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BOOK REVIEW

Personal Injury Damages in Wisconsin: By James D. Ghiardi.*
Chicago: Callaghan & Co. 1964. Pp. 144. \$12.50.

An empty space has now been filled on the shelf of a Wisconsin lawyer's working library. It is curious that text writers have long neglected the law of damages. Only a half-dozen worthy books on the subject have been written in the last half century. Wisconsin lawyers have been consigned to encyclopedias and digests as a point of entry in their research of the law. Professor Ghiardi's book is a welcome, competent, and necessary addition to a lawyer's permanent library.

Originating as a series of articles in the *Wisconsin Continuing Legal Education Journal* which developed the subject in depth, it has been updated, placed in permanent form, and graced with a type size and style of which I grow more fond with each passing year.

About three-fourths of non-family court civil litigation¹ involve personal injury. Like the title of the book, that statement is deceptively limiting. Because of the volume, personal injury is usually equated with accidental negligent trauma to the person. However, its true breadth encompasses most areas of damage resulting from intentional or unintentional torts, and this text refers to the damages resulting from such a broad range of subjects as assault and battery, false imprisonment, gross negligence or wanton conduct, conversion or destruction of personal property, replevin, attachment, trespass, defamation, malicious prosecution, wrongful discharge, conspiracy, alienation of affections, seduction, breach of promise of marriage, and fraud and deceit.

The author's hallmark, evidenced in his other publications, is a simple, direct style blended with a masterful talent for subject organization. Neither complex nor ponderous, the text is perceptive in its analysis of the basis and reasoning of the decisions discussed. It is rational and informative in criticism and comparison. Fortunately for the reader, Professor Ghiardi has not forgotten his vocation. He develops, informs, and directs the course of the law of damages, providing thought and direction for inconclusive areas of the subject rather than blandly collecting case law.

Dealing first with the general law of damages, the author discusses punitive damages, their theory and nature, evidentiary matters affecting them, and a principal's liability for punitive damages. The bibliography of cases on punitive damages is illustrative of the quick-focus character of the book. Not content with sole concern for what the law is, the author includes a comprehensive analysis of the unresolved (in Wisconsin) liability of an insurer for punitive damages.

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¹ Involving over \$500.

The transition to exemplary damages is made through discussion of a timely subject, "Injury Due To Fright or Shock—Mental Suffering," which was discussed at the recent convention of the National Conference of State Trial Judges where Milwaukee Circuit Judge William I. O'Neill presented a paper entitled "The Trial Judge and Problems of Proof of Damages for Injuries Negligently Inflicted Without Impact."

The work concludes with a chapter-by-chapter analysis of the more familiar ingredients of personal injury damages: pain and suffering, medical expenses, loss of earnings and earning capacity to time of trial, and such future losses.

Division of each chapter into topics with appropriate section headings simplifies the use of the book for ready reference to a specific point of research and contributes to easier understanding of the text.

Though not an involved legal matter, recovery of medical expenses is complex and intricate in its evidentiary aspects. The collateral source rule and the recovery of medical expenses by married women are discussed in clear and simple fashion. They are becoming increasingly important to lawyers as one sees more involvement by "collateral source" subrogees in assertions of their newly-claimed subrogated interests in personal injury cases. Although not equal to the frustration one meets in attempting to pierce the veil of mystery enshrouding "disability," "pain and suffering," or "impairment of the ability to enjoy the benefits of life," the recovery of loss of earnings and earning capacity is also involved and intricate. The book handles the matters in a most adequate fashion.

The trial of a difficult liability case of personal injury is a stimulating intellectual exercise, but academic and abortive to the litigant unless supported by an effective proof of damage. In the eternal struggle for a dynamic system of justice, those concerned in its administration often forget that the assessment of dollar damages is a means by which the end of justice is achieved. As lawyers we become overly engrossed in liability, and litigants, similarly distracted, reject settlement offers because of principle rather than inadequacy. It is neither blasphemous nor iconoclastic to remind ourselves that the means of our system in the quest for justice in this field is not found near to the heart but seated in the hip pocket. Unless the plaintiff's theories of liability and damage intersect at trial, he has met defeat. Although professional journals are increasingly concerned with trial techniques, there is a customary obsession with proof of liability rather than proof of the extent of resultant damage. Although the author does not attempt to solve this problem directly, he has contributed to its solution indirectly, for his book provides a Wisconsin lawyer with an easy and quick

knowledge of the law of personal injury damages that will free many hours of legal research for devotion to fact preparation for trial.

I have always felt that if one would write his jury argument after preparing for trial, it would make apparent the additional evidence that must be elicited to persuade the jury to one's position. For instance, a plaintiff's attorney urges this:

In arguing pain and suffering, take the approach that has been described as the 'whole-man' concept.

That is, when a part of a man has been injured or when a part of him aches and pains, he cannot divorce or separate that part from the whole man. When a man has a pounding headache, it is not just his head that is affected, but his entire personality, his entire enjoyment of living. Although his arms and legs suffered no injury and function as well as ever, he doesn't feel up to using them to bowl or golf or engage in other physical activities, when his head hurts. He does not want to wrestle with his children or take them to the park. He is impatient with his wife. He is irritable with his fellow employees, and, perhaps, even the customers, thus affecting his ability to perform his job. In such a manner, a man's entire personality and mode of living has been changed by reason of pain and suffering, and it is not just an ache or pain to a small, confined area of the body.

If you are successful in showing how your client's injury affects the whole man, his whole method of living, and his enjoyment of living, this means something to the jurors and is something for which they are willing to award compensation. Although a particular juror may not feel that a headache is worth a great deal, the same juror might be willing to compensate adequately for a man's loss of the thrill of wrestling with his small son or in his loss of ability to participate in the many activities that make our life more enjoyable.²

And from the defense attorney's point of view, seldom does one hear elicited from medical witnesses the information that intervertebral disc degeneration begins at ages eighteen to twenty-five and progresses until old age; that a study of disc patients established that 60 per cent gave no history of trauma before the onset of pain;³ or that 20 per cent of a studied group of people with normal, uninjured necks had a straightened lordotic reverse of the cervical spine.⁴

The Committee on Medical Rating of Physical Impairment of the American Medical Association, recognizing the complexity of the term "disability," avoids the difficulty by distinguishing "disability" from "impairment." The latter is defined as a purely medical condition, the evaluation of which is a function which physicians alone are competent

² Miller, *Opening & Closing Statements from the Viewpoint of the Plaintiff's Attorney*, 10 PRAC. LAW. 87, 93 (Oct. 1964).

³ Rahilly, *Lumbar Discography*, MED. TRIAL TECH. Q. 9 (Sept. 1964).

⁴ Frankel, *Medical Reevaluation of the "Whiplash,"* 13 DEFENSE L. J. 513, 517 (1964).

to perform. Disability evaluation is defined as an appraisal of a patient's present and probable future ability to engage in gainful activity as it is affected by nonmedical factors such as age, sex, education, economic and social environment, and the medical factor, permanent impairment. The committee asserts that the evaluation of permanent disability is an administrative (legal) decision. The committee says: "It is not and never can be the duty of physicians to evaluate the social and economic effects of permanent impairment. These effects must be evaluated by administrators [triers of fact and law] in making determinations of permanent disability." Nevertheless, the physician as an expert in skeletal engineering is a logical witness from whom to elicit the relationship of the patient's medical condition and his personal efficiency in the activities of daily living. I cannot help but feel that the medical profession should hasten to fill this void, recognizing that because they are doctors, they have a fund of knowledge that enables them to make a substantial contribution of information. Although Professor Ghiardi does not suggest courses of action in this regard, he has discussed many of the Wisconsin cases which may provoke the reader's thought on how this may be accomplished.

One can only hope that the brevity of this book will not inspire the reader to a "once over lightly." There are many refinements of the discussed legal propositions which, although presented, are not discussed but will become apparent as the author's comprehensive understanding of the subject and his direction is acquired by the reader.

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