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Awarding Damages for Permanent Injuries: A Proposal to Eliminate the Unreasonableness of "Reasonable Certainty" in Jordan v. Bero

Leonard Grumbach

AWARDING DAMAGES FOR PERMANENT INJURIES: A PROPOSAL TO ELIMINATE THE UNREASONABLENESS OF "REASONABLE CERTAINTY" IN JORDAN v. BERO

INTRODUCTION

In reviewing an award in a personal injury suit, the Supreme Court of Appeals of West Virginia wrote:[1]

> Without a doubt, the most troublesome problem presented on this appeal involves the proof of permanent injuries and the instructions given and refused by the court in clarification of this issue.

This statement reflects the problem that arises when a plaintiff alleges that an injury is permanent but the fact of permanency is not self-evident. This may occur where a plaintiff bears no prominent physical infirmity or where there is no other concrete evidence to clearly substantiate the claim. Courts must often rely on the testimony of medical experts[2] that the wrong done by the tortfeasor may or will result in future pain and suffering, medical expense, impairment of earnings, or a combination of all three.

The need to assess future damages at the time of trial is a consequence of the established rule that a plaintiff has but one day in court to allege all injuries proximately resulting from the particular tort that is the basis of the cause of action.[3] These injuries need not exist at the time of trial, but if they are consequential and may be reasonably anticipated, the victim must be compensated.[4] In fact, damages for present and past injuries may be nominal while the claim for future damages can result in a larger award.[5] In most cases involving serious permanent injury,

1. Jordan v. Bero, 210 S.E.2d 618, 628 (W. Va. 1974).

2. Generally, damages for future pain and suffering or future medical expenses will not be awarded unless the claim is supported by expert medical testimony. *See, e.g.*, Edwards v. Chandler, 308 P.2d 295, 297 (Okla. 1957); Washington County Bd. of Educ. v. Hartley, 517 S.W.2d 749, 751 (Tenn. 1975); Sawdey v. Schwenk, 2 Wis. 2d 532, 87 N.W.2d 500, 503 (1958). *See also* 2 J. KELNER, PERSONAL INJURY, SUCCESSFUL LITIGATION TECHNIQUES 598 (1973).

3. *See, e.g.*, Salmon v. M.E. Blasier Mfg. Co., 123 App. Div. 171, 173, 108 N.Y.S. 448, 449 (4th Dep't 1908); Schwegel v. Goldberg, 209 Pa. Super. 280, 228 A.2d 405, 409 (1967); Jordan v. Bero, 210 S.E.2d 618, 633 (W. Va. 1974); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 540 (1973).

4. *See, e.g.*, Yarrow v. United States, 309 F. Supp. 922, 932 (S.D.N.Y. 1970); Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

5. *See* Filer v. New York Cent. R.R., 49 N.Y. 42, 44-45 (1872). *See also* D. DOBBS,

the major portion of recovery has been based on impairment of future earning capacity.[6] When the plaintiff is young, the question of future earnings becomes more important, and the measure of future damages is necessarily more speculative. It is apparent, then, that the responsibility of determining both the fact of permanency and the amount of damages to be awarded presents great difficulty to the trier of fact.

The Reasonable Certainty Rule

Generally, the rule has been that prospective damages are awarded when they are either "reasonably certain" or "reasonably probable" to occur as a consequence of a harm that is compensable.[7] The issue of permanent damage arises only after the plaintiff has proved that the defendant is liable and only the measure of damages remains to be decided.

Damages recoverable in tort actions cannot be contingent, uncertain, or speculative.[8] Under either the "reasonably certain"

Handbook on the Law of Remedies 551 (1973), in which it was stated that:

> When injury is permanent, plaintiffs usually prove their life expectancy and how each item of damage will extend through that expectancy. This often results in high multiplication of damages, since even a very moderate sum becomes substantial when multiplied by a life expectancy of 40 years.

6. *See* Daniels, *Measure of Damages in Personal Injury Cases*, 7 Miami L.Q. 171 (1953).

7. Some jurisdictions favor "reasonably certain," while others favor "reasonably probable." "Reasonably certain" is generally considered the stricter standard, but from many of the cases it appears that the phrases are actually meant to convey the same standard of proof—a preponderance of the evidence rather than a mere likelihood or possibility. For an analysis of the use of the two phrases in the state of Washington see Brachtenbach, *Future Damages in Personal Injury Actions—The Standard of Proof*, 3 Gonzaga L. Rev. 75 (1968) [hereinafter cited as Brachtenbach]. *See* notes 13 and 14 *infra* and the accompanying text for further discussion.

For cases favoring "reasonably certain" *see, e.g.*, Thompson v. Underwood, 407 F.2d 994 (6th Cir. 1969); Moe Light, Inc. v. Foreman, 238 F.2d 817, 818 (6th Cir. 1956); Jurney v. Lubeznik, 72 Ill. App. 2d 117, 218 N.E.2d 799, 806 (1966); Adams v. Atchinson, T. & S. Fe Ry., 280 S.W.2d 84, 93-94 (Mo. 1955); Orme v. Watkins, 44 Wash. 2d 325, 267 P.2d 681, 684-86 (1954). For cases favoring "reasonably probable" *see, e.g.*, Hardwick v. Bublitz, 254 Iowa 1253, 119 N.W.2d 886, 896 (1963); Connolly v. Philadelphia Transp. Co., 420 Pa. 280, 216 A.2d 60, 64-65 (1966); McElroy v. Luster, 254 S.W.2d 893, 895 (Tex. Civ. App. 1953). In *McElroy*, the court noted:

> The courts of Connecticut, Pennsylvania, Texas, Utah, and Wyoming have refused to adopt the "reasonable certainty rule" and have held that if the jury is confined to a consideration of only such pain and suffering as it is reasonably probable will result from the injury, it is a sufficient safeguard against speculation and conjecture on the part of the jury. This is known as the "reasonable probability rule."

Id. at 895.

8. *See, e.g.*, Hannigan v. Sears Roebuck and Co., 410 F.2d 285, 293 (7th Cir.), *cert.*

or "reasonably probable" standard, the court must determine whether sufficient evidence[9] has been presented to allow a jury to conclude that a permanent injury will occur. The sufficiency of the evidence will in turn depend upon what medical-expert testimony has previously been excluded because of its speculative nature.[10]

When the court is satisfied with the sufficiency of the evidence, it must then issue instructions that enable the jury to award only those prospective damages which it deems "reasonably certain" or "reasonably probable" to occur. The framing of these instructions has resulted in much confusion and innumerable reversals.[11]

In some jurisdictions, it appears that the omission of certain "magic words" from the instructions may result in reversible error.[12] A study of some thirty-odd cases in the state of Washing-

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denied, 396 U.S. 902 (1969); United States v. Huff, 175 F.2d 678, 680 (5th Cir. 1949); Steitz v. Gifford, 280 N.Y. 15, 20, 19 N.E.2d 661, 664 (1939); Bates v. Holbrook, 89 App. Div. 548, 561-62, 85 N.Y.S. 673, 682 (1st Dep't 1904).

9. "The prognosis of the future effect of permanent injuries . . . must be elicited from qualified experts, evaluated first by the court and then, if found sufficient, considered by the jury upon proper instruction." Jordan v. Bero, 210 S.E.2d 618, 633 (W. Va. 1974).

10. *See, e.g.*, Waco v. Teague, 168 S.W.2d 521, 527 (Tex. Civ. App. 1943)(reversal for lower court's failure to exclude medical testimony pointing to a mere possibility rather than a probability of future harm). *But see* Schwegel v. Goldberg, 209 Pa. Super. 280, 228 A.2d 405, 409 (1967), where the court allowed medical evidence that the plaintiff had but a one-in-twenty chance of incurring epilepsy in the future, stating that while the probability of future seizures is low, it should nevertheless be weighed by the jury and "the defendant's remedy lies in objecting to the excessiveness of the verdict . . . ." *See also* 7 J. WIGMORE, EVIDENCE 122 (3d ed. 1940):

> Courts sometimes misapply the Opinion rule to enforce the doctrine of Torts that a recovery for future *personal injuries* must include only the certain or fairly *probable*, but not the merely *possible*, consequences; so that the judge instead of covering the subject by an instruction to the jury as to the measure of recovery excludes from evidence a physician's opinion expressed in terms of possibility only (emphasis in original).

11. *See* 22 AM. JUR. 2d *Damages* § 352 (1965):

> In jurisdictions adopting the rule that damages may be recovered only for such future pain and suffering as are reasonably certain to result from the injury received, it has been held by some courts that the words "reasonably certain" or "reasonable certainty" should be used in giving instructions on the subject, and that the use of the terms "reasonably probable," "probable," "likely," "liable," "shall," "may," "will," and similar expressions, do not express the requisite degree of certainty on which to assess damages, and, therefore, instructions including them are erroneous.

Id. at 457. *Accord*, Green v. Catawba Power Co., 75 S.C. 102, 55 S.E. 125, 126 (1906); Fisher v. Coastal Transp. Co., 149 Tex. 224, 230 S.W.2d 522, 524 (1950); Oak Knolls Realty Corp. v. Thomas, 212 Va. 396, 184 S.E.2d 809, 810 (1971).

12. *See* Brachtenbach at 80; Note, *Damages: Future Pain and Suffering: Instructions to Jury*, 4 OKLA. L. REV. 116 (1951); Note, *Damages—Future Pain and Suffering—*

ton by Robert F. Brachtenbach graphically illustrates this problem.[13] In 1859 a jury was instructed that future damages would be appropriate only "when it is rendered reasonably certain from the evidence that such damages will inevitably and necessarily result from the original injury."[14] The study traces the deviations from this early, strict standard, to a lesser one used in later cases, as reflected by the instructions given to juries. Numerically, a majority of the cases approved a standard based on "probabilities" with slightly fewer demanding "reasonable certainty."[15] Other words used with approval in jury instructions were "may," "likely," "will," and "reasonably expected."[16] Surely, the most cautious judge—though certainly not the clearest—was the one who charged that the plaintiff must prove "to a reasonable certainty that he will in reasonable probability sustain damages."[17] Twelve years later, no doubt seeking a way out of the judicial maze, a court determined that there was no material difference between "reasonable certainty" and "reasonable probability."[18] The conclusion finally reached in Brachtenbach's study is that it is difficult to articulate the present rule but "it is a sound conclusion that the Washington court has not required future damages to be proved by reasonable certainty to the exclusion of anything short of that standard."[19]

JORDAN V. BERO—THE APPLICATION OF THE RULE OF REASONABLE CERTAINTY

Jordan v. Bero[20] is a good example of the problems of the admissibility of evidence and the framing of jury instructions that are encountered in cases where the plaintiff seeks prospective damages for a permanent injury. In *Jordan*, suit was brought by the father of a ten year old boy who was the victim of an auto

Instructions to Jury, 29 TEXAS L. REV. 115 (1951); Note, *Damages—Personal Injuries—Recovery for Future Pain and Suffering—Instructions to Jury*, 22 TEXAS L. REV. 505 (1944).

13. Brachtenbach, *supra* note 7.

14. Curtis v. Rochester & S.R.R., 18 N.Y. 534, 75 Am. Dec. 258 (1859) *as cited in* Brachtenbach at 75.

15. Brachtenbach at 77.

16. *Id.*

17. Rowe v. Whatcom County R. & Light Co., 44 Wash. 658, 87 P. 921 (1906) *as cited in* Brachtenbach at 79.

18. Holt v. School Dist. No. 71, 102 Wash. 442, 173 P. 335 (1918) *as cited in* Brachtenbach at 81.

19. Brachtenbach at 83.

20. 210 S.E.2d 618 (W. Va. 1974).

accident. The plaintiff sought damages on behalf of himself and his son for medical expenses, both past and future, and for impairment of his son's earning capacity.

While riding a bicycle, the infant in *Jordan* was struck by an automobile. The jury, finding negligence and no contributory negligence, awarded $20,000 to the infant and $6,000 to the father. One of the principal questions raised on appeal by the defendants (owner and driver of the car) was:[21]

> [Whether] the medical evidence in support of the plaintiffs' claim for personal injury and future effects proximately therefrom was adduced with a degree of *reasonable certainty*, so as to support instructions to the jury which made the existence of and recovery for such injuries a question for the jury to decide (emphasis added).

The court instructed the jury that consideration could be given to permanent injuries and the appropriate damages allocable to the father based on:[22]

> (1) Future doctor, drug, and medical bills to be incurred, *if any*, on behalf of Russel Jordan;
> (2) Any future labor or wages of Russel Jordan that his father, Norman D. Jordan, would be entitled to in the future, *if any*. (Emphasis in original.)

The jury was also instructed that the infant could recover from a negligent defendant for physical and mental pain that he had suffered to date as a result of the accident and also for the future damages resulting from the accident which were permanent in nature. Such an award would compensate for:[23]

> (1) Future physical and mental pain and suffering, *if any*.
> (2) Loss of future earnings, *if any*, which he may sustain in the future.
> (3) Any residuals, *if any*, that he may sustain in the future. (Emphasis in original.)

The thrust of the defendants' objection to these instructions was that they did not convey to the jury the rule that future damages must be proved with "reasonable certainty"[24]—the "magic

21. *Id.* at 624.
22. *Id.* at 629.
23. *Id.* The court defined residuals as "future effects of an injury which have reduced the capability of an individual to function as a whole man." *Id.* at 623.
24. *Id.* at 629.

words" had not been used.

The defendant also claimed that the court erred when it refused to instruct the jury that insufficient evidence had been introduced to allow a recovery for permanent injury even if the verdict was for the plaintiffs.[25] Evidence was admitted to show that the infant suffered a scalp injury which rendered him unconscious at the time of the accident. He remained unconscious for six days and was hospitalized for a total of ten days. The attending physician and a neurosurgeon both testified that the child suffered a "severe brain injury."[26] They explained that such an injury results in the " 'death' of brain cells" since the brain lacks the regenerative capacity found in other organs.[27]

The treating physician further testified that a significant number of people with similar brain injuries later suffer from permanent residuals, including personality changes, memory changes, and seizures that could range from mild to severe.[28] The doctor's opinion, as expressed by the court, was that "in the context of having an approximate fifty-one percent chance of probability . . . the plaintiff would have headaches in the future due to the injury."[29]

A neurosurgeon who conducted an examination ten months after the accident testified that the boy was asymptomatic at that time. He could not, however, to a reasonable degree of medical certainty, rule out future complications or the possibilities of the common residuals of brain injuries, and concluded that "only time will tell."[30] He added that at the time of his examination, no further medical treatment was needed.

The appellate court found that the instructions were not in error and that sufficient evidence had been properly admitted to support the award of $20,000 to the boy. In this instance, the court did not insist on "magic words" appearing in the instructions, nor did it find, as the defense asserted, that the phrase "if any" implied the future damages could be less than "reasonably certain" to occur. The court did, however, find that there was insufficient evidence to support an award to the father for future medical expenses or impairment of the child's earning capacity

25. *Id.* at 628.
26. *Id.* at 630.
27. *Id.*
28. *Id.* at 633.
29. *Id.*
30. *Id.* at 634.

and gave him the option of a remittitur.[31]

The Concurring Opinion—A New Proposal for Computing Future Damages for a Permanent Injury

Justice Neely concurred with the holding in *Jordan*, but disagreed with the reasoning of the majority.[32] He objected to the fact that the majority accepted the traditional rule of "reasonable certainty," but nevertheless recognized "that in an area such as brain injury where it is difficult to predict the ultimate effects of an injury it is almost impossible to comply with the rule."[33] Evidently, this did not surprise the Justice for he wrote:[34]

> I believe that the real rule, which is in practice applied in the courts and which has been applied by this Court in this case at bar is far different from the enigma of supposed logic which is presented as the formal rule.

Justice Neely never explicitly stated what the "real rule" is. The "rule" appears to be that while courts enunciate a standard of "reasonable certainty," damages are awarded on a case-by-case basis, depending upon the equities involved.

In expressing his dissatisfaction with the present standard, Justice Neely proposed a new system that merits consideration. Specifically, he proposed that the risk of incurring prospective consequences as a result of a compensable tort should be treated as a separate injury with an award based on the probability of these consequences materializing:[35]

> The fact that a person is confronted with a ten percent, fifteen percent, or twenty percent probability (in the mathematical sense) that he will suffer future injuries should be sufficient to permit him to recover for those future injuries at least in proportion to the probability of such injuries occurring.

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31. One could reasonably argue that the same evidence which makes the son's residuals a "reasonable certainty" should do the same for the father's future medical expenses. It is possible that the child's future expenses, however, will not arise until he is self-supporting.

32. Jordan v. Bero, 210 S.E.2d 618, 640 (W. Va. 1974).

33. *Id.*

34. *Id.*

35. *Id.* at 640-41. To illustrate this point, Justice Neely used the folk story, "The Lady or the Tiger," where a suitor for the king's daughter must choose which of two doors to open. Behind one is the princess, behind the other a starving tiger. Under the rule of "reasonable certainty," if the suitor were to sue the king for having been forced to assume a risk of future injury, he would not prevail since the probability of incurring the injury was only fifty percent. *Id.* at 640.

This view assumes that physicians, on the basis of their experience and analysis of statistical information regarding similar cases, are able to forecast the approximate percentage of probability that a particular injury will result in future harm to the victim. In other words, what should be proved by a preponderance of the credible evidence is the percentage of probability of future damages, rather than the damages themselves. Under this new method, the jury would be required to multiply the full amount of damages which would be awarded if future consequences were in fact certain to occur by the percentage of probability proved. Plaintiffs could, therefore, recover prospective damages for which there is less than a 51 percent probability. Such a recovery is theoretically impossible under the present rule, which requires that a plaintiff prove at least that percentage before recovery may be had at all.

Effects of the "New Rule"

Admission of Evidence and Instructions to the Jury

The "new rule" would reduce the inconsistency and confusion inherent in the present system regarding the admission of evidence and instructions to the jury on the issue of permanent injury.[36] All competent testimony of medical experts, subject to the usual rules of evidence governing expert opinion, would be admitted. When necessary, statisticians could be called upon to testify why a particular percentage of probability exists that at some future time the plaintiff may suffer further damages from an injury. The court would no longer be required to assess the soundness of a physician's opinion in light of the "reasonable certainty" standard, but would rather determine whether there was an adequate foundation for that opinion. Medical experts would not be pressured into crossing that all-important line of 50 percent probability so that the plaintiff could recover some damages. This fact would undoubtedly lead to more realistic and dependable expert opinions.

Under the "new rule" the jury would first be instructed to weigh the opinion evidence to decide whether there was any probability of a permanent injury. If they so decided, the jury would then be required to determine the percentage of that probability. The court would no longer struggle with the elusive standard of

36. *See* notes 13-14 *supra* and accompanying text.

"reasonable certainty,"[37] and need no longer be concerned whether the jury would correctly perceive the meaning conveyed by those words.

Jurors would admittedly still have the problem of evaluating the contradictory opinions of the experts, but choosing the correct percentage of probability of future damages is not as difficult or crucial as deciding whether prospective damages have been proved to a "reasonable certainty." One reason for this is that expert opinions, substantiated by statistical data, would hopefully be within the same range. It should be noted that jurors are now faced with a more difficult problem in jurisdictions where they must decide comparative negligence percentages.[38]

Fairness to the Litigants

The ultimate test for the "new rule" is whether its implementation would allocate risks more equitably than does the present system. The basic premise, that the risk of a permanent injury deserves compensation, is sound and does not offend the long-standing principle that damages recoverable in tort actions cannot be contingent, uncertain, or speculative.[39] While future damages would remain uncertain, the risk of future damages would be substantiated by expert opinion. There is no logical reason for ignoring such a risk merely because it is less than a 51 percent probability. Surely a 49 percent risk of incurring blindness or epilepsy is a greater burden to the victim than a broken bone already healed before trial. The tortfeasor should be properly assessed for the imposition of such a risk and should not benefit from its degree of uncertainty.

Many courts presently recognize as compensable *present* mental distress sustained by a victim because of apprehension of an anticipated *future* condition stemming from an injury suffered.[40] While such a fear may not be unreasonable or ground-

37. *See* notes 15-19 *supra* and accompanying text.

38. *See, e.g.*, Nietfeldt v. American Mut. Liab. Ins. Co., 67 Wis.2d 79, 226 N.W.2d 418 (1975). Here, where the plaintiff's motorcycle struck the defendants' truck, the court upheld a jury verdict finding the plaintiff 22 percent contributorily negligent and three defendants causally negligent—47 percent, 27 percent, and 4 percent, respectively.

39. *See* note 8 *supra* and accompanying text.

40. *See, e.g.*, Hayes v. New York Cent. R.R., 311 F.2d 198, 201 (2d Cir. 1962); Dempsey v. Hartley, 94 F. Supp. 918, 920 (E.D. Pa. 1951); Baylor v. Tyrrell, 177 Neb. 812, 131 N.W.2d 393, 402 (1964); Ferrara v. Galluchio, 5 N.Y.2d 16, 19-21, 152 N.E.2d 249, 251-52, 176 N.Y.S.2d 996, 998-99 (1958) (plaintiff, in a malpractice action based on faulty X-ray treatment, was awarded damages for her cancerphobia, a neurosis she developed after being told by a dermatologist that her condition might possibly become cancerous).

less,[41] it has been held that the fear may be based on a mere possibility rather than a probability.[42] Awards have been made when the anxiety stems from a remote secondary condition.[43] Thus, while a plaintiff may be compensated for a present anxiety about a future condition that is merely a possibility or even a mistake,[44] he or she may not be compensated for a realistic, proven risk of actually incurring the same condition. Such an anomaly seems to favor the more imaginative plaintiff rather than the more imperiled. In addition, it may be argued that whenever there is a realistic risk, there inevitably must be some apprehension or fear and thus every risk deserves compensation at least for the mental distress it causes.

Allocation of Awards

Theoretically, the "new rule" would mathematically insure that the total amount awarded would equal the total damages incurred in the future. This result is not presently achieved since under the rule of "reasonable certainty," the outlay can be more or less than the actual future damages, depending upon what percentage of the victims have a probability of future damages exceeding 50 percent. This can be simply demonstrated by the hypothetical of ten plaintiffs each with a 60 percent probability of future damages. Under the present rule, each of the ten would receive an award calculated to compensate them for 100 percent of the damages. Since only six of the ten will incur future injuries, however (assuming the probabilities to be correct), the amount awarded will be 66 2/3 percent greater than the damages actually

41. *See, e.g.*, Louisville & N.R.R. v. Davis, 199 Ky. 275, 250 S.W. 978, 979 (1923). The court held that the plaintiff could not magnify damages by testifying to fears that blood poisoning might ensue, necessitating amputation of his hand, where such fears were altogether groundless.

42. *See, e.g.*, Figlar v. Gordon, 133 Conn. 577, 585, 53 A.2d 645, 648 (1947). The court held that while the evidence would not support damages for the probability of the plaintiff incurring epilepsy in the future as a result of his head injuries, it did show the possibility of such a danger, and the jury was therefore entitled to take into account anxiety caused by that danger when it rendered an award.

43. *See, e.g.*, Heider v. Employers Mut. Liab. Ins. Co., 231 So.2d 438, 441-42, (La. Ct. App. 1970). Medical experts testified that there was a 2 percent to 5 percent chance that one with injuries such as those incurred by the plaintiff would experience epileptic seizures in years to come. The court stated: "This is an apprehension that is well founded on medical opinions and could certainly produce sufficient mental anguish to justify the trial court's award of $2,500 therefor." *Id.* at 442.

44. *See, e.g.*, Smith v. Boston & M.R.R., 87 N.H. 246, 177 A. 729, 738 (1935). The plaintiff's testimony that she feared that her legs might be paralyzed was properly admitted "even though the fear was mistaken."

suffered. Under the "new rule" each of the ten would receive only 60 percent of the full award and therefore the total outlay would exactly equal the "actual" damages. If in the hypothetical each of the victims had only a 40 percent probability of future injuries, under the present rule all ten would receive no compensation at all. Under the "new rule," however, they would each receive 40 percent of the full award and once again the total outlay would equal the actual damages.[45]

It is impossible to state which "rule" would result in a greater money outlay as the percentage of plaintiffs now passing the "reasonable certainty" test is unknown. While some would receive more under the "new rule" and some would receive less, the discrepancies between awards and actual damages would be decreased. No one with a proven risk could receive zero damages, as is presently the case. More victims incurring future injury, who under the present rule would not be compensated and might consequently become economic burdens on their community, would now receive some compensation. Unquestionably, the "new rule" would lead to better allocation of awards than does the present system.

The Volume of Litigation

The "new rule" would reduce the volume of litigation in personal injury cases where the question of liability for permanent injury is not at issue and the crux of the litigation is the dispute over the measure of damages.[46] The present system may serve to discourage settlements. Since a plaintiff must prove that there is a 51 percent risk of permanent injury, a defendant with only a fair chance of convincing the jury that the risk is only 49 percent has ample incentive to litigate. If the plaintiff succeeds, the entire award is saved. Under the "new rule," on the other hand, parties claiming a probability of future injury within a few percentage points of each other have little reason to litigate.

45. Another feasible change from the present system would be to combine the "new rule" with the present one of "reasonable certainty." Plaintiffs would receive the full award when the probability of future injury is greater than 50 percent and the actual percentage when it is less. This would insure no under-compensation in the high risk cases. However, plaintiffs would still be tempted to shoot at the 51 percent target ("reasonable certainty") and the present difficulties would remain. Also, the outlay would be grossly disproportionate to the "actual" damages incurred. Still, this proposal would be fairer than the present rule, in that everyone with a risk would be compensated.

46. *See* Harrington, *Personal Injury Cases: Proof of Damages,* 20 ARK. L. REV. 11 (1966). "Damages is what the litigation is all about . . . . Often liability will not even be a major issue." *Id.*

Since neither side can expect total victory, even when experts differ by a large percentage of probability of future injury, settlements are likely to result. Where there is a probability of permanent injury, honest and competent medical opinions—substantiated by statistical evidence—should be sufficiently similar in most cases to foreclose litigation when fault is not at issue.

Another beneficial result of this new system would be a reduction in the importance of advocacy. Lawyers' skills too often play a disproportionate role in personal injury litigation.[47] The ability to convince a jury that the elusive standard of "reasonable certainty" has or has not been met will no longer be determinative. The attorney must still help convince the jury that one medical opinion is to be given more weight than another. While under the present system, this might totally defeat plaintiff's recovery, under the "new rule" it would more likely result in a reduction of the plaintiff's award.

It can be argued that the "new rule" would increase the volume of litigation by encouraging plaintiffs to allege permanent injury when the probability of future damages is very low. When the probability is minimal, however, the amount of damages recoverable would be correspondingly small. Therefore, in all but the largest cases, when the amount recoverable for 100 percent probability would be a substantial amount, the ever-rising cost of litigation would discourage suits based on such claims.

Awarding a Percentage of the Total Damages—Other Applications in Tort Law

There are other situations in which a defendant is charged with a percentage of his victim's damages rather than released from all liability because of uncertainty as to the magnitude of those damages.[48] When the principle of comparative negligence is applied, a plaintiff who has been negligent receives a percentage of the total damages payable were he completely blameless. The award is reduced because the plaintiff's own conduct is deemed

47. "[W]hen it comes to the value of the case in money damages all the odds change, because it is at that point that the legal giants and pygmies part company." *Id. See also* Hare, *The Importance of Argument in Tort Cases*, 33 Ala. Lawyer 187 (1972).

48. *See, e.g.*, Steitz v. Gifford, 280 N.Y. 15, 20, 19 N.E.2d 661, 664 (1939), in which the court noted that "[t]he fact that they [damages] cannot be measured with absolute mathematical certainty does not bar substantial recovery if they may be approximately fixed." *See also* Petition of M/V Elaine Jones, 480 F.2d 11, 24 (5th Cir. 1973); Hughes v. Great Am. Indem. Co., 236 F.2d 71, 75 (5th Cir. 1956), *cert. denied*, 352 U.S. 989 (1957).

to be partially responsible for the tort which caused the injury.[49] Although the issue in comparative negligence cases is not the existence of damage, as it is when permanent injury is in dispute, it is nevertheless an example of legislative rejection of an all or nothing approach to liability. Through the doctrine of comparative negligence, a more equitable result is achieved since the defendant is not permitted to escape total liability. This is true notwithstanding the impossibility of calculating the exact amount attributable to his or her wrongful act. Uncertainty as to the probability of permanent injury—where the risk itself is certain—should also not absolve a defendant.

Other instances in which damages are sometimes approximated are where the defendant aggravates an already existing physical disability of the plaintiff[50] or whether the damages are apportioned among two or more successive tortfeasors[51] who have caused injuries incapable of division. Once again, the inability of the trier of fact to accurately measure or apportion damages will not deprive a plaintiff of compensation. "Where a logical basis can be found for some rough practical apportionment . . . it may be expected that the division will be made."[52] It is recognized that because a physician cannot segregate the injuries, a defendant should not receive a windfall. Moreover, a different rule "would

49. *See, e.g.*, Federal Employers' Liability Act, 45 U.S.C. § 53 (1970). This act applies to all negligence actions brought against railroads in federal or state courts for injuries to their employees engaged in interstate commerce, or in activities affecting it, and provides that:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . .

New York has enacted a comparative negligence statute effective September 1, 1975. Ch. 69, § 1411 [1975] N.Y. Laws 94 (McKinney).

Courts generally defer to legislatures the decision of whether to adopt the principles of comparative negligence. *See, e.g.*, Bissen v. Fujii, 51 Hawaii 636, 638-39, 466 P.2d 429, 431 (1970); Peterson v. Culp, 255 Ore. 269, 465 P.2d 876, 877 (1970); Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513, 514-17 (1970).

It has been suggested that "juries do in fact adjust the damages according to fault, even where there is no apportionment statute and they are instructed not to do it." W. PROSSER, THE LAW OF TORTS 436-37 (4th ed. 1971).

50. *See* RESTATEMENT (SECOND) OF TORTS § 433A, comment *e* at 438 (1965). *See, e.g.*, Peterson v. Baltimore & O.R.R., 73 F. Supp. 597, 601 (W.D. Pa. 1947); Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393, 396-97 (1968); McAllister v. Pennsylvania R.R., 324 Pa. 65, 187 A. 415, 417 (1936).

51. *See* RESTATEMENT (SECOND) OF TORTS § 433A, comment *c* at 435 (1965); 74 AM. JUR. 2d *Torts* § 78 (1974). *See, e.g.*, Corie v. Thompson, 282 App. Div. 810, 811, 122 N.Y.S.2d 508, 510 (3d Dep't 1953).

52. PROSSER, THE LAW OF TORTS 313-14 (4th ed. 1971).

place a premium on false testimony and penalize honest claimants."[53]

CONCLUSION

When a plaintiff incurs the risk of suffering future damages from an injury, compensation should be based on the probability of that risk materializing. A plaintiff should not be denied recovery for failure to satisfy the elusive standard of "reasonable certainty" as is now the case.

This change in policy would allocate awards more equitably and also eliminate the confusion inherent in the present rule of admissibility of evidence and instructions to the jury. In addition, by minimizing the differences between the parties, the "new rule" suggested in *Jordan v. Bero* would reduce litigation by encouraging settlements.

Leonard Grumbach

53. *See* McAllister v. Pennsylvania R.R., 324 Pa. 65, 187 A. 415, 417 (1936).