The Upward Trend in Personal Injury Verdicts

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Louis A. Ginocchio*

In preparing this note, the author has drawn on his personal courtroom experiences and has attempted to provide some insight into what he feels to be the reasons why jury verdicts in personal injury cases have been, and for the foreseeable future will be, increasing in dollar amounts. Only indirectly will it treat the area of a plaintiff’s increased opportunities for a verdict in his favor.

There are innumerable factual and psychological factors which govern the size of a verdict and render generalizations inapplicable to a particular case. Individual factors will vary in their importance when applied to the multitude of different situations presented by individual cases. Consequently, any list of such important factors behind verdict amounts cannot be compiled in any semblance of order of importance. A significant factor in one case may be of little or no importance in another. No attempt has been made to weigh arithmetically the importance of these factors. With the above cautions given, the following is a list of the factors which may be present in any given situation involving litigants, lawyers, witnesses, and jury, but excluding the Court:

(a) Nature of plaintiff’s injuries.
(b) Severity, permanency, or lack of severity or permanency of the injuries.
(c) Demonstrative capabilities of the injury, i.e., presence or lack of objective proof of injury.
(d) Whether or not the injury sustained is an initial injury or an aggravation of a pre-existing condition.
(e) Period which elapsed between the time the injury was sustained and when it became apparent.
(f) Demonstrability of physical and mental pain and suffering.
(g) Earning capacity of the plaintiff and the effect thereon of the injury.
(h) Rising costs of medical service, and the increase in and variety of methods of treating injuries.
(i) Effect of injuries on plaintiff’s ability to continue usual duties not connected with his employment.
(j) Effect of injury on plaintiff’s ability to pursue usual leisure activities.
(k) Effect of injury on plaintiff’s family relationship.
(l) Presence or absence of side effects of the injury, i.e., traumatic neurosis.
(m) Wage and salary increases, and the prospect of continuance of same.

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(n) Expanding areas of liability and verdicts resulting therefrom.
(o) Candor or lack of candor of the litigants.
(p) Candor or lack of candor of trial counsel.
(q) Candor or lack of candor of factual witnesses.
(r) Candor or lack of candor of expert witnesses.
(s) Ability of expert witnesses to communicate with the jury.
(t) Interest or disinterest of witnesses with the litigants.
(u) Absence or presence of an official capacity of any witness.
(v) Ability and experience of trial counsel.
(w) Financial, social and occupational status of the defendant.
(x) Financial, social and occupational status of the plaintiff.
(y) Jury's awareness of presence or lack of insurance coverage.
(z) Sympathy for the wage earner.
(aa) Absence of sympathy for the very rich.
(bb) Sympathy for the very young.
(cc) Sympathy for or prejudice against the elderly.
(dd) Sympathy for or prejudice against teenagers.
(ee) Social and financial position of the members of the jury.
(ff) Composition of jury as to male and female sexes.
(gg) Sex of the plaintiff and sex of the defendant.
(hh) Awareness of jurors of the social need for an adequate verdict.
(ii) Tendency for or against jury members to apply comparative negligence theory to Court's instructions.
(jj) Place of trial.

Certain of the factual and psychological factors enumerated above speak for themselves and need no elaboration, others do need some elaboration or explanation, which will follow the order in which they are listed.

It is noteworthy that defense verdicts are sometimes rendered even though the facts impose absolute legal liability on the defendant. These verdicts can be explained only by the fact that the jury was of the opinion that the plaintiff suffered no injury, or that the injury of which he complained existed prior to the accident and was not aggravated thereby. In other words, plaintiff failed to demonstrate or prove the existence of injury or its causal connection with the accident.

The familiar whip-lash injury is an example of a type of injury which can be difficult to demonstrate. Conversely, there is no problem establishing injuries which consist of bone fractures. However, even in fracture cases, the relationship between the time of the injury and the time of its manifestation is always important. If the plaintiff in the case was removed from the scene of the accident, taken immediately to a hospital for X-rays and other diagnostic techniques, and the fracture is
established thereby, a much different situation is presented from that in which the diagnosis of bone fracture is made months after the accident. In the latter case, doubt arises in the jury's mind as to whether or not plaintiff actually suffered a fracture or whether the fracture was sustained prior to or subsequent to the accident. When such doubts exist, or are created by defense technique, their very presence will tend to influence the size of the verdict towards a lesser amount than would ordinarily be awarded. Absence of such doubts has the opposite effect on the size of the verdict, relieves plaintiff's counsel from many problems, and permits him to spend his time profitably developing other areas during the trial of the case and in his final argument.

The amount of physical and mental pain and suffering connected with plaintiff's injury has an incalculable effect on the size of the verdict. Pain and suffering, as well as the degree thereof, are often in a somewhat nebulous area of proof. Sometimes, the very nature of the injuries, together with the presence of medical and lay evidence to substantiate the same, paints a vivid picture of pain. The ability of plaintiff's counsel to impress the jury in this area not only depends upon his own efforts, but also upon the efforts of defense counsel in rebutting or minimizing the existence or severity of these elements of damages. The field of pain and suffering is one in which the talents of opposing counsel have a tremendous influence on the size of the verdict.

Loss of earning capacity and the extent thereof is a "bread and butter" item in any verdict, dependent not only upon the wage or salary bracket of the plaintiff, but also on the presence of convincing proof as to the amount of wage loss actually attributable to the injury. Here, again, the interrelationship of all of the listed factors comes into play. If a plaintiff is confined to a hospital for six months immediately following the accident, no difficulty is presented in showing a six-month wage loss, less any amounts paid by the employer by contract or otherwise. However, the converse is true in those cases in which the plaintiff has not been hospitalized at any time following the injury, but nevertheless claims that he could not go back to work for weeks or months after the accident. The non-earning pursuits of the plaintiff during the period of alleged disability have a marked effect on the size of the verdict; if plaintiff was busy during his absence from work in painting his house, cutting the lawn, or playing golf, for example, doubt will be cast upon whether or not he actually was so disabled at any time as to prevent the pursuit of his gainful occupation. The nature of his employment, as well as the nature of the injury, becomes important in such situations. The effect of the injury on plaintiff's ability to earn money is an item of damage separate and distinct from its effect on his ability to pursue other occupations, including house and lawn work, customary leisure activities such as golf, bowling, fishing and the like, and the enjoyment of conjugal
and family relationships. Whether or not plaintiff was actually engaged in other pursuits not connected with his livelihood, and whether or not the injury affected these other pursuits are important items in the computation by the jury of the amount it should award plaintiff.

Mental pain and suffering can be as real and acute as physical pain and suffering. In some cases, the damage done to plaintiff's mental processes is such that traumatic neurosis results, an item compensable not only in itself, but also resulting in additional special damages incurred in the employment of psychiatrists, and delay or inability of the plaintiff to pursue his customary occupations, be they gainful, household or leisure occupations.

That the increasing cost of medical services produces larger special damages is self-evident. Larger hospital, doctor, laboratory and therapy costs have been influenced not only by the larger outlays these groups are now required to make in the business of furnishing these services, but also in obtaining the money to permit the professional men concerned to meet the larger expenses connected with their own ways of life. The continued developments in the type and variety of medical care also increase the patient's costs. Not only are a much greater number of X-rays employed in the diagnosis and treatment of the patient's injuries, but a greater number of laboratory and therapy offices have been established, independent of and outside hospital supervision, to speed his recovery. Hospitals, by virtue of the enormous load placed upon them, can no longer do all things for all patients, or if they can, cannot at times perform these functions with the speed or efficiency required by the attending physician or surgeon. Consequently, the plaintiff's medical list of special damages continues to expand and, if attributable to the injury, are more "bread and butter" items adding to the size of the verdict.

Salaries and wages are without doubt on the increase. Universally, persons performing the same occupation which they performed a few years ago are now being paid more money for that performance, and in many cases, have more leisure time to pursue other activities. Consequently, wage loss figures increase automatically, and less working hours may produce a consequent increase in damages attributable to inability to perform leisure activities. Juries are well aware of the fact that the wage scale of practically any plaintiff at the time of trial is less than it will be a year or two or three thereafter. The importance of this awareness comes into play when there is convincing evidence produced that the injuries sustained not only affected plaintiff's past and current ability to earn money, but also affect his prospect of future earnings.

During the last ten years, corporate and individual exposure to liability for their actions has increased. The fast growing number of products liability cases is just one example. The importance of this expanding area of liability has not only increased the number and variety of cases in which plaintiff verdicts are returned, but has also affected the
attitude of juries toward amounts to be awarded for injuries incurred in the more familiar tort situations, such as those resulting from automobile accidents. The increasing types of personal injury actions which come before juries and are publicized by news media, tend to condition juries to return plaintiff verdicts.

The author is thoroughly convinced that juries take their duties seriously and perform them exceptionally well. They are experts in detecting lack of candor or truthfulness among the trial participants. The parties to the case, and their trial counsel, must pass the "candor test" of the jury or suffer accordingly. To a lesser, but still very important degree, this test is applied to both factual and expert witnesses. The expert witness has an additional hurdle to negotiate, in that his qualifications are no more important than his ability to communicate, in understandable language, his findings and opinions to the jury.

Whether or not any of the witnesses, expert or otherwise, have an interest in the outcome of the case is a proper matter for demonstration to the jury. This interest may arise from relationship, friendship, or the witness's opportunity to gain or lose by the outcome of the case. Of lesser importance in its effect on the jury is the possible official capacity of the witness who may be a policeman, state, federal, county, or local elected official or employee. The testimony of such a witness is initially given a degree of credibility not accorded to the testimony of non-official witnesses. An official witness, however, may be subject to the bias and prejudice one or more members of any jury may feel toward policemen in general, public officeholders and, to a lesser degree, public employees, as a result of the juror's personal experience or the experience of others whose judgment the juror respects.

The author has been a long time arriving at one of the most important factors in the trial of any lawsuit, and that is the ability and experience of trial counsel. Counsel's talent has more effect on the outcome of a trial than does the skill and experience of a physician in the healing of the ordinary ills of life. The skill of the trial counsel, together with his personality, can best be likened in importance to the same attributes in a surgeon. The trial of any cause is truly an operation, both in its exploratory technique and in the methods adapted toward the attainment of the results desired.

The financial, or apparent financial, ability of the defendant to absorb or recover from a verdict, has a definite bearing on its amount. Certain corporate entities, such as railroads, trucking companies, utilities and financial institutions are sometimes designated as target defendants. This does not mean that juries wish to punish the rich, but does mean that juries believe that such defendants can pay fully for the damages sustained by the plaintiff and yet continue to operate more or less uninterruptedly. This is especially so when the jury has no doubts that the
defendant is insured or otherwise insulated. Obviously, wealthy individual defendants fall into the same category, but to a lesser degree. Conversely, the defendant in the lower income or social status will be given consideration in the amount of the verdict returned against him. This consideration also seems to extend to defendants who pursue occupations of a religious or teaching nature.

To a lesser degree than affects the defendant, but similarly, the financial, social and occupational status of the plaintiff can play a part in that portion of the damage award which does not relate to wage or other items of special damages. Plaintiffs who engage in professional sports as a means of livelihood apparently have special consideration given them by juries, probably because juries realize that such persons have a much shorter span of years within which to pursue their livelihood than do other persons, and partly, I suspect, because all the world seems to love, and to be attracted to, sportsmen, professional or otherwise.

Juries are aware of the widespread use of insurance coverage, and also of the fact that many motorists have no coverage or a low limit of coverage. The average juror, I believe, carries lower limits than he should, and it can be assumed that unconsciously he will attribute his own amount of coverage to a person in a similar social or financial bracket as his own. Jurors are also aware of the fact that they are not to punish insurance companies, and are not to assume that the acceptance of a premium by an insurer from the defendant automatically qualifies the plaintiff for a verdict. Frequently, defense verdicts are rendered even though the jury might be aware of the presence of insurance along with large limits. Jurors do assume their duties with a serious attitude, and desperately try to be fair, regardless of influences not germane to the subject matter of the trial.

Much has been said and written about the effect of sympathy on jury verdicts. From the beginning to the end of most bodily injury trials, occasions arise when the jury is reminded that sympathy is a commodity in which it should not indulge, and in every case is specifically so instructed in the Court’s general charge, and often in special charges. Within the frameworks of human capabilities, the author believes that juries make every effort to carry out their instructions on the question of sympathy. However, since jurors are human, it does not seem possible that they can escape a feeling of concern for the fate of the disabled wage earner, or to be overly concerned for the losses sustained by the very rich, or ignore a natural attraction to and for a very young child or the elderly. By the same token, it seems impossible to rule out the fact that jurors are cognizant and take notice of certain facts in life, i.e., the unpredictability of the actions of the very young and of the very old, especially when the very old happens to be the defendant auto driver,
or the plaintiff pedestrian. Teenage drivers are, I believe, somewhat suspect by juries, especially when they appear in the role of the defendant.

The social and financial position of the members of the jury definitely seems to be reflected in some measure in their verdicts. The author's own experience binds him to the belief that a jury, with a majority of members derived from the ordinary and less affluent walks of life, is more generous in its verdict than a jury whose members predominantly enjoy higher social and financial situations. Since litigants and their trial counsel must take what they get in the way of the social and financial positions of the members of the jury, this factor is just one of the many which form the basis of higher or lower verdicts, and one of the many reasons for the variances in the amounts awarded plaintiffs. Except in very special situations, preponderance by one sex over the other among members of the jury does not play too great a part in the size of the verdict. Jurors seem to think as jurors, rather than men and women, but there are exceptions. One of these exceptions seems to be related to the sex of the plaintiff and sometimes the sex of the defendant. A jury which is preponderantly female tends to be more critical and less generous with a woman plaintiff. Knowing nothing about women, the author will not ascribe a cause to this factor, and merely states that, in his observations, it can and does have an important bearing on the quantum of a verdict.

Are jurors aware of, and do they apply, any social considerations in arriving at an adequate verdict? It is my opinion that verdicts are not influenced in the average case by a social need feeling among the members of the jury, or that merely because a person is injured and has suffered pecuniary loss, society, through the jury, must compensate him, regardless of fault. Jurors who may have such notions are generally precluded from affecting the verdict by the fact that they will be excused on voir dire for cause or by peremptory challenge, further they may be prevented from affecting jury trends by the fact that courts can and do instruct verdicts for defendants, and lastly, if such jurors do survive the voir dire and no instructed verdict is given, their influence on other members of the jury is unappreciable.

The structure of negligence law is such that, even though in this state (Ohio) the doctrine of comparative negligence does not obtain, jury members have some latitude in applying the comparative negligence doctrine, and can thereafter arrive at verdicts which will be upheld by reviewing courts, because there is nothing apparent in the record to establish the fact that the jury ignored the court's instructions in this respect. Judging by the results, there must be some use by jurors of a comparative negligence theory of their own. In those cases in which it is apparent that plaintiff is absolutely without fault, his chances of a higher verdict seem to be much greater than in those cases in which there is some
question that his conduct played some part in his sustaining the damages for which he seeks to recover.

The place of trial seems to have a definite bearing on the dollar amount of verdicts. In general, the smaller and more rural the community, the smaller will be the size of the verdict. Some reasons behind this factor might be the variance in cost of living, the variance in medical facilities, variance in earning power, and the fact that there are fewer defendants with adequate pocketbooks in the smaller or rural communities than in the urban communities.

The extraordinary variance which exists in cases involving almost identical injuries and special damages can be explained only by the fact that the actual verdict reached by the jury is based in large part on the application by the jury of some or all of the factors discussed to the injuries and special damages sustained. For this reason, the author feels that jury verdicts returned in different courts during any given week, and involving almost identical injuries and special damages, cannot be totalled, divided by the number of verdicts, and a pronouncement made as to a trend resulting from the compilation of these verdicts.

A certain amount of stigma was, in times past, attached to the making of a claim for bodily injuries and "going to court" in the prosecution of the claim. If any part of such stigma now remains, it is more than overcome by the fact that jurors accept personal injury suits as a means of legitimate recovery for damages sustained, regardless of personal feelings which any individual juror may have unconsciously felt against personal injury suits at the time he or she was impanelled and sworn.

The trend in jury verdicts has been gradually establishing an upward curve, but it is impossible to assign percentage increases for any year past, current or future. The declining purchasing power of the dollar, the fact that what was once considered a luxury twenty years ago is now considered a necessity, and the fact that plaintiff's counsel are now better equipped by training, experience and investigative technique and aids to cope with defense counsel, are just some of the reasons why jury verdicts trend higher. This article, therefore, could not be geared to the methods employed in producing a cost of living report, and no attempt to do so was made in its format. The factual and psychological factors treated herein seems to be the real basis behind jury verdicts, but by their very nature individually produce an "X," or an unknown quantity factor, instead of statistics.

In preparing this note, the author has attempted to enter the jury room as a 14th juror, by applying observations derived from court room experiences outside the jury room. Without question, other lawyers will have formulated additional, and/or divergent, causes for the upward trend in personal injury awards. If the author's efforts have stimulated thought on this subject, his purpose will have been accomplished.