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## *Inadequate Damages in P. I. Actions: Trends in Appellate Decisions*

*Owen T. Palmer, Jr.\**

**T**HE JURY HAS RE-ENTERED the courtroom. The foreman prepares to read the verdict. An air of hopeful expectancy prevails at the plaintiff's table. Counsel is satisfied that his client's case was carefully and skillfully presented. Defendant's liability was virtually conceded. There is also cautious optimism at defendant's table. He made an excellent witness. Cross-examination of the plaintiff had been most effective. Attorney for defendant had scrupulously avoided technical errors which might constitute grounds for reversal on appeal. As the moment of truth nears, the outward confidence of plaintiff's attorney most probably conceals an inward uneasiness—a haunting feeling that this time something may have gone awry; that the award of the jury might be only a pittance. Is it possible that this jury could return a verdict in a sum less than the ridiculous settlement offer made by defendant's lawyer? Is this case to wear the label "inadequate damages"? If so, will the plaintiff have any chance for relief on appeal?

By combining this hypothetical situation with several recent jury awards, the problems of the inadequate verdict and its contrast with excessive damages are brought into clearer focus. In Courtroom A, the jury finds for the plaintiff, Mrs. Tippit, and assesses her damages at \$2,000.00. Plaintiff had suffered severe bodily injuries, including compound fracture of the left humerus, left tibia and right patella, fractured ribs resulting in a punctured left lung, multiple lacerations, contusions and internal injuries. She was hospitalized thirty days and confined to a wheelchair for several months. Unfortunately, from the standpoint of plaintiff's counsel, she was a non-wage earner at the time of the injury; medical expenses were not involved. Plaintiff's counsel is naturally stunned at the verdict. The trial judge denies a new trial on the grounds of inadequacy of damages. Appeal is perfected.<sup>1</sup>

In Courtroom B, the jury finds for the plaintiff, Mrs. Farmer, and assesses her damages in the amount of \$2,109.14. Mrs. Farmer established medical expenses in the amount of \$788.11 and claimed lost wages in the amount of \$2,448.86. Her injuries are consistent with the usual whiplash accident with pain extending from head to lower back, abdomen, and interior chest. She had been hospitalized for several days and prescribed drugs and was given intravenous fluids to stop nausea. She was confined to her bed at home for approximately thirty days, after

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\* Member of the law firm of Palmer & Stewart, of Gulfport, Mississippi.

<sup>1</sup> Tippit v. Hunter, 205 So. 2d 267 (Miss. 1967).

which she returned to work on a part-time basis. After an additional thirty days, she resumed full time employment. One of the physicians testified that the plaintiff had a ruptured disc with 10% overall disability. Plaintiff's attorney is obviously disappointed with the jury's verdict. A motion for new trial, because of inadequate damages, is overruled by the judge. Appeal is perfected.<sup>2</sup>

In Courtroom C, the jury renders a judgment, with a feeling that it has more than performed its duty, by assessing damages in favor of the plaintiff, Mr. Ladner, in the amount of \$18,000.00. Medical expenses in this instance were \$2,531.04, loss of income amounted to approximately \$12,000.00, and there was medical proof indicating 40% permanent partial disability. Plaintiff's counsel is horrified at the miserly award. Once again the trial judge overrules a motion for new trial, and appeal is perfected to the Supreme Court.<sup>3</sup>

In Courtrooms D1 and D2, slightly different situations prevail. In these trials, there was evidence of some contributory negligence on the part of the plaintiff. In Courtroom D1, a verdict is returned in behalf of Mrs. Herrington in the amount of \$2,100.00. In addition to incidental injuries, plaintiff suffered compound comminution of the distal end of the left humerus, which extended into the left elbow joint. She was confined to bed in traction for approximately four weeks, with continued treatment thereafter for several months. There was adequate evidence she was subjected to great pain, suffering, and inconvenience. Mrs. Herrington sustained permanent partial disability of 25° flexion motion and about 45° in extension motion to her left arm. Medical bills totaled \$1,127.30. During her confinement, she lost earnings at the rate of \$47.00 net per week. The jury had received an instruction authorizing a finding of contributory negligence. The trial judge did not disturb the verdict of the jury, and plaintiff appealed solely on the grounds of inadequate damages.<sup>4</sup>

In Courtroom D2, Mrs. Occhipinti recovered a verdict in the amount of \$1,500.00 against a trucking company. At the time of the accident, the plaintiff was five and one-half months pregnant. Two months later, she suffered a miscarriage as a result of the collision. In addition, she sustained multiple bruises with hemorrhages beneath the skin of her abdomen. Medical bills total \$500.00. The plaintiff had not sought recovery for the unborn child under the actionable death statutes of the state. The trial judge granted an instruction to the defendant on the issue of contributory negligence. Plaintiff's motion for new trial on the grounds of inadequate damages was overruled. Appeal was perfected.<sup>5</sup>

<sup>2</sup> Farmer v. Smith, 207 So. 2d 352 (Miss. 1968).

<sup>3</sup> Ladner v. Merchants Bank & Trust Co., 251 Miss. 804, 171 So. 2d 503 (1965).

<sup>4</sup> Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964).

<sup>5</sup> Occhipinti v. Rheem Mfg. Co., Inc., 252 Miss. 172, 172 So. 2d 186 (1965).

In Courtroom E, the jury returned a verdict in the amount of \$550,000.00 in favor of Mr. Dendy. Plaintiff had sustained a broken neck and suffered spinal separation as the result of a dive into shallow water from a municipal pier. At the time of the trial, plaintiff was permanently paralyzed and totally disabled. At the time of the injury, Dendy was twenty years of age with life expectancy of 50.1 years. Medical expenses at time of trial already exceeded \$1,500.00, with the undisputed testimony that such expenses for care would continue for as long as he lived. Plaintiff was a high school graduate and had worked as a truck driver earning \$1.25 per hour although unemployed at the time of the accident. The trial judge, who had heretofore pledged never to tamper with the verdict of a jury in the sole issue of damages, entered a remittitur of \$450,000.00, leaving a net verdict of \$100,000.00. Plaintiff refused to accept the remittitur and appeal from the judgment ordering a new trial was perfected.<sup>6</sup>

For the plaintiffs in Courtrooms A<sup>7</sup>, C<sup>8</sup>, and D2<sup>9</sup>, the Supreme Court of the state granted a new trial solely on the basis of inadequacy of damages. For the plaintiffs whose awards were granted in Courtrooms B<sup>10</sup>,

<sup>6</sup> Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967).

<sup>7</sup> "A careful reading of the record reveals that the trial in this case is a typical jury case. The jury has resolved the issue of negligence in favor of the plaintiff, and we cannot say that the verdict is contrary to the facts shown by the testimony. Moreover, it is apparent from the foregoing statement of facts that the plaintiff has suffered injuries entitling her to much greater damages than were accorded by the jury. The case must therefore be reversed, so that a new trial may be had because of the inadequacy of the damages awarded." Tippet v. Hunter, *supra* note 1, at 270. Justice Rodgers found it unnecessary to mention that the verdict was so shocking that it must have been the result of prejudice, etc. See Dunn v. Easley, 48 Ala. 51, 151 So. 2d 791 (Ala. App. 1963).

<sup>8</sup> "We are of the opinion that the damages awarded appellant in this case are so grossly inadequate as to evince prejudice and bias on the part of the jury. A mere statement of his injuries, medical expenses, and loss of earnings is sufficient basis for our conclusion. . . . The jury by its verdict appears to have allowed *only* about \$3,500.00 for the pain and suffering endured by the appellant and for his permanent injuries and loss of future earnings." (Emphasis added.) Ladner v. Merchants Bank & Trust Co., *supra* note 3, at 509.

<sup>9</sup> "Moreover, the evidence shows that the principal negligence causing the collision was that of Rheem's driver, the jury's verdict indicated that it applied to appellant substantial contributory negligence, the instruction erroneously told the jury that it could not consider the death of the unborn child in fixing appellant's damages, and appellant's medical bills were \$500. These factors show that the amount of the verdict was grossly inadequate." Occhipinti v. Rheem Manufacturing Co., *supra* note 5, at 191.

<sup>10</sup> "The principal thrust of appellant's argument is that she proved actual or special damages in excess of the amount of the verdict and that this of itself is evidence of the jury's failure to follow the instructions of the court in considering the evidence presented on the question of damages, making it evident that the verdict of the jury was the result of bias, passion and prejudice. As we have heretofore pointed out, most of the special damage she claims to have suffered was the loss of wages at the Forrest General Hospital. We do not think that the jury was bound to accept without question her testimony on this point. . . . We have carefully considered the evidence in this case, and while we think the verdict of the jury is small and we are not completely satisfied with it, we are unable to say with confidence that the amount of damages is so inadequate as to evidence bias, passion and prejudice on the part of the jury." Farmer v. Smith, *supra* note 2, at 355.

D1<sup>11</sup>, and E<sup>12</sup>, the search for justice ended in the appellate court which affirmed the decisions in each instance. The initial reaction to the response of the appellate court in these cases is that there is no consistency, no rule of law on which an appeal for inadequate damages can be predicated with any assured hope of success.

There is no mystery in the language which courts from time immemorial expressed in an attempt to explain when they will interfere with a verdict which has been challenged on the grounds of either excessiveness or inadequacy. Lip service is given to the rule that the size of the verdict alone is not the criteria for interference with the verdict of a jury. The usual language is that excessiveness or inadequacy, to warrant interference, must evince or carry an implication of passion or prejudice, corruption, partiality, improper influences, or the like. An analysis of the decisions, however, justifies "the conclusion that courts generally grant relief if convinced that the verdict substantially exceeds or falls below any rational appraisal or estimate of the damages, even though the inference of passion, prejudice, partiality, or other improper notice on the part of the jury is no more natural or reasonable than the inference of a mistake or misapprehension" on the part of the jury.<sup>13</sup> This general statement of the law has in the past at least been subject to considerable challenge. If one should study the extent of treatment to these two "similar" errors in the pages of *Am. Jur. 2d* and *Corpus Juris Secundum*, the dissimilar approach by the trial and appellate

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<sup>11</sup> "After reviewing all the testimony in this case, briefs of counsel and the related authorities we hold that the verdict of the jury in this case is not so grossly inadequate as to evince bias, prejudice or passion on the part of the jury or that the jury improperly diminished the damages, due the appellant, in proportion to the contributory negligence properly attributable to the appellant, and the appellant's motion for a new trial as to damages only was properly overruled." *Herrington v. Hodges*, *supra* note 4, at 194. Justice Brady applies the customary language in denying new trial.

<sup>12</sup> "On direct appeal Dendy strenuously urges that the circuit court erred in sustaining the motion on behalf of the City for a new trial unless Dendy would consent to a remittitur of \$450,000. It is pointed out that the trial judge did not state or specifically find that the verdict of the jury was so large that it evidenced bias, passion or prejudice on the part of the jury. It is contended that the trial judge merely substituted his judgment for that of the jury. The fact that the trial judge did not specifically state that the verdict of the jury was so large that it evidenced bias, passion or prejudice on the part of the jury does not necessarily mean that he did not reach that conclusion. The trial judge is presumed to know the law and he is presumed to have correctly applied it in passing on the motion for a new trial.

The trial judge could have determined, as we do, that Dendy was guilty of contributory negligence, and that the verdict of the jury indicated that it failed to respond to this instruction, and such failure evidenced bias, passion and prejudice on its part.

We have consistently held in a long line of cases that this Court, in considering the action of the trial court in passing on a motion for a new trial will consider the action with favor and support it unless it is manifestly wrong. Especially is this true where a new trial has been granted, since the rights of the parties are not finally settled at this point. We will not disturb such action unless it is a manifest abuse of discretion." *Dendy v. City of Pascagoula*, *supra* note 6, at 563, 564.

<sup>13</sup> 22 *Am. Jur. 2d Damages* § 364, at 470; see also 25A *C.J.S. Damages* § 196.

judges reflects rather conclusively that the courts are much more prone to apply rational appraisal or estimate of damages to the excessive award and limit reversal of the inadequate award to cases indicating prejudice or passion on the part of the jury.<sup>14</sup>

Until most recently, with rare exceptions, inadequate damages for personal injury claims to support a reversal fell in the category of shocking or prejudicial;<sup>15</sup> the appellate courts carefully avoided a rational approach in such instances. The only real hope for an aggrieved plaintiff in reversing a "stingy" jury was to find error or errors, perhaps harmless in other cases, on which a sympathetic court could predicate a reversal for a new trial. The possibilities that a trial judge would order a new trial on the sole grounds that the verdict of the jury was too small were practically non-existent. In contrast to the plaintiff's difficulty in dealing with an inadequate verdict, the task of defendant's counsel was considerably easier. If the verdict seemed too large, the trial judge had an opportunity to reduce the "excessive" award. Obviously, the philosophy of these trial court judges has varied and still varies greatly from district to district and state to state. Application of the rules of the individual states and judicial logic have not been as important as the personality and background of the respective judges. As noted above, the "excessive" verdict does not necessarily reflect prejudice and passion; obviously the nine or more jurors who return the verdict are not shocked at the result. In fact, the award is often merely larger than considered reasonable by the court.

Recently a group of plaintiffs' attorneys in one Mississippi Circuit Court District became most disturbed at the consistent action of the trial judge in reducing by remittitur every substantial jury award. The judge is an able jurist whose integrity is above reproach. Finally an opportunity presented itself for several members of the plaintiff's bar to discuss damages informally with the judge. He expressed great concern over the

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<sup>14</sup> In 22 Am. Jur. 2d, 32 sections encompassing 62 pages deal with excessive awards; 14 sections covering only 18 pages, with inadequate awards. Although the divisions are not so distinct in *Corpus Juris Secundum*, the difference in emphasis is clearly noticeable. No general conclusion, or even an assumption, can or should be made from such a casual observation; perhaps juries are just more prone to the "excessive" verdict, or defendants are more likely to appeal on such grounds or at least are in a better financial position to delay payment of judgment and to perfect an appeal. Most probably all these factors, and others, including the recognized difficulty of securing relief from "inadequate" damages, have created such a disparity in the case law on this subject. See, generally, Oleck, *Cases on Damages* (1962), c. 8 (*Excessive Awards*); c. 9 (*Inadequate Awards*).

<sup>15</sup> See *Scott v. Yazoo M. V. R. Co.*, 103 Miss. 522, 60 So. 215 (1913), in which the court did not find too great difficulty in reversing a \$100 verdict for loss of leg; and *Whitehead v. Newton Oil & Mfg. Co.*, 105 Miss. 711, 63 So. 219 (1913), in which a \$175.00 award for loss of eye found to be inadequate. Compare *Pounders v. Day*, 151 Miss. 436, 118 So. 298 (1928), in which \$400 for a fractured skull and hip was not held inadequate under evidence authorizing diminishing damages proportionate to negligence attributable to injured person. See also *So. Ry. in Miss. v. Turner*, 49 So. 113 (Miss. 1909), in which the court found any award exceeding \$250.00 excessive for scratch or laceration of plaintiff's back with several days of pain and suffering.

enormous size of the verdicts being returned. One of the lawyers then asked him, "What would you feel to be a maximum award in the event your attractive and able wife were killed by a drunken driver who ran a red light?" His immediate and positive response, "\$30,000.00 to \$35,000.00," brought the discussion to an early conclusion.

When trial and appellate judges, whose background and training have oriented them to small awards, must deal with a substantial verdict, their personal attitudes fail to distinguish between a large verdict and an excessive verdict. Unfortunately, they are not similarly troubled by the distinction between small and inadequate. During the past decade, and particularly in many recent cases, there appears to be a growing recognition by the courts that there should be greater consistency in dealing with the matter of improper damages, whether excessive or inadequate. Changes are occurring. Some trial judges are now granting new trials when the amount of the damage award is clearly too small. The plaintiffs' attorneys are perfecting more and more appeals after remittitur by trial judges. At this time, there seems to be little or no evidence of any enthusiasm by the appellate courts to reinstate the original jury verdict.<sup>16</sup> On the other hand, the appellate courts in many states are dealing with the issue of inadequate damages with a new, or at least reluctant, willingness to reverse solely on grounds of inadequacy. Perhaps a few basic guidelines are emerging even though they are hazy:

I. A new trial should be granted if the amount of the jury verdict is equal to or less than the proven and allowable special damages; provided, of course, that contributory negligence in a comparative negligence state has not been a jury issue.<sup>17</sup> The escape clause, which appellate courts use to avoid the granting of a new trial in such instances, has been the theory that proof of damages was not sufficient to reverse the decision of the jury.<sup>18</sup>

II. Even in comparative negligence states, strong arguments for a new trial should be made if the award is less than the proven special damages, particularly where contributory negligence by the plaintiff is

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<sup>16</sup> Most states provide statutory authority for appeals on issue of damages only. The Mississippi Statute reads: "Every new trial granted shall be on such terms as the court shall direct; and no more than two new trials shall be granted to the same party in any cause. Provided, however, that when the sole ground for a new trial is the excessiveness or inadequacy of damages assessed, the party aggrieved may elect to appeal from the order granting a new trial." 2 Miss. Code § 1536 (1942). See *Dendy v. City of Pascagoula*, *supra* note 6.

<sup>17</sup> *Vascoe v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951); *Legler v. Kennington-Saenger Theatres*, 172 F. 2d 982 (5th Cir. 1949); *Walker v. Henderson*, 275 Ala. 541, 156 So. 2d 633 (1963); *Dunn v. Easley*, *supra* note 7.

<sup>18</sup> *Farmer v. Smith*, *supra* note 2; *Schmidt v. Tracey*, 150 So. 2d 275, *cert. denied* 159 So. 2d 645 (Fla. App. 1963); *Grissom v. Dahart Ice Cream Co.*, 40 So. 2d 333, 34 Ala. App. 282, *cert. denied* 40 So. 2d 339, 252 Ala. 235, in which an award of \$100 was held not inadequate although possible skull fracture was involved.

less than the negligence clearly attributable to the defendant.<sup>19</sup> The plaintiff in such instances, however, would do well in perfecting his appeal to seize on every potential error in the record no matter how trivial with the hope that a sympathetic appellate court would desire to peg a reversal on some grounds other than inadequacy. In those states whose rules of practice require the jury to designate the percentage of contributory negligence in the form of its verdict, the question of inadequacy of damages, even where the plaintiff is guilty of contributory negligence, should not be fraught with as many uncertainties as where the verdict is general in form.

III. The true test for the disappointed and mistreated plaintiff lies in a verdict equal to or somewhat in excess of the proven special damages.<sup>20</sup> The problem is much easier to pinpoint than the solution. Pain and suffering, partial disabilities in varying degrees, and certain subjective elements of damages are obviously not readily susceptible to mathematical computation in dollars and cents. This dilemma is the origin of the rule of thumb 3 to 1 or 5 to 1<sup>21</sup> adopted by the inexperienced, the uncertain and perhaps perplexed attorney. Placing a price tag on human pain and suffering, and the other elements of damages not readily computable in dollar value by any such theory, is perhaps a shabby and unscientific approach severely complicated by the innumerable differences in the characteristics of each plaintiff in each case. Tolerance to pain and suffering, the employment or unemployment of the plaintiff, the demands that the plaintiff must continue work regardless of the extent of his injury, the degrees of disability, the psychological effects of the injury on plaintiff's personality, and many other conditions are vital elements

<sup>19</sup> *Occhipinti v. Rheem Mfg. Co.*, *supra* note 5; *compare Murray v. Woods*, 106 Ga. App., 126 S.E. 2d 828 (1962).

<sup>20</sup> *Simpson v. Clay*, 139 So. 2d 494 (Fla. App. 1962); *Ladner v. Merchants Bank & Trust Co.*, *supra* note 3; *Hunter v. Schembs*, 273 Ala. 304, 139 So. 2d 614 (1963). An interesting comparison may be noted in a general study of cases in the states covered by the Southern Reporter System (Alabama, Florida, Louisiana and Mississippi). Because of the special role of the jury system in Louisiana, its appellate courts are continually reviewing and altering awards, both on the basis of inadequacy and excessiveness. Alabama and Mississippi judges, both on the trial and appellate levels, are rather unrestrained in entering remittiturs for "excessive" awards. The Mississippi Supreme Court now gives signs that some balance will be maintained and that the small award will be scrutinized with as much care as the large verdict. The Florida appellate courts appear to exercise a greater reluctance to interfere either with the large or the small verdict. There seems to be greater consistency, but there is no question that the "excessive" award is given greater emphasis. Although it seems clear that Alabama appellate courts have no great qualms about interfering with and reducing the "excessive" award, they apparently do not act with the same fervor with inadequate verdicts. There are few cited cases of a successful appeal on such a basis. *But see So. Ry. Co. v. Norris*, 241 Ala. 386, 2 So. 2d. 899 (1941); *City of Birmingham v. Cain*, 17 Ala. App. 489, 86 So. 124 (1920), and *Summerlin v. Robinson*, 42 Ala. App. 116, 154 So. 2d 685 (1963).

<sup>21</sup> The medical expense, loss of earnings and other out of pocket expense (excluding elements of property damage) are simply totalled, multiplied by 3 or 5, and the product equals the initial demand.

of damages which vary from case to case. Although trying to establish a mathematical ratio between provable special and total allowable damages may be a ridiculous and impossible premise, plaintiff's counsel cannot afford to overlook any argument which may be both effective and practical for submission to the trial and appellate judges. Somewhere in each case there must be a minimum under which a lesser award is legally inadequate. The concept can have value, even for the plaintiff who is unemployed or whose medical expenses are not involved, by improving and estimating reasonable special damages, by assuming certain fundamental medical costs, and by evaluating basic earning capacity. The tortfeasor should be grateful that he does not have to bear these extra burdens, but he should not escape the logical damages which will follow as normal consequences.

The increased tampering by both trial and appellate courts with inadequate verdicts does have its mixed blessings. In Louisiana, the jury's function in regard to damages has long been secondary to the court.<sup>22</sup> There is a growing fear nationally that the function of the jury is being subordinated more and more to the philosophy of the single judge or the appellate panel. In the final analysis, most plaintiffs' attorneys would be happy as a last resort to take their chances in all cases with the jury and allow the amount of the jury's verdict to be absolutely inviolate. The realities of the situation, however, will not permit such an indulgence. If the courts continue—and they will continue—to interfere with the large verdicts, then they must accept an equal obligation to scrutinize and strike down the small verdicts. Care must be exercised to avoid handling the problem by additur where there is no discretion on the part of the plaintiff.<sup>23</sup> Although a few jurisdictions follow this rule of practice, it is certainly not the choice of most plaintiffs' lawyers who would prefer to leave the matter to a new trial before a new jury. The additur is merely a further encroachment by judges into an area which is the province of a jury.

Because it is now quite evident that appellate courts are adopting a more realistic approach to the inadequate award, there are two strong reasons why such trends should be supported and continued. In the first place, a plaintiff whose personality, race, status in life, or some other intangible factor influences a jury to short-change him, whose lawyer or witness for some inexplicable reason antagonizes the jury against the

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<sup>22</sup> *Wainwright v. Globe Indemnity Co.*, 75 So. 2d 554 (La. 1954). *But cf. Veal v. Audubon Ins. Co.*, 114 So. 2d 648 (La. 1959) in which the court exercised the right to enter additur.

<sup>23</sup> In personal injury actions, the right of the trial or appellate judges to grant a new trial to plaintiff unless a specific additur is made by defendant is most limited. The number one exception is Louisiana practice. *Veal v. Audubon Ins. Co.*, *supra* note 22. For complete annotation on the subject of additurs, see Annot., 56 A.L.R. 2d 213 (1957).

plaintiff, is entitled to better treatment. An equally compelling reason is that perhaps in some areas parties may reach settlements more easily. The odds have been stacked in certain instances because defendant's counsel has had no concern that an inadequate verdict would be disturbed, but was confident that an excessive verdict would be reduced. With the growing storm nationally over the Keeton-O'Connell Plan, it would behoove all counsel who are interested in preserving the jury system for dealing with personal injury claims, to find a common language and some clearer guidelines in disputes over the inadequacy or excessiveness of jury verdicts. If plaintiff's and defendant's bar do not find such a realistic approach, sooner or later the public will, through legislation, impose a maximum and minimum award in each case regardless of the basic differences—unfortunately, the maximum and minimum will be the same.