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Damages for Potential Residuals of Brain Injuries

Jerry B. Kraig and Henry A. Hentemann***

THE HUMAN BRAIN in the adult male weighs about 49½ ounces, and the female brain is even lighter.¹ Yet this semigelatinous, incompressible organ enclosed completely within the bony skull² is the main part of the complex nervous system³ and is probably the most highly developed structure in the universe.⁴ The seriousness of damage to the head and resultant impairment of the body functions has been given proper cognizance as evidenced by substantial jury awards.⁵ Injury to the brain, however, may not only result in immediate damage to the body function but may result in damage that will be experienced at a remote future time.

Trauma to the brain may be followed within days, weeks or months by the appearance of such complaints as headaches, dizziness, especially on change of position, irritability, inability to work or concentrate, easy perspiring and emotional liability. Personality changes can also result. A previously healthy, reliable worker can become complaining and unreliable. In other cases memory loss, increased sensitivity to alcohol, sometimes chronic alcoholism and serious behavior irregularities are encountered.⁶ These residual effects are often termed post-traumatic sequelae, post-traumatic syndrome or traumatic encephalopathy,⁷ and they range from the persistent headache and personality change to the more spectacular convulsive disorder known as post-

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¹ Malory, *Legal Anatomy and Surgery* 346 (1930).

² Gordy, *Anatomy and Physiology of the Brain*, 2 *Trauma* (1) 7 (June, 1960).

³ Webster's *New Twentieth Century Dictionary Unabridged*, Second Edition (1958).

⁴ Kety, *Cerebral Circulation and Metabolism*, 2 *Cyclopedia of Medicine* 397 (1962).

⁵ See 5 Belli, *Modern Trials* 149 (1960); Oleck, *Damages to Persons and Property* 966.81-.85 (1961); Oleck, *Cases on Damages* 546 (1962); Kelley, *Recent Head Damage Awards*, 10 *Clev.-Mar. L. R.* 2 (May, 1960).

⁶ Adams, *Physical Damages* 863 (14th ed. 1958).

⁷ Lapham, *Long Range Pathological Changes Following Trauma To The Head*, *The Head* 68 (1956).

traumatic epilepsy. This residual and potential effect of brain damage is the difficult problem in the assessment of damage awards.

From a medico-legal point of view the most perplexing problem and the one most commonly encountered in the courtroom is the post-traumatic syndrome,⁸ which is the resulting headaches, dizziness and/or mental and personality changes. The term itself has been defined to mean "a chronic defect in the organization of mental function caused specifically by damage to the brain at the time of a head injury and persistent after the post-traumatic state has cleared up."⁹ The assessment of damages for these residual effects can be as arbitrary as the jury may decide.

In *Barango v. E. L. Hedstrom*,¹⁰ at the time of trial, six years after the accident, plaintiff still had dizzy spells, floating sensations, and dulling of his motor powers in conjunction with constant pain in his neck and back. Evidence was speculative as to the subjective complaints of headaches and dizziness. Specials amounted to \$4,000. The verdict of \$75,000 was held to be not excessive. In *Harris v. Lambert*¹¹ specials were again around \$4,000. The injuries primarily consisted of permanent brain injury, persistent headaches which would probably last for plaintiff's lifetime, personality change and tinnitus. Here the verdict was \$47,369. And again in *Barker v. Reedy*¹² the woman plaintiff sustained, among other injuries, post-concussional syndrome primarily consisting of headaches and blackouts. Plaintiff underwent a brain operation in hope of alleviating the headache condition but achieving only temporary relief. Medical testimony stated that the headaches would be permanent. Plaintiff's husband spent \$765 for medical and hospital bills and domestic help. The jury returned a verdict of only \$500 for the injured plaintiff and \$1,000 for her husband. Subsequently, however, a new trial was granted.

These cases illustrate the capricious latitude assumed by juries in awarding damages based on primarily subjective residuals. The obvious difficulty confronting the jury is in dis-

⁸ *Id.*

⁹ Bochner, *Psychiatric Evaluation of the Post Traumatic Syndrome of Head Injury*, *The Head* 220 (1956).

¹⁰ 12 Ill. App. 2d 118, 138 N. E. 2d 829 (1956).

¹¹ 131 Cal. App. 2d 751, 281 P. 2d 292 (1955).

¹² 167 Pa. Super. 222, 74 P. 2d 533 (1950).

tinguishing the neurotic or malingerer or the individual desiring to collect insurance, from the truly defective individual, as the syndrome consists of subjective complaints with no clinical evidence of presently existing brain damage.

Experience has taught the medical profession the length of disability due to a bone fracture, and that the disability following an operative repair of a certain organ should not exceed a certain length of time. But in cases of head injuries, similar calculations are not possible. It is true that it is approximately known just how long it will take for a fractured skull to heal; yet concerning the extent and permanent effects of any associated injury to the brain, statistics are of little help. Only a careful study of the neurological physical signs which the patients present will allow any kind of estimate of this.¹³ For this reason it is very important to study the individual's antecedent history. Had he any previous neurotic illnesses or psychotic episodes, were there any previous incidents with or without consciousness, and what was his reaction to them? Has his domestic life been peaceful; has he had economic security? What are the individual's habits in regard to alcohol and tobacco, and what other diseases has he had especially in relation to the nervous system? If the symptoms appeared after the accident, when did they first make themselves manifest;¹⁴ and if the injury includes damage to the mental function, a detailed history of post-traumatic amnesia is very important.¹⁵ Too much emphasis cannot be laid on the value of a good history.¹⁶

Damage to the brain which has resulted in an impairment of mental functioning manifests itself in several ways. The injured party may have disturbances in his ability to speak. This is of two types. One may know what he wants to say but cannot find the word he is looking for. This is technically called "aphasia." Or the individual cannot get the right organization of words, so that no matter how hard he tries, his conversation, his grouping of words, fails to make sense. This is technically called "dysphasia."¹⁷

¹³ Reed-Emerson, *Relation Between Injury and Disease* 384 (1938).

¹⁴ Brock, *Injuries to the Brain and Spinal Cord and Their Coverings* 14 (4th ed. 1960).

¹⁵ Bochner, *op. cit. supra*, n. 9 at 222.

¹⁶ Shapiro, *Methods of Diagnosis in Head Injuries*, 2 *Trauma* (1) 23 (June, 1960).

¹⁷ See: *Kings Indiana Billiard Company v. Winters*, 123 Ind. App. 110, 106 N. E. 2d 713 (1952), where a residual of apasia along with other injuries resulted in a \$65,000 award.

There is also "acalculia," which is difficulty in calculation even of simple sums. With this symptom care must be used in evaluating what part is due to head injury and what part is due to just the characteristics of the particular person. There is a number of intelligent people who have difficulty in performing the simple mathematics of everyday living such as correctly adding their grocery bills or balancing their checkbooks. Consequently, investigation should be made into this particular individual's history to determine whether he has always been a very accurate calculator but one who is now unable to calculate. The importance of this aspect is exemplified in a case where the occupation of the plaintiff requires an analytical mind. In evaluating the effects of this type of residual, the inability to perform such an occupation is paramount in assessing proper damages. In the case of *Lukasiewicz v. Haddad*¹⁸ an award of \$100,000 for brain damage which rendered a 37 year old plaintiff unable to continue in his profession as a chemist was affirmed. He was unable to rationalize in a scientific manner as before the accident. His salary was \$505 a month as a chemist, and the injury left him with 75 per cent total disability and 100 per cent disability to perform his old job.

There are also other subtle manifestations of an impairment in an injured party's mental functioning, demonstrated either by his inability to recognize familiar objects, usually limited to a few objects, or by his inability to use instruments he has been accustomed to using. The latter is known as "apraxia."

One of the most tragic potential injuries which could result from a serious head injury is traumatic epilepsy. "Next to cancer, epilepsy is about the worst condition you could possibly have."¹⁹

Not every convulsive disorder is epilepsy.²⁰ The mere term epilepsy is usually applied to the idiopathic type of epilepsy. These are convulsive attacks without recognizable cause, which normally begin in childhood or adolescence. In childhood they may appear as petit mal epilepsy, which may be very mild and oftentimes undiagnosed. They may be manifested as a peculiar movement, attacks of faintness, dizziness or sensation of falling.²¹

¹⁸ 24 N. J. Super. 399, 94 A. 2d 504 (1953).

¹⁹ Averbach, *The Problems of Traumatic Epilepsy as Viewed by the Trial Lawyer*, *Trial and Tort Trends* 60 (1957).

²⁰ Abbott, *Post-Traumatic Epilepsy*, 2 *Trauma* (1), 100 (June, 1960).

²¹ McBride, *Disability Evaluation* 643 (5th ed. 1953).

Therefore, even when convulsive disorders follow trauma, a meticulous investigation should be made of the childhood disposition and habits.

Diseased conditions of the brain may also cause a convulsive disorder, which is not epilepsy. Some of these are syphilis, hereditary brain defects, parasitic diseases, brain abscess, meningitis, encephalitis and brain tumors,²² brain swelling and even tuberculosis.²³ Some systemic diseases such as toxemia of pregnancy, uremia and hyperinsulinism are also accompanied by convulsions.²⁴ Exogenous intoxications may also produce them.²⁵ The importance of a thorough check into the medical history is obvious in determining a causal relation between trauma and a resulting convulsive disorder.

Traumatic epilepsy, however, is a convulsive disorder precipitated by an injury to the head.²⁶ Traumatic epilepsy may be caused by a simple concussion, but this is only in a very small percentage of cases.²⁷ Usually it implies an injury to the head of such magnitude as to produce an unconscious state of one hour or more in duration.²⁸

Traumatic epilepsy may produce any type of epileptic seizure: *grand mal*—severe convulsions and loss of consciousness; *akinetic*—falling without jerking of the extremities; *petit mal*—momentary “blackout” but without convulsions or prolonged loss of consciousness; *Jacksonian*—involves only half of the body or extremity or a small area without loss of consciousness; *sensory*—alterations in all senses, including sense of taste, smell, hearing or vision; or *psychomotor*—brief unconscious states with automatic movements which seem voluntary, masked epilepsy.²⁹

The first onset of traumatic epilepsy usually occurs months or even years after the injury. The average time interval is usually from six months to three years.³⁰ Although the actual mechanism which is concerned with the production of traumatic

²² *Id.*

²³ Pollock, *Trauma and Disease of the Nervous System* 311 (2d ed. 1941).

²⁴ McBride, *op. cit. supra* n. 21.

²⁵ Pollock, *op. cit. supra* n. 23.

²⁶ Abbott, *op. cit. supra* n. 20.

²⁷ 4 *Lawyer's Medical Encyclopedia* 385 (1960).

²⁸ Abbott, *op. cit. supra* n. 20.

²⁹ *Id.*

³⁰ *Id.*

epileptic seizures is unknown,³¹ there is speculation that it is caused by a small hemorrhage at the time of trauma, which is later repaired by nature with the formation of a scar.³² Therefore, for a well-founded diagnosis of traumatic epilepsy, the attacks should not occur within the first three months following the injury.³³ The exact time as to when epilepsy will manifest itself cannot be categorically determined.³⁴ An extreme example of this is an interval of twenty-seven years between the head injury and the first epileptic seizure.³⁵ However, in delayed traumatic epilepsy there is normally a symptom which persists during the interval between the time when the injury was sustained and when the first seizure is experienced.³⁶ This can be in the form of paralysis or mere dizziness.

The existing possibilities of delayed traumatic epilepsy may be medically inserted into evidence in order to be assessed in the damages.³⁷ In *Fort Wayne Transit, Inc., v. Shomo*³⁸ an award of \$15,000 for skull fractures and lacerations sustained by a 6 year old child who would probably suffer in later years from convulsive disorder and epilepsy was held not excessive. In this case a doctor testified, "I think it would be fair to state that there is objective evidence of permanent brain damage which may very well later manifest in her by having convulsions." To establish the probability of such a future happening, the doctor testified that from similar wounds (as plaintiff's) during the war, 75 per cent developed some form of convulsive disorder. Also 75 per cent of the people with a similar abnormality will at some time develop focal epilepsy. Such evidence is not considered to be an injection of passion provocation designed to prejudice the jury against the defendant and, thereby, result in an excessive verdict.³⁹

³¹ Elvidge, *The Post-Traumatic Convulsive and Allied States*, *op. cit. supra* n. 14 at 291.

³² 4 *Lawyer's Medical Cyclopedia* 385 (1960).

³³ Averbach, *op. cit. supra* n. 19 at 52.

³⁴ See: *Tables of Frequency*, Elvidge, *op. cit. supra* n. 31 at 288 and 295.

³⁵ Abbott, *op. cit. supra* n. 20.

³⁶ McBride, *op. cit. supra* n. 21.

³⁷ *Potter v. Empress Theatre Company*, 91 Cal. App. 2d 4, 204 P. 2d 120 (1949). In this case, medical testimony that because of injury to the brain there was "a good possibility" that convulsions and epilepsy might develop later was sufficient to sustain a large award.

³⁸ 143 N. E. 2d 431 (Ind. 1957).

³⁹ *Prizio v. Penachio*, 146 Conn. 452, 152 A. 2d 507 (1959).

In *Hayward v. Yost*⁴⁰ there was expert medical testimony to the effect that plaintiff may later develop severe headaches and be afflicted with Jacksonian-type seizures and possibly even partial paralysis of certain types. A verdict of \$10,000 to a minor plaintiff and \$3,605 (which included \$605 for hospital care and medical bills) to plaintiff's parents was not excessive.

An award of \$24,500 for injuries to a 4 year old boy with \$1,868.45 in specials was held not excessive, where a definite brain injury was shown and it was reasonably probable that there would be resulting petit mal attacks of epilepsy.⁴¹

Once the petit mal epilepsy condition is existent, there is even the further possibility that it may become greater in degree. In such a case, there is need for an evaluation of this potentiality. In *Melford v. Gaus & Brown Construction Company, Inc.*,⁴² a doctor testified that the plaintiff's condition was petit mal epilepsy which "can eventually become a full blown epilepsy with convulsions." Although the medical evidence consisted mainly of electroencephalographic tests, a verdict of \$20,000 was sustained, holding the medical testimony "not speculative" and sufficient for a jury to infer that there was "reasonable medical certainty" that the epilepsy would grow progressively worse.

When traumatic epilepsy can reasonably be anticipated, the evaluation of compensating damages should not omit the non-medical effects of this condition. The epileptic will not be able to carry on in his normal way of living. Epilepsy will have an effect upon his marriageability⁴³ and his legal rights to operate a motor vehicle.⁴⁴ An epileptic convulsive seizure is a potential cause of bone fractures in other parts of the body.⁴⁵ Also there are many things the epileptic should not be able to do alone. Some of these are swimming, bathing and sleeping (which might result in suffocation). And the term of life expectancy is shortened in the epileptic.⁴⁶

⁴⁰ 72 Idaho 415, 242 P. 2d 971 (1952).

⁴¹ *Prizio v. Penachio*, *supra* n. 39.

⁴² 17 Ill. App. 2d 497, 151 N. E. 2d 129, 66 A. L. R. 2d 528 (1958).

⁴³ 19 states have sterilization laws specifically applicable for epileptics; 17 states forbid their marriage (6 of these make marriage a crime). *Time Magazine*, Dec. 20, 1954, p. 47.

⁴⁴ 2 Gray, *Attorney's Textbook of Medicine* 1067 (3d ed. 1961).

⁴⁵ *Moritz*, *Pathology of Trauma* 350 (2d ed. 1954).

⁴⁶ 2 Gray, *op. cit. supra* n. 44.

In addition to these, there is the attitude of society which oftentimes has a greater effect upon the epileptic's economic condition than do the seizures themselves. For the epileptic is not accepted on the same level as the normal individual.⁴⁷

Realization by one who has sustained a severe head injury that he may be subjected to convulsive seizures and all the associated socio-economic implications can lead to a state of mental anxiety. Such a state of mind is often termed post-traumatic neurosis and could be considered as a compensable damage. It is not uncommon for a doctor to indicate to his patient the conceivable implications which might ultimately result from their particular injury. Notice of such possibilities may cause mental anguish to the patient. The patient may constantly worry as to if and when the first seizure will strike him, and his normal way of living will necessarily be changed. Such mental anguish, being a proximate result of the head injury, may be the basis for a mental suffering claim whether or not the condition actually develops, and therefore should be assessed in the damages.⁴⁸

The case of *Ferrara v. Galluchi*⁴⁹ allowed a recovery of \$15,000 for mental anguish which plaintiff had to endure from the knowledge of possible cancer. The significance of such a decision can be readily appreciated when considering the future effects of head injury. This would mean that a warning or indication from a doctor in regard to potential residual effects from the injury could establish a basis for a claim for mental suffering. In many cases the mental anxiety may be far greater than the actual resulting effects.

The importance of proper assessment for head injuries is clearly indicated by the nature of the injury and the tragic effects of the potential residuals. There is reasonable certainty that where there is a fracture of the skull, the violence which was sufficient to fracture bones was "sufficiently great to damage a soft organ such as the brain."⁵⁰

Damages for future pain and suffering must have a basis in the evidence submitted to support the claim; therefore, pain and suffering which are merely possible and specu-

⁴⁷ *Id.* at 1069.

⁴⁸ 6 *Curr. Med. for Attorneys* (24) p. 6 (May, 1959).

⁴⁹ 176 N. Y. S. 2d 996, 152 N. E. 2d 249 (1959).

⁵⁰ Adelson, *Anatomic Findings in Acute Head Injuries*, *The Head* 48 (1956).

lative or conjectural are not to be considered in assessing the damages.⁵¹

An excellent example is the case of *Figlar v. Gorden*.⁵² Specials amounted to \$4,383.50, for injuries consisting of a compound depressed fracture of the skull with laceration of the brain and destruction of much brain tissue, and a badly comminuted fracture of the right tibia and fibula. A verdict of \$40,000 for a 17 year old plaintiff was held to be not excessive. On the issue of the possibility of epilepsy, the court stated:

While the evidence would not justify an award of damages based upon the occurrence of epilepsy in the future because it went no further than to deal with this as a *possible* result, the danger that it might ensue was a present fact and the jury were entitled to take into consideration anxiety resulting therefrom.

The *Figlar* case also illustrates the importance of valid medical testimony to substantiate the burden of evidence. It would not be sufficient to show mere possibility. The court requires a reasonable probability in order to sustain the proof.⁵³

In *Arkansas City v. Payne*⁵⁴ the court said that the future pain for which a plaintiff may recover is limited to that which the evidence shows it is reasonable to expect. In *Southland Broadcasting Company v. Tracy*⁵⁵ plaintiff suffered a basal fracture of the skull with resulting damage to brain tissue. Plaintiff's physician was of the opinion that epilepsy would probably result in future years. Medical bills were around \$1,000. Plaintiff's salary was \$55 per week. The court sustained a verdict of \$25,000.

"Is likely to cause people to have convulsions or epileptic fits" was held sufficient to constitute reasonable certainty in *Kuemmel v. Vradenburg*.⁵⁶ In this case the court held:

The word likely has been held to be sufficient to give that measure of certainty required for future damage. We hold that convulsions and epileptic seizures are not disassociated with pain and mental anguish and are conditions which

⁵¹ 15 Am. Jur. Damages 484 (1938).

⁵² 133 Conn. 577, 53 A. 2d 645 (1947).

⁵³ *Fort Wayne Transit, Inc. v. Shomo*, *supra* n. 38.

⁵⁴ 80 Kan. 353, 102 P. 781 (1909).

⁵⁵ 210 Miss. 836, 50 So. 2d 572 (1951).

⁵⁶ 239 S. W. 2d 869 (Tex. Civ. App. 1951).

under the evidence, will probably result from the brain injury.

Even "in all probability" has been held to be equivalent to reasonable certainty.⁵⁷

In *Thompson v. Anderman*⁵⁸ the case came to trial in a little less than two years after the accident. The plaintiff had not yet had an epileptic seizure. The attorney for the plaintiff introduced medical evidence to establish the probability of epilepsy. One doctor testified that most seizures following head injury are going to develop within one year, but that doctors are always worried about seizures developing up to three years after injury. On cross-examination the medical experts for the defense would make no certain statement that the plaintiff would not develop epilepsy. Judgment for \$54,000 was affirmed.

In attempting to aid juries in their decisions as to the amount of damages to be awarded for future pain and suffering, various methods have been devised.⁵⁹ However, in attempting to assess a potentiality, these methods of calculation would not generally be applicable because of the uncertainty of the starting date and the degree of disability that will result. Also, the statistical factors concerning frequency with which these potential injuries will occur are far from approaching a high degree of certainty. However, since potential residuals are compensable damages, juries have a wide range of discretion in assessing the amount.

An interesting theory⁶⁰ has been advanced that, due to the highly speculative nature of this potential injury and its seriousness if it should occur, large awards in essence are representative of an insurance against this injury. Therefore, rather than grant actual compensation for traumatic epilepsy, a policy of insurance should be issued together with the award for the pres-

⁵⁷ *King v. Neller*, 228 Mich. 15, 199 N. W. 674 (1924).

⁵⁸ 59 N. M. 400, 285 P. 2d 507 (1955).

⁵⁹ For a discussion of various methods see *Botta v. Brunner*, 26 N. J. 82, 138 A. 2d 713 (1958); *Southern Truck Leasing Company v. Manieri*, 325 S. W. 2d 912 (Tex. Civ. App.) (1959); *Braddock v. Seaboard Air Line R.R. Company*, 80 S. 2d 662 (Fla. 1955); *Imperial Oil, Limited v. Drlik*, 234 F. 2d 4 (6th Cir. 1956), cert. den., 352 U. S. 941 (1957). As to the per diem theory see generally, 2 Averbach, *Handling Accident Cases*, Sec. 2:235 (1958). For a discussion on the pros and cons of the computation technique see 1960 Wash. U. L. Q. 302 (June, 1960); Hauth, *Per Diem Argument of Pain and Suffering Damages*, elsewhere in this issue of this Law Review (Sept. 1962).

⁶⁰ *Abbott*, *op. cit. supra* n. 20 at 132.

ent, existing injuries. If epileptic convulsions should occur, the policy becomes effective; if not, the only loss to the defendant would be the policy premium, which would certainly be far smaller in amount.

Nevertheless, as a method for calculating an award for potential injuries is as difficult a problem as determining the probability of the injury occurring, and as these two speculative factors both are to be considered by the jury, it should be within the power of the jury to grant a present award and thus to conclude the matter forever.