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I. INTRODUCTION

A substantial part of the law practice in Louisiana today is devoted to the personal injury field, as is much of the litigation in our courts. In no other area are there more conflicting interests and philosophies among our profession. For the most part these interests are represented by two extremes: the *plaintiff* lawyer and the *insurance* lawyer. While these attorneys are sincere in their endeavors, somewhere in the center stands the general public. Although society has always maintained a vital interest in the reparation and compensation of the injured, modern times have made this stake more important.

The machine age constantly creates new risk areas and from them flow more and more accidents which are an inherent and inseparable part of everyday life. The general public is the beneficiary of mechanization and progress, the creator of this new risk. Correspondingly, society is generally the risk bearer since the cost of accidents can usually be passed on to the public through the medium of liability insurance or as a standard operational business expense.[1]

This has been long recognized, is the subject of much scholarly writing, and has been often referred to as *enterprise liability*.[2] This concept has caused great changes in the law of torts. Vi-

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1. During the period of industry's infancy, it was in the public interest not to unduly burden its development by imposing strict liability for all accidents incident to its growth. Now, however, industry is able to serve as the middle man and distribute the accident risk to society. See the excellent discussion by Professor James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 551 (1948).

2. For a challenging approach to this subject, see EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951). See also James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LOUISIANA LAW REVIEW 231 (1952); Pound, *The End of Law as Developed in Legal Rules and Doctrine*, 27 HARV. L. REV. 197, 223 (1914).

carious liability is constantly expanding, and actual fault is waning as a prerequsite for liability.[3] Some even urge a complete emasculation of fault in the accident field.[4] It is the purpose of this article to determine what impact, if any, enterprise liability has had, or should have, on the law and theory of damages. Loss of life, maimed limbs, and pain and suffering cannot be replaced, only minimized through the allowance of pecuniary damages. The generally accepted rule of law is that *ex delicto* losses are to be recompensed by pecuniary damages commensurate with the actual injury sustained as nearly as can be done by money.[5] This is known as the compensatory theory of damages: it is all pervasive and embraces the entire field of tort law.[6] It applies indiscriminately to all defendants whether they be held liable for active moral fault or vicariously where actual fault is absent. It is submitted that the history and development of the compensatory theory will show that it is a sequel to fault liability and that its present application is of questionable validity.

II. ORIGIN OF DAMAGE LAW

Since earliest times man has sought relief from injuries wrongfully sustained[7] and even primitive societies afforded redress for tortious injuries.[8] From time to time various reasons have been advanced to justify the intercession of law on behalf of the injured. Among the more significant are:

(1) to satisfy the vengeance of the injured so as to prevent any breach of the peace,[9]

3. For a few of the many studies of the rise and fall of the fault concept, see EHRENZWEIG, NEGLIGENCE WITHOUT FAULT §§ 2-4 (1951); James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946); Bohlen, *The Rule in Rylands vs. Fletcher*, 59 U. PA. L. REV. 298, 373, 423 (1911).

4. See note 2 *supra*.

5. BAUER, DAMAGES § 64 (1919); HALE, DAMAGES § 2 (1912); JOYCE, DAMAGES § 26 (1903); MCCORMICK, DAMAGES § 137 (1935); PROSSER, TORTS § 28 (1941); SEDGWICK, DAMAGES § 29 (6th ed. 1874); SUTHERLAND, DAMAGES § 12 (4th ed. 1916).

6. See HALE, DAMAGES § 2 (1912); SUTHERLAND, DAMAGES § 12 (4th ed. 1916).

7. For a comprehensive history of the law of damages, see SEDGWICK, DAMAGES §§ 10-38 (6th ed. 1874).

8. For example, in Jewish law (*Exodus*, ch. xxi, verse 32): "If the ox shall push (gore) a manservant or a maidservant; he shall give unto their master thirty shekels of silver, and the ox shall be stoned." The early Hindu law provided: "Where a claim is proved, the person who gains the suit is put in possession, and the judge exacts a fine of equal value from the defendant. And if the plaintiff loses his cause, he in a like manner pays double the amount sued for." 2 AYCEN AKBERRY, by Gladwin, pp. 498, 504.

9. See HOLMES, THE COMMON LAW 10th seg. (1881); Jenks, *Theories of Tort in Modern Law*, 19 L.Q. REV. 19 (1903).

(2) to serve as a deterrent to would be wrongdoers,[10]

(3) to compensate the injured for his economic loss and intangible suffering,[11] and

(4) to minimize loss which has occurred and distribute it among those capable of sustaining it,

and each has undoubtedly played a role in the development of tort law.

Probably the first pecuniary damages were awarded on the notion of satisfying the vengeance of the injured so as to remove the desire for revenge and the resulting possibility of a breach in the peace.[12] While the severity of the injury was important, computation of damages was made according to rigid fixed schedules allowing certain sums for each type injury.[13] The humiliation caused the injured and his family was an important factor. Thus an injury not covered from view by clothing entitled one to more damages than one covered by clothing.[14]

At common law the fixed schedule of damages was discarded with the development of judicial processes[15] in favor of a system whereby the tribunal, jury, or judge had the prerogative of determining the amount of damages.[16] A real law of damages, however, did not emerge until courts were given certain controls over the jury, and the present common law of damages is a by-product of judicial control over jurors.[17]

In our sister states, in the federal courts, and in our own civil jury trials, the trial judge instructs the jury to compensate the injured plaintiff on the basis of actual economic loss and

10. SALMOND, LAW OF TORTS 13, 18 (10th ed. 1945); STREET, THE FOUNDATIONS OF LEGAL LIABILITY 478 (1906).

11. MCCORMICK, DAMAGES 137 (1935).

12. *Id.* § 5; SEDGWICK, DAMAGES § 12 (6th ed. 1874). See also Pound, *Development of Legal Liability*, 10 NACCA L.J. 186, 192 (1952).

13. MCCORMICK, DAMAGES § 5 (1935); SEDGWICK, DAMAGES § 13 (6th ed. 1874).

14. Thus under the Laws of Ethelbert (Anglo-Saxon) of about 600 A.D., if a bruise was black in part and not covered by clothes, the damages were thirty scaetts; if it was covered, only twenty scaetts. POUND & PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 46, 47 (3d ed. 1927).

15. Trial by jury, originally a trial by witnesses, gradually supplanted the various modes of trial by battle, ordeal and wages of law, and from the time of the reign of Henry II seem to have begun to obtain stability, if not its present form. SEDGWICK, DAMAGES § 20 (6th ed. 1874).

16. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW ch. 4 (1929); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW ch. 2 (1898).

17. Although there is no evidence to indicate what standards the early jurors used, seemingly the idea of appeasing the vengeance of the injured and his clan was dominant. See note 9 *supra*.

the intangible loss resulting from pain and suffering.[18] While this theory primarily aims at *compensation* through shifting the loss from the plaintiff to the wrongdoer, such a practice has always been thought to *deter* conduct involving fault.[19] Although the old notions of revenge and punishment are generally administered by the state through the law of crimes in modern jurisdictions, it would be error to underestimate their significance in the application of the present compensatory theory. Certainly this is true in those jurisdictions where punitive damages are recognized and allowed. Also, allowing a court or jury to compensate for the intangible loss (pain and suffering and mental anguish) invites an evaluation of the defendant-plaintiff conduct relationship.[20]

Tracing the development of the law of damages in tort cases is more difficult in Louisiana than in the common law jurisdictions. The articles in our Civil Code and their predecessors that explicitly pertain to damages deal primarily with losses resulting from breach of contracts.[21] However, Article 2315 of the Civil Code,[22] which is the fundamental basis of Louisiana tort law, provides in part:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ."

Seemingly, Article 2315 contemplates the compensatory theory of damages. As a result, the elements of loss that can be repaired or compensated are practically the same in Louisiana and the common law jurisdictions. But in Louisiana the damage jurisprudence has developed in connection with the appellate courts' review of the quantum allowed by the trial judges; whereas, in the common law jurisdictions, the jurisprudence has been built around rulings of the lower court as to what evidence of damage could be heard by the jury, the instructions to be given the jury, and the degree of control the trial court has over the jury's verdict.

III. Public Policy in Compensating Accident Victims

Since the inception of the *compensatory theory* of damages,

18. McCormick, Damages §§ 86-90 (1935).
19. Prosser, Torts §§ 4, 8 (1941). See also Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 441 (1894).
20. See Note, 54 Dick. L. Rev. 345 (1950).
21. La. Civil Code art. 1933 *et seq.* (1870).
22. *Id.* art. 2315.

time and progress have made their mark upon law and society. The conditioning factors which contributed to the development of the present doctrine have been implemented by others, or have disappeared altogether. At the time when the compensatory theory was being developed, the dominant philosophy was to maintain the *status quo*.[23] Power and wealth were to be found in land and property. When an injury situation arose the natural tendency was to limit the results as much as possible to the immediate parties. Society through law only aided the injured to shift the loss to the wrongdoer, it did not choose to bear the risk.

This public policy toward damage awards was the natural product of its times, just as was its sequel — fault. In civil law and common law fault was the essence of tort liability. Fault then denoted culpability. It had not yet received the first of the many inevitable emasculations. Forcing one at fault, or morally culpable, to compensate fully his innocent victim seemed only fair and just. The compensatory theory of allowing full compensation based on fault effectuated the existing social objectives. It admonished and deterred conduct involving fault,[24] it punished the wrongdoer,[25] and relieved the innocent victim by shifting the loss to the party *guilty* of fault.[26]

This rationale was fundamentally sound under the original fault concept. But today the anatomy of fault bears little resemblance to that of its original ancestor. Rules of causation have been liberalized to spread the risk.[27] Absentee defendants are being held liable through the rules of vicarious liability.[28] Fault is sometimes presumed in certain operations.[29] Some defendants even receive the burden of proof to negate fault.[30]

23. Laissez faire was the dominant economic doctrine of the nineteenth century. See Bohlen, *The Rule in Rylands vs. Fletcher*, 59 U. PA. L. REV. 298, 373, 423 (1911) for discussion of this principle and the growth of strict liability.

24. PROSSER, TORTS § 4 (1941).

25. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

26. For discussion of loss shifting, see James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 551 (1948); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946).

27. See James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Malone, *Theories of Causation in the Law of Negligence*, 11 KAN. B.J. 353 (1943).

28. Holmes, *Agency*, 4 HARV. L. REV. 345 (1891); PROSSER, TORTS § 63 (1941).

29. A.L.I., RESTATEMENT, TORTS § 519 (1934); Comment, 37 CALIF. L. REV. 269 (1949).

30. See Note, 5 LOUISIANA LAW REVIEW 344 (1943).

This fictional broadening of the fault concept evidences a public policy toward enlarging the risk area of tort liability in the accident field. This is a necessary step forward in a social and economic system where as many as nine million injuries occur in a year.

Today in the accident field where liability does not require moral fault and where the ultimate cost is borne by the public in general, does the present compensatory theory of damages best effectuate the public interest? Vengeance and punishment should not be revelant in accident cases where the public ultimately pays and is guilty of no actual fault. Further the present system, as our highway death tolls indicate, is very ineffective in deterring accidents. Higher insurance premiums alone deter few accidents. Probably the most effective means of deterrence, the notion of self preservation, would function equally under all theories of damages. Educational programs and safety drives have been far more effective as a deterrent than the fear of being sued. Considering the above, it is the duty of law as the efficient administrator of justice to accomplish the social goal of granting speedy relief to the injured with a minimum burden on society.

From the view of the public as well as the victim the accident victim should at least receive speedy pecuniary remuneration for all tangible economic loss. A personal injury with dollar and cent value cannot be written off just because it is an inherent incident to the overall social enterprise. Fairness and justice demand that all pecuniary losses be recompensed dollar for dollar.

A question which undoubtedly invites controversy is whether the public interest is served by attempting to compensate intangible loss. It cannot be actually measured, nor can it ever be replaced. It is a type loss that can never be shifted to the public. Paying for an intangible loss is but an attempt to soothe a hurt with a cash prize, and serves no purpose in deterring accidents or punishing moral wrongdoers. Has the ultra liberal philosophy gone so far that it is within the scope of social justice to pay for all the pain and suffering incurred by accident victims? On the other hand, certainly these intangible losses are very much a reality to the innocent accident victims themselves and they should receive something for their loss and hurt. Pos-

sibly some light on this subject may be had by examining the handling of intangible losses by the courts in accident cases.

IV. INTANGIBLE LOSSES IN DEATH CASES

In accident cases where a death is involved there is far more divergence in the awards given among the various jurisdictions than in any other area of tort law.[31] For seemingly equal and identical actual losses caused by the same degree of culpability pecuniary recovery may and does vary thousands of dollars depending upon which state's laws govern, upon the social and economic attitudes of the particular area, upon who is the trial judge, and many other variables.[32] However, the tangible items of out of pocket pecuniary loss are treated the same in all courts.[33] Thus the variations in the amount of awards can be best explained by the treatment of the intangible items of loss. Here the court or jury is charged to compensate the abstract and is given great leeway in evaluating the plaintiff-defendant relationship without regard to the agency really bearing the risk, the public.

Undoubtedly the present system, allowing liberal damages for intangible losses, produces very fair and just results for those widows and children who successfully manage to attain a damage award when the problem is viewed from the standpoint of those few. However, viewing the problem from the point of view of accident victims *as a class* and from that of the public, how adequate is the present system? Would it not be better for ten families of deceased persons to receive twenty thousand dollars each than one family to receive two hundred thousand dollars and nine families receive nothing?

If we are to assume our obligation to the real victims of accidental deaths, a theory of compensation should be followed whereby victims' families may be speedily compensated for all

31. For a detailed study indicating the vast differences, see Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951). In Appendix A, page 38, Mr. Belli lists the statutory limits in various states.

32. For example, if *A* boards an airliner in Miami, intending to fly to San Francisco, the value assessed to his life will be a constant variable as his flight progresses. If he loses his life while taking off in Florida, or landing in California, his family may recover a huge sum. If, however, the hypothetical death occurred when the plane crashed into a Colorado mountain peak, his family's benefit would be limited to $5,000.00 by statute. Certainly the price of butter and eggs does not vary that much.

33. See TIFFANY, DEATH BY WRONGFUL ACT § 158 (2d ed. 1913); MCCORMICK, DAMAGES § 93 *et seq.* (1935).

actual calculable pecuniary loss. These are all special damages and loss of earnings. Those elements of loss which reflect the human sympathies of the courts and juries, the amounts which once tended to deter fault and punish wrongdoers, should be disregarded in a realistic compensation theory. If our aim in death cases is to be compensation, not retribution, then possibly only the dollar and cent losses should be considered. Society has no interest in compensating the dead or paying for their pain and suffering. It is the living dependents of accident victims who should be compensated, and it should be on the basis of actual pecuniary loss.

The compensable elements of loss in a death action in Louisiana are generally the same as in most other states.[34] While some states have only a beneficiary type wrongful death action[35] and others have only a survivorship type provision,[36] Louisiana and a number of other states have both type features.[37] Louisiana differs from all other states in that it allows the mental suffering of the living beneficiaries to be compensated in death cases.[38] Certainly this is not a loss that can be effectively shifted to the general public.

V. INTANGIBLE LOSSES IN PERSONAL INJURY CASES

As indicated previously, the actual out of pocket losses, usually referred to as special damages, present a minimum of difficulty in reaching a sound result. A uniform application of the present compensatory damage theory breaks down with the attempt to handle the intangible losses. Professor McCormick, a noted authority in the damage field, states that the various forms of pain and suffering are as numberless as the capacities of the human soul for torturing itself.[39] The list of intangible losses

34. LA. CIVIL CODE art. 2315 (1870).

35. The death action is a separate cause of action given certain designated beneficiaries for the loss they sustain because of the wrongful death of a family member. The earliest death act was passed in England in 1846 and was known as The Lord Campbell's Act. 9 & 10 Vict. c. 93 (1846).

For a detailed discussion of this type provision, see MCCORMICK, DAMAGES 366 *et seq.* (1935).

36. Connecticut, Delaware, New Hampshire, and Tennessee.

37. In the death action, the intent is indicated by the original title to the first death act, The Lord Campbell's Act, which provided: "an act for compensating the families of persons killed." 9 & 10 Vict. c. 93 (1846). Thus the elements of damages are the pecuniary loss of the dependents and not the loss of the deceased. In the survival acts the beneficiaries of a decedent are vested with the cause of action which the decedent would have had if he had lived.

38. HALE, DAMAGES § 132 (2d ed. 1912). See Parker v. Crowell and Spencer Lumber Co., 115 La. 463, 39 So. 445 (1905).

39. MCCORMICK, DAMAGES 316 (1935).

recognized as compensable pain and suffering is long and is continuing to grow. Having such elements recognized and compensated is often a challenge only to the ingenuity of plaintiff's counsel, and depends more on his stage ability than law itself. Undoubtedly this has contributed heavily to the trend toward the "more adequate award."

There is no accurate measuring stick to evaluate intangible losses in injury cases. The triers of fact are given wide discretion in their determination of a compensating fee. While it is impossible in any given case to determine just which factors were considered in "repairing" the intangible losses, one cannot but suspect that many of such awards are in reality punitive and charitable in nature.

Pain and suffering, as well as other intangible losses, cannot be replaced or repaired by a damage award, but the injured is made happy in another way — by receiving a cash bonus. Thus forcing the general public ultimately to pay the cost of pain and suffering does not shift the loss, but actually creates a new financial loss.

VI. The Golden Egg or the Public Interest

Observing the present trend of damage awards in death and personal injury cases, some alarming conclusions become readily apparent. *First*, court dockets are becoming congested to the extent that the whole process of administration of justice is being endangered. Some victims in necessitous circumstances are forced to long and unnecessary delays to get adequate and fair compensation. *Second*, while some successful parties get more than adequate awards, accident victims *as a class* are woefully neglected. And *third*, the imperfections in the present system of compensating accident victims are giving rise to increased agitation to abolish the present court administered system in favor of one patterned along the lines of workmen's compensation.

In the event the present trends continue, the demands of a new system of accident compensation may attain merit and validity. Such a change, however, should only be made as a last resort, when it has been proven that the existing evils cannot be remedied. Any radical social changes are understandably shocking to the legal profession. The advocacy of such a change is not the purpose of this writer; but instead, to revise the pres-

ent system of awarding damages to meet the test of changing times.

The existing imperfection which needs to be remedied is mainly this: some few lucky accident victims receive more than adequate compensation, while accident victims as a class receive inadequate relief. It is submitted that this evil lies in the present practice of balming intangible losses with cash prizes.

Our present law of damages is based on the premise that tort doctrines require an actual wrongdoer to pay for all harms whatsoever he may inflict on an innocent victim. As mentioned previously, this notion takes into consideration not only compensation, but, also, deterrence of wrongdoing and punishment of guilt. It is a natural sequel to the old fault concept. What our present damage law fails to recognize is the gradual deterioration of rigid fault requirements in accident liability. This has resulted in the application of rules of damages including notions of deterrence and punishment in a situation where the ultimate risk bearer is guilty of no fault.

In considering a damage formula that is suited to present accident liability principles, certainly the accident victim should be recompensed for all financial loss. Also, fair play and equity would seem to demand that some consideration should be given in the form of money damages for intangible losses. The real challenge is finding a way to allow some reasonable compensation for intangible losses without opening the door to excessive awards which unduly burden the public. In order to maintain some degree of uniformity, it would appear that legislative action would be necessary. Any such action would of necessity establish an arbitrary method of limiting such damages. It is submitted that limiting the damages to a certain fixed ratio to the special damages would result in a workable solution. For example, such legislation could provide that in no case shall the damages for intangible losses exceed that of the proven pecuniary loss or special damages. This formula would not establish the amount of damages for intangible loss but would effectively establish a maximum limit on awards for intangible loss.

By limiting potential recovery in accident cases to actual pecuniary loss, plus a fixed maximum for intangible damages, fear of excessive awards will be reduced to a minimum. The courts would not be restrained from developing complete enter-

prise liability in the accident field. Contributory negligence as a defense could be discarded. No reason exists why a widow in a death action should be placed on the mercy of society and denied recovery because of the negligence of the deceased if her husband was a victim of typical activities of an enterprise undertaking. It would be far simpler for each entrepreneur to insure against the risks typical to his operations than require each individual to attempt to insure against the risks he might face. Under such a system a maximum number of potential accident victims would be protected.

Removing the uncertainties of liability in a system fraught with legal fictions and narrowing the range of damage awards would have the effect of facilitating the settlement of accident claims. The proposed change would remove plaintiff's incentive to get before a sympathetic forum to benefit from large pain and suffering awards. This would result in less docket congestion and trial delays. And much more important to society, there would be far fewer uncompensated accident victims.

Any change in the present law of damages will not come easy. Support cannot be expected from the two extremes — the plaintiff lawyers and the insurance interest. It must come from those who pay the insurance premiums and stand as possible victims. When plaintiff lawyers shout for "an adequate award" or "a more adequate award" their motivation is at least colored by their own financial interest. From the other corner comes cries of "educate the public" and the "unethical plaintiff lawyer," which are only vocalizations designed to overcome the overwhelming tide that has turned in recent years.

In an article a few years ago an insurance spokesman stated the following in regard to the present trend of damage awards:

> "I believe that 'more adequate' means excessive, and if 'The More Adequate Award' gets to the point where insurance premiums become prohibitive, then NACCA members, you as adjusters, liability insurers and my group as defense attorneys will be legislated out of business, and there will be passed statutes of compensation without fault limiting the amounts recoverable for injuries sustained in automobile accidents."[40]

40. Robbins. *Industry's Answer to 'The More Adequate Award,'* 21 INS. COUNS. J. 455, 459 (1954).

Then the author goes on to admonish NACCA "not to kill the goose that lays the golden eggs."

Both the plaintiff interest and the defendant interest play vital and important roles in our judicial structure. When our present accident law and rules of damages reach a point where it can be considered that any group or groups are finding financial "golden eggs" at the expense of the general public, the risk bearer, then such a system should be evaluated on the basis of the real public interest. It is submitted that the goal of our accident law should be adequate compensation for all accident victims, not "golden eggs" for a few.