "special damages" claimed in a personal injury case. In a case involving brain injury or spinal damage, the cost of care may dwarf even the loss of lifetime earning capacity. For example, in *Fortman v. Hemco, infra*, the plaintiff's medical care was estimated to cost \$180,000 per year. Or consider *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), in which the plaintiff suffered brain injury because of a hospital's negligent treatment. His overall award

was \$4 million, of which \$500,000 was income loss, future medical and attendant care/education were \$1.8 million, and pain and suffering \$1.6 million. Like lost income, damages for future medical expenses must be discounted to present value.

3. "Non-economic" Damages — Pain and Suffering

MORSE v. AUBURN AND SYRACUSE RAILROAD CO.

10 Barb. 621 (N.Y. S. Ct. 1851)

By the Court, JOHNSON, J.

The defendants excepted to that part of the charge to the jury, in which they were instructed, that in cases of this kind it was competent for them to go beyond the actual pecuniary damages sustained, and take into consideration, not only the loss of time and pecuniary expenses, but the bodily pain and suffering also, which the plaintiff had undergone, and compensate him in damages therefor. I confess I am yet to learn that this is contrary to law. I am confident the rule has been generally understood, and uniformly administered by our courts, as laid down by the learned justice to the jury, in all cases of this kind, where one person has received personal injury and mutilation, by the careless or negligent act of another. The bodily pain and suffering is part and parcel of the actual injury, for which the injured party is as much entitled to compensation in damages, as for loss of time or the outlay of money. It is true the footing for a precise and accurate estimate of damages may not be quite as sure and fixed in regard to it, as where a loss has been sustained in time or money; and yet the actual damage is no less substantial and real.

... If persons or corporations engaged in the business of the defendants, intrusted daily with the lives and personal safety of hundreds of individuals, and using such an untamable power, may negligently cause serious injuries to the person, and occasion intolerable bodily pain and suffering, and only be chargeable with the loss of time, at what it may be proved to be worth, and the surgeon's and nurse's bill, it is quite time it should be understood, that persons trusting themselves to

such protection may provide for more ample indemnity by special contract. Such a rule would, in my judgment, be a serious general evil and be productive of the most deplorable consequences.

... The defendants' counsel insists that all damages recovered beyond the actual loss of time and pecuniary expense, are strictly exemplary damages, and that to authorize a plaintiff to recover damages of that character, he must show the injury to have been willful and malicious on the part of the defend-ants. But I think that damages for bodily pain and suffering arising from physical injury, and connected with actual loss of time and money, are not exemplary, or punitive in their character, in any strict or proper sense of these terms. Exemplary or punitive damages, or smart money, as they are often called, are given by way of punishment, for intentional wrong, and to operate as an example to others.... Here the damages are strictly compensatory for the actual injury, of which the bodily pain and suffering were an essential part....

Questions and Notes

1. Many proposals for tort reform (some of which have been successful; *see* the case of *Fein v. Permanente, infra* § C) provide for a reduction or "cap" on pain and suffering damages, but allow a full recovery of "economic" losses. Is this an improvement to the tort system?

2. In a recent article, Bovbjerg, Sloan and Blumstein proposed an alternative to essentially unfettered jury determination of pain and suffering damages. In their view, "[d]etermination of awards on an ad hoc and unpredictable basis, especially for 'non-economic' losses, ... tends to subvert the credibility of awards and hinder the efficient operation of the tort law's deterrence function." As an alternative, they suggest one of using one or more methods for calculating awards:

- (1) a matrix of dollar values based on victim age and injury severity; (2) a scenario-based system that employs descriptions of prototypical injuries with corresponding award values to be given to juries as guides to valuation; or (3) a

system of flexible ranges of award floors and caps that reflect various categories of injury severity. Bovbjerg, Sloan and Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, [83 NW. U. L. REV. 908](#) (1989). If you were a member of the legislature, would you support a measure to include one or more of these methods in jury calculation of awards? Why or why not?

3. A recent symposium addressed the topic, *Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?:* Robert Cooter, *Hand Rule Damages for Incompensable Losses*, [40 SAN DIEGO L. REV. 1097](#) (2003); Adi Ayal, *Can We Compensate for Incompensable Harms?* [40 SAN DIEGO L. REV. 1123](#) (2003); Richard Craswell, *Instrumental Theories of Compensation: A Survey*, [40 SAN DIEGO L. REV. 1135](#) (2003); Michael Moore, *For What must We Pay? Causation and Counterfactual Baselines*, [40 SAN DIEGO L. REV. 1181](#) (2003); Richard Fumerton, *Moore, Causation, Counterfactuals, and Responsibility*, [40 SAN DIEGO L. REV. 1273](#) (2003); Stephen Perry, *Harm, History, and Counterfactuals*, [40 SAN DIEGO L. REV. 1283](#) (2003); John Goldberg, C.P., *Rethinking Injury and Proximate Cause*, [40 SAN DIEGO L. REV. 1315](#) (2003); Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, [40 SAN DIEGO L. REV. 1345](#) (2003); F.M. Kamm, *Baselines and Compensation*, [40 SAN DIEGO L. REV. 1367](#) (2003); Emily Sherwin, *Compensation and Revenge*, [40 SAN DIEGO L. REV. 1387](#) (2003); Kenneth W. Simons, *Compensation: Justice or Revenge*, [40 SAN DIEGO L. REV. 1415](#) (2003); Richard W. Wright, *the Grounds and Extent of Legal Responsibility*, [40 SAN DIEGO L. REV. 1425](#) (2003); C.J. Martin, *Judicial Redistribution of Punitive Damage Awards*, [40 SAN DIEGO L. REV. 1649](#) (2003).

SPADE v. LYNN & B.R. CO.

168 Mass. 285, 47 N.E. 88 (1897)

[Plaintiff was riding in defendant's train, late at night, when two intoxicated passengers entered her car. They were jostling one another, and plaintiff moved to avoid them. Then one of them quarreled with the conductor over the payment of the fare, and additional pushing and shoving resulted in one of the men colliding with the plaintiff. She testified that as the man "lurched over on me; then it seemed as though I turned to solid ice. My breath was cut right off. I could not have spoken; I tried to speak, but I chilled so I kept growing stiffer and stiffer, until I did not know, I do not know when they got me off the car." She admitted at trial that she suffered neither pain nor physical injury. The jury awarded a verdict, and the defendant appealed.]

ALLEN, J.

This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: Whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned by the negligence of another, which does not result in bodily injury, but that, when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge that he could not recover if he sustained no injury in his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Railroad Co.*, 163 Mass. 484, 40 N.E. 895, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground; and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright and resulting

nervous shock. The case calls for a consideration of the real ground upon which the liability of nonliability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety, does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of the enjoyment and of comfort, cause real suffering, and to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion, may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fall to meet what would be desirable if the single case were alone to be considered. Rules of law respecting the recovery of damages are framed with reference to

the just rights of both parties, —not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And, in determining the rules of law by which the right to recover compensation for unintended injury from other is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for traveling in general, notice should be given so that if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 Hurl & N. 534, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennow*, 155 Mass. 70, 28 N.E. 1125; *White v. Dresser*, 135 Mass. 150; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Railroad Co. v. Kellogg*, 94 U.S. 469, 475; *Wyman v. Leavitt*, 71 Me. 227; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11; *Jones v. Fields*, 57 Iowa, 317, 10 N.W. 747; *Renner v. Canfield*, 36 Minn. 90, 30 N.W. 435; *Lynch v. Knight*, 9 H.L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 Prob. Div. 105; *Hobbs v. Railway Co.*, L.R. 10 Q.B. 11, 122. The law of negligence, in its special application to

cases of accidents, has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Commissioners v. Coultas*, 13 App. Cas. 222; *Mitchell v. Railway Co.* (N.Y. App; Dec. 1, 1896) 45 N.E. 354; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340; *Haile's Curator v. Railroad Co.*, 9 C.C.A. 1345, 60 Fed. 557. In the following cases a different view was taken; *Bell v. Railroad Co.*, L.R. Ir. 26 Exch. 428; *Purchell v. Railroad Co.*, 48 Minn. 134, 50 N.W. 1034; *Fitzpatrick v. Railway Co.*, 12 U.C. Q.B. 645. See, also, BEVAN, NEG. 77 *et seq.* It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some other. Nor do we include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennow* and *Fillebrown v. Hoar*, already cited; *Meagher v. Driscoll*, 99 Mass. 281. In the present case no such considerations entered into the rulings or were presented by the facts. The entry therefore must be: Exceptions sustained.

TEMPLE-INLAND PRODUCTS CORP. v. CARTER

42 Tex. Sup. Ct. J. 592, 1999 WL 254718 (1999)

ON APPLICATION FOR WRIT OF ERROR TO
THE COURT OF APPEALS FOR THE NINTH
DISTRICT OF TEXAS

Justice HECHT delivered the opinion for a
unanimous Court.

The sole issue in this case is whether a person who has been exposed to asbestos but does not have an asbestos-related disease may recover damages for fear of the possibility of developing such a disease in the future. The district court granted summary judgment for the defendant on plaintiff's claims for actual and punitive damages. A divided court of appeals reversed only on the actual damages claim.² For reasons we explain, the district court was correct.

I

Temple-Inland Forest Products Corporation employed Biskamp Electric to install electric outlets and computer jacks in a laboratory at one of its paper mills. In performing the installation, two Biskamp employees, Martin Reeves Carter Sr. and Larry Wilson, drilled holes in laboratory countertops, which they did not know and were not told contained asbestos. The drilling generated dust containing asbestos fibers to which Carter and Wilson were exposed. They had no protective gear to prevent them from inhaling the dust. Carter worked on the project from four to six weeks, and Wilson worked on it about two weeks. Not until the work was almost complete did the laboratory manager warn Carter and Wilson of the asbestos, at which point they stopped work on the project. Temple-Inland then tested and decontaminated the lab.

Some eighteen months later Carter and Wilson were examined by Dr. Daniel Jenkins, to whom they had been referred by their attorney. Although Dr. Jenkins concluded that neither Carter nor Wilson had any asbestos-related disease, they sued Temple-Inland for mental anguish damages caused by its having negligently exposed them to asbestos fibers. Carter and Wilson also alleged that

Temple-Inland had failed to develop a hazard communication program as required by federal regulation³ to protect persons working on its premises.

Dr. Jenkins testified at his deposition that Wilson complained of shortness of breath on exertion, that Wilson's X-ray showed some bilateral pleural thickening, and that his pulmonary function report suggested some obstruction in the small peripheral airways. According to Dr. Jenkins, Wilson's shortness of breath and pleural thickening were possibly related to his obesity, and the pleural thickening could have been related to a history of asbestos exposure predating the Temple-Inland work. Dr. Jenkins did not attribute any of Wilson's symptoms to his exposure to asbestos on Temple-Inland's premises and agreed that that exposure was probably too recent to have resulted in any of Wilson's conditions, given the long latency period ordinarily involved in asbestos-related diseases. Carter's X-ray showed no abnormalities whatever, and his pulmonary function was close to normal. Dr. Jenkins thus concluded that Wilson and Carter suffered from no disease as a result of their exposure to asbestos and that they were not disabled. In their depositions Carter and Wilson reported no other symptoms.

Dr. Jenkins, however, insisted that Wilson and Carter had been injured by their exposure to asbestos and probable inhalation of asbestos fibers at the Temple-Inland lab. He estimated that the chances of their developing a disease as a result had increased from one in a million, which he estimated to be the risk that a person would ever develop a disease from asbestos exposure not occupationally related, to about one in 500,000 for the next ten or fifteen years, and as much as one in 100 over twenty or thirty years. Dr. Jenkins characterized plaintiffs' risk as a "high possibility" but not a probability.

Based on the depositions of Dr. Jenkins, Carter, Wilson, and others, Temple-Inland moved for summary judgment on the ground that Carter and Wilson had not suffered any injury for which they could recover mental anguish damages. Temple-Inland argued that plaintiffs' claims for fear of the mere possibility of developing some disease in the future amounted to nothing more

² 943 S.W.2d 221.

³ Plaintiffs cited 29 C.F.R. § 1926.59.

than negligent infliction of emotional distress for which they could not recover under this Court's decision in *Boyles v. Kerr*.⁴ Plaintiffs responded that their inhalation of asbestos fibers was a real, physical injury which could eventually lead to disease, and that they were entitled to be compensated for their anxiety over that eventuality. Temple-Inland also contended that as a matter of law it had not been grossly negligent.

The trial court granted summary judgment. The court of appeals affirmed the judgment denying punitive damages but, by a divided vote, reversed the judgment on plaintiffs' actual damage claims.⁵ Relying principally on the Fifth Circuit's decision in *Watkins v. Fibreboard Corp.*⁶ and the Sixth Court of Appeals' opinion in *Fibreboard Corp. v. Pool*,⁷ the court concluded that "it is well established a plaintiff may recover for mental anguish based upon fear of cancer even though the evidence shows the plaintiff does not have, and in reasonable medical probability, will not have cancer, so long as there has been exposure to the causative agent and the fear is reasonable."⁸ Holding that the summary judgment record did not establish that Carter's and Wilson's fears of developing asbestos-related diseases were unreasonable, the court remanded their claims for trial.⁹ Chief Justice Walker dissented, stating that plaintiffs' risk of developing cancer was so low that their fears were, as a matter of law, unreasonable.¹⁰

We granted Temple-Inland's application for writ of error¹¹ and now reverse the court of appeals' judgment insofar as it reversed the district court's judgment.

II

The summary judgment record establishes that Carter and Wilson were exposed to asbestos at Temple-Inland's lab but do not presently suffer from any asbestos-related disease, and that while their risk of developing such a disease was increased by their exposure to asbestos, that risk is still no higher than one chance in a hundred over twenty to thirty years. The issue is whether they can recover for their fear that they will someday develop such a disease from their work at Temple-Inland's lab.

A

Carter and Wilson first argue that they are entitled to recover mental anguish damages even if they sustained no physical injury, as long as their fear of developing some asbestos-related disease is reasonable. This argument conflicts with our decision in *Boyles v. Kerr*, where we held that "there is no general duty not to negligently inflict emotional distress."¹² As we later explained in *City of Tyler v. Likes*, "[i]t has been established for over a century that '[a] person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he has been placed in a perilous position. Nor is mere fright the subject of damages.'"¹³ Absent physical injury, the common law has not allowed recovery for negligent infliction of emotional distress except in certain specific, limited instances.¹⁴

There are few situations in which a claimant who is not physically injured by the defendant's breach of a duty may recover mental anguish damages. *See, e.g., Freeman v. City of Pasadena*, 744 S.W.2d 923, 923-24 (Tex.1988) (bystander recovery); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex.1986) (intentional tort of child abduction); *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984) (defamation); *Billings v. Atkinson*, 489 S.W.2d 858, 860-61

⁴ 855 S.W.2d 593 (Tex.1993).

⁵ 943 S.W.2d 221.

⁶ 994 F.2d 253 (5th Cir.1993) (applying Texas law).

⁷ 813 S.W.2d 658 (Tex. App.--Texarkana 1991, writ denied), cert. denied, 509 U.S. 923 (1993).

⁸ 943 S.W.2d at 223.

⁹ *Id.* at 223-224.

¹⁰ *Id.* at 224 (Walker, C.J., dissenting).

¹¹ 41 TEX. SUP. CT. J. 723 (May 8, 1998).

¹² 855 S.W.2d at 597.

¹³ 962 S.W.2d 489, 500 (Tex.1997) (quoting *Gulf, C. & S.F. Ry. v. Trott*, 86 Tex. 412, 25 S.W. 419, 420 (Tex.1894), and citing RESTATEMENT (SECOND) OF TORTS § 436A (1965)).

¹⁴ *Boyles*, 855 S.W.2d at 597.

(Tex. 1973) (invasion of privacy); *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S.W. 351, 353 (1885) (failure of telegraph company to timely deliver death message); *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 906-07 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.) (negligent handling of corpse).¹⁵

Whether a plaintiff can recover mental anguish damages without physical injury "depends on both the nature of the duty breached and the quality of proof offered by the plaintiff. For many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish."¹⁶

Plaintiffs' claims in this case do not fall within any of the categories in which recovery has been allowed. Moreover, a landowner's tortious breach of his duty to invitees--like Temple-Inland's negligently exposing Carter and Wilson to asbestos--is not a wrong for which mental anguish is compensable absent physical injury.¹⁷ This is true whether the landowner's duty arises from the common law or from the federal regulation invoked by Carter and Wilson in their pleadings. Accordingly, Carter and Wilson cannot recover mental anguish damages absent physical injury.

B

Alternatively, Carter and Wilson argue that they have been physically injured because of their exposure to asbestos fibers. Carter's and Wilson's testimony, as well as that of Dr. Jenkins, supports the inference that they inhaled asbestos fibers in the lab, and Temple-Inland has not refuted this inference. Also, Dr. Jenkins' testimony that plaintiffs were physically injured by the inhalation of asbestos is uncontradicted in the record. We therefore assume, as we must for summary judgment purposes, that Carter and Wilson were physically injured by their exposure to asbestos on

Temple-Inland's premises, so that they reasonably fear developing some asbestos-related disease. The question comes to this: given that plaintiffs inhaled asbestos fibers, can they recover mental anguish damages for their increased risk and reasonable fear of possibly developing asbestos-related diseases that they do not currently have and may never have?

While the existence of physical injury is ordinarily necessary for recovery of mental anguish damages except in those instances already mentioned, such injury may not be sufficient for recovery of mental anguish damages when the injury has not produced disease, despite a reasonable fear that such disease will develop. As we recently observed in *City of Tyler v. Likes*, "[w]ithout intent or malice on the defendant's part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish in only a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result."¹⁸ This appears to be the generally accepted rule in most, if not all, American jurisdictions. The United States Supreme Court recently surveyed asbestos cases applying this rule in *Metro-North Commuter Railroad Co. v. Buckley*.¹⁹ The issue in that case was whether a railroad worker negligently exposed to asbestos, but without symptoms of any disease, could recover damages under the Federal Employers' Liability Act (FELA)²⁰ for fear of developing disease in the future. FELA imposes liability for "injury",²¹ which the Supreme Court has construed to mean "physical impact".²² Because FELA's construction must be informed by common-law principles,²³ the Court examined the decisions in jurisdictions throughout the nation involving asbestos and concluded that "with only a few

¹⁵ *Motor Express, Inc. v. Rodriguez*, 925 S.W.2d 638, 639 (Tex. 1996) (per curiam); accord, *Boyles*, 855 S.W.2d at 597.

¹⁶ *Likes*, 962 S.W.2d at 494 (citing *Boyles*, 855 S.W.2d at 598, for "noting that mental anguish is not recoverable in an action for negligent misrepresentation").

¹⁷ *Motor Express*, 925 S.W.2d at 639 ("While there may be certain relationships that give rise to a duty which, if breached, would support an emotional distress award even absent proof of physical injury, *Boyles*, 855 S.W.2d at 600, the landowner-invitee relationship is not one.")

¹⁸ 962 S.W.2d at 496.

¹⁹ 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed.2d 560 (1997).

²⁰ 45 U.S.C.A. §§ 51-60 (1986).

²¹ *Id.* § 51.

²² *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-548, 114 S. Ct. 2396, 129 L. Ed.2d 427 (1994).

²³ *id.* at 544.

exceptions,²⁴ common-law courts have denied recovery to those who, like *Buckley*, are disease and symptom free.²⁵ The Court identified three reasons for denying recovery of mental anguish damages in such cases: the "special `difficult[y] for judges and juries' in separating valid, important claims from those that are invalid or `trivial'"; "a threat of `unlimited and unpredictable liability'"; and "the `potential for a flood' of comparatively unimportant, or `trivial,' claims".²⁶

For the same reasons, like the Supreme Court and courts in most other jurisdictions, we cannot permit recovery of mental anguish damages in cases like this one. In almost all instances involving personal injury, the law allows for the recovery of

accompanying mental anguish damages, even if the mental anguish is not itself physically manifested.²⁷ But if bodily injury is at most latent and any eventual consequences uncertain, as when a person's exposure to asbestos has not produced disease, then the case for recovery of mental anguish damages is much weaker. A person exposed to asbestos can certainly develop serious health problems, but he or she also may not. The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared. Also, claims for exposure could proliferate because in our society, as the Supreme Court observed, "contacts, even extensive contacts, with serious carcinogens are common."²⁸ Indeed, most Americans are daily subjected to toxic substances in the air they breathe and the food they eat. Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest diseases for the legal system's limited resources. If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk.²⁹ This would exacerbate not only the multiplicity of suits but the unpredictability of results.

The question is not, of course, whether Carter and Wilson have themselves suffered genuine distress over their own exposure. We assume they have, and that their anxiety is reasonable. The

²⁴ "We have found only three asbestos-related cases, all involving state law, that support *Buckley* directly. *Watkins v. Fibreboard Corp.*, 994 F.2d 253, 259 (C.A.5 1993) (Texas law) (recognizing cause of action for emotional distress based on exposures to asbestos in the absence of physical symptoms); *In re Moorenovich*, 634 F. Supp. 634 (Me. 1986) (Maine law) (same); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (Westchester Cty. 1991) (same). None of them was decided by the highest court of the relevant State." 521 U.S. at 437. But see *Farrall v. A.C. & S. Co.*, 558 A.2d 1078, 1080-1081 (Del. Super. Ct. 1989) (stating that plaintiffs' expert evidence on the increased likelihood of cancer from asbestos exposure was admissible to show fear of cancer was "reasonable"). But cf. *Adams v. Clean Air Sys., Inc.*, 586 N.E.2d 940, 942 (Ind. Ct. App. 1992) (stating in dicta that plaintiffs failed to prove exposure to asbestos).

²⁵ 521 U.S. at 432-433 (citing *Burns v. Jacquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28 (Ariz. Ct. App. 1987), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984); *Eagle-Picher Indus., Inc. v. Cox*, 481 So.2d 517 (Fla. Dist. Ct. App. 1985), review denied, 492 So.2d 1331 (Fla. 1986); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994); *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (Mass. 1982); *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (Pa. 1996); *Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir. 1991); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377 (3d Cir. 1987) (Pennsylvania and New Jersey law); *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589 (5th Cir. 1986) (Louisiana law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985) (Pennsylvania law); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990) (Hawaii law); *Amendola v. Kansas City So. R. Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988) (FELA); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 25 Cal. Rptr.2d 550, 863 P.2d 795 (Cal. 1993) (in banc)).

²⁶ *id.* at 433 (quoting *Gottshall*, 512 U.S. at 557) (alteration in original).

²⁷ *City of Likes*, 962 S.W.2d at 495 (citing *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995)).

²⁸ 521 U.S. at 434.

²⁹ See *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998).

question, rather, is whether this type of claim--for fear of an increased risk of developing an asbestos-related disease when no disease is presently manifest--should be permitted, regardless of any individual plaintiff's circumstances, when the effort in determining the genuineness of each claim and assuring appropriate recovery is beset with the difficulties we have described.³⁰ We conclude that no such action should be recognized.

C

The principal case on which Carter and Wilson rely is the Fifth Circuit's decision in *Watkins v. Fibreboard Corp.*³¹ There, plaintiffs produced evidence that they suffered pleural and parenchymal abnormalities that they claimed were due to exposure to asbestos at work. The jury found that plaintiffs' exposure had not caused them any disease but had caused them mental anguish. The Fifth Circuit concluded that Texas law, which governed the case, allowed recovery of mental anguish damages in such circumstances. For authority, the court looked to a decision of our Sixth Court of Appeals, *Fibreboard Corp. v. Pool*,³² and a prior decision of the Circuit, *Dartez v. Fibreboard Corp.*³³ But in *Pool*, unlike *Watkins*, all the plaintiffs pleaded and proved serious asbestos-related injuries: two lung cancer deaths, two cases of asbestosis, and one case of asbestos-related pleural disease.³⁴ The court held that the district court had properly instructed the jury that they could award mental anguish damages for any reasonable fear the plaintiff with asbestosis had that he might suffer cancer or mesothelioma in the future, distinct from any fear of cancer which

any person might have.³⁵ Thus, *Pool* supports the proposition that a plaintiff who has developed an asbestos-related disease may recover mental anguish damages for a reasonable fear of developing other asbestos-related diseases. Assuming that that proposition is correct, something we do not decide here, *Pool* does not support *Watkins'* conclusion that a person who has no asbestos-related disease can likewise recover for fear of possible future disease.

Dartez does appear to support *Watkins'* conclusion, but its reasoning is flawed. The plaintiff in *Dartez* claimed mental anguish damages for his increased risk of developing cancer or mesothelioma due to his exposure to asbestos. The court noted that no Texas court had permitted such recovery but concluded that Texas law would allow it based on a number of analogous cases. In each of the Texas cases the court cited, however, plaintiff suffered present and manifest physical injuries as well as a fear of future complications as a result.³⁶ The court in *Dartez* also stated that it had previously decided in *Gideon v. Johns-Manville Sales Corp.*,³⁷ that Texas law would allow recovery of mental anguish damages for fear of future disease without a present physical injury. But the plaintiff in *Gideon* suffered from asbestosis and claimed a fear of developing mesothelioma. Neither *Gideon* nor any Texas court

³⁰ See *Buckley*, 521 U.S. at 436 ("[T]he common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns. The point of such categorization is to deny courts the authority to undertake a case by case examination.").

³¹ 994 F.2d 253 (5th Cir.1993).

³² 813 S.W.2d 658 (Tex. App.--Texarkana 1991, writ denied), cert. denied, 509 U.S. 923 (1993).

³³ 765 F.2d 456 (5th Cir.1985).

³⁴ 813 S.W.2d at 666.

³⁵ *id.* at 675.

³⁶ *Kimbell v. Noel*, 228 S.W.2d 980 (Tex.Civ. App.--Dallas 1950, writ ref'd n.r.e.) (suggesting that a woman could recover mental anguish damages for fear that a traumatic injury to her breast in a car accident could, according to her physician, result in cancer); *Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379 (Tex.Civ. App.--Fort Worth 1940, writ dismissed judgment corrected) (holding that plaintiff could recover mental anguish damages for fear that the injury to his elbow in an elevator would lead to paralysis); *Gamer v. Winchester*, 110 S.W.2d 1190 (Tex.Civ. App.--Fort Worth 1937, writ dismissed) (indicating that person who was physically injured in a dog attack could offer evidence of mental anguish caused by fear of developing rabies); *Trinity & S. Ry. Co. v. O'Brien*, 18 Tex.Civ. App. 690, 46 S.W. 389 (Tex.Civ. App. 1898, no writ) (same); *Southern Kansas Ry. Co. v. McSwain*, 55 Tex.Civ. App. 317, 118 S.W. 874 (Tex.Civ. App. 1909, no writ) (holding that person whose foot was mangled in a railroad accident and subsequently amputated could offer evidence of mental anguish due to his fear of developing blood poisoning).

³⁷ 761 F.2d 1129 (5th Cir.1985).

decision supports the holding in *Dartez*.

Watkins does not correctly state Texas law, nor did it attempt to analyze the development of the common law as *Buckley* did.

III

We add this cautionary note. The principles we have used to deny recovery of mental anguish damages for fear of the possibility of developing a disease as a result of an exposure to asbestos may not yield the same result when the exposure is to some other dangerous or toxic element. Exposure to asbestos, a known carcinogen, is never healthy but fortunately does not always result in disease. In *Buckley*, for example, a steam tunnel worker employed for years with little or no protective gear in closed areas where he and his fellow workers were so covered with asbestos as to be dubbed "the snowmen of Grand Central"³⁸ had developed no asbestos-related disease in the five years following his employment.³⁹ Buckley's expert witnesses testified that this extensive exposure to asbestos increased his risk of death due to an asbestos-related disease by at most five percent.⁴⁰ The substantial uncertainty that exposure to asbestos will ultimately result in disease, even though the risk of disease is significantly increased, and the ordinarily long latency period before disease develops counsel strongly against compensating these types of fears. The consequences of exposure to other toxic materials vary, and while the analysis in other circumstances should be the same as that which we have employed here, the outcomes may be different.

* * * * *

Accordingly, the judgment of the court of appeals is reversed insofar as it reverses the judgment of the district court, and judgment is rendered that Carter and Wilson take nothing against Temple-Inland.

³⁸ *Buckley*, 521 U.S. at 446 (Ginsburg, J., dissenting).

³⁹ *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, 1341 (2 nd Cir.1996).

⁴⁰ *Buckley*, 521 U.S. at 427.

Questions and Notes

1. Commentators have noted the unique characteristics of asbestos and the difficulties of applying traditional tort principles: George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 PEPP. L. REV. 261 (2003); Katie Nester, *Asbestosis-inflicted Plaintiffs and Fear of Cancer Claims*, 23 ST. LOUIS U. PUB. L. REV. 367 (2004); Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949 (2003).

JOHNSON v. STATE OF NEW YORK

37 N.Y.2d 378, 334 N.E.2d 590 (1975)

BREITEL, Chief Judge

* * *

Claimant's mother, Emma Johnson, had been a patient in the Hudson River State Hospital since 1960. On August 6, 1970, another patient, also named Emma Johnson, died. Later that day, the hospital sent a telegram addressed to Nellie Johnson of Albany, claimant's aunt and the sister of the living Emma Johnson. The telegram read:

REGRET TO INFORM YOU OF DEATH OF
EMMA JOHNSON PLEASE NOTIFY RELATIVES
MAKE BURIAL ARRANGEMENTS HAVE
UNDERTAKER CONTACT HOSPITAL BEFORE
COMING FOR BODY HOSPITAL WISHES TO
STUDY ALL DEATHS FOR SCIENTIFIC
REASONS PLEASE WIRE POST MORTEM
CONSENT.

—HUDSON RIVER STATE HOSPITAL

In accordance with the instructions in the telegram, claimant was notified of her mother's death by her aunt. An undertaker was engaged; the body of the deceased Emma Johnson was released by the hospital and taken to Albany that night. A wake was set for August 11, with burial the next day. In the interim claimant incurred expenses in preparing the body for the funeral, and in notifying other relatives of her mother's death. On the afternoon of the wake, claimant and her aunt went to the funeral home to view the body. After examining the body, both claimant and her aunt

remarked that the mother's appearance had changed. Nellie Johnson also expressed doubt that the corpse was that of her sister Emma. Thereafter the doubts built up, and upon returning that evening for the wake, claimant, in a state of extreme distress, examined the corpse more closely and verified that it was not that of her mother. At this point, claimant became "very, very hysterical", and had to be helped from the funeral chapel.

The hospital was called, and the mistake confirmed. Claimant's mother was alive and well in another wing of the hospital. Later that evening at the hospital, the deputy director, with the authorization of the director, admitted the mistake to claimant and her aunt. Upon the trial it appeared that the hospital had violated its own procedures and with gross carelessness had "pulled" the wrong patient record.

After this incident, claimant did not work in her employment for more than 11 days. She complained of "[r]ecurrent nightmares, terrifying dreams of death, seeing the coffin ... difficulty in concentrating, irritability, inability to function at work properly, general tenseness and anxiety." Her psychiatrist testified that "[s]he appeared to be somewhat depressed, tremulous. She seemed to be under a considerable amount of pressure. She cried easily when relating events that occurred. I thought that she spoke rather rapidly and obviously perspiring." Both her psychiatrist and that of the State agreed that, as a result of the incident, claimant suffered "excessive anxiety", that is, anxiety neurosis. Her expert, as indicated, testified that she showed objective manifestations of that condition.

One to whom a duty of care is owed, it has been held, may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations (*Battalla v. State of New York*, 10 N.Y.2d 237, 238-239, 219 N.Y.S.2d 34, 35, 176 N.E.2d 729; *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21-22, 176 N.Y.S.2d 996, 999-1000, 152 N.E.2d 249, 252; *cf.* RESTATEMENT, TORTS 2D, § 313, subd. (1); *see, generally, Tobin v. Grossman*, 24 N.Y.2d 609, 613, 301 N.Y.S.2d 554, 556, 249 N.E.2d 419, 420; PROSSER, TORTS (4th ed.), § 54, pp. 330-333; 2 HARPER AND JAMES, LAW OF TORTS, § 18.4, pp. 1032-1034; *Torts — Emotional Disturbances, Ann.*, 64 A.L.R.2d 100, 143, § 11 *Et seq.*). In the

absence of contemporaneous or consequential physical injury, courts have been reluctant to permit recovery for negligently caused psychological trauma, with ensuing emotional harm alone (*see* RESTATEMENT, TORTS 2D, § 436A; PROSSER, TORTS (4th ed.), *Op. cit.*, pp. 328-330, and cases collected; 2 HARPER AND JAMES, LAW OF TORTS, *Op. cit.*, pp. 1031-1032, and cases collected; *Torts — Emotional Disturbances, Ann.*, 64 A.L.R.2d 100, 115, § 7; *cf. Weicker v. Weicker*, 22 N.Y.2d 8, 11, 290 N.Y.S.2d 732, 733, 237 N.E.2d 876). The reasons for the more restrictive rule were best summarized by PROSSER (*Op. cit.*, p. 329): "The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking". Contemporaneous or consequential physical harm, coupled with the initial psychological trauma, was, however, thought to provide an index of reliability otherwise absent in a claim for psychological trauma with only psychological consequences.

There have developed, however, two exceptions. The first is the minority rule permitting recovery for emotional harm resulting from negligent transmission by a telegraph company of a message announcing death (*see* cases collected in RESTATEMENT, TORTS 2D, *App.*, § 436A; PROSSER, *Op. cit.*, p. 329; *but see Western Union Tel. Co. v. Speight*, 254 U.S. 17, 18, 41 S.Ct. 11, 65 L. Ed. 104; *Curtin v. Western Union Tel. Co.*, 13 App. Div. 253, 255-256, 42 N.Y.S. 1109, 1110-1111 (majority rule denying recovery). The Federal rule does, however, permit recovery where the psychological trauma results in physical illness, *see Kaufman v. Western Union Tel. Co.*, 5 Cir., 224 F.2d 723, 731, *cert. den.* 350 U.S. 947, 76 S.Ct. 321, 100 L. Ed. 825).

The second exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse (*see* PROSSER, *Op. cit.* pp. 329-330, and cases collected). Recovery in these cases has ostensibly been grounded on a violation of the relative's quasi-property right in the body (*see Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 262, 95 N.E.

695, 696; but *cf. Owens v. Liverpool Corp.* (1939), 1 KB 394, 400 (CA) (applying negligence principles), disapproved in *Hay or Bourhill v. Young* (1943), AC 92, 110 (HL) (per Lord WRIGHT), but applied in *Behrens v. Bertram Mills Circus* (1957), 2 QB 1, 28 (DEVLIN, J.). It has been noted, however, that in this context such a "property right" is little more than a fiction; in reality the personal feelings of the survivors are being protected (PROSSER, *Op. cit.*, p. 59).

In both the telegraph cases and the corpse mishandling cases, there exists "an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious" (p. 330). PROSSER notes that "[t]here may perhaps be other such cases" (p. 330; *see Nieman v. Upper Queens Med. Group, City Ct.*, 220 N.Y.S.2d 129, 130, in which plaintiff alleged emotional harm due to negligent misinformation by a laboratory that his sperm count indicated sterility; and defendant's motion for judgment on the pleadings was denied). The instant claim provides an example of such a case.

As the Appellate Division correctly found and the State in truth concedes, the hospital was negligent in failing to ascertain the proper next of kin when it mistakenly transmitted the death notice to claimant's aunt and through her, at its behest, to claimant. While for one to be held liable in negligence he need not foresee novel or extraordinary consequences, it is enough that he be aware of the risk of danger. The consequential funeral expenditures and the serious psychological impact on claimant of a false message informing her of the death of her mother, were all within the "orbit of the danger" and therefore within the "orbit of the duty" for the breach of which a wrongdoer may be held liable (*Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339, 343, 162 N.E. 99, 100). Thus, the hospital owed claimant a duty to refrain from such conduct, a duty breached when it negligently sent the false message. The false message and the events flowing from its receipt were the proximate cause of claimant's emotional harm. Hence, claimant is entitled to recover for that harm, especially if supported by objective manifestations of that harm.

Tobin v. Grossman (24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419, *supra*) is not relevant. In the *Tobin* case, the court held that no cause of action lies for unintended harm sustained

by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries (p. 611, 301 N.Y.S.2d pp. 554-555, 249 N.E.2d pp. 419-420). In this case, however, the injury was inflicted by the hospital directly on claimant by its negligent sending of a false message announcing her mother's death. Claimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case. (Nor is *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, relevant to the tort rationale or holding in this case. There recovery was allowed solely on the elastic basis permitted by the Workmen's Compensation Law as applied in the courts.)

Moreover, not only justice but logic compels the further conclusion that if claimant was entitled to recover her pecuniary losses she was also entitled to recover for the emotional harm caused by the same tortious act. The recovery of the funeral expenses stands only because a duty to claimant was breached. Such a duty existing and such a breach of that duty occurring, she is entitled to recover the proven harmful consequences proximately caused by the breach. In the light of the *Battalla* and *Ferrara* cases (*supra*), and the reasoning upon which they were based, recovery for emotional harm to one subjected directly to the tortious act may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a "guarantee of genuineness" to which the court referred in the *Ferrara* case (5 N.Y.2d 16, 21, 176 N.Y.S.2d 996, 999, 152 N.E.2d 249, 252, *supra*; *see, also, Battalla v. State of New York*, 10 N.Y.2d 237, 242, 219 N.Y.S.2d 34, 38, 176 N.E.2d 729, 731, *supra*).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to that court for a determination of the facts in accordance with CPLR 5613.

JASEN, GABRIELLI, JONES, WACHTLER,

FUCHSBERG and COOKE, JJ., concur.

Order reversed, with costs, and case remitted to Appellate Division, Third Department, for further proceedings in accordance with the opinion herein.

Questions and Notes

1. In *Lafferty v. Manhasset Medical Center Hospital*, 54 N.Y.2d 277, 445 N.Y.S.2d 11, 429 N.E.2d 789 (1981), the plaintiff brought suit against the hospital to recover for emotional distress and aggravation of a preexisting heart problem. She suffered these upon witnessing a negligent transfusion of mismatched blood into her mother-in-law and upon participating in the events that occurred during the period immediately following the start of the transfusion. Would the court impose liability based upon *Johnson v. State of New York*?

STEINHAUSER v. HERTZ CORPORATION

421 F.2d 1169 (2d Cir. 1970)

FRIENDLY, Circuit Judge

On September 4, 1964, plaintiff Cynthia Steinhauer, a New Jersey citizen then 14 years old, her mother and father were driving south through Essex County, N.Y. A northbound car, owned by defendant Hertz Corporation, a Delaware corporation authorized to do business in New York, and operated by defendant Ponzini, a citizen of New York, crossed over a double yellow line in the highway into the southbound lane and struck the Steinhauer car heavily on the left side. The occupants did not suffer any bodily injuries.

The plaintiffs' evidence was that within a few minutes after the accident Cynthia began to behave in an unusual way. Her parents observed her to be "glassy-eyed," "upset," "highly agitated," "nervous" and "disturbed." When Ponzini came toward the Steinhauer car, she jumped up and down and made menacing gestures until restrained by her father. On the way home she complained of a headache and became uncommunicative. In the following days things went steadily worse. Cynthia thought that she was being attacked and that knives,

guns and bullets were coming through the windows. She was hostile toward her parents and assaulted them; becoming depressed, she attempted suicide. The family physician recommended hospitalization. After observation and treatment in three hospitals, with a final diagnosis of "schizophrenic reaction — acute — undifferentiated," she was released in December 1964 under the care of a psychiatrist, Dr. Royce, which continued until September 1966. His diagnosis, both at the beginning and at the end, was of a chronic schizophrenic reaction; he explained that by "chronic" he meant that Cynthia was not brought to him because of a sudden onset of symptoms. She then entered the Hospital of the University of Pennsylvania and, one month later, transferred to the Institute of Pennsylvania Hospital for long-term therapy. Discharged in January 1968, she has required the care of a psychiatrist. The evidence was that the need for this will continue, that reinstitutionalization is likely, and that her prognosis is bad.

As the recital makes evident, the important issue was the existence of a causal relationship between the rather slight accident and Cynthia's undoubtedly serious ailment.¹ The testimony was uncontradicted that prior to the accident she had never displayed such exaggerated symptoms as thereafter. However, she had fallen from a horse about two years earlier and suffered what was diagnosed as a minor concussion; she was not hospitalized but missed a month of school. The other evidence relied on by the defendants to show prior psychiatric abnormality was derived largely from the history furnished, apparently in large part

¹ The fact that no physical harm was suffered as a result of the accident does not affect plaintiff's right to recover. New York has abandoned the rule disallowing recovery for mental disturbance in the absence of a physical impact, see *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), and although some courts deny recovery for mental disturbance unaccompanied by physical injuries, see PROSSER, TORTS 348-49 (3d ed. 1964); A.L.I. RESTATEMENT 2D TORTS 436A, New York allows such recovery if the "mental injury [is] marked by definite physical symptoms, which are capable of clear medical proof," *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958), quoting PROSSER, TORTS 212 (1st ed. 1941); see also *Battalla v. State*, *supra*, and *"A.A." v. State*, 43 Misc. 2d 1004, 252 N.Y.S. 2d 800 (Ct. Cl. 1964) (awarding damages where slight physical impact "aggravated and exacerbated that pre-existing condition" to produce schizophrenia).

by Cynthia, at her admission to the first of the three hospitals on September 20, 1964, which we set out in the margin.

* * *

We add a further word that may be of importance on a new trial. Although the fact that Cynthia had latent psychotic tendencies would not defeat recovery if the accident was a precipitating cause of schizophrenia, this may have a significant bearing on the amount of damages. The defendants are entitled to explore the probability that the child might have developed schizophrenia in any event. While the evidence does not demonstrate that Cynthia already had the disease, it does suggest that she was a good prospect. Judge Hiscock said in *McCall*, "it is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense." 201 N.Y. at 224, 94 N.E. at 617. In *Evans v. S.J. Groves & Sons Company, supra*, we noted that if a defendant "succeeds in establishing that the plaintiff's pre-existing condition was bound to worsen ... an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant's negligence." 315 F.2d at 347-348. See also the famous case of *Dillon v. Twin State Gas & Electric Co.*, 85 N.H. 449, 163 A. 111 (1932), and 2 HARPER & JAMES, *supra*, at 1128-1131. It is no answer that exact prediction of Cynthia's future apart from the accident is difficult or even impossible. However taxing such a problem may be for men who have devoted their lives to psychiatry, it is one for which a jury is ideally suited.

Reversed for a new trial.

Questions and Notes

1. Should it make any difference whether the emotional injury is one that is classified as a "mental illness"? Why or why not?

2. Does it make sense to draw the line between compensable and noncompensable emotional injuries based on whether they are accompanied by physical injury? If not, where should the line —if

any —be drawn?

3. Note that in the *Spade* case the judge distinguished negligently caused emotional injury from other types of compensable harm, such as libel or slander (see Chapter Fourteen for a discussion of these torts). If a newspaper had printed a story in which it incorrectly identified Nellie Smith as the daughter of a mental patient, Nellie Smith might sue the newspaper for libel. Does it make a difference if the negligence is on the part of a New York hospital, that sends a telegram to the daughter of the wrong Mrs. Johnson? Why does tort law generally permit one kind of emotional injury to be compensated without proof of physical harm, but not another?

4. The *Johnson* case is significant because the defendants did no physical harm to anyone. In many of the so-called "negligent infliction of emotional distress" cases (such as *Dillon v. Legg*, considered *infra*, § B.3.), the defendant has inflicted physical injury upon Party X, and some person related to Party X is seeking recovery of emotional damages. One could call those damages "parasitic" because they depend upon the existence of an otherwise valid tort claim. In this case, however, there is no physical injury. Does that make the case for recovery stronger or weaker?

5. A well-known case recognizing a claim for negligently inflicted emotional distress, even where no physical injury was caused (to anyone, not just to plaintiff), is *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In *Molien* an employee of the defendant hospital negligently examined the plaintiff and erroneously told her that she had contracted syphilis. If the hospital should be forced to compensate the plaintiff for her emotional distress, what theory provides the best justification?

4. Punitive Damages

MORAN v. JOHNS-MANVILLE SALES CORPORATION

691 F.2d 811 (6th Cir. 1982)

John W. PECK, Senior Circuit Judge

In this diversity action, Johns-Manville Sales Corp. ("JM") appeals from a judgment for the plaintiff, and from the trial court's denial of JM's motions for judgment notwithstanding the verdict ("JNOV"), for a new trial, and for a remittitur. On appeal, JM attacks the sufficiency of the evidence at trial to support the jury's award of \$350,000 in compensatory and \$500,000 in punitive damages. JM also offers policy arguments against any award of punitive damages in this case.

Edward Moran, the plaintiff's deceased, worked for over thirty years installing insulation. During that time he worked with asbestos insulation products made by JM's corporate predecessors. Moran died of lung cancer at age sixty-one. His executrix prosecuted this action against various manufacturers of asbestos products under a theory of strict liability in tort.

* * *

JM next argues that the evidence at trial did not support an award of punitive damages. JM states that Ohio law requires that "actual malice" —which JM apparently equates with ill-will—be established before punitive damages may be awarded. This is not the law of Ohio as stated by the Ohio Supreme Court or as construed by this Court. The Ohio Supreme Court recently summarized the "malice" justifying punitive damages thus:

Evidence of actual malice ... must be present before a jury question of punitive damages is raised; actual malice may take either the form of the defendant's express ill will, hatred or spirit of revenge, or the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances. *Detling v. Chockley*, 70 Ohio St.2d 134, 137-38 (436 N.E.2d 208) (1982) (*per curiam*). *Accord, Drayton v. Jiffie Chem. Corp.*, 591 F.2d 352, 365-66 (6th Cir. 1978); *Gillham v. Admiral Corp.*, 523 F.2d 102, 108 (6th Cir. 1975) (applying Ohio law).

In the product liability action of *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 456 at syllabus 2, 424 N.E.2d 568 (1981), the Ohio Supreme Court held that "[p]unitive damages may be awarded where a manufacturer's testing and examination procedures are so inadequate as to manifest a flagrant indifference to the probability that the product might expose consumers to unreasonable risks of harm." By analogy to *Leichtamer* we hold that a jury question of punitive damages was established if a reasonable juror could have concluded that JM's failure to place warning labels on insulation products before 1964 manifested such a "flagrant indifference" to users' risks of harm.

To rebut Moran's evidence of flagrant indifference to risks to insulation workers, JM argues that the record discloses that the Selikoff study of 1964¹ was the first to document health risks to users, rather than producers, of asbestos products. This assertion is belied by the summary of prior knowledge given in the Selikoff study itself:

Ellman in 1934 mentioned a case of asbestosis in an insulation worker. Other cases were subsequently reported, and in the annual report of the Chief Inspector of Factories for the year 1956, "lagging," or insulation work, was recognized as hazardous. Similarly, Hervieux in France drew attention in 1962 to the dangers of such end product use as insulation work. The only large scale survey of asbestos insulation workers was undertaken in the U.S. by Fleischer *et al.* in 1945. They found only three cases of asbestosis and concluded that "asbestos pipe covering of naval vessels is a relatively safe operation." Unfortunately, 95 per cent of those examined by them had worked for less than 10 years at the trade and, as we shall see, evaluation of the risk of insulation workers limited to study of men with relatively short durations of exposure may be misleading. Selikoff at 140 (footnotes omitted).

¹ Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANN. N.Y. ACAD. SCI. 139 (1965).

In judging whether a manufacturer's indifference to consumers' risks is "flagrant" we believe a jury may weigh the gravity of the harms threatened against the onerousness of the manufacturer's correctives. Here the harms threatened were chronic debilitating diseases; the corrective was the placement of warning labels on insulation products so that insulation workers might try to protect themselves if they so chose. Under the limited standard of review we may employ, we cannot disturb the jury's award of punitive damages in this case.

* * *

II. Policy Arguments Against Punitive Damages Award

JM offers numerous reasons why an award of punitive damages would be inappropriate in this case. The first is that the goals of punishment and deterrence would not be served by awarding "punitive" damages. JM argues that "there is no conduct to deter because Johns-Manville modified its products in the 1960's." In Ohio, however, the deterrence sought by punitive damages is general, not specific: the offending party is set up "as an example *to others* that they might be deterred from *similar* conduct." *Detling, supra*, 70 Ohio St. 2d at 136, 436 N.E.2d 208 (emphasis added); *see also* 30 OJUR 3D, *Damages*, § 148 (citing cases). Whether a defendant's particular course of conduct has ceased is irrelevant to the accomplishment of this broader purpose.

In *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 365-66 (6th Cir. 1978), we affirmed a district court's refusal to award punitive damages in a product liability case. The trial court had noted both improving industry practices, and a change in corporate ownership, as weighing against such an award. *See* 395 F. Supp. 1081, 1097-98 (N.D. Ohio 1975). The trial court's action may be questioned in light of later Ohio precedent; moreover, our own affirmance, by a divided court, was lukewarm. *See* 591 F.2d at 365-66, 371-74. *Drayton* was a case tried to the bench, and it was key to this Court's affirmance that "the trial judge's decision not to award punitive damages was based upon considerations of both law and fact." *Id.* at 365. We also noted the trial judge's factual characterization of the plaintiffs' arguments for punitive damages as "more shrill than persuasive." *Id.* at 366. Finally, we invoked Rule 52(a), FED. R.

CIV. PRO., a pellucid indication that a factual determination was being left undisturbed. *See* 591 F.2d at 366. Nothing we said in *Drayton* requires us to disallow punitive damages in this case.

JM contends that no culpable party would be punished by an award of "punitive" damages here. It points out that the persons responsible for the business decisions giving rise to JM's liability have long ago left JM's employ. We noted in Gillham that, under Ohio law, a corporation may be "subjected to punitive damages for the tortious acts of its agents within the scope of their employment in any case where a natural person acting for himself would be liable for punitive damages." 523 F.2d at 108. JM would have us overlook the liability of the legal person. We decline to adopt the boundless principle that legal entities may escape liability for punitive damages if the "culpable" persons are no longer agents of the corporation. It is agency at the time of the tortious act, not at the time of litigation, that determines the corporation's liability. JM's rule would make the corporate veil an impenetrable shield against punitive damages; JM points to nothing in Ohio law from which such a shield could be fashioned.

We are not dissuaded from allowing punitive damages because this cost will ultimately be borne by "innocent" shareholders. Punitive damage awards are a risk that accompanies investment. *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) did not establish a contrary rule. In that case we reduced, but did not eliminate, an award of punitive damages against a union; we noted that "the ones who will end up paying for the punitive damages award are the union members. For this reason, courts should be slow to award huge punitive damages awards against unions." *Id.* at 103 (fn. omitted). The case of a union member and shareholder are, however, not wholly analogous. Individual workers only seldom can choose which union to belong to; a group of workers cannot change bargaining agents overnight. Investors may typically place their money where they choose and withdraw it when they wish. The prospect of ultimate liability for punitive damages may encourage investors to entrust their capital to the most responsible concerns.

JM urges with particular force that punitive damages should not be awarded against a company that faces a multitude of product liability actions. If punitive damages are awarded in many of these

actions, JM argues that it will not be punished, but destroyed. We have read Judge Friendly's interesting essay on such a prospect, and its implications for the law, in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-41 (2d Cir. 1967). However eloquent the essay, it is confessed dictum. Judge Friendly noted that "the New York cases afford no basis for our predicting that the [New York] Court of Appeals would adopt a rule disallowing punitive damages in a case such as this, and the *Erie* doctrine wisely prevents our engaging in such extensive law-making on local tort liability, a subject which the people of New York have entrusted to their legislature and, within limits, to their own courts, not to us." *Id.* at 841. So it is here. The relief sought by JM may be more properly granted by the state or federal legislature than by this Court. Such legislative relief is even now being sought by asbestos-product manufacturers. *See* 68 A.B.A.J. 398 (April 1982); NEW YORK TIMES, Aug. 10, 1982, at 34.

* * *

Questions and Notes

1. The asbestos cases generated huge litigation costs on both sides. Unfortunately, of the entire amount spent on the asbestos litigation, only 17¢ of every dollar actually went to the victims. The balance was chewed up in litigation, insurance and administrative expenses. Asbestos has been replaced by tobacco as the new object of scrutiny. *See* Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, [67 Miss. L.J. 847](#) (1998).

GRIMSHAW v. FORD MOTOR CO.

119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)

TAMURA, Acting Presiding Justice

A 1972 Ford Pinto hatchback automobile unexpectedly stalled on a freeway, erupting into flames when it was rear ended by a car proceeding in the same direction. Mrs. Lilly Gray, the driver of the Pinto, suffered fatal burns and 13-year-old Richard Grimshaw, a passenger in the Pinto, suffered severe and permanently disfiguring burns

on his face and entire body. Grimshaw and the heirs of Mrs. Gray (Grays) sued Ford Motor Company and others. Following a six-month jury trial, verdicts were returned in favor of plaintiffs against Ford Motor Company. Grimshaw was awarded \$2,516,000 compensatory damages and \$125 million punitive damages; the Grays were awarded \$559,680 in compensatory damages. On Ford's motion for a new trial, Grimshaw was required to remit all but \$3½million of the punitive award as a condition of denial of the motion.

Ford appeals from the judgment and from an order denying its motion for a judgment notwithstanding the verdict as to punitive damages. Grimshaw appeals from the order granting the conditional new trial and from the amended judgment entered pursuant to the order. The Grays have cross-appealed from the judgment and from an order denying leave to amend their complaint to seek punitive damages.

Ford assails the judgment as a whole, assigning a multitude of errors and irregularities, including misconduct of counsel, but the primary thrust of its appeal is directed against the punitive damage award. Ford contends that the punitive award was statutorily unauthorized and constitutionally invalid. In addition, it maintains that the evidence was insufficient to support a finding of malice or corporate responsibility for malice. Grimshaw's cross-appeal challenges the validity of the new trial order and the conditional reduction of the punitive damage award. The Grays' cross-appeal goes to the validity of an order denying them leave to amend their wrongful death complaint to seek punitive damages.

Facts

Since sufficiency of the evidence is in issue only regarding the punitive damage award, we make no attempt to review the evidence bearing on all of the litigated issues. Subject to amplification when we deal with specific issues, we shall set out the basic facts pertinent to these appeals in accordance with established principles of appellate review: We will view the evidence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor, and indulging all reasonable inferences favorable to them. (*Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 507, 156 Cal. Rptr. 41, 595 P.2d 619; *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 925, 101 Cal. Rptr.

568, 496 P.2d 480.)

The Accident:

In November 1971, the Grays purchased a new 1972 Pinto hatchback manufactured by Ford in October 1971. The Grays had trouble with the car from the outset. During the first few months of ownership, they had to return the car to the dealer for repairs a number of times. Their car problems included excessive gas and oil consumption, down shifting of the automatic transmission, lack of power, and occasional stalling. It was later learned that the stalling and excessive fuel consumption were caused by a heavy carburetor float.

On May 28, 1972, Mrs. Gray, accompanied by 13-year-old Richard Grimshaw, set out in the Pinto from Anaheim for Barstow to meet Mr. Gray. The Pinto was then six months old and had been driven approximately 3,000 miles. Mrs. Gray stopped in San Bernardino for gasoline, got back onto the freeway (Interstate 15) and proceeded toward her destination at 60-65 miles per hour. As she approached the Route 30 off-ramp where traffic was congested, she moved from the outer fast lane to the middle lane of the freeway. Shortly after this lane change, the Pinto suddenly stalled and coasted to a halt in the middle lane. It was later established that the carburetor float had become so saturated with gasoline that it suddenly sank, opening the float chamber and causing the engine to flood and stall. A car traveling immediately behind the Pinto was able to swerve and pass it but the driver of a 1962 Ford Galaxie was unable to avoid colliding with the Pinto. The Galaxie had been traveling from 50 to 55 miles per hour but before the impact had been braked to a speed of from 28 to 37 miles per hour.

At the moment of impact, the Pinto caught fire and its interior was engulfed in flames. According to plaintiffs' expert, the impact of the Galaxie had driven the Pinto's gas tank forward and caused it to be punctured by the flange or one of the bolts on the differential housing so that fuel sprayed from the punctured tank and entered the passenger compartment through gaps resulting from the separation of the rear wheel well sections from the floor pan. By the time the Pinto came to rest after the collision, both occupants had sustained serious burns. When they emerged from the vehicle, their clothing was almost completely burned off. Mrs. Gray died a few days later of congestive heart

failure as a result of the burns. Grimshaw managed to survive but only through heroic medical measures. He has undergone numerous and extensive surgeries and skin grafts and must undergo additional surgeries over the next 10 years. He lost portions of several fingers on his left hand and portions of his left ear, while his face required many skin grafts from various portions of his body. Because Ford does not contest the amount of compensatory damages awarded to Grimshaw and the Grays, no purpose would be served by further description of the injuries suffered by Grimshaw or the damages sustained by the Grays.

Design of the Pinto Fuel System:

In 1968, Ford began designing a new subcompact automobile which ultimately became the Pinto. Mr. Iacocco [sic], then a Ford Vice President, conceived the project and was its moving force. Ford's objective was to build a car at or below 2,000 pounds to sell for no more than \$2,000.

Ordinarily marketing surveys and preliminary engineering studies precede the styling of a new automobile line. Pinto, however, was a rush project, so that styling preceded engineering and dictated engineering design to a greater degree than usual. Among the engineering decisions dictated by styling was the placement of the fuel tank. It was then the preferred practice in Europe and Japan to locate the gas tank over the rear axle in subcompacts because a small vehicle has less "crush space" between the rear axle and the bumper than larger cars. The Pinto's styling, however, required the tank to be placed behind the rear axle leaving only 9 or 10 inches of "crush space" far less than in any other American automobile or Ford overseas subcompact. In addition, the Pinto was designed so that its bumper was little more than a chrome strip, less substantial than the bumper of any other American car produced then or later. The Pinto's rear structure also lacked reinforcing members known as "hat sections" (2 longitudinal side members) and horizontal cross-members running between them such as were found in cars of larger unitized construction and in all automobiles produced by Ford's overseas operations. The absence of the reinforcing members rendered the Pinto less crush resistant than other vehicles. Finally, the

differential housing selected for the Pinto had an exposed flange and a line of exposed bolt heads. These protrusions were sufficient to puncture a gas tank driven forward against the differential upon rear impact.

Crash Tests:

During the development of the Pinto, prototypes were built and tested. Some were "mechanical prototypes" which duplicated mechanical features of the design but not its appearance while others, referred to as "engineering prototypes," were true duplicates of the design car. These prototypes as well as two production Pintos were crash tested by Ford to determine, among other things, the integrity of the fuel system in rear-end accidents. Ford also conducted the tests to see if the Pinto as designed would meet a proposed federal regulation requiring all automobiles manufactured in 1972 to be able to withstand a 20-mile-per-hour fixed barrier impact without significant fuel spillage and all automobiles manufactured after January 1, 1973, to withstand a 30-mile-per-hour fixed barrier impact without significant fuel spillage.

The crash tests revealed that the Pinto's fuel system as designed could not meet the 20-mile-per-hour proposed standard. Mechanical prototypes struck from the rear with a moving barrier at 21-miles-per-hour caused the fuel tank to be driven forward and to be punctured, causing fuel leakage in excess of the standard prescribed by the proposed regulation. A production Pinto crash tested at 21-miles-per-hour into a fixed barrier caused the fuel neck to be torn from the gas tank and the tank to be punctured by a bolt head on the differential housing. In at least one test, spilled fuel entered the driver's compartment through gaps resulting from the separation of the seams joining the rear wheel wells to the floor pan. The seam separation was occasioned by the lack of reinforcement in the rear structure and insufficient welds of the wheel wells to the floor pan.

Tests conducted by Ford on other vehicles, including modified or reinforced mechanical Pinto prototypes, proved safe at speeds at which the Pinto failed. Where rubber bladders had been installed in the tank, crash tests into fixed barriers at 21-miles-per-hour withstood leakage from punctures in the gas tank. Vehicles with fuel tanks installed above rather than behind the rear axle

passed the fuel system integrity test at 31-miles-per-hour fixed barrier. A Pinto with two longitudinal hat sections added to firm up the rear structure passed a 20-mile-per-hour rear impact fixed barrier test with no fuel leakage.

The Cost To Remedy Design Deficiencies:

When a prototype failed the fuel system integrity test, the standard of care for engineers in the industry was to redesign and retest it. The vulnerability of the production Pinto's fuel tank at speeds of 20 and 30-miles-per-hour fixed barrier tests could have been remedied by inexpensive "fixes," but Ford produced and sold the Pinto to the public without doing anything to remedy the defects. Design changes that would have enhanced the integrity of the fuel tank system at relatively little cost per car included the following: Longitudinal side members and cross members at \$2.40 and \$1.80, respectively; a single shock absorbent "flak suit" to protect the tank at \$4; a tank within a tank and placement of the tank over the axle at \$5.08 to \$5.79; a nylon bladder within the tank at \$5.25 to \$8; placement of the tank over the axle surrounded with a protective barrier at a cost of \$9.95 per car; substitution of a rear axle with a smooth differential housing at a cost of \$2.10; imposition of a protective shield between the differential housing and the tank at \$2.35; improvement and reenforcement of the bumper at \$2.60; addition of eight inches of crush space at a cost of \$6.40. Equipping the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space at a total cost of \$15.30 would have made the fuel tank safe in a 34 to 38-mile-per-hour rear end collision by a vehicle the size of the Ford Galaxie. If, in addition to the foregoing, a bladder or tank within a tank were used or if the tank were protected with a shield, it would have been safe in a 40 to 45-mile-per-hour rear impact. If the tank had been located over the rear axle, it would have been safe in a rear impact at 50 miles per hour or more.

Management's Decision To Go Forward With Knowledge Of Defects:

The idea for the Pinto, as has been noted, was conceived by Mr. Iacocco, then Executive Vice President of Ford. The feasibility study was conducted under the supervision of Mr. Robert Alexander, Vice President of Car Engineering. Ford's Product Planning Committee, whose

members included Mr. Iacocca, Mr. Robert Alexander, and Mr. Harold MacDonald, Ford's Group Vice President of Car Engineering, approved the Pinto's concept and made the decision to go forward with the project. During the course of the project, regular product review meetings were held which were chaired by Mr. MacDonald and attended by Mr. Alexander. As the project approached actual production, the engineers responsible for the components of the project "signed off" to their immediate supervisors who in turn "signed off" to their superiors and so on up the chain of command until the entire project was approved for public release by Vice Presidents Alexander and MacDonald and ultimately by Mr. Iacocca. The Pinto crash tests results had been forwarded up the chain of command to the ultimate decision-makers and were known to the Ford officials who decided to go forward with production.

Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford's management made the decision to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that "fixes" were feasible at nominal cost. He testified that management's decision was based on the cost savings which would inure from omitting or delaying the "fixes."

Mr. Copp's testimony concerning management's awareness of the crash tests results and the vulnerability of the Pinto fuel system was corroborated by other evidence. At an April 1971 product review meeting chaired by Mr. MacDonald, those present received and discussed a report (Exhibit 125) prepared by Ford engineers pertaining to the financial impact of a proposed federal standard on fuel system integrity and the cost savings which would accrue from deferring even minimal "fixes."¹ The report refers to crash

tests of the integrity of the fuel system of Ford vehicles and design changes needed to meet anticipated federal standards. Also in evidence was a September 23, 1970, report (Exhibit 124) by Ford's "Chassis Design Office" concerning a program "to establish a corporate [Ford] position and reply to the government" on the proposed federal fuel system integrity standard which

¹(...continued)

To meet 30 mph movable barrier requirements, original fuel system integrity programs assumptions provided for relocation of the fuel tanks to over the axle on all car lines beginning in 1974. Major tearup of rear and center floor pans, added rear end structure, and new fuel tanks were believed necessary for all car lines. These engineering assumptions were developed from limited vehicle crash test data and design and development work.

Since these original assumptions, seven vehicle crash tests have been run which now indicate fuel tank relocation is probably not required. Although still based heavily on judgement, Chassis Engineering currently estimates that the 30 mph movable barrier requirement is achievable with a reduced level of rear end tearup.

In addition to added rear-end structure, Chassis Engineering believes that either rubber "flak" suits (similar to a tire carcass), or alternatively, a bladder lining within the fuel tank may be required on all cars with flat fuel tanks located under the luggage compartment floor (all cars, except Ford/Mercury/Lincoln and Torino/Montego station wagons). Although further crash tests may show that added structure alone is adequate to meet the 30 mph movable barrier requirement, provisions for flak suits or bladders must be provided. The design cost of a single flak suit, located between the fuel tank and the axle, is currently estimated at \$(4) per vehicle. If two flak suits (second located at the rear of the fuel tank), or a bladder are required, the design cost is estimated at \$(8) per vehicle. Based on these estimates, it is recommended that the addition of the flak suit/bladder be delayed on all affected cars until 1976. However, package provision for both the flak suits and the bladder should be included when other changes are made to incorporate 30 mph movable barrier capability. A design cost savings of \$10.9 million (1974-1975) can be realized by this delay. Although a design cost provision of \$(8) per affected vehicle has been made in 1976 program levels to cover contingencies, it is hoped that cost reductions can be achieved, or the need for any flak suit or bladder eliminated after further engineering development.

Current assumptions indicate that fuel system integrity modifications and 1973 bumper improvement requirements are nearly independent. However, bumper requirements for 1974 and beyond may require additional rear end structure which could benefit fuel system integrity programs.

¹The "Fuel System Integrity Program Financial Review" report included the following:

Product Assumptions

To meet 20 mph movable barrier requirements in 1973, fuel filler neck modifications to provide breakaway capability and minor upgrading of structure are required.

(continued...)

included zero fuel spillage at 20 miles per hour fixed barrier crash by January 1, 1972, and 30 miles per hour by January 1, 1973. The report states in part: "The 20 and 30 mph rear fixed barrier crashes will probably require repackaging the fuel tanks in a protected area such as above the rear axle. This is based on moving barrier crash tests of a Chevelle and a Ford at 30 mph and other Ford products at 20 mph. (¶) Currently there are no plans for forward models to repackage the fuel tanks. Tests must be conducted to prove that repackaged tanks will live without significantly strengthening rear structure for added protection." The report also notes that the Pinto was the "[s]mallest car line with most difficulty in achieving compliance." It is reasonable to infer that the report was prepared for and known to Ford officials in policy-making positions.

The fact that two of the crash tests were run at the request of the Ford Chassis and Vehicle Engineering Department for the specific purpose of demonstrating the advisability of moving the fuel tank over the axle as a possible "fix" further corroborated Mr. Copp's testimony that management knew the results of the crash tests. Mr. Kennedy, who succeeded Mr. Copp as the engineer in charge of Ford's crash testing program, admitted that the test results had been forwarded up the chain of command to his superiors.

Finally, Mr. Copp testified to conversations in late 1968 or early 1969 with the chief assistant research engineer in charge of cost-weight evaluation of the Pinto, and to a later conversation with the chief chassis engineer who was then in charge of crash testing the early prototype. In these conversations, both men expressed concern about the integrity of the Pinto's fuel system and complained about management's unwillingness to deviate from the design if the change would cost money.

* * *

VI

Punitive Damages

Ford contends that it was entitled to a judgment notwithstanding the verdict on the issue of punitive damages on two grounds: First, punitive damages are statutorily and constitutionally impermissible in a design defect case; second, there was no evidentiary support for a finding of malice or of corporate responsibility for malice. In any event,

Ford maintains that the punitive damage award must be reversed because of erroneous instructions and excessiveness of the award.

(1) "Malice" Under Civil Code Section 3294:

The concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this country. (Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1262-1263 (hereafter Owen); Mallor & Roberts, *Punitive Damages, Towards A Principled Approach*, 31 HASTINGS L.J. 639, 642-643 (hereafter Mallor & Roberts); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-520.) The doctrine was a part of the common law of this state long before the Civil Code was adopted. (*Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657, 661; *Nightingale v. Scannell*, 18 Cal. 315, 325-326; *Dorsey v. Manlove*, 14 Cal. 553, 555-556; *Wilson v. Middleton*, 2 Cal. 54.) When our laws were codified in 1872, the doctrine was incorporated in Civil Code section 3294, which at the time of trial read: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."²

² Section 3294 was amended in 1980 (Stats. 1980, ch. 1242, § 1, p. ---, eff. Jan. 1, 1981) to read:

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following
(continued...)

Ford argues that "malice" as used in section 3294 and as interpreted by our Supreme Court in *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, requires animus malus or evil motive an intention to injure the person harmed and that the term is therefore conceptually incompatible with an unintentional tort such as the manufacture and marketing of a defectively designed product. This contention runs counter to our decisional law. As this court recently noted, numerous California cases after *Davis v. Hearst*, *supra*, have interpreted the term "malice" as used in section 3294 to include, not only a malicious intention to injure the specific person harmed, but conduct evincing "a conscious disregard of the probability that the actor's conduct will result in injury to others." (*Dawes v. Superior Court*, 111 Cal. App. 3d 82, 88, 168 Cal. Rptr. 319, *hg. den.* (Dec. 17, 1980); *e.g.*, *Taylor v. Superior Court*, 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854; *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 922, 148 Cal. Rptr. 389, 582 P.2d 980; *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 922-923, 114 Cal. Rptr. 622, 523 P.2d 662; *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 521 P.2d 1103; *Donnelly v. Southern Pacific Co.*, 18 Cal. 2d 863, 869-870, 118 P.2d 465; *Nolin v. National Convenience Stores, Inc.*, 95 Cal. App. 3d 279, 285-286, 157 Cal. Rptr. 32; *Seimon v. Southern Pac. Transportation Co.*, 67 Cal. App. 3d 600, 607, 136 Cal. Rptr. 787; *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 30-32, 122 Cal. Rptr. 218; *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 465, 113 Cal. Rptr. 416; *Barth v. B.F. Goodrich*, 265 Cal. App. 2d 228, 240-241,

71 Cal. Rptr. 306; *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 713-714, 60 Cal. Rptr. 398.) *Pease*, *Barth* and *Toole* were strict products liability cases.

* * *

In *Taylor v. Superior Court*, *supra*, 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854, our high court's most recent pronouncement on the subject of punitive damages, the court observed that the availability of punitive damages has not been limited to cases in which there is an actual intent to harm plaintiff or others. (*Id.*, at p. 895, 157 Cal. Rptr. 693, 598 P.2d 854.) The court concurred with the Searle (*G.D. Searle & Co. v. Superior Court*, *supra*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218) court's suggestion that conscious disregard of the safety of others is an appropriate description of the animus malus required by Civil Code section 3294, adding: "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (*Id.*, 24 Cal. 3d at pp. 895-896, 157 Cal. Rptr. 693, 598 P.2d 854.)

Ford attempts to minimize the precedential force of the foregoing decisions on the ground they failed to address the position now advanced by Ford that intent to harm a particular person or persons is required because that was what the lawmakers had in mind in 1872 when they adopted Civil Code section 3294. Ford argues that the Legislature was thinking in terms of traditional intentional torts, such as, libel, slander, assault and battery, malicious prosecution, trespass, etc., and could not have intended the statute to be applied to a products liability case arising out of a design defect in a mass produced automobile because neither strict products liability nor mass produced automobiles were known in 1872.

A like argument was rejected in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, where the court held that in enacting section 1714 as part of the 1872 Civil Code, the Legislature did not intend to prevent judicial development of the common law concepts of negligence and contributory negligence. As the court noted, the code itself provides that insofar as its provisions are substantially the same as the common law, they should be construed as continuations thereof and not as new enactments

²(...continued)

definitions shall apply:

- (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.
- (2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.
- (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(Civ. Code §§ 4, 5), and thus the code has been imbued "with admirable flexibility from the standpoint of adaptation to changing circumstances and conditions." (*Id.*, at p. 816, 119 Cal. Rptr. 858, 532 P.2d 1226.) In light of the common law heritage of the principle embodied in Civil Code section 3294,³ it must be construed as a "continuation" of the common law and liberally applied "with a view to effect its objects and to promote justice." (Civ. Code §§ 4, 5.) To paraphrase *Li v. Yellow Cab Co.*, *supra*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, the applicable rules of construction "permit if not require that section (3294) be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes." (*Id.*, at p. 822, 119 Cal. Rptr. 858, 532 P.2d 1226.)

(3) Sufficiency of the Evidence to Support the Finding of Malice and Corporate Responsibility:

Ford contends that its motion for judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support a finding of malice or corporate responsibility for such malice. The record fails to support the contention.

"The rules circumscribing the power of a trial judge to grant a motion for judgment notwithstanding the verdict are well established. The power to grant such a motion is identical to the power to grant a directed verdict; the judge cannot weigh the evidence or assess the credibility of witnesses; if the evidence is conflicting or if several reasonable inferences may be drawn, the motion should be denied; the motion may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 877-878, 151 Cal. Rptr. 285, 587 P.2d 1098; *Brandenburg v. Pac. Gas &*

Elec. Co. (1946) 28 Cal. 2d 282, 284, 169 P.2d 909, quoting *Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 110-111, 120 Cal. Rptr. 681, 534 P.2d 377, 74 A.L.R.3d 1282.)" (*Castro v. State of California*, 114 Cal. App. 3d 503, 512, 170 Cal. Rptr. 734.) There was ample evidence to support a finding of malice and Ford's responsibility for malice.

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.

Ford's argument that there can be no liability for punitive damages because there was no evidence of corporate ratification of malicious misconduct is equally without merit. California follows the RESTATEMENT rule that punitive damages can be awarded against a principal because of an action of an agent if, but only if, "(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act." (REST. 2D TORTS (Tent. Draft No. 19, 1973) § 909.) (*Egan v. Mutual of Omaha Ins. Co.*, *supra*, 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452; *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416.) The present case comes within one or both of the categories described in subdivisions (c) and (d).

There is substantial evidence that management was aware of the crash tests showing the vulnerability of the Pinto's fuel tank to rupture at low speed rear impacts with consequent significant risk of injury or death of the occupants by fire. There was testimony from several sources that the test results were forwarded up the chain of command; Vice President Robert Alexander

³ The doctrine was expressed in *Dorsey v. Manlove*, *supra*, 14 Cal. 553, as follows: "But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone. In these cases the jury are not confined to the loss or injury sustained, but may go further and award punitive or exemplary damages, as a punishment for the act, or as a warning to others." (*Id.*, at p. 556.)

admitted to Mr. Copp that he was aware of the test results; Vice President Harold MacDonald, who chaired the product review meetings, was present at one of those meetings at which a report on the crash tests was considered and a decision was made to defer corrective action; and it may be inferred that Mr. Alexander, a regular attendee of the product review meetings, was also present at that meeting. MacDonald and Alexander were manifestly managerial employees possessing the discretion to make "decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Ins. Co.*, *supra*, 24 Cal. 3d 809, 823, 157 Cal. Rptr. 482, 598 P.2d 452.) There was also evidence that Harold Johnson, an Assistant Chief Engineer of Research, and Mr. Max Jurosek, Chief Chassis Engineer, were aware of the results of the crash tests and the defects in the Pinto's fuel tank system. Ford contends those two individuals did not occupy managerial positions because Mr. Copp testified that they admitted awareness of the defects but told him they were powerless to change the rear-end design of the Pinto. It may be inferred from the testimony, however, that the two engineers had approached management about redesigning the Pinto or that, being aware of management's attitude, they decided to do nothing. In either case the decision not to take corrective action was made by persons exercising managerial authority. Whether an employee acts in a "managerial capacity" does not necessarily depend on his "level" in the corporate hierarchy. (*Id.*, at p. 822, 157 Cal. Rptr. 482, 598 P.2d 452.) As the Egan court said: "Defendant should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions." (*Id.*, at p. 823, 157 Cal. Rptr. 482, 598 P.2d 452, quoting concurring and dissenting opinion in *Merlo v. Standard Life & Acc. Ins. Co.*, *supra*, 59 Cal. App. 3d at p. 25, 130 Cal. Rptr. 416.)

While much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice. (*See Toole v. Richardson-Merrell, Inc.*,

supra, 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398.)

* * *

Nor was the reduced award excessive taking into account defendant's wealth and the size of the compensatory award. Ford's net worth was 7.7 billion dollars and its income after taxes for 1976 was over 983 million dollars. The punitive award was approximately .005% of Ford's net worth and approximately .03% of its 1976 net income. The ratio of the punitive damages to compensatory damages was approximately 1.4 to one. Significantly, Ford does not quarrel with the amount of the compensatory award to Grimshaw.

Nor was the size of the award excessive in light of its deterrent purpose. An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. (*See Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d 910, 929, fn. 14, 148 Cal. Rptr. 389, 582 P.2d 980.) The award in question was far from excessive as a deterrent against future wrongful conduct by Ford and others.

Disposition

In *Richard Grimshaw v. Ford Motor Company*, the judgment, the conditional new trial order, and the order denying Ford's motion for judgment notwithstanding the verdict on the issue of punitive damages are affirmed.

Questions and Notes

1. In an internal Ford memorandum, Ford engineers estimated the benefits and costs of installing rubber bladders into the gas tanks as follows: *Benefits*: 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles avoided. Valued at \$200,000, \$67,000, and \$700 respectively, the total came to \$49.5 million. *Costs*: 11 million cars and 1.5 million light trucks, @ \$11 per installation, totalling \$137 million. On the basis of this calculation, Ford decided not to install the rubber bladders. Were they wrong?

2. Some states, like Washington, do not allow

the award of punitive damages except where some special statute (like an antitrust statute allowing treble damages) authorizes it. *Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968).

3. Note that in footnote 2 the court sets out the statutory requirements to establish a corporation's liability for punitive damages for acts of its employees. These are tests to determine whether it can fairly be said that it was the corporation rather than the individual alone who committed the acts leading to the imposition of punitive damages.

4. One problem in the award of punitive damages, raised in cases like this one, is how courts can award consistent punitive damage awards where the same act (manufacturing the Ford Pinto or the Dalkon Shield) gives rise to multiple separate claims. See Owen, *Problems on Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).

5. The United States Supreme Court has limited the ability of states to impose punitive damages where the 14th amendment guarantee of due process is not observed. The following case contains the current law on that subject:

STATE FARM v. CAMPBELL

538 U.S. 408 (2003)

Justice KENNEDY delivered the opinion of the Court.

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of \$145 million in punitive damages, where full compensatory damages are \$1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway.

Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." 65 P.3d at 1141 (Utah 2001). Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of \$50,000 (\$25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.*, at 1142. To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for \$185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the \$135,849 in excess liability. Its counsel made this clear to the Campbells: "' You may want to put for sale signs on your property to get things moving.' " *Ibid.* Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad faith action.

No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful death and tort actions. *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989). State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. 840 P.2d 130 (Utah App.1992). On remand State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and refused to sustain a \$2 million punitive damages award which accompanied a verdict of only \$4,000 in compensatory damages. Based on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. App. to Pet. for Cert. 168a-172a. The trial court denied State Farm's motion. *Id.*, at 189a.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial:

"State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was

referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages." 65 P.3d at 1143.

Evidence pertaining to the PP & R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in *Gore, supra*, at 574-575, 116 S.Ct. 1589, and it reinstated the \$145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP & R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," 65 P.3d at 1153, and concluded that the ratio between punitive and compensatory damages was not unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have faced, including \$10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. *Id.*, at 1154. We granted certiorari. 535 U.S. 1111, 122 S.Ct. 2326, 153 L.Ed.2d 158 (2002).

II

We recognized in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. *Id.*, at 432, 121 S.Ct. 1678. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Ibid.* (citing Restatement (Second) of Torts § 903, pp. 453-454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra*, at 432, 121 S.Ct. 1678; see also *Gore, supra*, at 568, 116 S.Ct. 1589 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. *Cooper Industries, supra*; *Gore*, 517 U.S., at 559, 116 S.Ct. 1589; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Haslip, supra*. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries, supra*, at 433, 121 S.Ct. 1678; *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; see also *id.*, at 587, 116 S.Ct. 1589 (BREYER, J., concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion"). The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.*, at 574, 116 S.Ct. 1589; *Cooper Industries,*

supra, at 433, 121 S.Ct. 1678 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion"). To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *Haslip, supra*, at 42, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category").

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor, supra*, at 432, 114 S.Ct. 2331; see also *Haslip, supra*, at 59, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process--of the law in general--is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim"). Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," App. to Pet. for Cert. 108a-109a, do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is

tangential or only inflammatory.

In light of these concerns, in *Gore, supra*, we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, at 575, 116 S.Ct. 1589. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. 532 U.S., at 424, 121 S.Ct. 1678. Exacting appellate review ensures that an award of punitive damages is based upon an "' application of law, rather than a decisionmaker's caprice.'" *Id.*, at 436, 121 S.Ct. 1678 (quoting *Gore, supra*, at 587, 116 S.Ct. 1589 (BREYER, J., concurring)).

III

Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury's \$145 million punitive damages award. We address each guidepost of *Gore* in some detail.

A

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S., at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after

having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575, 116 S.Ct. 1589.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct toward the Campbells. 65 P.3d at 1143 ("[T]he Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced from \$145 million to \$25 million. App. to Pet. for Cert. 120a ("[T]he Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP & R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management").

The Campbells contend that State Farm has only itself to blame for the reliance upon dissimilar and out-of-state conduct evidence. The record does not support this contention. From their

opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities. App. 208 ("You're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses"); *id.*, at 242 ("[T]his is a very important case.... [I]t transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages"). This was a position maintained throughout the litigation. * * *

A State cannot punish a defendant for conduct that may have been lawful where it occurred. *Gore, supra*, at 572, 116 S.Ct. 1589; * * *. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. Brief for Respondents 46-47 ("[E]ven if the practices described by State Farm were not *malum in se* or *malum prohibitum*, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP & R policy"). This argument misses the mark. Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. *Gore*, 517 U.S., at 572-573, 116 S.Ct. 1589 (noting that a State "does not have the power ... to punish [a defendant] for conduct that was

lawful where it occurred and that had no impact on [the State] or its residents"). A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. *Id.*, at 569, 116 S.Ct. 1589 ("[T]he States need not, and in fact do not, provide such protection in a uniform manner").

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P.3d at 1149 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate' "). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore, supra*, at 593, 116 S.Ct. 1589 (BREYER, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore, supra*, at 577, 116 S.Ct. 1589, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. *TXO*, 509 U.S., at 462, n. 28, 113 S.Ct. 2711 (noting that

courts should look to "' the existence and frequency of similar past conduct' ") (quoting *Haslip*, 499 U.S., at 21-22, 111 S.Ct. 1032).

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. 65 P.3d at 1148; *id.*, at 1150. * * *

B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore*, *supra*, at 582, 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); *TXO*, *supra*, at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24, 111 S.Ct. 1032. We cited that 4-to-1 ratio again in *Gore*. 517 U.S., at 581, 116 S.Ct. 1589. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.*, at 581, and n. 33, 116 S.Ct. 1589. While these ratios are not binding, they are

instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, 116 S.Ct. 1589, or, in this case, of 145 to 1.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.*; see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145- to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded \$1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ("In many cases in which compensatory damages include an amount for

emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

* * *

The remaining premises for the Utah Supreme Court's decision bear no relation to the award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages. While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585, 116 S.Ct. 1589 * * *.

C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *Id.*, at 575, 116 S.Ct. 1589. We note that, in the past, we have also looked to criminal penalties that could be imposed. *Id.*, at 583, 116 S.Ct. 1589; *Haslip*, 499 U.S., at 23, 111 S.Ct. 1032. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, 65

P.3d at 1154, an amount dwarfed by the \$145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of \$145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, dissenting.

I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "unreasonable" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect. See *id.*, at 599, 116 S.Ct. 1589. I would affirm the judgment of the Utah Supreme Court.

Justice THOMAS, dissenting.

I would affirm the judgment below because "I continue to believe that the Constitution does not constrain the size of punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group*,

Inc., 532 U.S. 424, 443, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (THOMAS, J., concurring) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (SCALIA, J., joined by THOMAS, J., dissenting)). Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), the Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties. *Id.*, at 262-276, 277-280, 109 S.Ct. 2909. Two years later, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Court observed that "unlimited jury [or judicial] discretion ... in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *id.*, at 18, 111 S.Ct. 1032; the Due Process Clause, the Court suggested, would attend to those sensibilities and guard against unreasonable awards, *id.*, at 17-24, 111 S.Ct. 1032. Nevertheless, the Court upheld a punitive damages award in *Haslip* "more than 4 times the amount of compensatory damages, ... more than 200 times [the plaintiff's] out-of-pocket expenses," and "much in excess of the fine that could be imposed." *Id.*, at 23, 111 S.Ct. 1032. And in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the Court affirmed a state-court award "526 times greater than the actual damages awarded by the jury." *Id.*, at 453, 113 S.Ct. 2711;¹ cf. *Browning-Ferris*, 492 U.S., at 262, 109 S.Ct. 2909 (ratio of punitive to compensatory damages over 100 to 1).

It was not until 1996, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), that the Court, for

the first time, invalidated a state-court punitive damages assessment as unreasonably large. See *id.*, at 599, 116 S.Ct. 1589 (SCALIA, J., dissenting). If our activity in this domain is now "well-established," see *ante*, at 1519, 1525, it takes place on ground not long held.

In *Gore*, I stated why I resisted the Court's foray into punitive damages "territory traditionally within the States' domain." 517 U.S., at 612, 116 S.Ct. 1589 (dissenting opinion). I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, the Court "work[s] at this business [of checking state courts] alone," unaided by the participation of federal district courts and courts of appeals. 517 U.S., at 613, 116 S.Ct. 1589. It was once recognized that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." *Haslip*, 499 U.S., at 42, 111 S.Ct. 1032 (KENNEDY, J., concurring in judgment). I would adhere to that traditional view.

I

The large size of the award upheld by the Utah Supreme Court in this case indicates why damage-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP & R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a profit center." App. to Pet. for Cert. 116a. "[T]he Campbells presented considerable evidence," the trial court noted, documenting "that the PP & R program ... has functioned, and continues to function, as an unlawful scheme ... to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits." *Id.*, at 118a-119a. That policy, the trial court observed, was encompassing in scope; it "applied

¹ By switching the focus from the ratio of punitive to compensatory damages to the potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581, and n. 34, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

equally to the handling of both third-party and first-party claims." *Id.*, at 119a. But cf. *ante*, at 1523, 1525 (suggesting that State Farm's handling of first-party claims has "nothing to do with a third-party lawsuit").

Evidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents. Ray Summers, "the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years," described several methods used by State Farm to deny claimants fair benefits, for example, "falsifying or withholding of evidence in claim files." *Id.*, at 121a. A common tactic, Summers recounted, was to "unjustly attac[k] the character, reputation and credibility of a claimant and mak[e] notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." *Id.*, at 130a (internal quotation marks omitted). State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instruct[ed] Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend." *Ibid.* In truth, "[t]here was no pregnant girlfriend." *Ibid.* Expert testimony noted by the trial court described these tactics as "completely improper." *Ibid.*

The trial court also noted the testimony of two Utah State Farm employees, Felix Jensen and Samantha Bird, both of whom recalled "intolerable" and "recurrent" pressure to reduce payouts below fair value. *Id.*, at 119a (internal quotation marks omitted). When Jensen complained to top managers, he was told to "get out of the kitchen" if he could not take the heat; Bird was told she should be "more of a team player." *Ibid.* (internal quotation marks omitted). At times, Bird said, she "was forced to commit dishonest acts and to knowingly underpay claims." *Id.*, at 120a. Eventually, Bird quit. *Ibid.* Utah managers superior to Bird, the evidence indicated, were improperly influenced by the PP & R program to encourage insurance underpayments. For example, several documents evaluating the performance of managers Noxon and Brown "contained explicit preset average payout goals." *Ibid.*

Regarding liability for verdicts in excess of policy limits, the trial court referred to a State Farm document titled the "Excess Liability Handbook"; written before the Campbell accident, the handbook

instructed adjusters to pad files with "self-serving" documents, and to leave critical items out of files, for example, evaluations of the insured's exposure. *Id.*, at 127a-128a (internal quotation marks omitted). Divisional superintendent Bill Brown used the handbook to train Utah employees. *Id.*, at 134a. While overseeing the Campbell case, Brown ordered adjuster Summers to change the portions of his report indicating that Mr. Campbell was likely at fault and that the settlement cost was correspondingly high. *Id.*, at 3a. The Campbells' case, according to expert testimony the trial court recited, "was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook." *Id.*, at 128a.

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. *Id.*, at 122a. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the weakest of the herd"--"the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value." *Ibid.* (internal quotation marks omitted).

The Campbells themselves could be placed within the "weakest of the herd" category. The couple appeared economically vulnerable and emotionally fragile. App. 3360a-3361a (Order Denying State Farm's Motion for Judgment NOV and New Trial Regarding Intentional Infliction of Emotional Distress). At the time of State Farm's wrongful conduct, "Mr. Campbell had residuary effects from a stroke and Parkinson's disease." *Id.*, at 3360a.

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, App. to Pet. for Cert. 123a, efforts that directly affected the Campbells, *id.*, at 124a. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed." *Ibid.* Yet in discovery proceedings, State Farm failed to produce any claim-handling practice manuals for the years relevant to the

Campbells' bad-faith case. *Id.*, at 124a-125a.

State Farm's inability to produce the manuals, it appeared from the evidence, was not accidental. Documents retained by former State Farm employee Samantha Bird, as well as Bird's testimony, showed that while the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting ... in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past--in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents." *Id.*, at 125a. "These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case." *Ibid.*

Consistent with Bird's testimony, State Farm admitted that it destroyed every single copy of claim-handling manuals on file in its historical department as of 1988, even though these documents could have been preserved at minimal expense. *Ibid.* Fortuitously, the Campbells obtained a copy of the 1979 PP & R manual by subpoena from a former employee. *Id.*, at 132a. Although that manual has been requested in other cases, State Farm has never itself produced the document. *Ibid.*

"As a final, related tactic," the trial court stated, the jury could reasonably find that "in recent years State Farm has gone to extraordinary lengths to stop damaging documents from being created in the first place." *Id.*, at 126a. State Farm kept no records at all on excess verdicts in third-party cases, or on bad-faith claims or attendant verdicts. *Ibid.* State Farm alleged "that it has no record of its punitive damage payments, even though such payments must be reported to the [Internal Revenue Service] and in some states may not be used to justify rate increases." *Ibid.* Regional Vice President Buck Moskalski testified that "he would not report a punitive damage verdict in [the Campbells'] case to higher management, as such reporting was not set out as part of State Farm's management practices." *Ibid.*

State Farm's "wrongful profit and evasion schemes," the trial court underscored, were directly relevant to the Campbells' case, *id.*, at 132a:

"The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier. The Campbells presented substantial evidence showing how State Farm's improper insistence on claims-handling employees' reducing their claim payouts ... regardless of the merits of each claim, manifested itself ... in the Utah claims operations during the period when the decisions were made not to offer to settle the Campbell case for the \$50,000 policy limits-- indeed, not to make any offer to settle at a lower amount. This evidence established that high-level manager Bill Brown was under heavy pressure from the PP & R scheme to control indemnity payouts during the time period in question. In particular, when Brown declined to pay the excess verdict against Curtis Campbell, or even post a bond, he had a special need to keep his year-end numbers down, since the State Farm incentive scheme meant that keeping those numbers down was important to helping Brown get a much-desired transfer to Colorado There was ample evidence that the concepts taught in the Excess Liability Handbook, including the dishonest alteration and manipulation of claim files and the policy against posting any supersedeas bond for the full amount of an excess verdict, were dutifully carried out in this case There was ample basis for the jury to find that everything that had happened to the Campbells--when State Farm repeatedly refused in bad-faith to settle for the \$50,000 policy limits and went to trial, and then failed to pay the 'excess' verdict, or at least post a bond, after trial--was a direct application of State Farm's overall profit scheme, operating through Brown and others." *Id.*, at 133a-134a.

State Farm's "policies and practices," the trial evidence thus bore out, were "responsible for the injuries suffered by the Campbells," and the means

used to implement those policies could be found "callous, clandestine, fraudulent, and dishonest." *Id.*, at 136a; see *id.*, at 113a (finding "ample evidence" that State Farm's reprehensible corporate policies were responsible for injuring "many other Utah consumers during the past two decades"). The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as "egregious and malicious." *Id.*, at 18a.

II

The Court dismisses the evidence describing and documenting State Farm's PP & R policy and practices as essentially irrelevant, bearing "no relation to the Campbells' harm." *Ante*, at 1523; see *ante*, at 1524 ("conduct that harmed [the Campbells] is the only conduct relevant to the reprehensibility analysis"). It is hardly apparent why that should be so. What is infirm about the Campbells' theory that their experience with State Farm exemplifies and reflects an overarching underpayment scheme, one that caused "repeated misconduct of the sort that injured them," *ante*, at 1523? The Court's silence on that score is revealing: Once one recognizes that the Campbells did show "conduct by State Farm similar to that which harmed them," *ante*, at 1524, it becomes impossible to shrink the reprehensibility analysis to this sole case, or to maintain, at odds with the determination of the trial court, see App. to Pet. for Cert. 113a, that "the adverse effect on the State's general population was in fact minor," *ante*, at 1525.

Evidence of out-of-state conduct, the Court acknowledges, may be "probative [even if the conduct is lawful in the state where it occurred] when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious . . ." *Ante*, at 1522; cf. *ante*, at 1521 (reiterating this Court's instruction that trial courts assess whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"). "Other acts" evidence concerning practices both in and out of State was introduced in this case to show just such "deliberateness" and "culpability." The evidence was admissible, the trial court ruled: (1) to document State Farm's "reprehensible" PP & R program; and (2) to "rebut [State Farm's] assertion that [its] actions toward the Campbells were inadvertent errors or mistakes in

judgment." App. 3329a (Order Denying Various Motions of State Farm to Exclude Plaintiffs' Evidence). Viewed in this light, there surely was "a nexus" between much of the "other acts" evidence and "the specific harm suffered by [the Campbells]." *Ante*, at 1522.

III

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S., at 568, 116 S.Ct. 1589. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," *TXO*, 509 U.S., at 457, 113 S.Ct. 2711, the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ante*, at 1524.² Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee." *Ante*, at 1524; see *ante*, at 1526 ("facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages"). In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

* * *

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. *Gore*, 517 U.S., at 607, 116 S.Ct. 1589 (GINSBURG, J., dissenting). Even if I were prepared to accept the flexible guides

² *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, n. 8, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), noted that "[u]nder well-settled law," a defendant's "wrongdoing in other parts of the country" and its "impressive net worth" are factors "typically considered in assessing punitive damages." It remains to be seen whether, or the extent to which, today's decision will unsettle that law.

prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

5. Attorneys Fees

Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?

49 IOWA L. REV. 75, 80-81 (1963)

* * *

The proposal of awarding attorney's fees as costs is not new. It is usually referred to as the "English rule" as it has existed there at least since 1275. Why it was not incorporated into our own system of costs is subject to speculation. As previously stated, we generally recognize that costs are recoverable and follow the judgment, and yet, in most instances attorney's fees, generally the main expense of litigation, are not recoverable.

Several ideas seem inherent in the historical explanation of why the "English rule" failed to develop in the United States. One initial problem facing a new government must be the creation of a willingness in its citizenry to submit to the system designed and established for the resolution of their disputes. At this stage of development, concern over points of justice (such as seeing a party made whole through complete compensation) is less important than encouraging persons into the established system. At this stage deterrents to submission are not appropriate.

It also seems that at the time our judicial system was established there was a wish to maintain a system of laws and procedures in which every man would be able to represent himself adequately before the courts....

The naïveté that accompanies advocating retention of the present cost structure on the basis of these reasons would seem to merit little comment. The idea that one must encourage litigation seems to have been discarded long ago in light of the constantly repeated pronouncement of the courts that the present public policy is to encourage settlement and compromise rather than litigation. While the wish that law and its procedures remain sufficiently uncomplicated so that every man can represent himself may be devoutly desired, it would seem to overlook not only "an obvious truth" but also the demands of contemporary society.

Questions and Notes

1. Should the "English rule" be adopted for torts litigation? Why or why not?

2. For a review of the latest proposals to shift from the American rule to some form of "loser pays," as proposed by the 1994 Republican "Contract with America," see Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863 (1998).

§ B. Related Parties: Who Else Is Entitled to Compensation?

1. Wrongful Death

MORAGNE v. STATES MARINE LINES

398 U.S. 375 (1970)

Mr. Justice HARLAN delivered the opinion of the Court

We brought this case here to consider whether *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, in which this Court held in 1886 that maritime law does not afford a cause of action for wrongful death, should any longer be regarded as acceptable law.

The complaint sets forth that Edward Moragne, a longshoreman, was killed while working aboard the vessel Palmetto State in navigable waters within the State of Florida. Petitioner, as his widow and representative of his estate, brought this suit in a state court against respondent States Marine Lines, Inc., the owner of the Vessel, to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were predicated upon both negligence and the unseaworthiness of the vessel.

* * *

Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all. Further, regardless of the viability of the rule in 1886 as applied to American land-based affairs, it is difficult to discern an adequate reason for its extension to admiralty, a system of law then already differentiated in many respects from the common law.

One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable

simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." *E.g.*, *Osborn v. Gilliett*, L.R. 8 Ex. 88, 94 (1873) (LORD BRAMWELL, dissenting); F. POLLOCK, *LAW OF TORTS* 55 (Landon ed. 1951); 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 676-677 (3d ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him — usually spouse and children — seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly.

Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century — the felony-merger doctrine. *See* POLLOCK, *supra*, at 52-57; Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916). According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. *Smith v. Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (K.B. 1677); *Higgins v. Butcher*, Yel. 89, 80 Eng. Rep. 61 (K.B. 1606). The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion of Lord Ellenborough, sitting *in nisi prius*, in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine in announcing that "[i]n a Civil court, the death of a human being could not be complained of as an injury." *Ibid.* Nor had the felony-merger doctrine seemingly been cited as the basis for the denial of recovery in any of the other reported wrongful-death cases since the earliest ones, in the 17th century. *E.g.*, *Smith v. Sykes*, *supra*; *Higgins v. Butcher*, *supra*. However, it seems clear from those first cases that the rule of *Baker v. Bolton* did derive from the felony-merger doctrine, and that there was no other ground on which it might be supported even at the time of its inception. The House of Lords in 1916 confirmed this historical derivation, and held that although the felony-merger doctrine was no longer part of the law, the rule against recovery for wrongful death should continue except as modified by statute. *Admiralty Commissioners v. S.S. Amerika*, (1917) A.C. 38. Lord Parker's opinion acknowledged that the rule was "anomalous ... to the scientific jurist," but concluded that because it had once found justification in the doctrine that "the trespass was drowned in the felony," it should continue as a rule "explicable on historical grounds" even after the disappearance of that justification. *Id.*, at 44, 50; *see* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 676-677 (3d ed. 1927). Lord Sumner agreed, relying in part on the fact that this Court had adopted the English rule in *Brame* [*Insurance Co. v. Brame*, 95 U.S. 754 (1878)]. Although conceding the force of Lord Bramwell's dissent in *Osborn v. Gillett*, L.R. 8 Ex. 88, 93 (1873), against the rule, Lord Parker stated that it was not "any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence," and thus that he was bound simply to follow the past decisions. (1917) A.C., at 42-43.¹

¹ The decision in *S.S. Amerika* was placed also on an alternative ground, which is independently sufficient. In that case, which arose from a collision between a Royal Navy submarine and a private vessel, the Crown sought to recover from the owners of the private vessel the

(continued...)

The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit. *E.g.*, *Grosso v. Delaware, Lackawanna & West. R. Co.*, 50 N.J.L. 317, 319-320, 13 A. 233, 234 (1888); *Hyatt v. Adams*, 16 Mich. 180, 185-188 (1867); *see* W. PROSSER, LAW OF TORTS 8, 920-924 (3d ed. 1964). Nevertheless, despite some early cases in which the rule was rejected as "incapable of vindication," *e.g.*, *Sullivan v. Union Pac. R. Co.*, 23 Fed. Cas. pp. 368, 371 (No. 13,599) (C.C. Neb. 1874); *Shields v. Yonge*, 15 Ga. 349 (1854); *cf. Cross v. Guthery*, 2 Root 90, 92 (Conn. 1794), American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption, culminating in this Court's decision in *Brame*, the courts failed to produce any satisfactory justification for applying the rule in this country.

Some courts explained that their holdings were prompted by an asserted difficulty in computation of damages for wrongful death or by a "repugnance ... to setting a price upon human life," *E.g.*, *Connecticut Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 265, 272-273 (1856); *Hyatt v. Adams*, *supra*, 16 Mich. at 191. However, other courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes, *see* Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 405, 406, nn.17, 18 (1966), does not present difficulties more insurmountable than assessment of damages for

¹(...continued)

pensions payable to the families of navy sailors who died in the collision. The first ground given for rejecting the claim was that the damages sought were too remote to be protected by tort law, because the pensions were voluntary payments and because they were not a measure of "the future services of which the Admiralty had been deprived." *Id.*, at 42, 50-51. Similar alternative reasoning was given in *Brame*, which involved a similar situation. 95 U.S., at 758-759, 24 L. Ed. 580. Thus, in neither case was the enunciation of the rule against recovery for wrongful death necessary to the result.

many nonfatal personal injuries. See *Hollyday v. The David Reeves*, 12 Fed. Cas. pp. 386, 388 (No. 6,625) (D.C. Md. 1879); *Green v. Hudson River R. Co.*, 28 Barb. 9, 17-18 (N.Y. 1858).

It was suggested by some courts and commentators that the prohibition of nonstatutory wrongful-death actions derived support from the ancient common-law rule that a personal cause of action in tort did not survive the death of its possessor, e.g., *Eden v. Lexington & Frankfort R. Co.*, 53 Ky. 204, 206 (1853); and the decision in *Baker v. Bolton* itself may have been influenced by this principle. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916). However, it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death. See *ibid*; POLLOCK *supra*, at 53; Winfield, *Death as Affecting Liability in Tort*, 29 COL. L. REV. 239-250, 253 (1929).

The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in *Brame*, as well as many of the lower court opinions. E.g., *Grosso v. Delaware, Lackawanna & West. R. Co.*, *supra*. Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while "[o]ur ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; ... they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 2 Pet. 137, 144, 7 L. Ed. 374 (1829) (STORY, J.); *The Lottawanna*, 21 Wall. 558, 571-574, 22 L. Ed. 654 (1875); see R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 93-97 (1938); H. HART & A. SACKS, *THE LEGAL PROCESS* 450 (tent. ed. 1958). The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, "was applicable to their situation," and it is difficult to imagine on what basis they might have concluded that it was.

Further, even after the decision in *Brame*, it is not apparent why the Court in *The Harrisburg* concluded that there should not be a different rule for admiralty from that applied at common law.

Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law;² and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 1-11, 253 (1957); P. EDELMAN, *MARITIME INJURY AND DEATH* 1 (1960). These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea. This was the conclusion reached by Chief Justice Chase, prior to *The Harrisburg*, sitting on circuit in *The Sea Gull*, 21 Fed. Cas. p. 909 (No. 12,578) (C.C. Md. 1865). He there remarked that

There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures ... and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Id.*, at 910.

Numerous other federal maritime cases, on similar reasoning, had reached the same result.

² The Court in *The Harrisburg* acknowledged that, at least according to the courts of France, the civil law did allow recovery for the injury suffered by dependents of a person killed. It noted, however, that the Louisiana courts took a different view of the civil law, and that English maritime law did not seem to differ in this regard from English common law. 119 U.S., at 205, 212-213, 7 S. Ct., at 142, 146. See generally *Grigsby v. Coast Marine Service*, 412 F.2d 1011, 1023-1029 (C.A. 5th Cir. 1969); 1 E. BENEDICT, *LAW OF AMERICAN ADMIRALTY* 2 (6th ed. Knauth 1940); 4 *id.*, at 358.

E.g., *The Columbia*, 27 F. 704 (D.C.S.D.N.Y. 1886); *The Manhasset*, 18 F. 918 (D.C.E.D. Va. 1884); *The E.B. Ward, Jr.*, 17 F. 456 (C.C.E.D. La. 1883); *The Garland*, 5 F. 924 (D.C.E.D. Mich. 1881); *Holmes v. O. & C.R. Co.*, 5 F. 75 (D.C. Or. 1880); *The Towanda*, 24 Fed. Cas. p. 74 (No. 14,109) (C.C.E.D. Pa. 1877); *Plummer v. Webb*, 19 Fed. Cas. p. 894 (No. 11,234) (D.C. Maine 1825); *Hollyday v. The David Reeves*, 12 Fed. Cas. p. 386 (No. 6,625) (D.C. Md. 1879). Despite the tenor of these cases, some decided after *Brame*, the Court in *The Harrisburg* concluded that "the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but (only) on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisprudence of this country." 119 U.S., at 208, 7 S. Ct. at 144. Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical in this respect to the common law.

II

We need not, however, pronounce a verdict on whether *The Harrisburg*, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the area where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation.

To some extent this rejection has been judicial. The English House of Lords in 1937 emasculated the rule without expressly overruling it. *Rose v. Ford*, (1937) A.C. 826. Lord Atkin remarked about the decision in *S.S. Amerika* that "[t]he reasons given, whether historical or otherwise, may seem unsatisfactory," and that "if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum." At any rate, he saw "no reason for extending the illogical doctrine ... to any case where it does not clearly apply." *Id.*,

at 833, 834. Lord Atkin concluded that, while the doctrine barred recognition of a claim in the dependents for the wrongful death of a person, it did not bar recognition of a common-law claim in the decedent himself for "loss of expectation of life" — a claim that vested in the person in the interval between the injury and death, and thereupon passed, with the aid of a survival statute, to the representative of his estate. He expressed no doubt that the claim was "capable of being estimated in terms of money: and that the calculation should be made." *Id.*, at 834.³ Thus, except that the measure of damages might differ, the representative was allowed to recover on behalf of the heirs what they could not recover in their own names.

Much earlier, however, the legislatures both here and in England began to evidence unanimous disapproval of the rule against recovery for wrongful death. The first statute partially abrogating the rule was Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which granted recovery to the families of persons killed by tortious conduct, "although the Death shall have been caused under such Circumstances as amount in Law to Felony."⁴

In the United States, every State today has enacted a wrongful-death statute. *See Smith, supra*, 44 N.C. L. REV. 402. The Congress has created actions for wrongful deaths of railroad employees,

³ Lord Wright, concurring, stated: "In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate." (1937) A.C., at 848.

⁴ It has been suggested that one reason the common-law rule was tolerated in England as long as it was may have been that the relatives of persons killed by wrongful acts often were able to exact compensation from the wrongdoer by threatening to bring a "criminal appeal." The criminal appeal was a criminal proceeding brought by a private person, and was for many years more common than indictment as a means of punishing homicide. Though a successful appeal would not produce a monetary recovery, the threat of one served as an informal substitute for a civil suit for damages. Over the years, indictment became more common, and the criminal appeal was abolished by statute in 1819. 59 Geo. 3, c. 46. *See Holdsworth, The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916); *Admiralty Commissioners v. S. S. Amerika*, (1917) A.C., at 58-59.

Federal Employers' Liability Act, 45 U.S.C. §§ 51-59; of merchant seamen, Jones Act, 46 U.S.C. § 688; and of persons on the high seas, Death on the High Seas Act, 46 U.S.C. § 761, 762.⁵ Congress has also, in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), made the United States subject to liability in certain circumstances for negligently caused wrongful death to the same extent as a private person. *See, e.g., Richards v. United States*, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

* * *

In sum, in contrast to the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus*, which followed upon it, and the problems of federal-state accommodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters. That prospect indeed makes for, and not against, the discarding of *The Harrisburg*.

We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties. The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice BLACKMUN took no part in the

⁵ *See also* National Parks Act, 16 U.S.C. § 457; Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (making state wrongful-death statutes applicable to particular areas within federal jurisdiction). *Cf. n.16, infra.*

consideration or decision of this case.

**FIRST NATIONAL BANK OF MEADVILLE
v. NIAGARA THERAPY MANUFACTURING CORPORATION**

229 F. Supp. 460 (W.D. Pa. 1964)

WILLSON, District Judge

The plaintiff in this case is the First National Bank of Meadville, Pennsylvania, Executor under the will of Kenneth W. Rice, deceased. Mr. Rice was killed in an airplane accident at the Port Erie Airport on January 22, 1962....

* * *

Liability

* * *

Applying the ruling of ordinary negligence, this Court does not hesitate to find that the pilot Counselman failed in his duty to exercise reasonable care in making his plans for his flight, and thereafter during the course of his flight in failing to return to Buffalo when he had the opportunity to do so. But the first point is sufficient to hold the defendant responsible for the crash....

Damages

Plaintiff brought suit under both the "Wrongful Death Statutes" (12 P.S. 1602-1604) and the "Survival Statute" (20 P.S. 320.603) of Pennsylvania for the benefit of the surviving widow and the two daughters of the decedent.

* * *

This Court will apply the principle announced in *Ferne v. Chadderton*, 363 Pa. at 197, 69 A.2d at 107, with respect to the amounts which the plaintiff is to recover for the benefit of the wife and daughters. That opinion says the rule is:

Under the Death Statutes the administratrix was entitled to recover for the benefit of the daughter and herself as widow the amount of the pecuniary loss they suffered by reason of decedent's death, that it 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; in other words, the measure of damages is the value of the decedent's life to the parties specified in the statute: *Minkin v. Minkin*, 336 Pa. 49, 55, 7 A.2d 461, 464. Recovery is also allowed for the expense incurred for medical and surgical care, for nursing of the deceased, and for the reasonable funeral expenses. Act of May 13, 1927, P.L. 992, 12 P.S. 1604. Under the Survival Statute, 20 P.S. 771, 772, the administratrix was entitled to recover for the loss of decedent's earnings from the time of the accident until the date of his death, and compensation for his pain and suffering during that period. Recovery may also be had for the present worth of his likely earnings during the period of his life expectancy, but diminished by the amount of the provision he would have made for his wife and children as above stated (thus avoiding duplication: *Pezzulli, Administrator v. D'Ambrosia*, 344 Pa. 643, 650, 26 A.2d 659, 662) and diminished also by the probable cost of his own maintenance during the time he would likely have lived but for the accident: *Murray, Administrator, v. Philadelphia Transportation Co.*, 359 Pa. 69, 73, 74, 58 A.2d 323, 325.

As indicated Mr. Rice was survived by his widow, Mary T. Rice, and two daughters, Cynthia and Barbara....

Under the evidence it is believed fair and just to award to the plaintiff the sum of \$7,500.00 for the loss of the contributions which the two children would have received had it not been for their father's death.

The widow, Mary T. Rice, had the benefit of the generosity of a husband who provided her with the good things in life commensurate with his \$25,000.00 a year income. It seems conservative of this Court to say that she had the benefit of at least \$10,000.00 a year of that income. She enjoyed the use of a new automobile every two years. She had an unlimited checking account. She

bought clothes of up to \$2,500.00 in price annually. They lived among friends commensurate with a house and furnishings of the value of \$65,000.00. Again but only as indicating the manner in which Mr. Rice spent his money, the records showed that he would borrow \$20,000.00 from the bank, invest it in stock, and pay off the debt over a period of about three years. It is apparent that the rest of his money was spent in good living, as he had no cash savings at the time he died. He had been some twenty-five years in the practice of law, and it is believed his income had leveled off. But under the testimony he had a life expectancy of approximately twenty-four years on January 22, 1962. Counsel for plaintiff argues that decedent's earnings would increase during his remaining working life. This is so, says counsel, because a lawyer's earnings will increase as he advances in wisdom and maturity. On the other hand, counsel for the defendant contended that it is more likely that decedent's earnings would fall off during the remainder of his life. Balancing the two theories together, it seems to the Court that \$25,000.00 a year averaged out for his life expectancy is reasonable. In this Court's opinion, Mrs. Rice had the benefit of \$10,000.00 per year contributions from her husband. She received the benefit of this sum by way of her general maintenance in the home on a rather luxurious standard of living, her expenses for her clothing, medical, and incidental bills, and in the expenditure of funds for her own and her husband's pleasure. There was a two year interval between the date of death, which occurred January 22, 1962, and the trial. Mrs. Rice's pecuniary loss during that period is not reduced, so for her benefit the Executor in this instance recovers \$20,000. Under the various life expectancy tables, it appears that twenty-two years is the proper number of years to be used in computing the present worth of likely earnings and contributions. Thus in Mrs. Rice's case \$10,000.00 a year for twenty-two years amounts to a gross of \$220,000.00. Under the tables, AM. JUR. 2D DESK BOOK, Doc. No. 133, the present value of \$1.00 per year, computed at 6 per cent as required by state law, for twenty-two years is 12.042 dollars. \$10,000.00 is \$120,420.00. Thus, under the Wrongful Death Acts, the Executor is entitled to recover for the benefit of Mrs. Rice, \$120,420.00. Also, the Executor is claiming the sum of \$2,000.00,

covering reasonable funeral and administration expenses, and this sum is awarded the Executor. Under the Wrongful Death Act then the damages

Loss of contributions by the two daughters	\$ 7,500
Loss of contributions by the widow to date of trial	20,000
Loss of future contributions to widow (reduced to present worth by 6% method)	120,420
Funeral and administration expenses	2,000

TOTAL DAMAGES UNDER WRONGFUL DEATH ACT
 \$149,920

The damages awarded in the foregoing amount under the Wrongful Death Acts are amply supported by the evidence. In the computation of damages under the Survival Act, however, the problem is not as clearly defined.

It is this Court's experience that under the Survival Act damages to be awarded a decedent's estate are generally based on evidence which must be estimated with some degree of elasticity. There has lately been considerable discussion as to what the rule is with respect to this type of award. See a discussion in the PENNSYLVANIA BAR JOURNAL, Vol. 32, p. 47 (Oct. 1960), "*Has The Measure Of Damages Under The Survival Act In Pennsylvania Been Modified?*" In the instant case, the problem is made somewhat difficult because the record is bare of any specific testimony as to the money spent by Mr. Rice for his own maintenance during his lifetime. The last decision of the Supreme Court of Pennsylvania, *Skoda v. West Penn Power Co.*, 411 Pa. 323, 191 A.2d 822, 829 (1963), states the rule as follows:

Recovery may also be had for the present worth of his likely earnings during the period of his life expectancy, but diminished by the amount of the provision he would have made for his wife and children as above stated, thus avoiding duplication. *Pezzulli, Administrator, v. D'Ambrosia*, 344 Pa. 643, 650, 26 A.2d 659, 662, and diminished also by the probable cost of his own maintenance

are computed as follows:

during the time he would likely have lived but for the accident. *Murray, Administrator v. Philadelphia Transportation Co.*, 359 Pa. 69, 73, 74, 58 A.2d 323, 325.

Counsel for plaintiff strongly urge that under the rule in the various decisions, including *Skoda*, the award to the Executor in this case should run over \$127,000.00. Although the award to be made under the Survival Statute is not to be based on savings and not to be based on accumulations, nevertheless, the history of Mr. Rice's financial status indicates that he shows not only the ability to save but also to accumulate. Following the rule, however, in *Ferne v. Chadderton*, and other cases, the present worth of decedent's likely earnings during the remaining period of the decedent's life expectancy is to be computed. This sum is to be diminished by the amount of the awards to the family under the Wrongful Death Acts and also diminished by the probable cost of his own maintenance during the time he would likely have lived but for the accident.

Therefore, in accordance with the rule and the tables, the present worth of \$25,000.00 a year for twenty-two years is \$301,050.00. From this sum the amount awarded to the family under the Wrongful Death Acts is to be deducted. This sum is \$147,920.00. Deducting this figure from the \$301,050.00 leaves \$153,130.00 as the present worth of the pecuniary earnings lost to the state. To arrive at an award from this sum, it is necessary to deduct decedent's own maintenance expenses which he would have incurred had he lived. Under the cases and decisions these items, of course, include his cost of living, medical expenses, reasonable amounts for recreation, and general expenses of living. This is the area in the evidence in which there is very little proof, but it seems to this Court safe to conclude that his maintenance expenses are certainly equal to the amount he provided for his wife, that is, \$10,000.00 a year. They both lived on the same scale. On this basis then, \$120,420.00 is to be deducted from \$153,130.00, leaving \$32,710.00. This sum represents the loss of future earnings to

the estate reduced to present worth. This sum also represents the difference between the likely gross earnings during decedent's lifetime diminished by the family contributions and less also the amount of his own maintenance during his life expectancy. To this sum is added the two years' gross earnings which are not to be reduced to present worth.

In applying the doctrine of "present worth," it should be borne in mind that compensation, both for loss of earning power under the Survival Act and for loss of contributions under the Death Act, accruing from the date of the accident until the date of trial, is not reduced to present worth." See PENNSYLVANIA BAR ASSOCIATION QUARTERLY, Vol. XXIII, No. 1, October 1951, p. 19.

The two years' gross earnings between the decedent's death and the trial amount to \$50,000.00. But, however, during the two years preceding the trial decedent would have expended \$20,000.00 on his own maintenance. Therefore, from his gross earnings that amount is to be deducted leaving the sum of \$30,000.00 to be added to the \$32,710.00, leaving a net recovery under the Survival Act of \$62,710.00.

In summary then, the damages to be awarded the Executor are as follows:

Under the Wrongful Death Acts	
.....	\$149,920
Under the Survival Act . . .	62,710
<hr/>	
TOTAL DAMAGES: . . .	\$212,630

FELDMAN v. ALLEGHENY AIRLINES

524 F.2d 384 (CA 2, 1975)

LASKER, District Judge

On June 7, 1971, an Allegheny Airlines flight crashed in fog which approaching New Haven Airport. Nancy Feldman, a passenger, died, in the crash. Allegheny conceded liability, and the parties submitted the issue of damages to Judge Blumenfeld of the United States District Court for

the District of Connecticut.¹ The airline appeals² from Judge Blumenfeld's judgment awarding \$444,056 to Reid Laurence Feldman, as administrator of the estate of his late wife.

Determination of damages in the diversity wrongful death of action is governed by Connecticut law, specifically CONN. GEN. STATS. § 52-555, which measures recovery by the loss to the decedent of her life rather than buy the value of the value of the estate she would have left had she lived a full life. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1351 (2d Cir. 1974); *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-671, 136 A.2d 918, 924 (1957). In accordance with Connecticut law, the judgment represented the sum of (1) the value of Mrs. Feldman's lost earning capacity and (2) the destruction of her capacity to enjoy life's non-remunerative activities, less (3) deductions for her necessary personal living expenses. No award was made for conscious pain and suffering before Mrs. Feldman's death because the evidence on this point was too speculative, nor did the award include pre-judgment interest.

Damages in a wrongful death action must necessarily represent a crude monetary forecast of how the decedent's life would have evolved. Prior to stating his specific findings, the district judge noted, and we agree, that "the whole problem of assessing damages for wrongful death ... defies any precise mathematical computation," citing *Floyd v. Fruit Industries, Inc.*, *supra*, 144 Conn. at 675, 136 A.2d at 927 (382 F. Supp. at 1282).

It is clear from Judge Blumenfeld's remarkably detailed and precise analysis that he nevertheless made a prodigious effort to reduce the intangible elements of an award to measurable quantities. It is with reluctance, therefore, that we conclude that his determination of loss of earnings and personal living expenses must be remanded.

¹ Judge Blumenfeld's detailed opinion is reported at 382 F. Supp. 1271.

² Mr. Feldman filed a cross-appeal to enable him to argue that, if this court were inclined to adopt some of Allegheny's contentions, "there are other damage elements, not recognized by the District Court which would offset any reduction in the award and thus justify a judgment of \$444,056." We disagree that Judge Blumenfeld failed to recognize any appropriate element of damages.

I

Damages for Destruction of Earning Capacity.

Nancy Feldman was 25 years old at the time of her death. From 1968 until shortly before the plane crash, she lived and worked in New Haven while her husband studied at Yale Law School. On Mr. Feldman's graduation from law school in the spring of 1971 the Feldmans moved to Washington, D.C., where they intended to settle. At the time of her death, Mrs. Feldman had neither accepted nor formally applied for employment in Washington, although she had been accepted by George Washington Law School for admission in the Fall of 1971 and had made inquiries about the availability of employment.

* * *

In computing the value of Mrs. Feldman's lost earning capacity, the trial judge found that Mrs. Feldman's professional earnings in her first year of employment would have been \$15,040. and that with the exception of eight years during which she intended to raise a family and to work only part time, she would have continued in full employment for forty years until she retired at age 65. The judge further found that during the period in which she would be principally occupied in raising her family, Mrs. Feldman would have remained sufficiently in contact with her profession to maintain, but not increase, her earning ability. Pointing out that under Connecticut law damages are to be based on "the loss of earning capacity, not future earnings per se...." (382 F. Supp. at 1282) (emphasis in original), the judge concluded that when a person such as Mrs. Feldman, who possesses significant earning capacity, chooses to forego remunerative employment in order to raise a family, she manifestly values child rearing as highly as work in her chosen profession and her loss of the opportunity to engage in child rearing "may thus fairly be measured by reference to the earning capacity possessed by the decedent" (382 F. Supp. at 1283). Applying this rationale, the trial judge made an award for the eight year period of \$17,044. per year, the salary which he computed Mrs. Feldman would have reached in the year preceding the first child-bearing year, but did not increase the amount during the period.

We believe the trial judge erred in automatically valuing Mrs. Feldman's loss for the child-bearing period at the level of her salary. As Judge Blumenfeld's opinion points out, the Connecticut cases distinguish clearly between loss of earning capacity and loss of capacity to carry on life's non-remunerative activities. As we read Connecticut law, where a decedent suffers both kinds of loss for the same period each must be valued independently in relation to the elements particular to it.

The court in *Floyd v. Fruit Industries, Inc.*, *supra*, equated "earning capacity" with "the capacity to carry on the particular activity of earning money." 144 Conn. at 671, 136 A.2d at 925. Here the evidence established, and the trial court found, that Mrs. Feldman would have worked only part-time while raising a family. In the circumstances, we believe that under the Connecticut rule the plaintiff is entitled to recover "loss of earnings" for the child raising years only to the extent that the court finds that Mrs. Feldman would actually have worked during those years. For example, if the court finds that she would have worked 25% of the time during that period, the plaintiff would properly be credited only with 25% of her salary for each of the eight years. This conclusion is consistent with the other leading authority in Connecticut. In *Chase v. Fitzgerald*, 132, Conn. 461, 45 A.2d 789 (1946), an award for "loss of future earnings" was denied in respect of a decedent who had been employed as a housekeeper, but who at the time of her death was a housewife with no intention of seeking outside employment. The court held that any award for wrongful death in such a case should be based not on the decedent's loss of earning capacity, but rather on her "loss of the enjoyment of life's activities." 132 Conn. at 470, 45 A.2d at 793. Consistently with the holding in *Chase*, we conclude that any award of relation to the portion of the child-raising period during which Mrs. Feldman would not have been working must be predicted on her "loss of the enjoyment of life's activities" rather than on loss of earnings, and on remand the district judge should reevaluate the elements accordingly.

We recognize that thus computed the total award for Mrs. Feldman's child-raising years may be similar to that already made, but conclude that

the conceptual framework we have described is required by Connecticut's distinctive law of damages.

II

Deductions for Decedent's Necessary Personal Living Expenses

Where the decedent had been subject to the expense of self-maintenance, Connecticut case law provides for the deduction of "personal living expenses" from damages otherwise recoverable for the loss of earning capacity. *Floyd v. Fruit Industries, Inc.*, *supra*, 144 Conn. at 674, 136 A.2d at 926. Judge Blumenfeld properly held that although a husband under Connecticut law has a duty to support his spouse, (*see e.g.*, CONN. GEN. STATS. §§ 46-10; 53-304), that duty does not exempt an income-earning wife from an obligation to apportion a part of her income for her own support. The Floyd court defined the term "personal living expenses" as:

those personal expenses which, under the standard of living followed by a given decedent, it would have been reasonably necessary for him to incur in order to keep himself in such a condition of health and well-being that he could maintain his capacity to enjoy life's activities, including the capacity to earn money." 144 Conn. at 675, 136 A.2d at 926-927.

The trial judge concluded that, under Connecticut law, deductions for Mrs. Feldman's personal living expenses should include the cost, at a level commensurate with her standard of living, of food, shelter, and clothing and health care. The judge fixed such costs in Washington, D.C. for the year following her death at \$2,750., increasing that figure by 3% per year to the age of retirement. After retirement, living expenses were deducted at the rate of \$5,000. annually. These figures were discounted annually by 1.5% to reduce the deduction to present value. Although the process by which the trial judge determined the level of Mrs. Feldman's living expenses was proper, we believe that he substantially underestimated the actual costs of food, shelter, clothing and health care.

On direct examination, Mr. Feldman testified that his wife's personal living expenses in New

Haven had been approximately \$2,210. per year. On cross-examination, this figure was shown to have been unduly conservative with regard to clothing and food, and the trial judge rounded the amount to \$2,200. He found that the Feldmans' cost of living would have increased after they moved to Washington, where living expenses were higher and their social and economic status would have changed from that of students to that of young professionals. Accordingly, the judge adjusted the \$2,200. figure upward by 25% for the first year Mrs. Feldman would have resided in Washington, and by 3% annually until she would have reached the age of sixty-five and retired. Personal living expenses for that year were calculated to be \$6,675, but during the years of retirement deductions were lowered to \$5,000., a level which the trial judge felt was consistent with a high standard of living but also reflected the fact that the cessation of work often produces a reduction in personal expenditures.

We recognize the perils involved in an appellate court dealing de novo with factual matters. We would not venture to do so in this case if we did not feel we have the right to take judicial notice of the facts of life, including the cost of living for those in the position of the Feldmans in such metropolitan areas as Washington, D.C. We reluctantly conclude that the trial judge was in error in computing living expenses at \$2,750. for the year after Mrs. Feldman's death, and building on that base for later years.

Without attempting to specify what the results of such a computation should be, we believe that it would fall more nearly in the area of \$4,000., including approximately \$25. per week for food, \$125. per month for rent, \$1,000. annually for clothing and \$400. annually for health care. For one year the difference between the trial judge's figure of \$2,750. and the suggested figure of \$4,000. may be considered de minimis in relation to the total award. However, projected over the 52 years of Mrs. Feldman's life expectancy, and at an annual increase of 3%, the difference is sufficiently large to require us to remand the matter for further determination by the trial judge.

We have considered the other points raised by Allegheny and find them to be without merit.

The judgment is affirmed in part, reversed in part and remanded.

FRIENDLY, Circuit Judge (concurring dubitante)

This case is another example of a federal court's being compelled by the Congressional grant of diversity jurisdiction to determine a novel and important question of state law on which state decisions do not shed even a glimmer of light...

I doubt whether judges, or anyone else, can peer so far into the future; the district court's computations suffer from what Mr. Justice Holmes, in another context, called "the dangers of a delusive exactness," *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (dissenting opinion)... The estate of a young woman without dependents is hardly an outstanding candidate for a forty-year protection against inflation not enjoyed at all by millions of Americans who depend on pensions or investment income and not fully enjoyed by millions more whose salaries have in no wise kept pace with inflation.

* * *

I would also question the likelihood —indeed, the certainty as found by the court—that, despite her ability, determination and apparent good health, Mrs. Feldman would have worked full time for forty years until attaining age 65, except the eight years she was expected to devote to the bearing and early rearing of two children. Apart from danger of disabling illness, temporary or permanent, there would be many attractions to which the wife of a successful lawyer might yield: devoting herself to various types of community service, badly needed but unpaid, or to political activity; accompanying her husband on business trips — often these days to far-off foreign countries; making pleasure trips for periods and at times of the year inconsistent with the demands of her job; perhaps, as the years went on, simply taking time off for reflection and enjoyment. Granted that in an increasing number of professional households both spouses work full time until retirement age, in more they do not. Surely some discount can and should be applied to the recovery for these reasons.

My guess is also that, even if inflation should be taken into account, neither a Connecticut nor a federal jury would have made an award as large as was made here. I say this despite the \$369,400 jury verdict for another death arising out of the same crash which we sustained in *Perry v. Allegheny Airlines, Inc.*, *supra*, 489 F.2d 1349, where we did not expressly discuss the inflation

question. Even though the existence of dependents is legally irrelevant under the Connecticut survival statute, a jury would hardly have ignored that, whereas Perry was survived by a dependent wife and five children ranging from 6 to 14 years in age, Mrs. Feldman had no dependents. More significant to me is that in Perry's case the jury awarded only \$369,400 as against the \$535,000 estimate of Mrs. Perry's expert for economic loss alone; here the judge was more generous in important respects than plaintiff's expert.

However, I am loathe to require a busy federal judge to spend still more time on this diversity case, especially when I do not know what instructions to give him about Connecticut law.

* * *

Judgments like Mr. Feldman's and Mrs. Perry's also inevitably raise serious policy questions with respect to damages in airline accident cases beyond those here considered, but these are for Congress and not for courts.

Questions and Notes

1. Obviously one of the most important issues in wrongful death cases is whether a recovery will be permitted for the "noneconomic" damages, sometimes called "hedonic damages." For an argument that recovery is necessarily incomplete unless some recovery is given for such damages, see McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, [66 NOTRE DAME L. REV. 57](#) (1990).

2. Should there be a flat amount of damages set by statute for airlines for wrongful death? What advantages would such a plan have? What disadvantages?

3. If a hospital's negligence results in the death of a child still in the womb, is there an action for wrongful death? For recovery under the survival statute, if there is one? See *Wartelle v. Women's & Children's Hospital*, 704 So. 2d 778 (La. 1997); Eleni M. Roumel, *Recent Development; Denial of Survival and Bystander Actions for Death of a Stillborn Child*, [73 TUL. L. REV. 399](#) (1998); Jonathan Dyer Stanley, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn*:

an Argument for a Social Standard, [56 VAND. L. REV. 1523](#) (2003); Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, [37 AKRON L. REV. 41](#) (2004).

4. Of recent interest is the status of “domestic partners” in wrongful death schemes. In California the domestic partner of a woman killed by her neighbor’s dogs challenged the constitutionality of a California statute that limited wrongful death recoveries to spouses, children, and other designated beneficiaries. A superior court judge agreed with the plaintiff that the statute did not comply with the equal protection clause, but before the case could be resolved on appeal, the California legislature amended the wrongful death statute to state that the eligible beneficiaries included “the decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.” Some commentators approved. See Christopher D. Sawyer, *Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union*, [54 HASTINGS L.J. 727](#) (2003). Others were critical: Megan E. Callan, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, [40 SAN DIEGO L. REV. 427](#) (2003).

2. "Wrongful Birth" and "Wrongful Life"

Introductory Note. “Wrongful birth” and “wrongful life” claims present a special problem. These cases must be distinguished from an ordinary tort claim based upon someone's negligence (typically a health care provider) in causing injury to a child. For example, suppose a pharmacist is given a prescription for iron supplements for a pregnant woman, and he negligently fills the prescription with a drug that causes harm to the fetus. The child (and perhaps his parents) can sue the pharmacist for his negligence, using as a measure of damage the

typical comparison of life as it is with life *but for* the defendant's negligence. Such a case would not differ from the analysis in the cases discussed in § A, *supra*.^{*} The difficult cases arise not where the negligent act harms an already existing person, but instead where the negligent act *causes a person to exist* in the first place.

UNIVERSITY OF ARIZONA HEALTH SCIENCES CENTER v. SUPERIOR COURT

136 Ariz. 579, 667 P.2d 1294 (1983)

FELDMAN, Justice

Petitioner, a health care provider which operates a teaching hospital, brings this special action, claiming that the respondent judge erred in a legal ruling on petitioner's motion for summary judgment in the underlying tort action. Petitioner seeks this court's intervention by way of an order requiring respondent judge to apply the correct rule of law and to grant the motion for partial summary judgment. We have jurisdiction to entertain the action by virtue of Ariz. Const. art. 6, § 5(1), and Ariz. R. Sp. Act. 4, 17A A.R.S.

The real parties in interest are Patrick Heimann and Jeanne Heimann, husband and wife

* To be fair, there are some additional wrinkles caused by injury to a fetus. Some early cases questioned whether a tortious act could be committed against a person not even in existence. However, it is obvious that a two-year-old would have a claim against a negligent carpenter if the house falls down on him at age 2, even if the negligent act was committed four years earlier, when the child was not even conceived. More difficult is the issue of wrongful death claims if the fetus dies *in utero*; when does the fetus become a “person” allowed to bring such a claim? See *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), (no wrongful death recovery, only a negligence action by the parents)(commented upon in Note, 21 RUTGERS L.J. 227 (1989)). The problem is further compounded by the possibility the mother's claim might amount to a double recovery.

A final twist exists in that as traditional family tort immunities erode (see Chapter 5 §A), the possibility rises that children might be able to sue their mothers for prenatal injuries. See “Can I Sue Mommy?” *An Analysis of a Woman's Tort Liability for Prenatal Injuries for Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984).

Nonetheless, it must be clearly borne in mind that a claim based upon *negligently causing a birth* raises a set of problems distinct from those associated with *negligently harming a person who would have been born anyway*.

(Heimanns). The Heimanns originally brought a medical malpractice action against petitioner, a health care provider. The Heimanns claimed that one of the hospital's employees, a doctor, had negligently performed a vasectomy operation upon Patrick Heimann, that as a result Jeanne Heimann became pregnant and on October 4, 1981 gave birth to a baby girl. The Heimanns alleged in the underlying tort action that the vasectomy had been obtained because "already having three children, [they] decided ... that they desired to have no more children. As a result of this decision they further decided that a vasectomy was the best means of contraception for them." The baby girl is normal and healthy, but the Heimanns argue that they are financially unable to provide for themselves, their other three children and the newest child whose birth was neither planned nor desired. Accordingly, they seek damages from the doctor and his employer.

The question of negligence is not before us. The issue which brings these parties to our court pertains, rather, to the nature and extent of the damages which can be recovered, assuming that negligence is subsequently proved. The hospital filed a motion for partial summary judgment (Ariz. R. Civ. P. 56(b), 16 A.R.S.), contending that while damages were recoverable for "wrongful pregnancy," "as a matter of law [the Heimanns] could not recover damages for the future cost of raising and educating their normal, healthy child born as the result of petitioner's negligence." The trial judge denied the motion for partial summary judgment. Petitioner then brought this special action, claiming that the ruling of the trial judge was improper and should be vacated by this court.

* * *

Therefore, we shall proceed to consider the legal questions pertaining to the nature and extent of damages which may be recovered in an action for "wrongful pregnancy."¹ The first question is

¹ Although this action is brought under common law negligence principles, the term "wrongful pregnancy" is generally used to describe an action brought by the parents of a healthy, but unplanned, child against a physician who negligently performed a sterilization or abortion. See *Phillips v. United States*, 508 F. Supp. 544, 545 n.1 (D.S.C. 1980). This action is distinguished from (continued...)

whether parents of a child who was neither desired nor planned for but who was, fortunately, normal and healthy, have been damaged at all by the birth of that child. An overview of the authorities indicates rather clearly that the law will recognize at least some types of damage which result from unwanted procreation caused by the negligence of another. See annot., *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15, 29 (1978); *Phillips v. United States*, 508 F. Supp. 544, 549 (D.S.C. 1980). The real controversy centers around the nature of the damages which may be recovered. On this issue there are three distinct views.

The first line of authority limits damages by holding that the parents may recover only those damages which occur as the result of pregnancy and birth, and may not recover the cost of rearing the child. *Boone v. Mullendore*, 416 So. 2d 718, 721 (Ala. 1982); *Wilbur v. Kerr*, 275 Ark. 239, 243-44, 628 S.W.2d 568, 571 (1982); *Coleman v. Garrison*, 327 A.2d 757, 761-62 (Del. Super. Ct. 1974), *aff'd* 349 A.2d 8, 13-14 (Del. 1975); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 203-04, 69 Ill. Dec. 168, 173-74, 447 N.E.2d 385, 390-91 (1983) (reversing 99 Ill. App. 3d 271, 54 Ill. Dec. 751, 425 N.E.2d 968 (1981)); *Schorck v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Sala v. Tomlinson*, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979); *Mason v. Western Pennsylvania Hospital*, 499 Pa. 484, 453 A.2d 974, 975-76 (1982).

A second view could be characterized as the "full damage" rule and allows the parents to recover all damages and expenses, including the cost of the unsuccessful sterilization procedure, the economic loss from pregnancy, and the economic, physical and emotional cost attendant to birth and rearing the child. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967); *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 273-74, 54 Ill. Dec. 751, 753, 425 N.E.2d 968, 970 (1981), *rev'd* 95 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E.2d 385 (1983). These cases appear to be

¹(...continued)

a "wrongful birth" claim brought by the parents of a child born with birth defects, or a "wrongful life" claim brought by the child suffering from such birth defects. See *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

a distinct minority.

A substantial number of cases have adopted a third rule which allows the recovery of all damages which flow from the wrongful act but requires consideration of the offset of benefits. See RESTATEMENT (SECOND) OF TORTS § 920 (1977).² Under this view, the trier of fact is permitted to determine and award all past and future expenses and damages incurred by the parent, including the cost of rearing the child, but is also instructed that it should make a deduction for the benefits that the parents will receive by virtue of having a normal, healthy child. *Stills v. Gratton*, 55 Cal. App. 3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976); *Ochs v. Borelli*, 187 Conn. 253, 259-60, 445 A.2d 883, 886 (1982); *Troppe v. Scarf*, 31 Mich. App. 240, 255, 187 N.W.2d 511, 519 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175-76 (Minn. 1977).

The hospital claims that the trial court was bound by law to adopt the first view, that the cost of rearing and educating the child are not compensable elements of damage. The Heimanns claim, on the other hand, that the proper rule is the second view, which permits the recovery of all damage and does not permit the jury to consider and offset benefits. We disagree with both positions.

We consider first the strict rule urged by the hospital. Various reasons are given by the courts which adopt the view that damages for rearing and educating the child cannot be recovered. Some cases base their decision on the speculative nature of the necessity to assess "such matters as the emotional affect of a birth on siblings as well as parents, and the emotional as well as pecuniary costs of raising an unplanned and, perhaps, an unwanted child in varying family environments." *Coleman v. Garrison*, 327 A.2d at 761. We think, however, that juries in tort cases are often required to assess just such intangible factors, both emotional and pecuniary, and see no reason why a new rule should be adopted for wrongful

pregnancy cases. Another reason given for the strict view is the argument that the benefits which the parents will receive from having a normal, healthy child outweigh any loss which the parents might incur in rearing and educating that child. *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973). No doubt this is true in many cases, but we think it unrealistic to assume that it is true in all cases. We can envision many situations in which for either financial or emotional reasons, or both, the parents are simply unable to handle another child and where it would be obvious that from either an economic or emotional perspective—or both—substantial damage has occurred.

A third basis for the strict rule is the argument that the "injury is out of proportion to the culpability of the [wrongdoer]; and that the allowance of recovery would place too unreasonable a burden upon the [wrongdoer], since it would likely open the way for fraudulent claims...." *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982). This, of course, is the hue and cry in many tort cases and in essence is no more than the fear that some cases will be decided badly. Undoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, we think it better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice in many. *Brannigan v. Raybuck*, 136 Ariz. 513, 519, 667 P.2d 213, 219 (1983).

The final basis for the strict rule is the one which gives this court greater pause than any of the others. It is well put by the Illinois Supreme Court in *Cockrum v. Baumgartner*, *supra*. The court used the following words to justify the denial of recovery of damages for the rearing and educating of the unplanned child: "There is no purpose to restating here the panoply of reasons which have been assigned by the courts which follow the majority rule.... In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.... [I]t is a matter of universally-shared emotion and sentiment that the intangible but all important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved. Speaking legally, this may be deemed

² RESTATEMENT (SECOND) OF TORTS § 920 states: When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

conclusively presumed by the fact that a prospective parent does not abort or subsequently place the "unwanted" child for adoption. On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law."... We consider that on the grounds described, the holding of a majority of jurisdictions that the costs of rearing a normal and healthy child cannot be recovered as damages to the parents is to be preferred. One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are the heart of our legal system and, broader still, our civilization. *Id.* 95 Ill. 2d at 198-201, 69 Ill. Dec. at 171-72, 447 N.E.2d at 388-89 (quoting *Public Health Trust v. Brown*, 388 So. 2d 1084, 1085-86 (Fla. App. 1980)).

These sentiments evoke a response from this court. In most cases we could join in the "universally shared emotion and sentiment" expressed by the majority of the Illinois court, but we do not believe we hold office to impose our views of morality by deciding cases on the basis of personal emotion and sentiment, though we realize we cannot and should not escape the effect of human characteristics shared by all mankind. However, we believe our function is to leave the emotion and sentiment to others and attempt to examine the problem with logic and by application of the relevant principles of law. In this case, we believe that the strict rule is based upon an emotional premise and ignores logical considerations. While we recognize that in most cases a family can and will adjust to the birth of the child, even though they had not desired to have it, we must recognize also that there are cases where the birth of an unplanned child can cause serious emotional or economic problems to

the parents.³ We therefore reject the hospital's claim that the cost of rearing and educating the child can never be compensable elements of damage.

We consider next the "full damage" rule urged by the Heimanns and adopted by the Illinois Court of Appeals in *Cockrum v. Baumgartner* and the California court in *Custodio v. Bauer*. The courts applying this rule have relied on traditional tort principles and determined that the cost of rearing the child is a foreseeable consequence of the physician's negligence and therefore compensable. *Cockrum v. Baumgartner*, 99 Ill. App. 3d at 272-73, 54 Ill. Dec. at 752, 425 N.E.2d at 969. We agree that these damages are compensable; however, we believe that a rule which does not allow for an offset for the benefits of the parent-child relationship prevents the trier of fact from considering the basic values inherent in the relationship and the dignity and sanctity of human life. We believe that these "sentiments," if they may be called such, are proper considerations for the fact finder in tort cases, whether they be used to mitigate or enhance damages. No doubt ascertaining and assigning a monetary value to such intangibles will be a difficult task, but we do not believe it more difficult than the task of ascertaining the pecuniary and non-pecuniary damages that the parents will experience after the birth of the child. Therefore, we agree with the Illinois Supreme Court (*Cockrum v. Baumgartner, supra*) that the "full damage" approach is an exercise in mechanical logic and we reject it.

In our view, the preferable rule is that followed by the courts which, although permitting the trier of fact to consider both pecuniary and non-pecuniary elements of damage which pertain to the rearing and education of the child, also require

³ The examples which may be cited are as various as human experience can provide. Suppose, for instance, a husband learns that he is suffering from cancer and that his prognosis is uncertain. He and his wife already have four children and decide that in view of his medical situation it is unwise to run the risk that the wife become pregnant again. He arranges for a vasectomy, which is negligently performed. Suppose further that the child which results is born shortly before or after the husband's death from cancer. Can one say as a matter of law that the benefits of having a normal child outweigh the financial and emotional obligations which the struggling mother must undertake? We think not.

it to consider the question of offsetting the pecuniary and non-pecuniary benefits which the parents will receive from the parental relationship with the child.⁴ Some may fear that adoption of such a rule will permit juries to recognize elements of damage which, because of our private philosophy or views of ethics, we, as judges, believe should not be recognized. We feel, however that the consensus of a cross-section of the community on such important issues is better and more accurately obtained from the verdict of a jury than from the decision of any particular group of that community. A jury verdict based on knowledge of all relevant circumstances is a better reflection of whether real damage exists in each case than can be obtained from use of any abstract, iron-clad rule which some courts would adopt and apply regardless of the circumstances of the particular case.

There may be those who fear that the rule which we adopt will permit the award of damages where no real injury exists. We feel this danger is minimized by giving weight and consideration in each case to the plaintiffs' reasons for submitting to sterilization procedures. Such evidence is perhaps the most relevant information on the question of whether the subsequent birth of a child actually constitutes damage to the parents. *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983). The parents' preconception calculation of the reasons for preventing procreation is untainted by bitterness, greed or sense of duty to the child and is perhaps the most telling evidence of whether or to what extent the birth of the child actually injured the parents. *Id.* For example, where the

parent sought sterilization in order to avoid the danger of genetic defect, the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing rather than a "damage." Such evidence should be admissible, and the rule which we adopt will allow the jury to learn all the factors relevant to the determination of whether there has been any real damage and, if so, how much. We are confident that the inherent good sense of the jury is the best safeguard to "runaway" verdicts and unfounded speculation in the award of damages, provided that the jury is allowed to consider the issues in realistic terms.

It may be argued also that the rule which we adopt will have the unhappy effect of creating situations in which parents will testify to their feeling or opinion that the child is "not worth" the burden of having and rearing. Such testimony could be harmful if or when the child learns of it. "We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most cases; ... we think the parents, not the courts, are the ones who must weigh the risk." *Hartke v. McKelway*, at 1552 n.8; *accord Sherlock v. Stillwater Clinic*, 260 N.W.2d 176-77.

We agree, therefore, with the special concurrence of Chief Justice Rose of the Wyoming Supreme Court: [T]hrough application of the "benefit rule" the courts give recognition to the philosophy that the costs and benefits associated with the introduction of an unplanned child to the family will vary depending upon the circumstances of the parents. As was stated in *Troppi v. Scarf*, *supra*, 187 N.W.2d at 519: "The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable." By recognizing these considerations, the "benefit rule" encourages and entrusts the trier of fact with the responsibility of weighing and considering all of the factors associated with the birth of the unplanned child in a given "wrongful pregnancy" case. For me, it is the soundest approach for dealing with the right of

⁴ The application of the benefit rule has been criticized by some courts which argue that § 920 applies only when the injury and benefit are to the same interest. See RESTATEMENT, *supra*, § 920, comments a and b. These courts argue that the emotional benefits of child rearing in no way offset the economic costs. *Cockrum v. Baumgartner*, 99 Ill. App. 3d at 274, 54 Ill. Dec. at 753, 425 N.E.2d at 970. We are not persuaded by this argument since we agree with the special concurrence of Justice Faulkner in *Boone v. Mullendore*, *supra*, that "the economic burden and emotional distress of rearing an unexpected child are inextricably related to each other...." *Id.* at 726. We also note that the benefit rule is based on the concept of unjust enrichment and agree with Justice Faulkner that strict interpretation of the same interest limitation would result in unjust enrichment in wrongful pregnancy cases. *Id.*

the parents to prove their damages caused by the unplanned birth of a child without, at the same time, uprooting the law of tort damages. *Beardsley v. Wierdsma*, 650 P.2d at 296-97.

In reaching our decision, we are influenced greatly by what we perceive to be the uniform rules of damages for all tort cases. One of the basic principles of damage law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong. *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 174; *Cockrum v. Baumgartner*, 95 Ill. 2d at 206-07, 69 Ill. Dec. at 175, 447 N.E.2d at 392 (CLARK, J., dissenting). We have recognized before in Arizona that the right to damages must be established without speculation, but that uncertainty as to the amount of those damages will not preclude recovery and is a question for the jury. Compare *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 446 P.2d 458 (1968), with *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (App. 1978).

We see no reason why ordinary damage rules, applicable to all other tort cases, should not be applicable to this situation.⁵ By allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence. By permitting the jury to consider the reason for the procedure and to assess and offset the pecuniary and non-pecuniary benefits which will inure to the parents by reason of their

relationship to the child, we allow the jury to discount those damages, thus reducing speculation and permitting the verdict to be based upon the facts as they actually exist in each of the unforeseeable variety of situations which may come before the court. We think this by far the better rule. The blindfold on the figure of justice is a shield from partiality, not from reality.

Accordingly, we hold that the respondent trial judge did not err in his ruling on the motion for summary judgment. The prayer for relief is denied.

HOLOHAN, C.J., and HAYS, J., concur.

GORDON, Vice Chief Justice (concurring in part and dissenting in part)

I would agree with the majority that health care providers should be responsible in damages for costs attendant to birth when they negligently perform a surgical sterilization. I would allow damages for obstetrical care, pre and post partum; all costs of lying in; where appropriate, loss of wages by the mother up to delivery and a short period thereafter, and her pain and suffering caused by delivery. Also if this were a case where the child were born seriously retarded, deformed, or chronically ill, I too would hold the health care provider responsible for the cost of lifetime support and care for the child. But here we are dealing with the birth of a normal and healthy, although undesired, child whose life I consider above monetary value. At this point I must respectfully dissent.

One of the most important functions of a state's highest appellate court is to guide and shepherd the growth of the common law of that state according to the Court's perception of existing public policy. This task is at once delicate and awesome. Emotion and sentimentality indeed should not play a part in our Court's decision of whether to apply an existing principle of law to a given set of facts. Were it otherwise the doctrine of stare decisis would be a fraud. But when, as members of this Court, we are called upon to extend an existing rule of damages to an entirely new concept within our jurisprudence, especially one so fraught with subjective differences in values, opinion and personal belief, we should tread cautiously, led by our most trusted senses, with both the goals of justice and the strengths and weaknesses of our system equally in mind.

The rule of damages established by the

⁵ In holding that ordinary damages rules are to be applied, we do not indicate or imply that parents should be forced to mitigate damages by choosing abortion or adoption, or that the parents' failure to do so may be considered as an offset. The rules requiring mitigation of damages require only that reasonable measures be taken. *Troppi v. Scarf*, 31 Mich. App. at 258, 187 N.W.2d at 519; see also, *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979). The decision not to conceive a child is quite different from the decision to abort or put the child up for adoption once it has been conceived. "If parents are confronted in such a situation with choices which they consider to be unenviable alternatives, they should not be precluded from recovering damages because they select the most desirable of these unpalatable choices." *Cockrum v. Baumgartner*, 95 Ill. 2d at 207, 69 Ill. Dec. at 175, 447 N.E.2d at 392 (CLARK, J., dissenting); see also Kelly, *Wrongful Life, Wrongful Birth and Justice in Tort Law*, WASH. U. L.Q. 919, 949-50 (1979).

majority in this case may indeed be logical and legally scientific. Logic and science may, however, lead to results at variance with public policy. Although I have a very high degree of respect for our country's system of civil justice, and readily admit that our common law concepts of tort liability have caused products manufactured in the United States to be among the safest in the world, I feel that there are some human misfortunes that do not lend themselves to solution by combat in the courtroom. Wrongful pregnancy, in my opinion, is one of those. I believe the rule allowing damage recovery beyond the costs of birth in cases such as these would violate what I consider the public policy of our state in several ways.

(1) As is pointed out in the majority opinion, the prosecution of this type of action requires parents to deny the worth of the child, thus placing the values of the parents over those of the child. Under the "benefits rule," a judgment for the parents is a conclusion by the court that a child is not worth what it takes to raise him or her. This problem has been recognized by several authors who refer to such a child as an "emotional bastard" when attempting to describe the stigma that will attach to the child when he learns the true circumstances of his upbringing. *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65 (1981). In attempting to minimize the effect of a wrongful pregnancy action on the child, some courts have addressed part of their opinion to the child: "Since the child involved might some day read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy. This case and this complaint are well beyond such limits." *Rieck v. Medical Protective Co. of Fort Wayne, Ind.*, 64 Wis. 2d 514, 520, 219 N.W.2d 242, 245-46 (1974). See also *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975) (advising the child that the case was not founded on rejection of him as a person, but rather was a malpractice action "sounding for the outlimits of physician

liability." *Id.* at 14). One court has gone so far as to guarantee the parents' anonymity by captioning the case *Anonymous v. Hospital*, 33 Conn. Sup. 126, 366 A.2d 204 (1976). The above authorities indicate the practical effect that such litigation may have on the child in future years. Although later discovery of their parents' feelings toward them may harm only a few children, I think a few are too many.

(2) The decision in this matter will likely impinge upon the availability and costs of sterilization surgery in Arizona. It is conceivable that hereafter many health care providers will either refuse to perform these procedures, or they will become so expensive that only the wealthy will be able to afford them. If the intended result of the majority is to lessen the number of unwanted pregnancies by requiring more skill and caution in the performance of sterilization procedures, I believe that this case will be self-defeating. There will probably be an increase in the number of unwanted pregnancies due to the increased cost and relative unavailability of surgical sterilization.

(3) Finally, it is well known that our courts are already overcrowded with cases. The majority has by this decision created a new and expansive concept which will generate new and protracted litigation. For example, in *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974), the plaintiff became pregnant and bore a child after her husband had received a vasectomy and was told by the defendant that the procedure would result in sterility. Aside from alleging causes of action in negligence and breach of contract, the complaint also set forth a cause of action on behalf of the plaintiffs' infant children. The court summarized the cause of action as follows: "[On behalf of the infant children, the plaintiffs' allege] that they, as prior born children, by reason of the defendant's negligence and breach of contract, will be deprived in the future of a portion of the care, affection, training and financial support that each would have received, except for the birth of their unexpected brother." *Id.* at 158-59, 352 N.Y.S.2d at 839. Although the court refused to recognize this cause of action, the case indicates the scope of actions that may potentially be brought in the aftermath of the decision handed down by this Court today. Such actions are particularly tempting both to the unscrupulous and the unethical which will further add to the court's burden.

A further non-policy criticism that I have of the majority opinion is that it is not entirely consistent. If the Court is to allow some of the logical principles of tort law to apply in this very sensitive area, then I feel that all of them should apply. The majority, however, fails to do so in at least two instances.¹ First, in the usual lawsuit if a plaintiff has failed to mitigate his or her damages, this fact is allowed as an offset against recovery. In this case the Court, although eschewing emotions and sentiment, has for reasons unexplained decided that the parents' failure to choose abortion or adoption should not be considered in mitigation. The majority has apparently decided that these methods of mitigating damages are unreasonable as a matter of law. The question of the reasonableness of a method of mitigating damages, however, is generally a question of fact to be decided by the trier of fact. In some cases abortion or adoption will not be reasonable, while in others it will be reasonable. If we are going to open the door, logically, we should open it all the way. If the plaintiff parents — who have endeavored not to have a child, pleaded his or her birth as an injury to them, and claimed substantial damages — chose not to take advantage of abortion or adoption, the defendant should be permitted to establish that by so doing the parents unreasonably failed to mitigate their damages. Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127, 164-170 (1978) [hereinafter cited as *Wrongful Birth Damages*]; Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1328 (1982) [hereinafter cited as *Limitations on Damages*]; cf. *Ziembra v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (question of whether option of abortion was appropriate cannot be decided on motion to dismiss).

Second, the majority misapplies

RESTATEMENT (SECOND) OF TORTS § 920 (1977). Section 920 specifically states that for a benefit to be considered in mitigation of damages it must be "a special benefit to the interest of the plaintiff that was harmed...." Furthermore, a comment to § 920 explains how the "same interest" requirement operates: "Limitation to same interest. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication ... unless damages are claimed for harm to pecuniary interests.... Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act.... Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife." RESTATEMENT, *supra*, § 920 comment b. A proper application of the "same interest" requirement in a wrongful pregnancy case would require that pecuniary harm of raising the child be offset only by corresponding pecuniary benefit, and emotional benefits of the parent-child relationship be applied as an offset only to corresponding emotional harm. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Comment, *Robak v. United States: A Precedent-Setting Damage Formula For Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 746-47 (1982); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1416-17 (1977); *Wrongful Birth Damages, supra*, at 158; *Limitations on Damages, supra*, at 1326.

The majority's reasons for overlooking the "same interest" requirement of § 920 are unpersuasive. The majority argues that the economic burden and emotional distress of rearing an unexpected child are so closely related that they cannot be separated. This seems inconsistent with the majority's expressed confidence in the ability of jurors to assess intangible emotional and pecuniary factors.

The majority also argues that because the "benefits rule" of § 920 is designed to prevent unjust enrichment, the "same interest" requirement of the rule should not be applied. The same argument could be made in any case and amounts to little more than an argument for deleting the

¹ I point these inconsistencies out not because I believe the majority opinion should remedy them. Indeed, the rule adopted by the majority but purged of these inconsistencies would be even less desirable as a matter of policy. I point them out in an attempt to demonstrate that the majority's attempt to avoid the moral and policy problems associated with this area of the law by appealing to strict principles of tort law is flawed. I am convinced that any such attempt would be flawed.

"same interest" requirement from the "benefits rule."

I am convinced that the proper balance between strict tort law principles and sound public policy would be struck by precluding recovery of the future costs of raising and educating the child.

CAMERON, J., concur.

HARBESON v. PARKE-DAVIS

98 Wash. 2d 460, 656 P.2d 483 (1983)

PEARSON, Justice

This case requires us to decide whether to recognize two new causes of action: "wrongful birth" and "wrongful life." We hold that, subject to the limitations set forth in this opinion, such actions may be brought in this state.

Plaintiffs brought against the United States an action for medical malpractice and failure to inform of the material risks of treatment. The action was based upon medical care that plaintiff Jean Harbeson received from physicians employed by the United States at Madigan Army Medical Center in 1972 and 1973. The case was tried during the week of November 30, 1981, in the United States District Court for the Western District of Washington, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2674-2680, § 1346(b), and § 2402 (1976). After hearing all the evidence and before giving judgment, the District Court, on its own motion, certified to this court questions of law pursuant to R.C.W. 2.60.020 and RAP 16.16. The District Court formulated from the evidence presented at trial a number of findings of fact and conclusions of law. These findings and conclusions comprise the record upon which we must resolve the issues certified.

The District Court found as follows. Plaintiff Leonard Harbeson has at all material times been a member of the United States Air Force. In 1970, while Mr. Harbeson was stationed at Malstrom Air Force Base, his wife Jean conceived their first child. In December 1970, Mrs. Harbeson learned, after suffering a grand mal seizure, that she was an epileptic. To control Mrs. Harbeson's seizures, physicians at the Air Force Base prescribed Dilantin, an anticonvulsant drug, which was the first choice of doctors in the treatment of epilepsy.

Mrs. Harbeson took Dilantin during the remainder of her pregnancy and in March 1971 gave birth to Michael, a healthy and intelligent child.

After Michael's birth, Mr. Harbeson was transferred to McChord Air Force Base, near Tacoma. The medical facility serving the base was Madigan Army Medical Center. In May 1972, Mrs. Harbeson went to Madigan for evaluation and treatment of her epilepsy. A neurologist at Madigan prescribed Dilantin to control her seizures. Between November 1972 and July 1973, the Harbesons informed three doctors at Madigan that they were considering having other children, and inquired about the risks of Mrs. Harbeson's taking Dilantin during pregnancy. Each of the three doctors responded that Dilantin could cause cleft palate and temporary hirsutism. None of the doctors conducted literature searches or consulted other sources for specific information regarding the correlation between Dilantin and birth defects. The Harbesons relied on the assurances of the Madigan doctors and thereafter Mrs. Harbeson became pregnant twice, giving birth to Elizabeth in April 1974, and Christine in May 1975. Throughout these pregnancies, Mrs. Harbeson continued to take Dilantin as prescribed by the Madigan doctors.

Elizabeth and Christine are the minor plaintiffs in this action, and are represented by Leonard Harbeson, as guardian *ad litem*. Elizabeth and Christine have been diagnosed as suffering from "fetal hydantoin syndrome." They suffer from mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects. Had Mr. and Mrs. Harbeson been informed of the potential birth defects associated with the use of Dilantin during pregnancy, they would not have had any other children.

The District Court's conclusions of law include the following.

4. Dilantin was a proximate cause of the defects and anomalies suffered by Elizabeth and Christine Harbeson.
5. The physicians at Madigan were the agents of the Defendant United States of America, and said Defendant is

responsible for the acts and omissions of the Madigan physicians.

6. Plaintiff, Leonard Harbeson, is the duly appointed guardian *ad litem* for the minor plaintiffs herein, Elizabeth and Christine Harbeson, and is authorized to bring the present action on their behalf.

7. The physicians at Madigan failed to conduct a literature search or to consult other sources in regard to the effects of Dilantin during pregnancy, even though the plaintiffs Leonard and Jean Harbeson specifically asked all three Madigan physicians of possible birth defects associated with the mother's consumption of Dilantin during pregnancy. Said acts of the Madigan physicians:

a. breached the standard of care for the average physician acting under the same or similar circumstances, and the physicians were thereby negligent;

b. were not reasonably prudent, and therefore, were negligent.

8. An adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the Harbesons would attach significance to such risks in deciding whether to have further children.

9. Each of the four Harbeson Plaintiffs has sustained permanent and severe damages and injuries past, present and future, as a direct and proximate result of the negligence of the Madigan physicians.

10. Plaintiffs are entitled to recover damages from the Defendant United States of America.

* * *

We have now arrived at the crucial issue: Does the wrongful birth action as formulated earlier in this opinion coincide with these principles by which we impose liability on providers of health care?

First, we measure the proposed wrongful birth

action against the traditional concepts of duty, breach, injury, and proximate cause. The critical concept is duty. The core of our decision is whether we should impose upon health care providers a duty correlative to parents' right to prevent the birth of defective children.

Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly. Parents can determine before conceiving a child whether their genetic traits increase the risk of that child's suffering from a genetic disorder such as Tay-Sachs disease or cystic fibrosis. After conception, new diagnostic techniques such as amniocentesis and ultrasonography can reveal defects in the unborn fetus. *See generally*, Peters and Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 857, 873-75 (1980). Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). We must decide, therefore, whether these developments confer upon potential parents the right to prevent, either before or after conception, the birth of a defective child. Are these developments the first steps towards a "Fascist Orwellian societal attitude of genetic purity," *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978), or Huxley's brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic cost of defective children?

We believe we must recognize the benefits of these medical developments and therefore we hold that parents have a right to prevent the birth of a defective child and health care providers a duty correlative to that right. This duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children. If medical procedures are undertaken to avoid the conception or birth of defective children, the duty also requires that these procedures be performed with due care. This duty includes, therefore, the requirement that a health care provider who undertakes to perform an

abortion use reasonable care in doing so. The duty does not, however, affect in any way the right of a physician to refuse on moral or religious grounds to perform an abortion. Recognition of the duty will "promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong." (Footnotes omitted.) Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 757 (1982) (hereinafter cited as *Rogers*).

We find persuasive the fact that all other jurisdictions to have considered this issue have recognized such a duty. These decisions are conveniently collected in *Rogers*, at 739-52, and we need not list them here.

Having recognized that a duty exists, we have taken the major step toward recognizing the wrongful birth action. The second element of the traditional tort analysis is more straightforward. Breach will be measured by failure to conform to the appropriate standard of skill, care, or learning. R.C.W. 4.24.290; R.C.W. 7.70.040. *Gates v. Jensen*, 92 Wash. 2d 246, 595 P.2d 919 (1979).

More problematical is the question of whether the birth of a defective child represents an injury to the parents. The only case to touch on this question in this state did not resolve it. *Ball v. Mudge*, 64 Wash. 2d 247, 250, 391 P.2d 201 (1964). However, it is an inevitable consequence of recognizing the parents' right to avoid the birth of a defective child that we recognize that the birth of such a child is an actionable injury. The real question as to injury, therefore, is not the existence of the injury, but the extent of that injury. In other words, having recognized that the birth of the child represents an injury, how do we measure damages? Other courts to have considered the issue have found this question troublesome. In particular, the New Jersey Supreme Court has taken a different approach to the question on each of the three occasions it has confronted it. In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), the court rejected the wrongful birth action altogether. One of the reasons for the rejection was the difficulty of

measuring damages.¹ When the court next considered the issue in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), it upheld an action for wrongful birth and permitted damages for mental anguish. However, the court refused to allow damages to compensate for the medical and other costs incurred in raising, educating, and supervising the child. The court retreated from this position in the third case, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981), and allowed the parents damages for certain medical expenses related to the child's affliction.

Other courts to have considered the issue exhibit widely divergent approaches. Comment, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127 (1978); *Rogers*, at 750-51.²

More certain guidance than that provided by decisions of other jurisdictions on the issue of damages is provided by the Legislature in R.C.W. 4.24.010.³ This statute provides that, in an action

¹ "[A] court would have to evaluate the ... intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is ... impossible to perform". 49 N.J. at 29, 227 A.2d 689.

² "Courts generally allow the extraordinary expenses relating to the child's defect that must be borne by the parents, (e.g., *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975)) and some courts have compensated for the parents' pain and suffering or mental anguish. (*Schroeder v. Perkel*, *supra*.) One court has allowed all expenses incident to the care of the child, without discounting those expenses not directly related to the child's defect that would be necessary for a normal child (*Robak v. United States*, 658 F.2d 471 (7th Cir. 1981))." *Rogers*, at 751. See also *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing pecuniary but denying emotional damages); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981) (allowing pecuniary and emotional damages).

³ RCW 4.24.010 provides, in part: "The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support...."

"... In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such

(continued...)

by parents for injury to a child, compensation may be recovered for four types of damages: medical, hospital, and medication expenses, loss of the child's services and support, loss of the child's love and companionship, and injury to the parent-child relationship. Recovery of damages for loss of companionship of the child, or injury or destruction of the parent-child relationship is not limited to the period of the child's minority. *Balmer v. Dilley*, 81 Wash. 2d 367, 502 P.2d 456 (1972). We have held that this section allows recovery for parental grief, mental anguish, and suffering. *Hinzman v. Palmanteer*, 81 Wash. 2d 327, 501 P.2d 1228 (1972). The statute is not directly in point because a wrongful birth claim does not allege injury to the child as the cause of the parents' injury; rather it alleges the birth of the child is the cause of the injury. Nevertheless, the statute reflects a policy to compensate parents not only for pecuniary loss but also for emotional injury. There appears to be no compelling reason that policy should not apply in wrongful birth actions. Accordingly, we hold that recovery may include the medical, hospital, and medication expenses attributable to the child's birth and to its defective condition, and in addition damages for the parents' emotional injury caused by the birth of the defective child. In considering damages for emotional injury, the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child. RESTATEMENT (SECOND) OF TORTS § 920 (1977). *Rogers*, at 751-52; *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Kingsbury v. Smith*, N.H., 442 A.2d 1003 (1982).

The final element to be considered is whether a breach of duty can be a proximate cause of the birth of the child. Proximate cause must be established by, first, a showing that the breach of duty was a cause in fact of the injury, and, second, a showing that as a matter of law liability should attach. *King v. Seattle*, 84 Wash. 2d 239, 249, 525 P.2d 228 (1974). Cause in fact can be established by proving that but for the breach of duty, the injury would not have occurred. *King v. Seattle*, *supra*. The legal question whether liability

should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists. We therefore hold that, as a matter of law in wrongful birth cases, if cause in fact is established, the proximate cause element is satisfied. This conclusion is consistent with the decisions of those other jurisdictions which have accepted wrongful birth actions, *e.g.*, *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

The action for wrongful birth, therefore, fits within the conceptual framework of our law of negligence. An action in negligence claiming damages for the birth of a child suffering congenital defects may be brought in this state.

We now turn to answer the first issue certified to us by the District Court. Our analysis leads us to conclude that plaintiffs Leonard and Jean Harbeson may maintain a cause of action for the wrongful births of Elizabeth and Christine. We have held above that physicians have a duty to protect their patient's right to prevent the birth of defective children. This duty requires physicians to act in accordance with the appropriate standard of care. The special standard of care formulated in *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974), had not been promulgated at the time the alleged negligence of the physicians occurred in 1972 and 1973. The standard which applied at that time was set forth in *Hayes v. Hulswit*, 73 Wash. 2d 796, 440 P.2d 849 (1968), the standard of the "average practitioner." The District Court concluded that the physicians' failure to conduct a literature search breached the standard of care of the "average physician." (Conclusion of law 7a.) The physicians therefore breached the duty of care they owed to Mr. and Mrs. Harbeson.

Moreover, as our analysis above indicates, the birth of children suffering congenital defects constitutes an actionable injury to the parents. The three elements of duty, breach, and injury are therefore established.

The final element which must be proved is that the negligence of the physicians was a proximate cause of this injury. The District Court concluded that Dilantin was the proximate cause of the birth defects suffered by the children (conclusion of law 4), and that an adequate literature search would have revealed the risks associated with Dilantin (conclusion of law 8). The court made a finding of fact that had the Harbesons been informed of those

³(...continued)

amount as, under all the circumstances of the case, may be just."

risks they would not have had any other children. These conclusions and findings establish that the breach of duty was a cause in fact of the birth of Elizabeth and Christine, and therefore a proximate cause of the injury.

The parents may therefore recover damages for the wrongful births of Elizabeth and Christine. These damages may include pecuniary damages for extraordinary medical, educational, and similar expenses attributable to the defective condition of the children. In other words, the parents should recover those expenses in excess of the cost of the birth and rearing of two normal children. In addition, the damages may compensate for mental anguish and emotional stress suffered by the parents during each child's life as a proximate result of the physicians' negligence. Any emotional benefits to the parents resulting from the birth of the child should be considered in setting the damages. (Implicit in this conclusion, in response to the District Court's question 2a, is that neither R.C.W. 4.24.290 nor R.C.W. 4.24.010 applies directly to the claims of the Harbesons.)

Mr. and Mrs. Harbeson also have a cause of action on a theory of informed consent. The health care which gives rise to the cause of action occurred between November 1972 and July 1973. At that time, the doctrine of informed consent was governed by *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wash. 2d 12, 499 P.2d 1 (1972). The doctrine required the physicians, in treating Mrs. Harbeson with Dilantin, to exercise reasonable care in disclosing "grave risks" of that treatment. It appears from the findings and conclusions of the District Court that the potential teratogenic effects of Dilantin would constitute a "grave risk" of which Mrs. Harbeson ought to have been informed in order to intelligently exercise her judgment whether to have further children. Failure to impart the information renders the physicians liable for injuries proximately caused by the failure. As we explained in our discussion of the negligence action, the failure to inform was a proximate cause of the births of the minor plaintiffs. Mr. and Mrs. Harbeson are entitled to damages for pecuniary and emotional injuries attributable to those births.

Wrongful Life

In a wrongful life claim,

[t]he child does not allege that the

physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence — his failure to adequately inform the parents of the risk — has caused the birth of the deformed child. The child argues that but for the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity. Comments, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980).

To this definition we would add that the physician's negligence need not be limited to failure to adequately inform the parents of the risk. It may also include negligent performance of a procedure intended to prevent the birth of a defective child: sterilization or abortion.

Wrongful life is the child's equivalent of the parents' wrongful birth action. However, whereas wrongful birth actions have apparently been accepted by all jurisdictions to have considered the issue, wrongful life actions have been received with little favor. There is an excellent discussion of the law relating to recognition of an action for wrongful life in *Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The action has been rejected in Alabama, *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978); New Jersey, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); New York, *e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); South Carolina, *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); Texas, *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); and Wisconsin, *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

Two other jurisdictions have come closer to embracing the cause of action. In Pennsylvania, a trial court decision that the action was not legally cognizable was affirmed only as a result of the even division of the Supreme Court. *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981). The Supreme Court of California rejected the claim of a child for general damages, but allowed the recovery of extraordinary medical expenses occasioned by the child's defect. *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982). The court acknowledges that "it would be illogical and anomalous to permit only

parents, and not the child, to recover for the cost of the child's own medical care."⁴ We agree. The child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.

We hold, accordingly, that a child may maintain an action for wrongful life in order to recover the extraordinary expenses to be incurred during the child's lifetime, as a result of the child's congenital defect. Of course, the costs of such care for the child's minority may be recovered only once. *Wooldridge v. Woolett*, 96 Wash. 2d 659, 666, 638 P.2d 566 (1981). If the parents recover such costs for the child's minority in a wrongful birth action, the child will be limited to the costs to be incurred during his majority.

The analysis whereby we arrived at our holding is similar to that which we used in considering the parents' wrongful birth action. It is convenient therefore to consider wrongful life according to the four traditional tort concepts of duty, breach, injury, and proximate cause.

We begin with duty. The first potential difficulty with this element of a wrongful life action is that in every case the alleged negligent act will occur before the birth of the child, and in many cases (including the one before us) before the child is conceived. Prenatal injuries to a fetus

have been recognized as actionable in this state for 20 years. *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962). We have not previously considered whether a duty could exist prior to conception. Other courts have recognized such a preconception duty. *E.g.*, *Turpin v. Sortini*, *supra*, and authorities cited therein. We now hold that a duty may extend to persons not yet conceived at the time of a negligent act or omission. Such a duty is limited, like any other duty, by the element of foreseeability. *Hunsley v. Giard*, 87 Wash. 2d 424, 435-36, 553 P.2d 1096 (1976).⁵ A provider of health care, or anyone else, will be liable only to those persons foreseeably endangered by his conduct. In most wrongful life cases, it should not be difficult to establish foreseeability. In the case before us, for example, the parents informed the defendant physicians of their intention to have further children. Such future children were therefore foreseeably endangered by defendants' failure to take reasonable steps to determine the danger of prescribing Dilantin for their mother.

One reason for the reluctance of other jurisdictions to recognize a duty to the child appears to be the attitude that to do so would represent a disavowal of the sanctity of a less-than-perfect human life. *Berman v. Allan*, 80 N.J. at 430, 404 A.2d 8. This reasoning was rejected in *Turpin v. Sortini*, at 233, 182 Cal. Rptr. 337, 643 P.2d 954.

[I]t is hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.

⁴ The court goes on to say: "If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.

"Realistically, a defendant's negligence in failing to diagnose an hereditary ailment places a significant medical and financial burden on the whole family unit. Unlike the child's claim for general damages, the damage here is both certain and readily measurable. Furthermore, in many instances these expenses will be vital not only to the child's well-being but to his or her very survival." (Footnote omitted.) *Turpin v. Sortini*, at 348, 182 Cal. Rptr. 337, 643 P.2d 954.

⁵ "The element of foreseeability plays a large part in determining the scope of defendant's duty. *Wells v. Vancouver*, 77 Wash. 2d 800, 467 P.2d 292 (1970). The point is summarized by the Hawaii Supreme Court: '[A] further limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.' *Rodrigues v. State*, 52 Hawaii 156, 174, 472 P.2d 509 (1970)." *Hunsley v. Giard*, 87 Wash. 2d at 435-36, 553 P.2d 1096.

We agree.

Furthermore, the policies which persuaded us (along with several other jurisdictions) to recognize parents' claims of wrongful birth apply equally to recognition of claims of wrongful life. Imposition of a corresponding duty to the child will similarly foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice. In a footnote, the court in *Turpin v. Sortini* wrote at 349 n.15, 182 Cal. Rptr. 337, 643 P.2d 954:

Permitting recovery of these extraordinary out-of-pocket expenses whether the cost is to be borne by the parents or the child should also help ensure that the available tort remedies in this area provide a comprehensive and consistent deterrent to negligent conduct.

In addition to providing a comprehensive and consistent deterrent to malpractice, recognition of the duty will provide more comprehensive and consistent compensation for those injured by such malpractice (at least for extraordinary out-of-pocket expenses) than would be available were the duty confined to the parents. In order to achieve these ends, therefore, we recognize the existence of a duty to the unborn or unconceived child.

This duty will be breached by failure to observe the appropriate standard of care. See *Rogers* at 332-33.

The most controversial element of the analysis in other jurisdictions has been injury and the extent of damages. The New Jersey Supreme Court gave two reasons for rejecting a child's wrongful life claim in *Berman v. Allan*. First, the quantum of damages in such an action would be impossible to compute because the trier of fact would be required to "measure the difference in value between life in an impaired condition and the utter void of nonexistence." 80 N.J. at 427, 404 A.2d 8. Second, to recognize life itself as an actionable injury would be inimical to deeply held beliefs that life is more precious than nonlife.

We agree with the New Jersey court that measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life

and nonexistence precludes the action altogether. General damages are certainly beyond computation. They are therefore incapable of satisfying the requirement of Washington law that damages be established with "reasonable certainty." *Dyal v. Fire Companies Adj. Bur., Inc.*, 23 Wash. 2d 515, 521, 161 P.2d 321 (1945). But one of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training. These expenses are calculable. Thus, although general damages are impossible to establish with reasonable certainty, such special damages can be proved. In respect of special damages, therefore, the objection advanced in *Berman v. Allan* is not persuasive.

The second objection advanced by the New Jersey court in *Berman v. Allan* we have already discussed. Suffice it to say here that we do not agree that requiring a negligent party to provide the costs of health care of a congenitally deformed child is a disavowal of the sanctity of human life.

The final element which requires consideration is proximate cause.

The causation issue in a wrongful life claim is whether "[b]ut for the physician's negligence, the parents would have avoided conception, or aborted the pregnancy, and the child would not have existed." Comments, 54 TUL. L. REV. at 491. Some early cases advanced a proximate cause argument based on the fact that the negligence of the physician did not cause the defect from which the plaintiff suffered; rather, the negligence was in failing to disclose the existence of the defect. *E.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 27-28, 227 A.2d 689 (1967). This argument does not convince us. It is clear in the case before us that, were it not for the negligence of the physicians, the minor plaintiffs would not have been born, and would consequently not have suffered fetal hydantoin syndrome. More particularly, the plaintiffs would not have incurred the extraordinary expenses resulting from that condition. There appears to be no reason a finder of fact could not find that the physicians' negligence was a proximate cause of the plaintiffs' injuries.

For these reasons, we hold that a claim for wrongful life may be maintained in this state. We therefore answer the District Court's questions 3 and 4, as follows.

Elizabeth and Christine Harbeson may maintain a wrongful life action. We have held that the physicians' duty to inform the parents of the risks associated with Dilantin extends to the unconceived children. The District Court held that this standard was breached by the Madigan physicians in failing to conduct a literature search. The minor plaintiffs suffer an actionable injury to the extent that they require special medical treatment and training beyond that required by children not afflicted with fetal hydantoin syndrome. They may recover damages to the extent of the cost of such treatment and training. The standard appropriate to the conduct of the physicians is the standard of the "average practitioner." R.C.W. 4.24.290 does not apply to the Harbesons' claim.

BRACHTENBACH, C.J., and DOLLIVER, ROSELLINI, WILLIAM H. WILLIAMS, STAFFORD, DIMMICK, UTTER and DORE, JJ., concur.

Questions and Notes

1. Based on *Harbeson*, what do you think would be the outcome in Washington in a case where the doctor negligently failed to prevent pregnancy, but the parents gave birth to a normal, healthy child? See *McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984).

2. In *Wilson v. Kuenzi*, 751 S.W.2d 741, 744-45 (Mo. 1988), the defendant doctor was sued after the parents gave birth to a child with Down syndrome. The parents claimed that he negligently failed to advise them to obtain an amniocentesis test, which would have afforded them an opportunity to terminate the pregnancy. The court dismissed the claim, holding, "The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor." Would you agree?

3. Minnesota enacted a statute that specifically rejects any claim for wrongful life. MINN. STAT. ANN. § 145.424. See also *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (holding statute constitutional).

4. In Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, [27 DUQ. L. REV. 461](#) (1989), the authors note the use of two other terms, *wrongful conception* and *wrongful pregnancy*, which refer to claims for the pregnancy and delivery of the child, as distinct from the subsequent child-rearing costs. However, the term wrongful birth is often used generically to refer to claims brought by the parents for the birth of a child who, but for someone's negligence, would not have been born.

5. Much of the commentary about the impact of wrongful birth / wrongful life claims has been negative. See, for example, Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 [HARV. C.R.-C.L. L. REV.](#) 141 (2005). One court went so far as to compare the logic of wrongful life claims to the eugenics philosophy of Nazi Germany, which encouraged in some cases required the sterilization or elimination of the "unfit." *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. App. 1999). Is this a fair comparison?

6. Cases involving wrongful birth / wrongful life claims continue to generate scholarly commentary: Thomas A. Burns, *When Life Is an Injury: an Economic Approach to Wrongful Life Lawsuits*, [52 DUKE L.J. 807](#) (2003); Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, [55 ALA. L. REV. 327](#) (2004); Jennifer R. Granchi, *The Wrongful Birth Tort: a Policy Analysis and the Right to Sue for an Inconvenient Child* [43 S. TEX. L. REV. 1261](#) (2002); Katherine Say, *Wrongful Birth-preserving Justice for Women and Their Families*, [28 OKLA. CITY U. L. REV. 251](#) (2003).

3. Bystander Injuries

Introductory Note. As noted earlier, some claims for emotional distress arise from a negligent act toward the plaintiff that doesn't cause physical harm (for example, *Johnson v. State of New York* or *Molien v. Kaiser Foundation Hospitals*). Here,

however, we have a case of severe physical injury to one individual — so severe that it causes a related party (typically a family member) to seek damages for emotional distress. After you have read these cases, you should consider whether such "parasitic" claims are more or less deserving of recovery than those where no physical harm occurs.

DILLON v. LEGG

68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968)

*[Plaintiff was the mother of two girls. While the girls were crossing a street defendant's automobile collided with one of them, killing her; the other girl was physically unhurt. The complaint alleged that plaintiff and the surviving daughter suffered severe emotional shock, with resulting physical injury. The daughter alleged she was within the "zone of danger" —the area where she might have apprehended physical contact from the defendant's automobile — but the mother admitted she witnessed the accident from a place of safety. The trial court granted summary judgment as to the mother's complaint, following the rule announced in **Amaya v. Home Ice**, 379 P.2d 513 (Cal. 1963) that damages for emotional loss could only be recovered where plaintiff was within the zone of danger. The mother appealed.]*

TOBRINER, Justice

* * *

The posture of this case differs from that of *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 Cal. 2d 295, 298, 29 Cal. Rptr. 33, 35, 379 P.2d 513, 515, which involved "fright or nervous shock [with consequent bodily illness] induced solely by ... apprehension of negligently caused danger or injury to a third person" because the complaint here presents the claim of the emotionally traumatized mother, who admittedly was *not* within the zone of danger, as contrasted with that of the sister, who *may* have been within it. The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death

and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. In the second place, to rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery (*Cook v. Maier* (1939) 33 Cal. App. 2d 581, 584, 92 P.2d 434.) The zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact*. At the threshold, then, we point to the incongruity of the rules upon which any rejection of plaintiff's recovery must rest.

We further note, at the outset, that defendant has interposed the defense that the contributory negligence of the mother, the sister, and the child contributed to the accident. If any such defense is sustained and defendant found not liable for the death of the child because of the contributory negligence of the mother, sister or child, we do not believe that the mother or sister should recover for the emotional trauma which they allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma.

We turn then to an analysis of the concept of duty, which, as we have stated, has furnished the ground for the rejection of such claims as the instant one. Normally the simple facts of plaintiff's complaint would establish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal.

The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question —whether the plaintiff's interests are entitled to legal protection

against the defendant's conduct.... It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself.... But it should be recognized that `duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (PROSSER, LAW OF TORTS, *supra*, at pp. 332-333.)

The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards. "It must not be forgotten that `duty' got into our law for the very purpose of combatting what was then feared to be a dangerous delusion (perhaps especially prevalent among juries imbued with popular notions of fairness untempered by paramount judicial policy), viz. that the law might countenance legal redress for all foreseeable harm." (FLEMING, AN INTRODUCTION TO THE LAW OF TORTS (1967) p. 47.)

Indeed, the idea of court-imposed restrictions on recovery by means of the concept of "duty" contrasted dramatically with the preceding legal system of feudal society.¹ In the enclosed feudal society, the actor bore responsibility for any damage he inflicted without regard to whether he was at fault or owed a "duty" to the injured person. Thus, at that time, the defendant owed a duty to all the world to conduct himself without causing injury to his fellows. It may well be that the physical contraction of the feudal society imposed an imperative for maximum procurable

¹ "The gradual development of the law in the matter of civil liability is discussed and traced by the late Sir William Holdsworth with ample learning and lucidity in his HISTORY OF ENGLISH LAW, vol. 8, pp. 446 *et seq.*, and need not here be rehearsed. Suffice it to say that the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent." (*Read v. J. Lyons & Co., Ltd.* (1947) A.C. 156, 171.)

safety and a corresponding absolute responsibility upon its members.

The Industrial Revolution, which cracked the solidity of the feudal society and opened up wide and new areas of expansion, changed the legal concepts. Just as the new competitiveness in the economic sphere figuratively broke out of the walls of the feudal community, so it broke through the rule of strict liability. In the place of strict liability it introduced the theory that an action for negligence would lie only if the defendant breached a duty which he owed to plaintiff. As Lord Esher said in *Le Lievre v. Gould* (1893) 1 Q.B. 491, 497: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

We have pointed out that this late 19th century concept of duty, as applied to the instant situation, has led the courts to deny liability. We have noted that this negation of duty emanates from the twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims. We shall point out why we think neither fear justified.

- 1. This court in the past has rejected the argument that we must deny recovery upon a legitimate claim because other fraudulent ones may be urged.**

* * *

The possibility that some fraud will escape detection does not justify an abdication of the judicial responsibility to award damages for sound claims: if it is "to be conceded that our procedural system for the ascertainment of truth is inadequate to defeat fraudulent claims ..., the result is a virtual acknowledgment that the courts are unable to render justice in respect to them." (*Chiuchiollo v. New England Wholesale Tailors* (1930) 84 N.H. 329, 335, 150 A. 540, 543.)

* * *

- 2. The alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases.**

In order to limit the otherwise potential infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for

injuries to others which to defendant at the time were reasonably foreseeable.

In the absence of "overriding policy considerations ... foreseeability of risk [is] of ... primary importance in establishing the element of duty."...

* * *

We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

The evaluation of these factors will indicate the *degree* of the defendant's foreseeability: obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case.

In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it

contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.

In the instant case, the presence of all the above factors indicates that plaintiff has alleged a sufficient *prima facie* case....

... To the extent that it is inconsistent with our ruling here, we therefore overrule *Amaya v. Home Ice, Fuel & Supply Co.*, *supra*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513.

To deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good reason compels our captivity to an indefensible orthodoxy.

The judgment is reversed.

PETERS, MOSK, and SULLIVAN, JJ., concur.

TRAYNOR, Chief Justice

I dissent for the reasons set forth in *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 Cal. 2d 295, 297-315, 29 Cal. Rptr. 33, 379 P.2d 513. In my opinion that case was correctly decided and should not be overruled.

BURKE, Justice [dissenting]

As recently as 1963 this court, in *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513, thoroughly studied and expressly rejected the proposition (pp. 298-299, 29 Cal. Rptr. 33, 379 P.2d 513) that tort liability may be predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person. As related in our *Amaya* opinion, plaintiff there was the mother of a 17-month-old boy who saw him struck by a truck; accordingly our ruling necessarily included all mothers of small children who observe them being injured. Yet today this court's *Amaya* decision is overruled by an opinion which disdains any discussion whatever of the history and policy of pertinent law painstakingly set forth in *Amaya*.

* * *

It appears to me that in the light of today's majority opinion the matter at issue should be commended to the attention of the Legislature of this state. Five years have elapsed since our *Amaya* decision, during which that body has not undertaken to change the law we there declared. We may presume, therefore, that the limitations upon liability there affirmed comport with legislative views. But if all alleged California tortfeasors, including motorists, home and other property owners, and governmental entities, are now to be faced with the concept of potentially infinite liability beyond any rational relationship to their culpability, then surely the point has been reached at which the Legislature should reconsider the entire subject and allow all interests affected to be heard.

I would affirm the judgment.

Questions and Notes

1. Recall that *Dillon* is a classic example of what might be called a "parasitic" claim for emotional distress. Without invoking the pejorative connotation of that word, it is important to bear in mind that without the related physical injury, Mrs. Dillon would have no claim. These cases are also sometimes called "bystander" cases, because they involve injury to someone "standing by" while someone related to them is injured.

2. The California Supreme Court decided in *Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1 (1985), that the death of a child need not be sudden in order for a mother to have a claim of negligent infliction of emotional distress. Nor did the mother need to have actually witnessed the child's death. However, that same decision refused to allow a claim by the father, who had seen his son well before the boy was in the process of dying of pneumonia, and neglect, in a state hospital. The issue continues to divide the court. In *Thing v. La Chusa*, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), the court denied a recovery to a parent who was not present at the accident scene, see VanDeWeghe, *California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress*, 24 LOY. L.A. L. REV. 89 (1990).

3. In *Ballinger v. Palm Springs Aerial Tramway*, 269 Cal. Rptr. 583 (Cal. App. 1990), plaintiffs were riding on an aerial tramway when a part of the system fell through the car they were riding in and struck a passenger, who later died from her injuries. Although plaintiffs were unrelated to the decedent, and did not suffer any physical injury, they sued the tramway company for their emotional distress. The defendant claimed that they could not recover, based upon *Dillon*. The judge granted summary judgment for the defendants. The plaintiffs appealed. How would you decide the case?

HEGEL v. McMAHON

136 Wash.2d 122, 960 P.2d 424 (1998)

DURHAM, Chief Justice.

Plaintiffs in these consolidated cases seek to recover for emotional trauma they experienced after witnessing the suffering of an injured family member at the scene of an accident. Their claims below were dismissed because the Plaintiffs were not present when the accidents occurred. We reverse and hold that Plaintiffs may recover for emotional distress caused by observing an injured relative at the scene of an accident shortly after its occurrence and before there is substantial change in the relative's condition or location.

Facts

Hegel v. McMahan

Dale Hegel ran out of gas and pulled over to the side of a road. As he poured gasoline into his tank, a passing car struck him and knocked him into a ditch. Dale Hegel's son and parents were driving along the same road and came upon the scene after the accident. They discovered him lying in the ditch, severely injured and bleeding from his nose, ears, and mouth. A few minutes later, Dale Hegel's brother and sister-in-law also came upon the scene and observed him in the ditch.

Dale Hegel suffered severe and permanent head injuries. He and his wife have settled all claims against the driver. The Hegel family members who came upon the accident scene sued the driver on their own behalf for negligent

infliction of emotional distress. They alleged that the sight of Dale Hegel's injured body in the ditch put them in a state of fear and panic and that they continue to suffer from anxiety and shock.

The Defendants moved for summary judgment, asserting that they owed no duty to the Hegels and that the Hegels' interrogatory answers did not allege sufficient objective symptoms of mental distress. The Hegels sought to amend their interrogatory answers to include physical ailments caused by their emotional distress, but the trial court refused to consider the amended answers because they contradicted the Hegels' previous answers and were unsupported by medical evidence. The court then dismissed the case on the grounds that the Hegels failed to show sufficient objective symptoms of emotional distress. The Court of Appeals affirmed the summary judgment, but did not examine the sufficiency of the symptoms. Instead, the court ruled that a plaintiff must actually witness the injury causing accident in order to state a cause of action for negligent infliction of emotional distress. *Hegel v. McMahon*, 85 Wash. App. 106, 112, 931 P.2d 181 (1997). The plaintiffs petitioned for discretionary review in this court.

Marzolf v. Stone

Nineteen-year-old Jeremy Marzolf was killed when his motorcycle collided with a school bus. Jeremy's father, Barton Marzolf, happened upon the scene within 10 minutes of the collision, before emergency crews arrived. He saw his son on the ground, still conscious, but "his leg was cut off, and he was about split in half." Br. of Pet' r at 2. Jeremy died soon afterward.

Barton Marzolf filed suit for wrongful death and negligent infliction of emotional distress against Snohomish County, the school district, and the driver of the bus. The Defendants moved to dismiss the emotional distress claim on the grounds that Mr. Marzolf was not at the scene when the accident occurred. Initially, the trial court denied the motion, but when the Court of Appeals issued its decision in *Hegel*, the County moved for reconsideration. After considering *Hegel*, the trial court granted the motion to dismiss. Marzolf petitioned this court for review and the two cases were consolidated.

Analysis

Bystander negligent infliction of emotional distress claims involve emotional trauma resulting from one person's observation or discovery of another's negligently inflicted physical injury. Washington restricts the class of bystander negligent infliction of emotional distress plaintiffs to those who were present at the scene of the accident, *Gain v. Carroll Mill Co.*, 114 Wash.2d 254, 260, 787 P.2d 553 (1990), and requires that plaintiffs demonstrate objective symptoms of their emotional injury. *Hunsley v. Giard*, 87 Wash.2d 424, 436, 553 P.2d 1096 (1976). The parties ask us to decide whether plaintiffs must actually be at the scene at the time of the accident, and what is necessary to sufficiently allege objective symptoms of their distress.

I.

Washington first recognized a bystander negligent infliction of emotional distress cause of action in *Hunsley*. In that case, the defendant negligently drove her car into the plaintiff's home. The plaintiff was not injured, but after the accident she experienced heart trouble which was later diagnosed as having resulted from severe mental stress. *Hunsley*, 87 Wash.2d at 425, 553 P.2d 1096. The court allowed the claim for negligent infliction of emotional distress, dispensing with the previous limiting requirement that the plaintiff be within the zone of danger. Instead, the court evaluated the claim based on the general tort principles of duty and foreseeability. If the specific harm alleged by the plaintiff was foreseeable to the defendant, he had a duty to avoid it and could be held liable. *Hunsley*, 87 Wash.2d at 434-35, 553 P.2d 1096.

More than 10 years after *Hunsley* first allowed a claim for bystander negligent infliction of emotional distress, the Court of Appeals reasoned that a liability scheme that was limited by foreseeability alone was contrary to public policy. *Cunningham v. Lockard*, 48 Wash. App. 38, 736 P.2d 305 (1987). The plaintiffs in *Cunningham* were the minor children of a mother who was struck by a car. The children neither witnessed the accident, nor came upon the scene shortly after its occurrence. The Court of Appeals held as a matter of law that the children could not recover for emotional distress. The Court of Appeals

explained that *Hunsley's* foreseeability approach did not set an adequate limit to the scope of a defendant's legal liability. "[T]he decision subjects defendants to potentially unlimited liability to virtually anyone who suffers physical manifestations of emotional distress ... Because of this virtually unlimited liability, a boundary establishing the class of persons who can sue must be drawn." *Cunningham*, 48 Wash. App. at 44, 736 P.2d 305. Thus, *Cunningham* held that negligent infliction of emotional distress claims should be limited to claimants who were present at the time the victim was imperiled by the defendant's negligence.

This court revisited the issue in *Gain v. Carroll Mill Co.*, 114 Wash.2d 254, 787 P.2d 553 (1990). In *Gain*, we recognized that *Hunsley's* foreseeability approach might allow for an overly expansive allocation of fault, and acknowledged the need for an outer limit to liability. In *Gain*, the plaintiff learned of his son's death when he viewed television news coverage of the fatal accident. The plaintiff sued the driver of the car that caused the accident. The court held that a plaintiff who viewed an accident on television may not bring a claim for negligent infliction of emotional distress. The court reasoned that such emotional injury is unforeseeable as a matter of law where the family member was not present at the scene of the accident. *Gain*, 114 Wash.2d at 255, 787 P.2d 553.

We agree with the Court in *Cunningham*, that unless a reasonable limit on the scope of defendants' liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one. As one court stated:

It would surely be an unreasonable burden on all human activity if a defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it....'

Gain, 114 Wash.2d at 260, 787 P.2d 553 (quoting *Budavari v. Barry*, 176 Cal. App.3d 849, 855, 222 Cal. Rptr. 446 (1986) (quoting *Scherr v. Hilton Hotels Corp.*, 168 Cal. App.3d

908, 214 Cal. Rptr. 393 (1985))).⁶⁹

Although *Gain* recognized that specific limitations must be placed on the foreseeability standard, the court did not embrace *Cunningham's* rule that a claimant must be present at the time of the accident. Instead, the court balanced the interest in compensating the injured party against the view that a negligent act should have some end to its legal consequences. The court held that mental suffering by a relative "who is not present at the scene of the injury-causing event is unforeseeable as a matter of law." The court later concluded that plaintiffs must be "physically present at the scene of the accident or arrive shortly thereafter. Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law." *Gain*, 114 Wash.2d at 261, 787 P.2d 553.

The significance of the phrase "shortly thereafter" in *Gain* is the center of the controversy in this case. The Court of Appeals below did not give effect to the "shortly thereafter" language. Instead, the court followed the lead of the Court of Appeals in *Cunningham* by holding that only plaintiffs who are present at the accident scene and observe the injury-causing event may recover for emotional distress. *Hegel*, 85 Wash. App. at 112, 931 P.2d 181. In its analysis, the court noted that later decisions have largely "ignored" our language in *Gain* that allows a cause of action to those who arrive shortly after an accident. *Hegel*, 85 Wash. App. at 110, 931 P.2d 181. The Court also referred to recent federal decisions that characterized Washington law as requiring that a plaintiff personally witness the injury or death of a family member in order to recover for negligent infliction of emotional distress. *Hegel*, 85 Wash. App. at 111, 931 P.2d 181 (citing *Consolidated*

⁶⁹ See also Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L.REV. 1513, 1526 (1985) ("Foreseeability proves too much.... Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm."); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553, 114 S. Ct. 2396, 129 L. Ed.2d 427 (1994) ("If one takes a broad enough view, all consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all.").

Rail Corp. v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396, 2407, 129 L. Ed.2d 427 (1994); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir.1994)).

Contrary to the position of the Court of Appeals, *Gain* does not limit negligent infliction of emotional distress claims to those who actually witness the injury-causing event. The Court of Appeals relies on *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993) for the proposition that this court has ignored the "shortly thereafter" language in *Gain*. However, *Fisons* does not involve bystander recovery for emotional trauma caused by witnessing an injured family member at the scene of an accident. *Fisons* is a product liability case and cites to *Gain* only for the principle that emotional distress damages caused by witnessing a third party's injuries are compensable under limited circumstances. *Fisons* repeats *Gain*'s holding that a plaintiff must be present at the scene of the accident in order to recover for emotional distress, but never discusses the specific issue of whether a plaintiff must be at the scene at the time of the accident in order to recover, or whether he may arrive after the accident has occurred. *Fisons*, 122 Wash.2d at 320-21, 858 P.2d 1054.

Likewise, the Court of Appeals placed undue emphasis on *Consolidated Rail* and *Chan*. Although those cases have characterized Washington as requiring a plaintiff to personally witness the injury of a family member, other jurisdictions have characterized Washington as a state that allows recovery where the plaintiff arrives at the scene shortly after the accident. See *Clohessy v. Bachelor*, 237 Conn. 31, 43-44, 675 A.2d 852, 859 (1996); *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 675, 435 S.E.2d 320, 324 (1993) (Meyer, J., concurring in result); see also Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. J. 391, 418 (1996).

We will not ignore the "shortly thereafter" language in *Gain*. Prior to *Gain*, negligent infliction of emotional distress claims were limited only by general tort principles. *Hunsley*, 87 Wash.2d at 434-36, 553 P.2d 1096. *Gain* narrowed the cause of action by requiring a

plaintiff to be present at the accident scene in order to recover. *Gain* did not further restrict liability by mandating that the plaintiff be present *at the time* of the accident, nor did it foreclose a cause of action for a plaintiff who arrives on the scene after the accident has occurred and witnesses the victim's suffering. Furthermore, *Gain* cited as comports with its holding several jurisdictions that allow recovery when the plaintiff arrives shortly after the accident. *Gain*, 114 Wash.2d at 260, 787 P.2d 553 (citing *Nancy P. v. D'Amato*, 401 Mass. 516, 517 N.E.2d 824 (1988); *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Gates v. Richardson*, 719 P.2d 193 (Wyo.1986); *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985)). *Gain*'s choice of authority suggests that the court did not intend to limit recovery to those who actually witness the accident.

A bright line rule that limits recovery for emotional distress to those who witnessed the accident is attractive in its simplicity. However, it draws an arbitrary line that serves to exclude plaintiffs without meaningful distinction. The emotional trauma caused by seeing a loved one injured at an accident scene stems not merely from witnessing the transition from health to injury, but also from witnessing the aftermath of an accident in all its alarming detail. The Wyoming Supreme Court explained in *Gates v. Richardson*, 719 P.2d at 199:

The essence of the tort is the shock caused by the perception of an especially horrendous event.... The kind of shock the tort requires is the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words which are really a continuation of the event. The immediate aftermath may be more shocking than the actual impact.

(Citation omitted.)

Allowing recovery only to those who were present at the time of the injury-causing event creates an arbitrary distinction. *Gain* limited recovery to those plaintiffs who were present at the scene of the accident. We will not further restrict recovery by requiring that a plaintiff actually be present *at the time* of the accident. However, although we must reject artificial lines that serve

only to restrict the number of plaintiffs, not every act that causes harm results in legal liability. *Hunsley*, 87 Wash.2d at 434, 553 P.2d 1096. The challenge is to create a rule that acknowledges the shock of seeing a victim shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim. In his *Gain* dissent, Justice Brachtenbach identified the difficulty in pinpointing the limit to a defendant's liability. "[W]hat does 'shortly thereafter' mean? What magic elapse of time will be the dividing line? Yes, to the plaintiff who arrives 5 minutes later, but no, to the father who arrives 10, 20, or 30 minutes later?" *Gain*, 114 Wash.2d at 266, 787 P.2d 553. An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured.⁷⁰

Other jurisdictions have developed a wide spectrum of rules to define liability for negligent infliction of emotional distress. Alaska has allowed a mother to bring a claim where she saw her injured daughter at the hospital after the accident. *See Beck v. State Dep't of Transp. & Pub. Facilities*, 837 P.2d 105 (Alaska 1992). Maine holds that a defendant is only liable for emotional distress that arises when parents actually witness their child receiving an injury. *See Cameron v. Pepin*, 610 A.2d 279, 284 (Me. 1992). Connecticut and Wyoming have adopted a principled intermediate approach which limits the scope of liability, yet still allows recovery to those plaintiffs who witness their relative's injuries at the scene of an accident. These states recognize a cause of action where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is material change in the attendant circumstances. *See Clohessy v. Bachelor*, 237 Conn. 31, 675 A.2d 852 (1996); *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986).

This rule addresses the concerns over limitless liability by allowing recovery only to the class of claimants who are present at the scene before the horror of the accident has abated. It dispenses with the arbitrary requirement that a plaintiff actually witness the accident, yet preserves the limitation on liability established in *Gain*. The critical factors are the circumstances under which the observation is made, and not any rigid adherence to the length of time that has passed since the accident.

We adopt this approach and hold that a family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location. Applying this rule to the facts of these cases, we conclude that it was improper for the lower courts to dismiss the Plaintiffs' claims for negligent infliction of emotional distress. Because Plaintiffs in both cases were present at the scene, and may have witnessed their family members' suffering before there was a substantial change in the victim's condition or location, their mental distress was not unforeseeable as a matter of law.

II.

The defendants in *Hegel* also challenge the sufficiency of the Hegels' objective symptoms of emotional distress. In order to recover for negligent infliction of emotional distress, a plaintiff's emotional response must be reasonable under the circumstances, and be corroborated by objective symptomology. *Hunsley*, 87 Wash.2d at 436, 553 P.2d 1096. In their original interrogatory answers, the Hegels alleged they felt scared, angry, upset, suffered nightmares, and felt fear and panic. The trial court relied on *Shoemaker v. St. Joseph Hosp. & Health Care Ctr.*, 56 Wash. App. 575, 784 P.2d 562 (1990) and held that these complaints were insufficient to satisfy *Hunsley*'s objective symptomology requirement. In doing so, the trial court implicitly incorporated *Shoemaker*'s rule that objective symptomology requires some sort of physical manifestation of the emotional distress.⁷¹ We disagree.

Shoemaker held that a plaintiff who had sleep disorders, nightmares, tearful outbursts, low

⁷⁰ For example, for purposes of diagnosing posttraumatic stress disorder, a traumatic event is one where a person experiences or witnesses actual or threatened physical injury or death, and has a response that involves "intense fear, helplessness, or horror." *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 428 (4th ed. 1994).

⁷¹ Both parties in this case also appear to equate objective symptomology with physical symptoms of distress.

energy level, and recurrent intrusive memories did not exhibit sufficient objective symptomology. The court stated that emotional distress must be "manifested by objective symptomatology", i.e., "physical symptoms evidencing and resulting from the emotional distress." *Shoemaker*, 56 Wash. App. at 581, 784 P.2d 562 (quoting *Hunsley v. Giard*, 87 Wash.2d at 433, 436, 553 P.2d 1096). However, *Shoemaker* quoted *Hunsley's* reference to physical symptoms out of context. *Hunsley* did not equate objective symptomology with physical manifestations. Instead, the court explicitly stated that it would not rule on the issue of whether physical symptoms were required.

Our decision necessarily is predicated upon the existence of physical symptoms evidencing and resulting from the emotional distress. We say that this is necessarily so because these are the facts of this case. Plaintiff suffered physical heart damage as well as emotional distress. Whether there is liability for emotional distress unmanifested by any physical symptoms must be determined in another case.

Hunsley, 87 Wash.2d at 433-34, 553 P.2d 1096.⁷²

Hunsley's objective symptomology limitation is valuable as corroborating evidence to fend off fraudulent claims. However, uncorroborated allegations of physical manifestations cannot serve to further this goal. Rather, they are the epitome of subjective symptoms: unverified assertions of pain that have not been supported by outside evidence or authoritative testimony.

Requiring physical manifestations of emotional distress severely and irrationally limits the types of symptoms that would be sufficient to prove a claim. Such a requirement would encourage exaggerated pleading and discount the reliability of psychiatric testimony. This approach

has been extensively criticized in other jurisdictions. See *Paugh v. Hanks*, 6 Ohio St.3d 72, 78, 451 N.E.2d 759, 765 (1983) ("[A] rigid requirement which prevents a plaintiff from recovering from serious emotional harm except where a physical injury manifestation has ensued, completely ignores the advances made in modern medical and psychiatric science ..."); *Folz v. State*, 110 N.M. 457, 470, 797 P.2d 246, 259 (1990) (illogical to require as a threshold element the presence of physical injury to manifest the emotional trauma); *Leong v. Takasaki*, 55 Haw. 398, 403, 520 P.2d 758, 762, 94 A.L.R.3d 471 (1974) (physical injury requirement is artificial and should only be used to show degree of emotional distress); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 438 (Me.1982) (proof of physical manifestations of the mental injury is no longer required); *Heldreth v. Marrs*, 188 W.Va. 481, 490, 425 S.E.2d 157, 166 (1992) (emotional distress can be severe and debilitating even absent physical manifestations of the emotional injury).

Restricting recovery to only those plaintiffs who experience some sort of physical ailment may disqualify seriously injured plaintiffs, while doing nothing to restrict fraudulent claims. Serious emotional distress can be diagnosed even in the absence of any physical manifestation, and can be proved with medical and psychiatric evidence. See *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) ("[P]laintiff must show an emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally diagnosed by professionals trained to do so.") (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)); *Lejeune v. Rayne Branch Hosp.*, 556 So.2d 559, 570 (La.1990) ("Compensation for mental pain and anguish over injury to a third person should only be allowed where the emotional injury is both severe and debilitating.... A non-exhaustive list of examples of serious emotional distress includes neuroses, psychoses, chronic depression, phobia and shock.").

We hold that to satisfy the objective symptomology requirement established in *Hunsley*, a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical

⁷² Other courts have not read *Hunsley* to require physical manifestations of emotional distress. See *Lindsey v. Visitec, Inc.*, 804 F. Supp. 1340, 1342-43 (W.D. Wash.1992) ("[T]he objective symptomatology requirement of *Hunsley* is not limited to purely physical manifestations such as gastrointestinal disorders, as defendants assert. The requirement is only that the manifestations be objective in nature. Depression, sleeplessness, loss of weight, and social and professional dysfunction impairment are all objective symptoms.").

evidence.⁷³ This approach calls for objective evidence regarding the severity of the distress, and the causal link between the observation at the scene and the subsequent emotional reaction. Thus, contrary to the holding of the Court of Appeals in *Shoemaker*, nightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient. However, in order for these symptoms to satisfy the objective symptomology requirement, they must constitute a diagnosable emotional disorder.

After the defendants moved for summary judgment, the Hegels attempted to amend their interrogatory answers to further explain their symptomology. The Hegels focused their efforts on presenting physical manifestations of their emotional harm. Given our rejection of the *Shoemaker* standard, we remand the Hegels' case to the trial court for a decision on whether the Hegels should be allowed to amend their pleadings or supplement their discovery in light of our holding.

Conclusion

It is not necessary for a bystander to be present at the time of the injury-causing event in order to state a claim for negligent infliction of emotional distress. A family member may recover for emotional distress if he or she arrives at the scene shortly after the accident before substantial change has occurred in the victim's condition or location. The plaintiff's emotional distress must be reasonable, and the plaintiff must present objective symptoms of the distress that are susceptible to medical diagnosis and proved through qualified evidence.

Both the Hegels and Mr. Marzolf were present at the scene of the accident. The fact that both arrived in time to witness only the suffering, not the infliction of injury on their relatives, does not preclude their claims. Furthermore, the Hegels' emotional symptoms of distress may be sufficient if they can be diagnosed and proved through medical evidence. We remand both cases

to the trial court for further proceedings.

DURHAM, C.J., and DOLLIVER, SMITH, GUY, JOHNSON, MADSEN, ALEXANDER, TALMADGE and SANDERS, JJ., concur.

4. Loss of Consortium

Introductory Note. Like the claims for bystander injuries, suits claiming loss of consortium (the "society" and companionship with another) argue that the injury to one person has caused injuries to someone dependent upon or related to the immediate victim. Whereas the *bystander* claims often involve a claim for the emotional impact caused by observing the injury (claims which can be made even by unrelated parties), in the following cases a related party sues for compensation even where he or she doesn't witness the original injury.

RODRIGUEZ v. BETHLEHEM STEEL CORPORATION

12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669 (1974)

MOSK, Justice

In this case we are called upon to decide whether California should continue to adhere to the rule that a married person whose spouse has been injured by the negligence of a third party has no cause of action for loss of "consortium," *i.e.*, for loss of conjugal fellowship and sexual relations. (*Deshotel v. Atchison, T. & S.F. Ry. Co.* (1958), 50 Cal. 2d 664, 328 P.2d 449; *West v. City of San Diego* (1960), 54 Cal. 2d 469, 475-478, 6 Cal. Rptr. 289, 353 P.2d 929.) As will appear, we have concluded that the reasons for this rule have ceased and that California should join the large and growing majority of jurisdictions which now recognize such a cause of action.

The case is here on an appeal from a judgment of dismissal entered upon the sustaining of general demurrers without leave to amend. From the pleadings and supporting declarations filed by the parties, the following picture emerges.

On May 24, 1969, Richard and Mary Anne

RODRIGUEZ v. BETHLEHEM STEEL CORPORATION

⁷³ We agree with *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) and *Lejeune v. Rayne Branch Hosp.*, 556 So.2d 559, 570 (La.1990) that examples of emotional distress would include neuroses, psychoses, chronic depression, phobia, shock, post traumatic stress disorder, or any other disabling mental condition.

Rodriguez were married. Both were gainfully employed. In their leisure time they participated in a variety of social and recreational activities. They were saving for the time when they could buy their own home. They wanted children, and planned to raise a large family.

Only 16 months after their marriage, however, their young lives were shattered by a grave accident. While at work, Richard was struck on the head by a falling pipe weighing over 600 pounds. The blow caused severe spinal cord damage which has left him totally paralyzed in both legs, totally paralyzed in his body below the midpoint of the chest, and partially paralyzed in one of his arms.

The effects of Richard's accident on Mary Anne's life have likewise been disastrous. It has transformed her husband from an active partner into a lifelong invalid, confined to home and bedridden for a great deal of the time. Because he needs assistance in virtually every activity of daily living, Mary Anne gave up her job and undertook his care on a 24-hour basis. Each night she must wake in order to turn him from side to side, so as to minimize the occurrence of bedsores. Every morning and evening she must help him wash, dress and undress, and get into and out of his wheelchair. She must help him into and out of the car when a visit to the doctor's office or hospital is required. Because he has lost all bladder and bowel control, she must assist him in the difficult and time-consuming processes of performing those bodily functions by artificial inducement. Many of these activities require her to lift or support his body weight, thus placing a repeated physical strain on her.

Nor is the psychological strain any less. Mary Anne's social and recreational life, evidently, has been severely restricted. She is a constant witness to her husband's pain, mental anguish, and frustration. Because he has lost all capacity for sexual intercourse, that aspect of married life is wholly denied to her: as she explains in her declaration, "To be deeply in love with each other and have no way of physically expressing this love is most difficult physically and mentally." For the same reason she is forever denied the opportunity to have children by him—he is, for all practical purposes, sterilized: again she explains, "I have lost what I consider is the fulfillment of my

existence because my husband can't make me pregnant so as to bear children and have a family." The consequences to her are predictable: "These physical and emotional frustrations with no outlet have made me nervous, tense, depressed and have caused me to have trouble sleeping, eating and concentrating." In short, Mary Anne says, "Richard's life has been ruined by this accident. As his partner, my life has been ruined too."

At the time of the accident Richard was 22 years old and Mary Anne was 20. The injuries, apparently, are permanent.

To paraphrase our opening observation in *Dillon v. Legg* (1968), 68 Cal. 2d 728, 730, 69 Cal. Rptr. 72, 74, 441 P.2d 912, 914, "That the courts should allow recovery" to a wife for losses she personally suffers by reason of negligent injury to her husband "would appear to be a compelling proposition." But the pathway to justice is not always smooth. Here, as in *Dillon*, the obstacle is a prior decision of this court; and as in *Dillon*, the responsibility for removing that obstacle, if it should be done, rests squarely upon us.

The point was clearly made by the courts below. Richard and Mary Anne jointly filed an amended complaint against Richard's employer and various subcontractors. In the first cause of action, predicated on his own injuries, Richard prayed for substantial general damages, past and future medical expenses, and compensation for the loss of his earnings and earning capacity. In the second cause of action Mary Anne alleged the consequences to her of Richard's injuries, and prayed for general damages in her own right, the reasonable value of the nursing care she furnishes her husband, and compensation for the loss of her earnings and earning capacity. Defendants filed general demurrers to the second cause of action on the ground that no recovery for any such loss is permitted in California under the authority of *Deshotel v. Atchison T. & S.F. Ry. Co.* (1958), *supra*, 50 Cal. 2d 664, 328 P.2d 449.

When the demurrers came on for hearing the trial court emphasized the rule, recognized in *Deshotel* (*id.*, at p. 669, 328 P.2d 449), that in a wrongful death case a widow can recover damages for the loss of her deceased husband's society, comfort, and protection. The court criticized the contrary rule applicable when, as here, the husband is severely injured but does not die: "I have never been able to justify the law which permitted a

widow to be compensated for the detriment suffered as a result of loss of companionship and so forth, but at the same time won't compensate her for the loss, together with the burden, of somebody made a vegetable as a result of something happening to her husband. I can't see it, but I feel kind of hide bound by the Appellate Court. That is my problem." Addressing Mary Anne's counsel, the court made it clear that it would have ruled in his client's favor but for the precedent of *Deshotel*: "I go along with you, counsel, on your philosophy of the law, as to what the law ought to be. What about the torque in me that is being created by the proposition that I have the expression of the courts on a higher level than this one that I feel duty bound to follow? You say I can blaze a trail. I don't think trial judges are entitled to blaze trails." On its own motion the court then severed Mary Anne's cause of action from that of Richard and sustained the general demurrers thereto without leave to amend, "In order to expedite the determination of the legal issues raised by defendants by a court of higher level than this...." Eventually a judgment of dismissal as to Mary Anne was entered (Code Civ. Proc. § 581, subd. 3), and she appealed.

In affirming the judgment the Court of Appeal likewise indicated its dissatisfaction with the *Deshotel* rule, but correctly deferred to this court for any reconsideration of the doctrine: Presiding Justice Kaus, writing for a unanimous court, stated that "In spite of counsel's eloquent exhortations to the contrary, we must hold that it is up to the Supreme Court to qualify or overrule its decisions. We say this in full recognition of Mary Anne's argument that several Supreme Court cases since *Deshotel* and *West* can be read as undermining the rationale of those holdings." This is a perceptive and accurate reading of our decisions, as we shall explain.

To begin with, we delineate the rationale of *Deshotel* and *West*. Clearly it is not the original common law view, which held that a wife could not recover for loss of her husband's services by the act of a third party for the starkly simple reason that she had no independent legal existence of her own (1 BLACKSTONE, COMMENTARIES, p. *442) and hence had no right to such services in

the first place.¹ That rationale was explicitly rejected in *West*, when the court declined to recognize the husband's common law right to recover for loss of his wife's consortium: "his right," we said, "was based upon the wife's subservient position in the marriage relationship whereas, under present-day law, spouses are generally regarded as equals." (54 Cal. 2d at p. 477, 6 Cal. Rptr. at p. 294, 353 P.2d at p. 934.)²

* * *

As the Massachusetts court observed, "We should be mindful of the trend although our decision is not reached by a process of following

¹ As the Iowa court neatly put it, "at common law the husband and wife were considered as one, and he was the one." (*Acuff v. Schmit* (1956), 248 Iowa 272, 78 N.W.2d 480, 484.)

² Prior to *Deshotel* and *West* the medieval view of the legal identity of husband and wife had been vigorously denounced in *Follansbee v. Benzenberg* (1954), 122 Cal. App. 2d 466, 476, 265 P.2d 183, 189. Holding that a wife who pays for necessary medical services for her negligently injured husband can obtain reimbursement from the tortfeasor who caused the expenses, the Court of Appeal reasoned: "The old common law rule that a wife had no right of action of this character obtained on the theory that the wife's personality merged in that of the husband's, that she had no right to hold property separate and apart from her husband, and had no right to sue in her own name. This hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course. These archaic notions no longer obtain. "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the need of justice for married women." (*Bernhardt v. Perry*, 276 Mo. 612 (208 S.W. 462, 470, 13 A.L.R. 1320).) The legal status of a wife has changed. Her legal personality is no longer merged in that of her husband. A husband has no longer any domination over the separate property of his wife. A wife may sue in her own name without joining her husband in the suit. Generally a husband and wife have, in the marriage relation, equal rights which should receive equal protection of the law."

Despite this declaration the anachronistic theory of the identity of spouses lingered on in other contexts, and was finally buried by the decisions in which this court held that one spouse can sue the other for a negligent or intentional personal tort (*Self v. Self* (1962), 58 Cal. 2d 683, 26 Cal. Rptr. 97, 376 P.2d 65, and *Klein v. Klein* (1962), 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P.2d 70) and that two spouses can be prosecuted for conspiring between themselves to commit a crime (*People v. Pierce* (1964), 61 Cal. 2d 879, 40 Cal. Rptr. 845, 395 P.2d 893).

the crowd." (*Diaz v. Eli Lilly and Company* (Mass. 1973), *supra*, 302 N.E.2d 555, 561.)³ Quantitative at first, the trend took a qualitative leap when the American Law Institute reversed its position on the subject not long ago. Consonant with prior law, section 695 of the first RESTATEMENT OF TORTS, published in 1938, had declared that a wife was not entitled to recover for any harm caused to any of her marital interests by one who negligently injured her husband. In 1969, however, at a time when the weight of authority was still slightly against such recovery—although the trend was running in its favor—the institute adopted a new section 695, declaring in relevant part that "One who by reason of his tortious conduct is liable to a husband for illness or other bodily harm is also subject to liability to his wife for resulting loss of his society, including any impairment of his capacity for sexual intercourse...." (REST. 2D TORTS (Tent. Draft No. 14, Apr. 15, 1969) § 695, adopted May 21, 1969 (Proceedings of American Law Inst. (46th Annual Meeting, 1969) pp. 148-157).)⁴

In these circumstances we may fairly conclude that the precedential foundation of *Deshotel* has been not only undermined but destroyed. In its place a new common law rule has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse. Accordingly, to adopt that rule in California at this time would not constitute, as the court feared in *Deshotel* (50 Cal. 2d at p. 667, 328 P.2d 449), an "extension" of common law liability, but rather a recognition of that liability as it is currently understood by the large

preponderance of our sister states and a consensus of distinguished legal scholars.

* * *

The injury is indirect, the damages speculative, and the cause of action would extend to other classes of plaintiffs.

Under this heading we group three arguments relied on in *Deshotel* which could be invoked against any proposed recognition of a new cause of action sounding in tort. As will appear, each has been refuted by application of fundamental principles of the law of negligence.

First the *Deshotel* court asserted that "Any harm [the wife] sustains occurs *only indirectly* as a consequence of the defendant's wrong to the husband" (italics added; 50 Cal. 2d at p. 667, 328 P.2d at p. 451). The argument was negated 10 years after *Deshotel* in *Dillon v. Legg* (1968), *supra*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912. There the issue was whether a driver who negligently runs over a small child in the street is also liable to the child's mother for emotional shock and resulting physical disorders suffered by the latter when she personally witnessed the occurrence of the accident. Finding such liability, we in effect rejected the argument that the injury to the mother was too "indirect." The critical question, we explained, was foreseeability: "In order to limit the otherwise potential infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable." (*Id.* at p. 739, 69 Cal. Rptr. at p. 79, 441 P.2d at p. 919.) The defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonable dangerous. (*Ibid.*) The foreseeable risk need not be of an actual physical impact, but may be of emotional trauma alone. (*Id.* at pp. 739-740, 69 Cal. Rptr. 72, 441 P.2d 912.) Whether a risk is sufficiently foreseeable to give rise to a duty of care depends on the circumstances of each case, including the relationship of the parties and the nature of the threatened injury. (*Id.* at p. 741, 69 Cal. Rptr. 72, 441 P.2d 912.) We concluded that "In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable

³ The trend of cases allowing the wife's recovery was taken into account in many of the decisions cited in footnote 5, *Ante*. In other contexts, this court has also given weight to similarly strong currents of judicial thinking in our sister states. (See, e.g., *Vesely v. Sager* (1971), *supra*, 5 Cal. 3d 153, 161-162, 95 Cal. Rptr. 623, 486 P.2d 151; *Gibson v. Gibson* (1971), 3 Cal. 3d 914, 922-923, 92 Cal. Rptr. 288, 479 P.2d 648.) And the vast majority of commentators have long supported the movement in favor of recovery for loss of consortium. (See authorities collected in *Gates v. Foley* (Fla. 1971), *supra*, 247 So. 2d 40, 42-43, fn. 2.)

⁴ Section 693 of both the first and second RESTATEMENTS recognizes an identical right of the husband to recover for loss of his wife's consortium, but includes liability for loss of her services as well.

foreseeability does not turn on whether the particular (defendant) as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected." (*Ibid.*)

Applying these rules to the facts alleged, we were of the opinion in *Dillon* that "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." (*Ibid.*) By parity of reasoning, we conclude in the case at bar that one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury. In our society the likelihood that an injured adult will be a married man or woman is substantial,⁵ clearly no less than the likelihood that a small child's mother will personally witness an injury to her offspring. And the probability that the spouse of a severely disabled person will suffer a personal loss by reason of that injury is equally substantial.

* * *

The next rationale of the *Deshotel* court (50 Cal. 2d at p. 667, 328 P.2d at p. 451) was that "the measurement of damage for the loss of such things as companionship and society would involve conjecture since their value would be hard to fix in terms of money." This argument, too, has fared badly in our subsequent decisions. (Although loss of consortium may have physical consequences, it is principally a form of mental suffering. We have full recognized that "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to

determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. (Citation.) In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy." (*Beagle v. Vasold* (1966), 65 Cal. 2d 166, 172, 53 Cal. Rptr. 129, 131, 417 P.2d 673, 675.) "Yet," we emphasized in *Beagle* (at p. 176, 53 Cal. Rptr. at p. 134, 417 P.2d at p. 678), "the inescapable fact is that this is precisely what the jury is called upon to do."

* * *

The third argument of this group set forth in *Deshotel* is that if the wife's cause of action were recognized "on the basis of the intimate relationship existing between her and her husband, other persons having a close relationship to the one injured, such as a child or parent, would likely seek to enforce similar claims, and the courts would be faced with the perplexing task of determining where to draw the line with respect to which claims should be upheld." (50 Cal. 2d at pp. 667-668, 328 P.2d at p. 451.) Here again the answer was subsequently given in *Dillon v. Legg*. In that case it was likewise urged that any cause of action granted to a mother who witnesses her child's injury could also be asserted by other close relatives present at the scene such as siblings or grandparents, thus involving the courts "in the hopeless task of defining the extent of the tortfeasor's liability." (68 Cal. 2d at p. 730, 69 Cal. Rptr. at p. 74, 441 P.2d at p. 914.)

We rejected this argument in *Dillon* on the ground that "the alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases." (*Id.* at p. 731, 69 Cal. Rptr. at p. 74, 441 P.2d at p. 914.) Those guidelines, as noted hereinabove, are the general principles of negligence law limiting liability to persons and injuries within the scope of the reasonably foreseeable risk. "We do not believe that the fear that we cannot successfully adjudicate future cases of this sort, pursuant to the suggested guidelines,

⁵ As of 1972, 74.8 percent of all men in the United States over age 18 were married. During the peak working years of ages 25 to 65, the proportion of married men ranged between 77.8 percent and 89.7 percent. In the case of women the corresponding figures are 68.5 percent for all adult females and 69.5 percent to 87.3 percent for women between the ages of 25 and 65. (Statistical Abstract of the United States (94th ed. 1973) p. 38, table No. 47.)

should bar recovery in an otherwise meritorious cause." (*Id.* at pp. 743-744, 69 Cal. Rptr. at p. 82, 441 P.2d at p. 922.) ...

... That the law might be urged to move too far, in other words, is an unacceptable excuse for not moving at all.

The fear of double recovery and of the retroactive effect of a judicial rule.

In this final group we deal with two *Deshotel* arguments which apply principally to loss of consortium cases. As will appear, the overwhelming majority of decisions since *Deshotel* have established that each of these objections is without substance and can satisfactorily be resolved by procedural means.

First, the *Deshotel* court expressed the concern that "A judgment obtained by a husband after he is injured by a third person might include compensation for any impairment of his ability to participate in a normal married life, and, if his wife is allowed redress for loss of consortium in a separate action, there would be danger of double recovery." (50 Cal. 2d at p. 667, 328 P.2d at p. 451.) Virtually every decision granting the wife the right to recover for loss of consortium since *Deshotel* has considered and rejected this argument (see fn. 5, *Ante*), calling it "fallacious," "fictional," and a "bogey" that is "merely a convenient cliché" for denying the wife her action for loss of consortium. The cases have made it crystal clear that, in the quoted words of *Deshotel*, recovery of damages for impairment of "his" ability to participate in a normal married life does not necessarily compensate for the impairment of "her" ability to participate in that life.

* * *

Nor is the wife's personal loss limited to her sexual rights. As we recognized in *Deshotel* (50 Cal. 2d at p. 665, 328 P.2d at p. 449), consortium includes "conjugal society, comfort, affection, and companionship." An important aspect of consortium is thus the Moral support each spouse gives the other through the triumph and despair of life. A severely disabled husband may well need all the emotional strength he has just to survive the shock of his injury, make the agonizing adjustment to his new and drastically restricted world, and preserve his mental health through the long years of frustration ahead. He will often turn inwards,

demanding more solace for himself than he can give to others. Accordingly, the spouse of such a man cannot expect him to share the same concern for *her* problems that she experienced before his accident. As several of the cases have put it, she is transformed from a happy wife into a lonely nurse. Yet she is entitled to enjoy the companionship and moral support that marriage provides no less than its sexual side, and in both cases no less than her husband. If she is deprived of either by reason of a negligent injury to her husband, the loss is hers alone. "In the light of the foregoing danger of double recovery is not real for presumably the husband is recovering for his own injuries and she is recovering for injury done to herself by the loss of his companionship. There is no duplication, instead, this is an example of a single tortious act which harms two people by virtue of their relationship to each other." (*General Electric Company v. Bush* (1972), *supra*, 88 Nev. 360, 498 P.2d 336, 371.)

* * *

We therefore overrule *Deshotel v. Atchison, T. & S.F. Ry. Co.* (1958), *supra*, 50 Cal. 2d 664, 328 P.2d 449, and *West v. City of San Diego* (1960) *supra*, 54 Cal. 2d 469, 475-478, 6 Cal. Rptr. 289, 353 P.2d 929, and declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party.

McCOMB, Justice (dissenting)

I dissent. I adhere to the view that any change in the law denying the wife recovery for loss of consortium should be left to legislative action. (*Deshotel v. Atchison, T. & S.F. Ry. Co.*, 50 Cal. 2d 664, 669, 328 P.2d 449.)

Questions and Notes

1. Should it matter whether the claimant is related by marriage to the victim? See Cavanaugh, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, [41 HASTINGS L.J. 447](#) (1990); Note, *Elden v. Sheldon* (758 P.2d 982 (Cal.)): *Negligent Infliction*

of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants, 26 CAL. W.L. REV. 175 (1989).

2. "Eileen Dunphy and Michael T. Burwell became engaged to marry in April 1988 and began cohabitating two months later. The couple set a date of February 29, 1992, for their wedding. On September 29, 1990, the couple responded to a friend's telephone call for assistance in changing a tire on Route 80 in Mount Arlington. As Michael changed the left rear tire of the friend's car on the shoulder of the roadway, he was struck by a car driven by defendant, James Gregor. After being struck by the vehicle, his body was either dragged or propelled 240 feet. Eileen, who had been standing approximately five feet from Michael, witnessed the impact, and ran to him immediately. Realizing that he was still alive, she cleared pebbles and blood from his mouth to ease his breathing. She attempted to subdue his hands and feet as they thrashed about, all the while talking to him in an effort to comfort him. The following day, after a night-long vigil at Dover General Hospital, Eileen was told that Michael Burwell had died as a result of his injuries. Since the accident, Eileen has undergone psychiatric and psychological treatment for depression and anxiety. She instituted an action seeking to recover damages for the 'mental anguish, pain and suffering' experienced as a result of witnessing the events that led to the death of her fiancé."

Will Eileen be able to recover? Why or why not? See *Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372, (N.J. 1994).

BORER v. AMERICAN AIRLINES

138 Cal. Rptr. 302, 563 P.2d 858 (1977)

TOBRINER, Acting Chief Justice

In *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669 we held that a married person whose spouse had been injured by the negligence of a third party may maintain a cause of action for loss of "consortium." We defined loss of "consortium" as the "loss of conjugal fellowship and sexual

relations" (12 Cal. 3d at p. 385, 115 Cal. Rptr. at p. 766, 525 P.2d at p. 670), but ruled that the term included the loss of love, companionship, society, sexual relations, and household services. Our decision carefully avoided resolution of the question whether anyone other than the spouse of a negligently injured person, such as a child or a parent, could maintain a cause of action analogous to that upheld in *Rodriguez*. We face that issue today:...

... Plaintiffs, the nine children of Patricia Borer, allege that on March 21, 1972, the cover on a lighting fixture at the American Airlines Terminal at Kennedy Airport fell and struck Patricia. Plaintiffs further assert that as a result of the physical injuries sustained by Patricia, each of them has been "deprived of the services, society, companionship, affection, tutelage, direction, guidance, instruction and aid in personality development, all with its accompanying psychological, educational and emotional detriment, by reason of Patricia Borer being unable to carry on her usual duties of a mother."...

* * *

Plaintiffs point out that courts have permitted recovery of monetary damages for intangible loss in allowing awards for pain and suffering in negligence cases and in sanctioning recovery for loss of marital consortium. The question before us in this case, however, pivots on whether we should recognize a wholly new cause of action, unsupported by statute or precedent; in this context the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, constitutes a strong reason for refusing to recognize the asserted claim. To avoid misunderstanding, we point out that our decision to refuse to recognize a cause of action for parental consortium does not remotely suggest the rejection of recovery for intangible loss; each claim must be judged on its own merits, and in many cases the involved statutes, precedents, or policy will induce acceptance of the asserted cause of action.

* * *

Plaintiffs place particular emphasis on *Dillon v. Legg* (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, which upheld a cause of action for injuries flowing from a mother's emotional trauma

in witnessing the death of her child. We suggested that the cause of action should be sustained whenever the injury was "reasonably foreseeable" (p. 741, 69 Cal. Rptr. 72, 441 P.2d 912), and that one factor to be considered was "whether plaintiff and the victim were closely related." (*Ibid.*) Plaintiffs urge that we follow that paradigm for decision of the instant case.

In *Dillon*, however, we carefully limited our ruling to a case in which the plaintiff suffered physical injury. (68 Cal. 2d at p. 740, 69 Cal. Rptr. 72, 441 P.2d 912.) Subsequent decisions, interpreting our holding in *Dillon*, have refused to recognize a cause of action in a case in which the plaintiff suffered no physical injury himself as a result of witnessing the infliction of injury upon a family member. (*See Krouse v. Graham*, Cal., 137 Cal. Rptr. 863, 562 P.2d 1022; *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal. 3d 889, 892 fn. 1, 103 Cal. Rptr. 856, 500 P.2d 880; *Hair v. County of Monterey*, *supra*, 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639.) Thus *Dillon* and subsequent authority support our decision in this case to deny a cause of action founded upon purely intangible injury.

We therefore conclude that we should not recognize a cause of action by a child for loss of parental consortium.¹

* * *

In summary, we do not doubt the reality or the magnitude of the injury suffered by plaintiffs. We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community. We conclude, however, that taking into account all considerations which bear on this question, including the inadequacy of monetary compensation to alleviate that tragedy, the

¹ The considerations which lead us to reject a cause of action for negligent injury to consortium in a parent-child context do not bar an action for intentional interference with parental consortium. An action for intentional interference with consortium, recognized by precedent in California (*see Rosefield v. Rosefield* (1963) 221 Cal. App. 2d 431, 34 Cal. Rptr. 479) is a relatively unusual tort that presents no danger of multiplication of claims or damages. The ruling, moreover, may serve to deter child stealing and similar antisocial conduct.

difficulty of measuring damages, and the danger of imposing extended and disproportionate liability, we should not recognize a nonstatutory cause of action for the loss of parental consortium.

The judgment is affirmed.

CLARK, RICHARDSON, SULLIVAN (Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council), and WRIGHT (Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council), JJ., concur.

MOSK, Justice, dissenting

I dissent.

Each of the policy arguments which the majority marshal against recognizing the cause of action for loss of consortium in the parent-child relationship was expressly considered and rejected by this court in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669.

First, the majority assert that because deprivation of consortium is an "intangible, nonpecuniary" loss, it is an injury which "can never be compensated." In *Rodriguez*, however, we held that loss of consortium is principally a form of mental suffering, and like all such subjective disabilities, it is compensable in damages. (*Id.* 12 Cal. 3d at p. 401, 115 Cal. Rptr. 765, 525 P.2d 669.) Nor was this new law, as we showed by quoting with approval from earlier decisions of this court.

* * *

The majority reject plaintiffs' claim for a second reason, *i.e.*, that "because of its intangible character, damages for such a loss are very difficult to measure." This merely restates the first reason, and was likewise rejected in *Rodriguez*. The loss here is no more and no less "intangible" than that experienced by Mrs. Rodriguez, whose husband became permanently incapacitated, and yet we held the valuation problem to be difficult but manageable....

* * *

I conclude that there is no escaping the conflict between the reasoning of the majority herein and

the letter and spirit of *Rodriguez*. Yet the majority repeatedly reaffirm the holding of that decision. One can only infer that the majority's true motivation is neither the claimed inadequacy of monetary compensation for this loss, nor the difficulty of measuring damages, nor the danger of disproportionate liability. These are mere window-dressing, designed to lend an appearance of logic and objectivity to what is in fact a purely discretionary exercise of the judicial power to limit the potential liability of common law tort-feasors. The majority suggest their actual incentive earlier in the opinion, when they reason that the victim foreseeably has not only a husband, children, and parents, but also "brothers, sisters, cousins, inlaws, friends, colleagues, and other acquaintances who will be deprived of her companionship. No one suggests that all such persons possess a right of action for loss of (the victim's) consortium; all agree that somewhere a line must be drawn."

I agree that it must, but I cannot subscribe to the majority's *ad terrorem* argument for determining the proper place to draw such a line...

* * *

There is, in short, no valid excuse for denying these children their day in court. Justice,

compassion, and respect for our humanitarian values require that the "line" in this matter be drawn elsewhere.

I would reverse the judgment.

Questions and Notes

1. *Dillon*, *Rodriguez* and *Borer* were decided by the same court. Are they consistent?

2. The treatment of claims for parental consortium continues to vary from jurisdiction to jurisdiction; Ernest J. Szarwark, *Recovery for Loss of Parental Consortium in Non-wrongful Death Cases*, [25 WHITTIER L. REV. 3](#) (2003); Radensky, *The Child's Claim for Loss of Parental Consortium — the Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)*, 17 W. ST. U.L. REV. 277 (1990).

3. If you were writing a statute to codify the computation of damages in personal injury actions, what rule(s) would you adopt with respect to recovery by parties who either witness accidents or are related to injury victims?

§ C. The Size of Damage Awards

1. How Much is Too Much (or Too Little)?

FORTMAN v. HEMCO, INC.

211 Cal. App. 3d 241, 259 Cal. Rptr. 311 (1989)

Arleigh M. WOODS, Presiding Justice

[Nichole Fortman, a minor, sustained permanent and extensive injuries when she was ejected from her parents' jeep after inadvertently unlatching the passenger door while the car was in operation. The door, which was rear hinged and front opening, caught the wind and flew open ejecting Nichole, who had snagged her sleeve on the door handle. She fell to the street and was run over by another vehicle. In her lawsuit Nichole alleged that the jeep door was defective by reason of being rear hinged and front opening and because of its use of exposed door handles. The door was part of a fiberglass jeep top sold to jeep owners as an after-market product.¹

The liability theory applied in this case is that of strict liability. The main liability issue discussed is: Did Hemco's participation in the production of the rear-hinged, front-opening doors (which were determined to be defective) on the jeep contribute to the overall manufacturing enterprise of the jeep doors? The sub-issues that determine this question include Hemco's making of the mold for the jeep top and doors, the use of exposed, nonrecessed interior door handles, and the participation of Ronald Hill, the president of Hemco. The court answered "yes" to the principal issue and declared Hemco strictly liable.]

* * *

III

A

Hemco makes a number of arguments regarding the propriety of the damages that were awarded to Nichole. Before reaching those arguments it is necessary to set forth the evidence

relevant to the damages issue.⁹

The record reveals that the injuries that Nichole sustained from the accident are permanent and catastrophic.

Dr. William Kneeland, a board certified pediatric neurologist, testified to her injuries and future medical expenses. Immediately after the accident, she was rushed from the scene to a nearby hospital where she remained in a coma for four months. Dr. Kneeland began to treat Nichole five weeks later. Dr. Kneeland was brought in because of Nichole's continuing coma and because she was experiencing convulsions. At the time he first saw her she was being treated by a number of doctors for her various injuries: an orthopedic doctor for broken bones, an oral surgeon for broken jaw and facial bones, a urologist for kidney damage, and a pulmonary specialist for lung damage. She required mechanical ventilation in order to breath and had undergone a tracheotomy.

Dr. Kneeland's examination of Nichole revealed significant brain injury, specifically to the cerebral hemispheres of her brain and to her spinal cord. X-rays also showed atrophy, a shrinkage of the brain, which is an irreparable condition. Nichole underwent a craniotomy to relieve pressure from fluids that had collected in her brain.

At the time of her release, Nichole was still comatose. When she eventually regained consciousness, she was, and is, a paraplegic. She has no bowel or bladder function. She suffers from scoliosis, and must wear a body brace. To prevent seizures she takes phenobarbital, and macrodantin to prevent urinary tract infections. At some point she may require a colostomy.

As a result of the severe damage to her brain, Nichole will function at a five-year-old's intellectual level for the rest of her life. For awhile she suffered cortical blindness, a condition in which the brain is unable to recognize an object that the eyes see. Even now she has perceptual

¹ The Fortmans had purchased their jeep second hand from a private party.

⁹ Hemco failed to set forth an account of the evidence to support its claim of excessive damages. Such failure can result in the argument being deemed waived. (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal. 2d 343, 356, 282 P.2d 23.) Nonetheless, we will consider Hemco's argument in the interests of justice.

problems and is sometimes unable to identify objects correctly.

Nonetheless, given appropriate care, Nichole will have a normal life expectancy which, at the time of trial, was estimated to be 70.9 years. She will never be self-sufficient, however, and will incur lifetime expenses for nursing and medical care and for therapy. Dr. Kneeland estimated that, in 1985 dollars, this care would cost \$180,895 per year.

The largest single component of this expense is 16-hour-a-day nursing care estimated by Dr. Kneeland to cost \$125,000 per year. Additionally, Dr. Kneeland testified that Nichole would require physician services for the rest of her life from a range of doctors, including a neurologist, a pediatrician, an orthopedic surgeon and an ophthalmologist. Extensive and varied laboratory services will also be required. Further expenses will also be incurred for educational and therapeutic services, including physical, occupational and speech therapy. Dr. Kneeland testified that Nichole would require a specially-equipped van, wheelchairs and other medical appliances over the course of her life. Finally, she will also require medicines.

Peter Formuzis, an economist, testified to the present cash value of Nichole's future expenses based, in part, upon Dr. Kneeland's figures. Using an actuarial table showing Nichole's life expectancy to be 70.9 years he calculated the present cash value of her future medical expenses to be \$16 million. He also calculated her lifetime lost wages to be between \$884,078 and \$1,132,599.

Hemco did not put on evidence regarding damages.

The jury's subsequent award for economic losses was \$17,742,620. Noneconomic damages were assessed at \$6 million.

B

Hemco argues that the trial judge failed to make an independent assessment of the evidence relating to damages before denying Hemco's new trial motion. This contention is utterly without substance.

Code of Civil Procedure section 657 provides in part: "A new trial shall not be granted ... upon the ground of excessive or inadequate damages,

unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury should have reached a different verdict or decision." Accordingly, in deciding whether to grant a new trial "the trial court must independently weigh the evidence and assess whether it sufficiently supports the jury's verdict. [Citations.]" (*People v. Capps* (1984) 159 Cal. App. 3d 546, 552, 205 Cal. Rptr. 898, fn. omitted.) As a corollary to this rule, the trial court's ruling "is entitled to great weight" on appeal. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal. App. 3d 374, 414, fn. 28, 196 Cal. Rptr. 117.)

Hemco relies on *Lippold v. Hart* (1969) 274 Cal. App. 2d 24, 78 Cal. Rptr. 833, a rare reversal of a trial court's denial of a new trial. The judge in *Lippold* denied the motion for new trial in a personal injury action even though he believed the verdict was unfair and questioned the defendant's credibility as a witness. His reason for denying the motion was his belief that he was bound by the jury's unanimous verdict. On appeal, his ruling was reversed. The appellate court stated that the trial court is not bound by the jury's verdict but must "reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury 'clearly should have reached a different verdict' [citations]." (*Id.*, at pp. 25-26, 78 Cal. Rptr. 833.)

Hemco would liken the actions of the judge in *Lippold* to that of the judge in the case before us, but there is no comparison.

Here, the trial judge conducted the trial in an informed, intelligent and scrupulously unbiased manner. On the specific issue of his handling of the new trial motion, it is quite clear that he was well aware of his duty to independently assess the evidence. Indeed, in reference to the liability issue, the judge expressly stated that he had "reviewed the evidence" and made his "own independent assessment" of whether it supported imposition of liability. It is simply not plausible that the judge could have discharged his duty properly with reference to the liability issue but not damages. The fact that he did not make explicit reference to the independent assessment standard in passing upon damages is not determinative. On appeal, where the record is silent we presume that an

official duty has been correctly performed. (*People v. Mack* (1986) 178 Cal. App. 3d 1026, 1032, 224 Cal. Rptr. 208; Evid. Code, § 664.)

Equally unconvincing is Hemco's citation to a remark by the trial judge that he was "limited by the evidence at trial" in ruling on the new trial motion. This observation is absolutely correct. A trial judge is limited to a review of the evidence at trial and, as this judge recognized, cannot be guided by personal bias or belief. This remark in no way shows that he failed to independently assess the evidence. Rather, the remark reveals that he had performed his function fairly and impartially and determined there was no rational basis in the evidence to warrant a new trial on damages. We accord this determination great weight as we approach Hemco's remaining arguments.

C

Hemco maintains that the award of damages was excessive. It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may have been presumed to have been the result of passion or prejudice. Then the reviewing court must act. (*Bertero v. National General Corp.* (1974) 13 Cal. 3d 43, 64, 118 Cal. Rptr. 184, 529 P.2d 608; *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal. App. 3d 709, 727, 236 Cal. Rptr. 633.) The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive "is entitled to great weight" because it is bound by the "more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule..." (*Hilliard v. A.H. Robins Co.*, *supra*, 148 Cal. App. 3d at p. 414, fn. 28, 196 Cal. Rptr. 117.) All presumptions favor the trial court's determination (*Fagerquist v. Western Sun Aviation, Inc.*, *supra*, 191 Cal. App. 3d at p. 727, 236 Cal. Rptr. 633), and we review the record in the light most favorable to the judgment (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927, 148 Cal. Rptr. 389, 582 P.2d 980).

In light of these rules we reject Hemco's attack on the substantiality of the evidence to support that portion of the jury's award of \$17,742,620 attributable to Nichole's economic

losses.¹⁰ Hemco attacks the testimony of economist Formuzis, claiming that his reliance upon Dr. Kneeland's estimate of Nichole's medical expenses was improper because Dr. Kneeland had no sufficient basis for estimating those costs. Hemco's argument is more rhetorical than real and amounts to a belated attack on the credibility of Nichole's witnesses. As we previously observed, however, it is not our function to weigh credibility. (*Hilliard v. A.H. Robins Co.*, *supra*, 148 Cal. App. 3d at p. 414, fn. 23, 196 Cal. Rptr. 117.)

Nor is Hemco's reliance on *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 234 Cal. Rptr. 630, persuasive insofar as it purports to support Hemco's argument that Formuzis's reliance on Dr. Kneeland's estimations was improper. The Pacific Gas decision involved expert testimony on the noel issue of the value of storage rights for underground reservoirs of gas. In that decision the record revealed that the plaintiff's expert disregarded pertinent information and fabricated information without a factual basis to arrive at a vastly overinflated valuation of those storage rights. (*Id.*, at pp. 1128-1134, 234 Cal. Rptr. 630.)

Nothing comparable occurred in the case before us. There was nothing novel in the medical or rehabilitative services which Dr. Kneeland testified (orally and by written statement) Nichole would require. Nor did Hemco challenge the veracity of Dr. Kneeland's cost estimation or the manner by which it was derived. Hemco put on no evidence of its own on this issue. Only now, on appeal, does Hemco find reason to quarrel with those assumptions. It does so in the wrong forum.

Addressing a similar contention, the court in *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230, 243, 116 Cal. Rptr. 733, said: "The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants ... might better have been presented to the jury in opposition to

¹⁰ Actually, Hemco's challenge goes only to future medical expenses, leaving unchallenged that evidence which goes to lost future wages.

respondents' expert testimony." In our case, too, the testimony which we set forth in part III A is substantial evidence supporting the award for Nichole's future medical expenses.

* * *

The judgment is affirmed. Nichole to recover her costs on appeal.

Questions and Notes

1. Note also that when a physician commits malpractice after an auto accident, she is not liable for whatever damage was already present (no causation). Instead, she is liable only for the damage she caused; for that "second" injury she will be jointly and severally liable with the original tortfeasor, subject to an allocation by the jury of their relative proportions of fault. Suppose, for example, that a negligent driver strikes the plaintiff, causing an injury that, with proper medical care, would have been valued at \$100,000. However, negligent medical care turns it into a \$200,000 injury. If the jury finds that both the physician and the driver are equally to blame for the worsening of the plaintiff's condition (the driver for causing the plaintiff to need medical care in the first place and the physician for failing to deliver good medical care), then the cost of the total injury should be borne (assuming both the driver and the doctor have deep enough pockets) in the ratio of \$150,000 for the driver and \$50,000 for the doctor.

FEIN v. PERMANENTE MEDICAL GROUP

175 Cal. Rptr. 177 (1981)

REYNOSO, Associate Justice

The constitutionality of major portions of the Medical Injury Compensation Reform Act (MICRA) is challenged.

[Plaintiff suffered chest pains and was negligently cared for by defendant medical group. - ed.]

* * *

The jury found in favor of plaintiff and entered special findings on the amount of

damages. Noneconomic damages, to compensate for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and other intangible damages from the time of injury until plaintiff's death were found to be \$500,000. Additional damages included lost wages until the time of trial in the sum of \$24,733; present cash value of future lost wages as a result of the reduction of plaintiff's life expectancy totalling \$700,000; and present value of future medical expenses, amounting to \$63,000.

Pursuant to Civil Code section 3333.2, the trial court ordered that the award of damages for noneconomic losses be reduced from \$500,000 to \$250,000. And following Civil Code section 3333.1, the trial court ordered that the award for lost wages to the time of trial be reduced by collateral source disability payments of \$19,302.83, leaving an award of \$5,430.40. The court further ordered that defendant pay future medical expenses which are not covered by medical insurance provided by plaintiff's employer up to \$63,000. The court declined, however, to order that future lost wages and general damages awarded by the jury be paid periodically pursuant to Code of Civil Procedure section 667.7; it ruled that the section is directory and should not be applied to the case at bench. Both parties appeal.

I

We are called upon to determine the constitutionality of several provisions of MICRA. These sections deal with periodic payment of the judgment (Code of Civ. Procedure, § 667.7),¹ applicability of collateral benefits to offset damages

¹ Code of Civil Procedure section 667.7 provides in relevant part:

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages.

(Civ. Code § 3333.1),² and the \$250,000 maximum recovery for noneconomic damages (Civ. Code § 3333.2) in personal injury actions against health providers.³ The attack is focused on the asserted unconstitutionality of classifications created by the Act. It is incumbent on us, therefore, to be respectful of the role courts play in such a review.

The power to legislate, needless to say, is in the Legislature, not the courts. Courts do not substitute their social and economic beliefs for the judgment of the legislative bodies. (*Ferguson v. Skrupa* (1963) 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, 97.) "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the

legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, " (*Berman v. Parker* (1954) 348 U.S. 26, 32, 75 S. Ct. 98, 102, 99 L. Ed. 27, 37.) The California Supreme Court has enunciated the same concept: "Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations." (*Lockard v. City of Los Angeles* (1949) 33 Cal. 2d 453, 461-462, 202 P.2d 38.)

With the above principles in mind, we turn to the constitutional attack on the legislation.

Plaintiff assails the constitutionality of selected provisions of MICRA on the following grounds: (1) MICRA violates the equal protection clause of the United States and California Constitutions; (2) MICRA deprives plaintiff of due process of law; (3) MICRA violates the right to trial by jury and (4) the Act is unconstitutionally vague and uncertain.

The provisions of MICRA which plaintiff attacks involve three changes affecting plaintiffs who prevail in medical malpractice suits against health care providers. Civil Code section 3333.1 abrogates the "collateral source rule" in such suits. (*See Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 13, 84 Cal. Rptr. 173, 465 P.2d 61, for a statement of the rule.) Civil Code section 3333.2 limits awards for noneconomic or nonpecuniary damages to \$250,000. Finally, under Code of Civil Procedure section 667.7, awards for future losses may be ordered to be paid in periodic installments rather than a lump-sum. Plaintiff argues that these sections cannot be shown to be a rational method of dealing with the purported "crisis" which spawned their enactment.

A. The Equal Protection Argument

We first address the assertion by plaintiff that the above provisions of the Act violate the equal protection clauses of both the federal and state Constitutions. In making this argument, plaintiff asserts that the Act unlawfully discriminates against

² Civil Code section 3333.1 states:

(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

³ Civil Code section 3333.2 provides:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

plaintiffs who are victims of medical malpractice, by setting up arbitrary and unreasonable classifications which bear no substantial relation to the object of the legislation.

As a foundation to his argument that the legislation at issue is arbitrary and unreasonable and thus violative of equal protection, plaintiff seeks to show that the alleged "crisis" pursuant to which the legislation was enacted was largely fabricated. This "crisis," plaintiff maintains, was brought about, not by increasing medical malpractice suits and verdicts, but by stock market losses incurred by insurance companies. Hence, he contends that there is and was no legitimate state purpose to sustain the Act.

In 1975, a special session of the Legislature was called by the governor to grapple with the problem of increasing medical malpractice insurance premiums. Upon enacting MICRA, the Legislature proclaimed: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, Second Ex. Sess., ch. 2, § 12.5, p. 4007.)

Plaintiff urges us to reconsider the Legislature's findings and to declare that there was no health care crisis. In making this argument plaintiff cites various published articles and studies, and has appended certain articles to his brief. Defendant responds that a crisis did exist, and in support of that argument cites published articles to that effect. Amicus curiae have cited additional articles and appended texts to their briefs to support the Legislature's finding.

In making this request, plaintiff asks the court to assume a role which is not ours to assume. "A court cannot declare legislation invalid because it disagrees with its desirability." (*Werner v.*

Southern Cal. etc. Newspapers (1950) 35 Cal. 2d 121, 130, 216 P.2d 825.) Rather, our role is limited to a determination of whether the legislation is constitutional. (*See Lockard v. City of Los Angeles* (1949) 33 Cal. 2d 453, 461, 202 P.2d 38.)

In assessing the constitutional validity of the Act, our initial inquiry concerns the appropriate standard of review. California courts, together with the U.S. Supreme Court, employ the two-tiered standard of review where statutes are attacked upon equal protection grounds. (*See D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10.) In cases involving suspect classifications such as race or sex, or affecting fundamental interests that are explicitly or implicitly guaranteed by the Constitution (*i.e.*, voting rights or education), the "strict scrutiny" test is applied (*Hawkins v. Superior Court* (1978) 22 Cal. 3d 584, 592, 150 Cal. Rptr. 435, 586 P.2d 916). Under this standard, the courts conduct an "active and critical analysis" of the controverted classification. (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 597, 96 Cal. Rptr. 601, 487 P.2d 1241.) The state must sustain its burden of establishing "'not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.'" (Citations.)" (*Ibid.*) In all other cases, such as those involving economic regulation or social welfare legislation "in which there is a 'discrimination' or differentiation of treatment between classes or individuals," the traditional standard of review is employed. (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal. 3d at p. 16, 112 Cal. Rptr. 786, 520 P.2d 10.) This standard simply requires that "distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." (*Westbrook v. Mihaly* (1970) 2 Cal. 3d 765, 784, 87 Cal. Rptr. 839, 471 P.2d 487; *D'Amico v. Board of Medical Examiners, supra*, 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10; *Cooper v. Bray* (1978) 21 Cal. 3d 841, 846, 148 Cal. Rptr. 148, 582 P.2d 604.)

It is the latter "rational relationship" standard we now apply to review the constitutionality of MICRA pursuant to plaintiff's equal protection challenge. Clearly no "suspect classification" or fundamental interest is here involved which would subject the statute to a higher level of judicial scrutiny. (*See Brown v. Merlo* (1973) 8 Cal. 3d 855, 862, 106 Cal. Rptr. 388, 506 P.2d 212: the

right to sue for negligently inflicted personal injuries is not a fundamental interest.)

Plaintiff contends that the provisions of MICRA limiting the amount of recovery in an action against a health care provider and authorizing periodic payment of the judgment deny him the right to a jury trial and thus must be considered under the "strict scrutiny" test of equal protection. We reject this contention. Plaintiff's argument fails to consider the distinction between legislative acts and judicial acts. It is the province of the Legislature to make general rules and the province of the courts to apply the general rule to a state of facts. (*Smith v. Strother* (1885) 68 Cal. 194, 197, 8 P. 852. See also *Marin Water etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 712, 154 P. 864.) It is within the power of the Legislature to create and abolish causes of action and to determine a remedy which will be provided in a given set of circumstances. (See *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal. 2d 720, 723, 192 P.2d 916.) In enacting Civil Code section 3333.2 and Code of Civil Procedure section 667.7, the Legislature has performed a function within the ambit of this authority. In doing so, it has not denied the right to a jury trial to determine the factual issues in the case.

Therefore, we deem the "rational basis" test the correct standard to apply. Plaintiff contends that MICRA fails to satisfy this test. We disagree. Under that standard wide discretion is vested in the Legislature in making a classification. Further, the statute is imbued with a presumption of constitutional validity (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal. 3d 719, 739, 100 Cal. Rptr. 301, 493 P.2d 1165; *Cooper v. Bray, supra*, 21 Cal. 3d 841, 846, 148 Cal. Rptr. 148, 582 P.2d 604), and the party challenging it bears the burden of proving it invalid. (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal. 2d 228, 233, 18 Cal. Rptr. 501, 368 P.2d 101.) A distinction is not arbitrary if any set of facts may be reasonably conceived in its support.

After applying the proper standard to this case we cannot disturb the Legislature's finding that a health care crisis did exist. The sum total of the articles on the question submitted by the parties to this litigation establish that the question cannot be said to be one where there may be no difference of opinion or which is not debatable. Indeed, the issue appears to be one which is widely debated

and subject to substantial divergence of opinion. In such circumstances it is for the Legislature and not the courts to determine whether the exercise of the state police power is warranted.

We likewise decline to hold that the "crisis" is past and that the legislation is therefore of no continued validity. When the Legislature has determined that a need for legislation exists it is also for the Legislature to determine whether the need has passed and the legislation should be repealed. Moreover, everything submitted in support of the need for legislation indicates that the "crisis" was not of a sudden nature, but was built up over an extensive period of time. As the Joint Legislative Audit Committee stated in its report to the Legislature: "It is apparent from a close reading of the report that harbingers of the present 'malpractice crisis' have been evident for years to the Department of Insurance." Under such circumstances the Legislature could well conclude that continued application of its reform act is necessary to prevent recurrence of the crisis.

Moreover, we cannot rule, as plaintiff requests, that the means chosen by the Legislature were irrational and arbitrary responses to the perceived crisis. The crisis which MICRA was designed to relieve was in the health care industry. Indicia of the problem included significantly increasing numbers of suits against health care providers and increasing settlements and awards in those suits, projected losses related to malpractice insurance, a decrease in the number of companies willing to provide malpractice insurance, and skyrocketing costs of such insurance. The Legislature could reasonably determine that the elimination of the collateral source rule, limitation of awards for nonpecuniary damages, and the payment of damages by periodic installments over the period during which the damages would be incurred would have the effect of reducing the costs of insuring health care providers without depriving the injured party of provision for his needs. Whether this is the method we would have chosen to deal with the situation is irrelevant so long as it is not a constitutionally defective method.

Under such circumstances, the legislative decision to focus its reform efforts upon lawsuits against health care providers rather than upon tort actions in general bore a rational relationship to the state purpose involved in the legislation and cannot be said to be arbitrary.

Thus, we reject plaintiff's attack on equal protection grounds and uphold the challenged provisions of the Act which limit plaintiff's recovery of noneconomic losses, restrict application of the collateral source rule, and provide for periodic payments of future damages.

B. Due Process

Plaintiff contends that Code of Civil Procedure section 667.7 of MICRA, providing for periodic payment of the judgment, denies him due process in arbitrarily depriving him of a property right. He argues further that the section fails to provide for additional care should plaintiff's condition worsen, and that these burdens are not imposed upon other similarly situated plaintiffs.

We agree with the statement that a personal injury judgment cannot be taken away arbitrarily. However, Code of Civil Procedure section 667.7 does not deprive plaintiff of his judgment; it merely changes the form the award takes. Plaintiff has no constitutional property right or interest in the manner of payment for future damages. Except as constitutionally limited, the Legislature has complete power to determine the rights of individuals. (*Modern Barber Col. v. Cal. Emp. Stab. Com.*, *supra*, 31 Cal. 2d 720, 726, 192 P.2d 916.) It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights. (*Ibid.*) It has consistently been held that the Legislature has the power to abolish causes of action altogether. (*Werner v. Southern Cal. etc. Newspapers*, *supra*, 35 Cal. 2d, at p. 126, 216 P.2d 825; *Langdon v. Sayre* (1946) 74 Cal. App. 2d 41, 43-44, 168 P.2d 57.)

Therefore, in view of this authority, the Legislature was justified in imposing the challenged limitations upon plaintiff's right of recovery. Further, in light of the fact we have determined that MICRA satisfies constitutional requisites in creating classifications bearing a rational relation to the state goal, we reject plaintiff's averment that the Act arbitrarily denies him due process of law.

C. Right to Jury Trial

Plaintiff argues that Code of Civil Procedure section 667.7 impermissibly deprives him of the constitutional right to jury trial since it requires the

judge to determine the dollar amount of periodic payments. We disagree. Plaintiff's right to jury trial was strictly observed in this instance, and we see no reason to believe other cases will differ in safeguarding this important right. The jury in this case heard evidence as to the facts, made findings on those facts and decided the amount of damages to be awarded. Section 667.7 merely requires that at least a portion of the judgment payments be made on a periodic basis. We do not find this to be an unwarranted compromise or curtailment of the jury trial to which plaintiff was entitled.

* * *

Questions and Notes

1. Would you have voted for MICRA? Why or why not? Was it an appropriate response to cases of this type?

2. Should MICRA's limits on damages be imposed in areas other than medical malpractice? Why or why not?

3. One recurring complaint by health care providers is the compensation provided by the contingent fee system. Recent empirical research sheds some light on the issue: Lester Brickman, *Effective Hourly Rates of Contingency-fee Lawyers: Competing Data and Non-competitive Fees*, [81 WASH. U. L.Q.](#) 653

3. Tort reform legislation similar to MICRA has been proposed in virtually every state, with an overwhelming number adopting some form of "reform." From 1985 to 1987 "forty-two legislatures have enacted some form of tort reform legislation." Priest, *The Current Insurance Crisis and Modern Tort Law*, [96 YALE L.J.](#) 1521, 1587 (1987). Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, [36 IND. L. REV.](#) 645 (2003). Courts are divided on the constitutionality of statutes which reduce defendants' liability for negligently caused injuries. For a survey of cases considering these issues, see Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?*, [40 ALA. L. REV.](#) 533 (1989).

4. In *Sofie v. Fibreboard*, 112 Wash. 2d 636, 771 P.2d 711 (1989), the Washington Supreme Court declared unconstitutional a legislative restriction on the award of non-economic (pain and suffering) damages. The court found that the state constitution's guarantee that the "right of trial by jury shall remain inviolate" was breached by limiting noneconomic damages to a formula based on the plaintiff's life expectancy.

2. Collateral Source Benefits

SCHONBERGER v. ROBERTS

456 N.W.2d 201 (Iowa 1990)

HARRIS, J.

When the legislature, in two separate statutes, prohibits the application of a rule of common law we are clearly obliged to yield to the mandate. The question here is whether we should give the mandate double effect. This appeal calls for interpretation of an Iowa statute which is in part designed to deal with a situation already controlled by another statute. A literal interpretation of the latter statute, in view of the prior one, would call for doubling an intended reduction in tort recoveries. We believe the goal of the two statutes should be fully realized, but only once. We affirm the trial court.

On July 22, 1987, the plaintiff, Rodney Schonberger, was driving west on U.S. Highway 30 in Carroll, Iowa. He had picked up his employer's mail and was headed to work when an accident occurred. Schonberger was preparing to turn into his employer's parking lot when he was struck by the defendant, Carroll John Roberts, who was driving a truck owned by defendant Buck Hummer Trucking, Inc.

As a result of the accident Schonberger was unable to return to work for three and one-half weeks. He suffered injuries to his neck, back, and knee. His medical bills totaled \$7625.40 at the time of trial. These expenses, as well as future medical expenses, are being reimbursed as a part of the workers' compensation benefits Schonberger is receiving. Schonberger's injuries were permanent, and he will continue to incur medical expenses as a result of the accident.

Schonberger then brought this tort suit for his injuries which resulted in a jury verdict in his favor. The jury assessed eighty percent of the negligence to Roberts and twenty percent to Schonberger. It determined past damages were \$18,000 and that future damages were \$115,000. The jury also found that Schonberger was not wearing a seat belt and determined the award should be reduced an additional two percent.

Although defendants assert the damage awards were excessive—a matter we later address—the preeminent issue in the case is defendants' challenge to a trial court ruling refusing to admit evidence. Defendants sought to introduce evidence regarding the payment of medical bills and other workers' compensation benefits to Schonberger. The trial court ruled the evidence inadmissible. This ruling is defendants' first assignment of error on appeal.

Since 1913 an Iowa statute, now Iowa Code section 85.22 (1989), has provided a right of indemnity to workers' compensation employers (or their insurers) for amounts paid under the Act from recoveries realized by the worker in tort actions for the same injuries. Without doubt Schonberger's workers' compensation insurer is entitled to be compensated from his recovery in this suit for any amounts paid to or for him on account of this injury. *See, e.g., Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 531-32 (Iowa 1986).

In 1987 the General Assembly amended the comparative fault Act, to include a special provision, Iowa Code § 668.14,¹ also aimed at

¹ Section 668.14 provides:

668.14 Evidence of previous payment or future right of payment.

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family. [Ed. Note: Apparently the worker's compensation program at issue here was privately run and therefore did not fall within this exception.]

(continued...)

prohibiting an injured worker to recover twice for the same industrial injury. Both section 85.22 (in a limited situation) and section 668.14 (in a broader sense) are limitations on the collateral source rule, a principle long recognized as a part of our common law. Under the collateral source rule a tortfeasor's obligation to make restitution for an injury he or she caused is undiminished by any compensation received by the injured party from a collateral source. *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938).

The trial court's rejection of the proffered evidence was in reaction to the obvious inconsistency between compelling the injured worker to pay back his benefits from his recovery and at the same time have the jury reduce his recovery because of them. To remedy this inconsistency the trial court rested its exclusion of evidence of workers' compensation benefits on Iowa rule of evidence 402 (all irrelevant evidence is inadmissible). Schonberger argues in support of the ruling in part by contending that the workers' compensation Act is, because of its design and regulated status, a state program. State programs are expressly exempted from the sweep of section 668.14.

I. There are well-recognized limits to the extent to which courts will slavishly ascribe literal meanings to the words of a statute. Because legislative intent is the polestar of statutory interpretation

it is clear that if the literal import of the

¹(...continued)

2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

4. This section does not apply to actions governed by section 147.136. [*Medical malpractice cases.*]

text of an act is inconsistent with the legislative meaning or intent, or if such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.07 (Sands 4th Ed. 1984) (citing *Graham v. Worthington*, 259 Iowa 845, 854, 146 N.W.2d 626, 633 (1966)).

In construing various statutes we have often applied this rule by refusing to attribute to the General Assembly an intention to produce an absurd result....

In the last cited case we were faced with a statute which, literally interpreted, would lead to an absurd result. We said:

Such absurdity of result calls for scrutiny of the statute. Ad absurdum is a "Stop" sign, in the judicial interpretation of statutes. It is indicative of fallacy somewhere, either in the point of view or in the line of approach. In such case, it becomes the duty of the court to seek a different construction, and to presume always that absurdity was not the legislative intent. To this end, it will limit the application of literal terms of the statute, and, if necessary, will even engraft an exception thereon. *Trainer*, 199 Iowa at 59, 201 N.W. at 67 (citations omitted).

A literal application of section 668.14 under the present circumstances would also lead to an absurd result. Under section 85.22 Schonberger must repay from his recovery his workers' compensation insurer any benefits he has received. The only conceivable purpose of informing the jury of those benefits is to invite the jury to reduce his recovery because of them. But, to any extent the jury does reduce the damage award because of the benefits, Schonberger is in effect paying, not once, but twice. We are convinced the legislature did not intend to call for this double reduction.

To avoid this unintended result we interpret the statute so as to deem its requirements satisfied when the requirements of section 85.22 are complied with. The case is remanded to district

court for a proceeding in which it must be established that the proceeds of any recovery received by Schonberger are pledged to reimburse his workers' compensation insurer in accordance with Iowa Code section 85.22. Upon such a showing the judgment of the trial court shall stand as affirmed.

II. Defendants also complain of the amount of the award which, by present standards, does appear to be generous for the injuries sustained. The amount is not however so flagrantly excessive as to compel our interference. *See Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988).

Affirmed and Remanded.

All Justices concur except McGIVERIN, C.J., and NEUMAN, and ANDREASEN, JJ., who dissent.

McGIVERIN, Chief Judge (dissenting)

I respectfully dissent.

The majority opinion substantially sets aside the clear terms of Iowa Code section 668.14 and, as a practical matter, fully reinstates the judicially created collateral source rule by use of Iowa Rule of Evidence 402, at least in cases where collateral benefits are paid subject to a statutory right of subrogation.

Unlike the majority, I believe that the terms of section 668.14 can be respected without visiting inequity on Schonberger and others in his position....

One effect of the common law collateral source rule is that in cases where the plaintiff receives collateral benefits which are not paid subject to a right of subrogation in the payor, and also is compensated for the same injuries from a tort suit against the defendant, the plaintiff receives duplicate damages to the extent that the collateral benefits and tort recovery overlap. 22 AM. JUR. 2D *Damages* § 566 (1988). This is commonly known as "double dipping" and is thought by tort defendants to unfairly overcompensate the plaintiff. Carlson, *Fairness in Litigation or "Equity for All,"* 36 DRAKE L. REV. 713, 719 (1987). The counterargument is that to allow collateral benefits to reduce the tort recovery would relieve the defendant of the consequences of tortious conduct. *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938). As

between the plaintiff and the tortfeasor, the common law deems it more just that the plaintiff profit from collateral benefits. *See id.*; 22 AM. JUR. 2D *Damages* § 566 (1988).

On the other hand, in cases where collateral benefits are paid subject to a right of subrogation, the plaintiff is not double dipping because the subrogee will recover the collateral benefits out of the plaintiff's tort recovery from the defendant. Schonberger's case is a prime example of this situation because under Iowa Code section 85.22, the workers' compensation benefits he received will have to be repaid out of his tort recovery....

IV. Instead of working within the statutory framework mandated by the legislature in section 668.14, the majority opinion sets it aside. The majority's approach would require the trial judge to exclude all evidence from the jury of collateral benefits as irrelevant whenever the judge found that the benefits were paid subject to a right of subrogation. It would then be up to the judge to enforce those subrogation rights at a separate hearing following a plaintiff's verdict in the tort suit....

V. I would reverse the trial court judgment and remand for a new trial on the issue of damages. The parties should be allowed to introduce evidence before the jury pursuant to Iowa Code section 668.14. Then the jury should be instructed appropriately and allowed to state the effect of such evidence on its verdict.

The court should work within the intent and language of section 668.14 rather than against it. Section 668.14 was the result of a studied decision by the legislature to abrogate the collateral source rule as a common law rule of evidence, and to prevent double dipping. The majority effectively refuses to acknowledge that fact. Therefore, I dissent.

NEUMAN and ANDREASEN, JJ., join this dissent.

Questions and Notes

1. For a discussion of the history of the collateral source rule and legislative modifications, see Flynn, *Private Medical Insurance and the*

Collateral Source Rule: A Good Bet?, [22 U. Tol. L. Rev. 39](#) (1990).

2. The collateral source rule is a common ingredient in tort reform statutes. See *Fein v. Permanente, supra*; and R.C.W. 7.70.080, *infra* Chapter Ten.

3. *Subrogation* is a means by which insurance companies recover damages they have been forced to pay to their customers for damage caused by the negligence of a third party. For example, when a homeowner suffers a fire caused by the negligence of a neighbor who was burning leaves, the fire insurance carrier for the homeowner is obligated to pay the homeowner for the damage. However, under the standard terms of a homeowner's insurance policy the company then has the right to file an action against the negligent party as though the insurance company were the homeowner. "Subrogation" is the equivalent of allowing one party to "stand in the shoes" of someone who has the power to assign certain legal rights.

4. Aside from the question of how much the defendant will be forced to pay, is there any other reason for allowing the evidence of collateral payments to be presented to the jury?

3. The Scope of Acceptable Argument

BOTTA v. BRUNNER

26 N.J. 82, 138 A.2d 713 (1958)

FRANCIS, J.

* * *

In prosecuting the appeal, plaintiff urged that the trial court also erred in refusing to permit counsel to suggest to the jury in summation a mathematical formula for the admeasurement of damages for pain and suffering. The Appellate Division agreed with plaintiff's viewpoint. The problem is of sufficient current urgency to demand our attention.

In his closing argument to the jury, after speaking of actual monetary losses, plaintiff's counsel said:

You must add to that, next, the pain and

suffering and the disability that she has undergone from August 2d, 1953 to now. Take that first. That is 125 weeks of pain and suffering. Now, that is difficult to admeasure, I suppose. How much can you give for pain and suffering? As a guide, I try to think of myself. What would be a minimum that a person is entitled to? And you must place yourself in the position of this woman. If you add that disability which has been described to you, and you were wearing this 24 hours a day, how much do you think you should get for every day you had to go through that harrowing experience, or every hour?

Well, I thought I would use this kind of suggestion. I don't know. It is for you to determine whether you think I am low or high. Would fifty cents an hour for that kind of suffering be too high?"

On objection, the court declared the argument to be improper as to "the measure of damages for pain and suffering" and directed that it be discontinued.

But the Appellate Division sanctioned the practice, saying:

[W]e see no logical reason why the fair scope of argument in summation by trial counsel should not be permitted to include mention of recovery in terms of amount. It is well settled that counsel may advise the jury as to the amount sued for, *Rhodehouse v. Director General*, 95 N.J.L. 355, 111 A. 662 (Sup. Ct. 1920), and we have recently held that he may state his opinion that the jury should allow a stated amount short of the sum sued for. *Kulodziej v. Lehigh Valley R. Co.*, 39 N.J. Super. 268, 120 A.2d 763 (App. Div. 1956).

The argument is sometimes heard that since there is no evidence in the case as to how much pain and suffering, or a given physical disability, is worth in dollars, and since it is the exclusive function of the jury to fix the amount by its verdict, counsel should not be allowed to ask the jury to return a named amount. *Stassun v. Chapin*, 324 Pa. 125, 188 A. 111 (Sup. Ct. 1936). We do not think this follows.

Counsel may argue from the evidence to any conclusion which the jury is free to arrive at, and we perceive no sound reason why one of the most vital subjects at issue, the amount of recovery, should not be deemed within the permitted field of counsel's persuasion of the jury by argument. This, within reasonable limits, includes his supporting reasoning, as in the present case, whether soundly conceived on the merits or not. *Cf. Standard Sanitary Mfg. Co. v. Brian's Adm'r*, 224 Ky. 419, 6 S.W.2d 491, 493 (Ct. App. 1928); *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S.W. 953, 962 (Sup. Ct. 1910). If necessary, the trial court can in its instructions caution the jury that the argument does not constitute evidence as to the amount of damages.

For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been "fair and reasonable compensation." This general standard was adopted because of universal acknowledgment that a more specific or definitive one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated. No market place exists at which such malaise is bought and sold. A person can sell quantities of his blood, but there is no mart where the price of a voluntary subjection of oneself to pain and suffering is or can be fixed. It has never been suggested that a standard of value can be found and applied. The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.

* * *

There can be no doubt that the prime purpose of suggestions, direct or indirect, in the opening or closing statements of counsel of per hour or *per diem* sums as the value of or as compensation for pain, suffering and kindred elements associated

with injury and disability is to instill in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence. An outspoken exponent of the approach described its aim in this fashion:

When you break down pain and suffering into seconds and minutes and do it as objectively as this (on a blackboard), then you begin to make a jury realize what permanent pain and suffering is and that \$60,000 at five dollars a day isn't an adequate award. (Insertion ours.)

So let's put on the board \$60,000 for pain and suffering. Of course in your opening statement you are only privileged to say that you are going to explain to the jury and ask for \$60,000 as pain and suffering in order to make up your total figure. It would be improper *to argue*, this must be reserved for the final summation. (Emphasis added.)

The jurors must start thinking in days, minutes and seconds and in five dollars, three dollars and two dollars, so that they can multiply to the absolute figure. Maybe your juror will feel that \$5 a day is not enough, that it should be \$10 per day. They may feel that it should be \$4 or \$3 a day. At least you have started them thinking; and when they follow the mechanics of multiplication they must by this procedure come to some substantial figure if they are fair. A jury always tries to be fair. Never forget this." Belli, *The Use of Demonstrative Evidence in Achieving the More Adequate Award*," Address before the Mississippi State Bar Association (1954); BELLI, *MODERN TRIALS*, p. 1632 (1954).

And:

Depending on the jurisdiction it may be permissible during argument to ask for \$2 a day for pain and suffering." *Id.*, § 305(8).

Clearly these statements are what analysis shows them to be — suggestions of valuations or compensation factors for pain and suffering. They

have no foundation in the evidence. They import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible of evaluation on any such basis. No one has ever argued that a witness, expert or otherwise, would be competent to estimate pain on a per hour or per diem basis....

* * *

[The court ultimately affirmed the refusal of plaintiff's requested instruction - ed.]

Questions and Notes

1. The jurisdictions are about evenly split on the question of whether some variant of the "per diem" argument is acceptable.
2. Would you permit use of the "per diem" argument? Why or why not?

STECKER v. FIRST COMMERCIAL TRUST CO.

331 Ark. 452, 962 S.W.2d 792 (1998)

NEWBERN, Justice.

This is the second appeal concerning the liability of Dr. Rheeta Stecker for the death of her patient, sixteen-month-old Laura Fullbright. First Commercial Trust Company ("First Commercial"), as administrator of the child's estate, sued Dr. Stecker for medical malpractice and for failure to report under the child-abuse-reporting statute, Ark.Code Ann. §§ 12-12-501 through 12-12-518 (Repl.1995 and Supp.1997). In addition to the action on behalf of the estate, First Commercial sued on behalf of several of Laura Fullbright's relatives, individually. It was alleged that Dr. Stecker's failure to report evidence of physical abuse of the child resulted in the child's death. In addition to Dr. Stecker, Mary Ellen Robbins, the child's mother, and Joseph Rank who lived with Ms. Robbins and her child and who was convicted of murdering the child, *see Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994), were named as defendants.

In the first trial, Ms. Robbins was found not liable. Mr. Rank was found liable for damages to

Laura Fullbright's halfbrother, but no damages were awarded to the estate. Dr. Stecker was found not liable for civil penalties prescribed under the child-abuse-reporting statute, and she was awarded a directed verdict on the medical malpractice claim because the only medical expert witness sought to be presented by First Commercial was found not to be qualified to testify as to the standard of medical care concerning child abuse in Hot Springs. We reversed and remanded for a new trial on the medical malpractice claim, holding it was error to have excluded the testimony of Dr. Frederick Epstein, the expert medical witness whose testimony First Commercial sought to introduce on behalf of the estate. *First Commercial Trust Co. v. Rank*, 323 Ark. 390, 396, 915 S.W.2d 262, 264 (1996).

In the second trial, a jury verdict resulted in a judgment against Dr. Stecker. She argues three points on appeal. First, she contends the doctrine of law of the case precludes any recovery against her because the estate recovered no damages in the first trial. Second, she contends her motion for a directed verdict should have been granted because there was insufficient evidence that her failure to report the child's condition resulted in the death. Finally, she argues her motion for a mistrial should have been granted because of improper closing argument by counsel for First Commercial. We affirm the judgment.

At the second trial, there was evidence from which the jury could have concluded the following. Dr. Stecker, a family practitioner, treated Laura Fullbright on several occasions prior to the child's death which occurred on September 12, 1992. On June 12, 1992, Dr. Stecker saw Laura, who was 12 1/2 months old, for a "well baby check-up." Laura was brought to Dr. Stecker by Ms. Robbins, a pharmacist, whom Dr. Stecker regarded as a friend and colleague. She noticed a visible angulation of one of the baby's arms, and she pointed the problem out to Ms. Robbins and to Mr. Rank. An x-ray showed the fracture of two bones in the child's left forearm. Ms. Robbins and Mr. Rank indicated that they did not know that there was a problem. Dr. Stecker became concerned about the possibility of neglect or abuse. Dr. Stecker referred Laura to Dr. Robert Olive, an

orthopedist. After seeing the x-rays as well as the child and her mother, Dr. Olive wrote Dr. Stecker that he did not think that there was any evidence of neglect on the part of the parents.

The letter from Dr. Olive did not totally alleviate Dr. Stecker's suspicions of possible abuse; however, she did not confront Ms. Robbins or Mr. Rank about her suspicions, contact the baby's father, Jim Fullbright, about her suspicions, or report her suspicions to any law enforcement agency. Ms. Robbins did not tell Jim Fullbright about the broken arm because she knew that he would "raise a fuss about it."

On July 9, Dr. Stecker again examined Laura. Her notes reflect that the family had observed that the child was "wobbly" and running into things. Dr. Stecker found that she was better and diagnosed the problem as ataxia or dizziness and concluded that the child had been drinking too much juice. However, she also recognized that the symptoms were consistent with other possibilities, including head trauma.

On July 21, Laura was brought to the clinic with both eyelids swollen, and Ms. Robbins reported that the bruises were a result of the child falling down several stairs. Dr. Stecker was not present and Dr. Stecker's husband, Dr. Elton Stecker, saw the baby. Dr. Elton Stecker's nurse recorded that the child had been nauseated the previous day and had vomited that morning. When she awoke, there was swelling on the right side of the head in the temple area and over the right eye.

On July 22, Dr. Stecker again saw Laura, and she read the record of the July 21 visit. At this time, the child's eyelids were swollen, and Ms. Robbins reported that the child had fallen down several stairs. Ms. Robbins wondered if the swelling of the upper lids could be the result of an allergy or a spider bite, and she stated that Laura had had watery nasal discharge which she felt was due to an allergy. Dr. Stecker wondered why there were new falls when child had been seen in the clinic the day before. Dr. Stecker discussed the possibility of abuse with Ms. Robbins. Ms. Robbins was adamant that abuse was highly unlikely. She stated that her five-year-old son carried Laura around and that he might have dropped her. She also told Dr. Stecker that her boyfriend did not have a temper.

Dr. Stecker again considered reporting her suspicions of child abuse to the authorities; however, she did not. She made a conscious decision that there was not enough evidence to put the family in jeopardy of an investigation.

In August, there was an adult guest in Ms. Robbins's home, and nothing happened to the child while he was present. On September 12, 1991, Ms. Robbins returned home from work and found Laura, whom she had left in the care of Mr. Rank, unconscious. She took the child to St. Joseph's Regional Medical Center in Hot Springs. Laura was transported to Arkansas Children's Hospital in Little Rock, where she was later pronounced dead. The medical examiner determined that the cause of death was homicide.

* * *

3. Closing argument

In her third point on appeal, Dr. Stecker argues that prejudicial error occurred during First Commercial's closing argument when First Commercial wove a "send a message" theme into the argument even though punitive damages were not at issue in the case. Early in First Commercial's closing argument on behalf of Laura Fullbright's estate, it asked the jury not to apply a "weak" or "watered down" standard of care. Counsel for Dr. Stecker objected on the ground that punitive damages had not been sought, and the argument was a "send a message" argument. The Trial Court responded that he would take no action "until it happens." Later, First Commercial's counsel on several occasions referred to protecting "the children" and to protecting "the Lauras of the world." Dr. Stecker's counsel moved for a mistrial, and the motion was denied.

It has indeed been held that an argument having a "send a message" to the community theme may be improper when punitive damages are not sought. *See, e.g., Smith v. Courter*, 531 S.W.2d 743 (Mo.1976); *Maercks v. Birchansky*, 549 So.2d 199 (Fla.App.1989). At first blush, the argument made on behalf of Laura Fullbright's estate might seem to have had that as its theme. In response to that contention, however, First Commercial argues that its counsel was addressing the standard of care to be exercised by a physician in circumstances such as those with

which Dr. Stecker was presented and not the matter of damages.

We agree with the contention of First Commercial that the opinions of Dr. Epstein and that of Dr. Smith were very much at odds concerning the duty of a physician to report suspected child abuse. Dr. Smith felt a physician should be more than fifty percent certain before making a report. Dr. Epstein opined that any suspicion should be reported so that an objective government agency could make a determination. It is at least plausible that the reference to "the children" had to do with the standard of care to be taken by physicians rather than with a "message" to them.

A mistrial is a drastic remedy that should only be used when there has been an error so prejudicial that justice cannot be served by

continuing the trial, or when fundamental fairness of the trial itself has been manifestly affected. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). The Trial Court has wide discretion in granting or denying a motion for mistrial, and absent an abuse the decision will not be disturbed. *Id.*

We hold that, viewing the closing argument in its entirety, the repeated references to protection of "the children" did not necessarily evidence a "send a message" theme when combined with the discussion of the standard of care and the other points made in the closing argument. *See Beis v. Dias*, 859 S.W.2d 835 (Mo.App. S.D.1993); *Derossett v. Alton and Southern Ry. Co.*, 850 S.W.2d 109 (Mo.App. E.D.1993).

Affirmed.