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Damages - The “Whole” Truth - A Rebuttal

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In an article in the January 1971 issue of JUDICATURE (January 1971 JUDICATURE, p.247), Judge Leonard L. Finz of New York put forward the proposal that the successful plaintiff in a personal injury action should be awarded actual attorney fees in addition to the other damages given him by a court or jury. Judge Finz asserts that present damage procedures do not make the plaintiff "whole" since the damages he received are reduced by the sum which is paid to his attorney. He uses as an example the contingent fee agreement by which from 25% to 50% of a damage award is paid by the plaintiff to his lawyer.

The article appears to be a "top-of-the-head" proposal which brushes over many aspects of the rule of damages and ignores others which should be carefully considered.

LIMITATION TO PERSONAL INJURY ACTIONS

The first question which the judge's proposal provokes is why his suggestion is limited only to personal injury litigation. Except in those instances in which there is some contractual agreement or statutory provision for the assessment of actual attorney fees against the unsuccessful litigant, anyone who pays his attorney from the damages collected through litigation is not made "whole" as a result of the damages that may be awarded by a court or jury. The personal injury litigant stands in no unique position which entitles him to special treatment. The same arguments for the addition of actual attorney fees to the damage award can be made for any person who is forced to use an attorney and the court to establish the merit of his claim or position. If the basic logic which led to Judge Finz's proposal was sound, it makes no sense at all to limit the scope of his proposal only to one class of litigants.

LIMITATION TO THE SUCCESSFUL PLAINTIFF

Judge Finz's proposal has a further limitation which makes the class of persons who would be awarded attorney fees even smaller. Fees would be awarded only if the plaintiff was successful. His basis for this additional limitation is that "the substantial burden upon the unsuccessful 'personal' plaintiff in such a case (when there is a defense verdict) would far outweigh the minimal benefits to be received by the successful 'represented' defendant, who in almost every case is represented by counsel in the employ of or retained by large insurance firms." How the public interest can be served by establishing a privileged class of litigants is not explained. Further, it ignores the realities that are faced by defendants who employ and pay their own attorneys, or those who have counsel furnished to them by "small" insurance firms, and those defendants who may be faced by a judgment in excess of their policy limits.

This type of reasoning is just another example of the "large insurance firm" syndrome which has infected some of this nation's judiciary. Rules of law are changed, not because they are found to be anachronistic, but because "the defendant is generally protected by insurance with a large insurance firm which can spread the cost." Somehow lost in this national passion to sock it to the "large insurance firm" is the fact that insurers get their money from "small premium payers." We have reached a point at which the tort system—at least as it applies to automobile accident reparations—may fall because the public has been led to believe that it is paying too much for auto insurance. Therefore, it seems strange to suggest that "small premium payers" should be saddled with a rule which would make them pay a successful plaintiff's attorney fees,

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without imposing a similar sanction upon the unsuccessful plaintiff who forced their money to be expended in a meritorious defense. With statistics clearly showing almost an even split of plaintiffs' and defense verdicts in personal injury litigation, it is abundantly clear that "large insurance firms" and their "small premium payers" do not stand alone in forcing claims to trial in which their position is without merit.

TORT MEASURE OF DAMAGES

Judge Finz emasculates the rule of damages in tort cases by his proposal. The law provides that the successful plaintiff shall be indemnified to the extent that money damages are able to so that he will be in the same position he occupied immediately prior to the accident. Except for out-of-pocket economic loss, the tort judgment merely approximates the loss for inconvenience, pain, suffering, etc. Further, the cost of litigation such as filing fees, witness fees and attorneys' fees are not considered as damages within the tort rules of the United States. These items are considered as costs. Judge Finz's quarrel is really with the inadequate cost structure that we have in the United States. If he had directed his criticism to this area of our legal system, an area which should be the concern of our judiciary, his remarks would have had more value. We should clearly improve the cost system in the United States.

INEQUITY OF THE PROPOSAL

In providing for the payment of attorneys' fees to the successful plaintiff, Judge Finz fails to specifically consider the amount of the fee and its relationship to the amount of work actually performed. He does not specify that payment to the attorney should be on a "quantum-meruit" basis but indicates it should be based solely on the agreement between plaintiff and counsel. To use an extreme example, a million dollar verdict on a 50% contingent fee basis would cost the defendant $1,500,000 plus court costs, interest and his own attorney's fee. Rather than being the "whole" truth, the judge's proposal would be an inducement to over-reaching by the unscrupulous.

A legal rationale is proposed on the basis of an implied contract. How such a contract can be implied for only successful plaintiffs and not successful defendants is not part of the hornbook law of contracts.

PROMOTION OF SETTLEMENTS

It is clear that Judge Finz believes that his proposal will result in the settlement of more claims. However, the sanction which he suggests would only prompt the defense to take a long, hard look at settlement potential. In this age of rising defense costs and excess liability cases, there is much pressure now applied upon "large" and "small" insurance firms to settle claims. But the question which Judge Finz fails to consider is whether his proposal might cause more plaintiffs to "go for broke" rather than settle. If the personal injury plaintiff settles without trial under the Judge's proposal, he would have to pay his attorney out of his settlement award. However, if he goes to trial and is successful, he will receive all of his damages and his attorney will be paid by the defendant or his "large insurance firm." In those cases in which liability is clear and the only dispute is over the amount of damages, the plaintiff would have nothing to lose under the proposal by going to trial. In those cases in which the defense wanted to settle and provided a realistic and adequate offer, the defendant would be penalized when it was actually the plaintiff who provoked the trial in order to get a so-called "whole" award.

AN ALTERNATIVE

Judge Finz has presented a germ of an idea

which should be given further thought to find a more workable and equitable approach not in the area of damage law but by a re-evaluation of our cost and fee system in all litigation. The successful litigant, be he plaintiff or defendant, in any type of action should be compensated for the reasonable expense of hiring an attorney and engaging in the litigation process to prove the merit of his claim or defense.

The proper solution may lie in the Offer of Settlement—Offer of Judgment approach. Prior to trial, each party should be allowed to put the other on notice of the best offer he will make to settle the case. If the offer is not accepted and the trial results in a finding that the person making it was correct in his position, the party who refused the offer should have the litigation expenses, including reasonable attorney fees, of the successful party taxed against him. This will force all parties to take a realistic look at settlement. It will accomplish the basic result that Judge Finz had in mind without adopting a "what's sauce for the goose is sauce for the goose" approach to the problem.