Second Study Commission  
Civil Law and Procedure

ANSWERS TO QUESTIONNAIRE

DAMAGES FOR PERSONAL INJURY

Hon. Paul A. Manguson  
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Part I – General questions

1a. Does your system of law have any rules governing damages for personal injury? If so, what do they provide?

The general rule is that juries determine monetary damages in personal injury actions. However, if a judge determines that a jury award is too high or too low, the judge has the power to order the plaintiff to choose between either a new trial or an alternate damages amount as determined by the judge. In addition, some systems in the United States have established "caps," or limits, on personal injury awards, such as those involving medical malpractice and punitive damages.

The vast majority of personal injury cases are resolved outside the traditional courts system, such as through arbitration and mediation. Those forms of alternative dispute resolution—arbitration in particular—operate with a wide range of rules related to damages. Importantly, there exists a system of workers' compensation in which employers are held strictly liable for workplace injuries in return for the general assurance that they cannot be sued in tort or subjected to punitive damages. Many states also require motor vehicle insurers to compensate persons for basic injuries soon after an accident, regardless of who was at fault. The insurers then retain the right to litigate fault at a later date.

1b. Is non-patrimonial (non-pecuniary) compensation limited to cases provided by law?

United States legal systems do not commonly place non-patrimonial or "moral" rights into a separate category. Rather, those rights—such as the rights to one's honor, freedom, privacy, and interest in being free from bodily threats—are included in the various systems of tort, constitutional, and civil rights law. The rules described above generally apply to the limits on compensation for these causes of action.

2. Which are the criteria to distinguish patrimonial and non-patrimonial damage? What are the consequences of the distinction if it exists?

See above.
3a. What are the primary aims and the general principles of the law of damages for personal injury (e.g. prevention, sanction, distributive function, adequate compensation)?

Monetary compensation is the primary aim of the law of civil damages. Prevention and sanction are usually matters for the criminal law. However, when a civil litigation defendant has acted with malice or reckless disregard for the plaintiff's rights, punitive damages are available and effectively do serve to sanction the defendant and prevent future conduct.

3b. Do different forms of damages for personal injuries exist (e.g. compensatory, exemplary, punitive damages)?

Yes, see above. Exemplary damages are synonymous with punitive damages.

4. Does your system of law recognize different categories of damages for personal injury, particularly:

- physical pain
- mental suffering due to permanent loss of abilities
- mental suffering due to false imprisonment
- mental suffering due to damage to intangible rights of personality
- sentiments of fear (e.g. the worry caused by the fear of developing cancer)
- mental suffering caused by the death of a close relative

Damages for physical pain are commonly awarded. Damages for negligent and intentional infliction of emotional distress, including distress experienced through sentiments of fear and from a close relative's death, are less common and are subject to heightened standards, i.e. are awarded only for "outrageous" conduct or when there has been proof of treatment for a medical condition. The law of privacy generally encompasses intangible rights of personality. Personality-related damages usually are limited to compensatory losses, i.e. damages from illegal appropriation of a person's likeness for economic gain.

5a. What methods are used to assess the non-patrimonial damage? Are there any statutory rules on sums to be awarded (e.g. minimum, maximum sums)? Are there any judicial tariffs?

See above.

5b. According to your system of law, which circumstances should be taken into consideration in assessing non-patrimonial loss (e.g. nature, intensity and duration of the injury and/or suffering; individual circumstances of the victim; social position; financial situation)?

Permanent injuries are compensated more generously than non-permanent injuries, and sometimes even more generously than injuries resulting in death. Individual
circumstances always are relevant, particularly with respect to a victim's age and vocation. For example, a young and promising concert pianist who loses a finger due to negligence will be compensated more generously than a retiree whose livelihood and future are not significantly affected by the injury. Under the so-called "eggshell-skull" rule, this is true regardless of whether the defendant knew of the plaintiff's special circumstances, health conditions, or propensity for injury.

A victim's social position and financial situation rarely are relevant. However, a defamation plaintiff who is considered to be a public figure can recover damages only by showing that the defendant acted with malice, i.e. with reckless disregard for the truth.

5c. What is the role of an expert appointed by the court in assessing non-patrimonial loss?

Experts assist juries, arbitrators, mediators, lawyers, and the parties themselves in assessing losses in a wide variety of matters.

II - Cases

6. A defective product harms V, a 25-year-old woman. Her right eye is severely injured (the sight is reduced to 50%). What kind of non-patrimonial (non-pecuniary) damages is she entitled to?

If the injury occurred at work and her employer is at least partially at fault, V's damages will be limited by the workers' compensation system. Regardless, V's damages will be mainly compensatory in nature, particularly because she has not completely lost her sight. In addition, the award most likely will be reduced in an amount proportionate to her own fault. V might be eligible for punitive damages if she can establish that the manufacturer knew the product was dangerous but kept it on the market anyway. Her young age and vocation will be relevant factors.

7. A, a 20-year-old student, suffers severe brain injuries. He is reduced to a living dead. Are his parents who take care of him entitled to a compensation for their mental suffering?

If A's parents witnessed their son's injury and can prove that they have developed their own medical conditions because of what they experienced, they might be eligible for emotional distress damages. More likely but still not certain would be an award for "loss of consortium," a common law cause of action that entitles parents to recover for loss of services from a child. Most likely, the damages will be limited to compensatory damages—specifically, the amount required for A's long-term medical care.
8. A, a publisher publishes an article, which contains many untrue and offending statements of B’s life. B sues for compensation. When assessing the non-patrimonial loss does it make any difference if B is a rock star, a politician or an unknown citizen?

B's damages will sound in defamation and are limited by the First Amendment to the United States Constitution as interpreted by the United States Supreme Court. If B is an unknown citizen, he may recover compensatory damages upon showing that A acted with simple negligence and may recover punitive damages upon showing that A acted with actual malice, i.e. reckless disregard for the truth. If B is a rock star (a public figure) or politician (a public official), he may recover compensatory damages only upon a showing of actual malice. Public figures and public officials may recover punitive damages only in the most extreme of circumstances.

9. A who is slightly injured in a car accident misses a trip to Australia he had booked recently. Is he entitled to a compensation because he was prevented from enjoying his holiday (non-pecuniary damages)?

No.

10. A’s house is burgled and he cannot sleep for months after the event. Is he entitled to monetary compensation of his distress?

If A was terrorized in an outrageous fashion during the burglary and his lack of sleep has led to a medical condition, he would be entitled to emotional distress damages from the burglar. However, collecting damages from such a criminal would be next to impossible.

III

11. Are there any proposals for reform of the legislation governing damages for personal injury?

Yes. Politicians across the United States talk about "tort reform," most typically with regards to medical malpractice. There is a perception that by awarding multimillion-dollar verdicts, "runaway juries" are effectively limiting access to health care—particularly in rural areas and for women giving birth.

12. What points would you wish to discuss in greater detail and/or at the next meeting?

The benefits and detriments of Universal Jurisdiction in criminal matters.