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No. 98296-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and  
JAMES P. SPURGETIS, solely in his capacity as the personal  
representative of the Estate of JERRY D. COOGAN, deceased,

*Petitioners,*

vs.

GENUINE PARTS COMPANY and NATIONAL AUTOMOTIVE  
PARTS ASSOCIATION a.k.a. NAPA, ,

*Respondents,* and

BORG-WARNER MORSE TEC, INC. (sued individually and as  
successor-in-interest to BORG-WARNER CORPORATION), *et al.*,

*Defendants.*

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the basis upon which an appellate court may grant a new trial on the ground that the award of damages in a jury's verdict is excessive.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case presents the Court with the opportunity to clarify the basis upon which an appellate court may grant a new trial on the ground that the award of damages in a jury's verdict is excessive. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Coogan v. Borg-Warner Morse TEC Inc., noted at 12 Wn. App. 2d 1021, 2020 WL 824192, review granted, 195 Wn.2d 1024 (Table) (2020); Genuine Parts Company (GPC) Op. Br. at 4-23; National Automotive Parts Association (NAPA) Op. Br. at 2-11; Coogan Resp. Br. to GPC at 3-22; Coogan Resp. Br. to NAPA at 2-16; NAPA Reply Br. at 2-3; Coogan Pet. for Rev. at 4-8; NAPA Ans. to Pet. for Rev. at 2.*

For purposes of this amicus brief, the following facts are relevant. Jerry Coogan died from peritoneal mesothelioma. Coogan's spouse and estate sued multiple entities alleging Coogan was exposed to asbestos from

their products and that this exposure caused Coogan's death. All of the defendants except GPC and NAPA settled or were dismissed prior to or during trial. During the course of a three-month trial, the plaintiffs presented evidence that Coogan's mesothelioma started in the lining of his abdomen, and caused tumors in his abdomen, bowels, diaphragm and lungs. He developed painful swelling of his belly from severe fluid build-up pressing against his organs and skin. The fluid build-up required frequent drainage from his abdomen and around his lungs. Coogan suffered from "air hunger" (breathlessness), pain-induced insomnia, constipation, dehydration, kidney failure, malnutrition, weakness and wasting away of his body. He received narcotic medications and three rounds of chemotherapy. Coogan knew that he was going to die.

The jury was instructed that in compensating the estate for noneconomic damages, it could consider the pain, suffering, anxiety, emotional distress and fear that Jerry Coogan suffered before his death. The jury was further instructed that: "The law has not furnished us with any fixed standards by which to measure noneconomic (pain and suffering) damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions." *Coogan*, 2020 WL 824192 at \*11. The jury entered a verdict for the plaintiffs against both defendants for \$81.5 million, including \$30 million to Coogan's estate for his pain and suffering and \$51.5 million to his wife

and daughters. The trial court denied defendants' CR 59 motion for new trial, or, in the alternative, for remittitur under RCW 4.76.030.

The Court of Appeals affirmed the liability verdict against both GPC and NAPA, reversed different portions of the damages verdict on independent grounds and remanded for a new trial on damages only. The court reversed the awards to Coogan's wife and daughters on the basis that the trial court erred in excluding the testimony of defendants' medical expert. In a 2-1 decision, the court reversed the \$30 million verdict to the estate for Jerry Coogan's pain and suffering on the basis that it shocked the court's conscience. *See Coogan* at \*\*11-12. The appellate court did not address whether there was substantial evidence to support the verdict or whether the jury was motivated by passion or prejudice.

In reversing the estate's damages verdict, the majority states the "third basis" for reversing a jury's verdict is "if the evidence supports the verdict and the record does not show unmistakable passion or prejudice, the question is whether the size of the verdict 'shocks the conscience of the court.'" *Id.* at \*11 (quoting *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wn.2d 831, 836-37, 699 P.2d 1230 (1985)). "We focus on this third basis for granting relief under CR 59(a)(5). The question here is whether the \$30 million pain and suffering verdict shocks this court's conscience." *Id.* Two of the three Court of Appeals judges reversed the \$30 million verdict for pain and suffering because it shocked the conscience of the court, and

held that the trial court erred in denying a new trial on damages under CR 59(a)(5). The majority stated its conclusion was “subjective.” *See id.* at \*12.

The dissenting judge emphasized that the majority did not conclude that the jury’s verdict was “outside the range of substantial evidence in the record,” or “appear[ed] to have been arrived at as the result of passion or prejudice,” but rather the sole reason for reversing the pain and suffering award was because it “shock[ed] the conscience of the court.” *Id.* at \*27 (Melnick, J., dissenting in part; brackets added).

Plaintiffs petitioned for review, arguing: 1) an appellate court cannot substitute its judgment for that of the jury solely based upon a subjective belief that the award is too high; 2) the court of appeals did not apply the proper standard for determining whether an award “shocks the conscience”; 3) the trial court did not err in excluding evidence regarding Coogan’s cirrhosis. GPC and NAPA argued that if review is granted, the Supreme Court should consider whether: 1) attorney misconduct warrants a new trial, or constitutes an alternative ground to order a new trial on the award of damages; 2) the entire verdict should have been reversed as excessive; 3) evidence discovered after the verdict warrants relief from the judgment. The Supreme Court granted the petition for review and review of the issues contingently raised in the defendants’ answer to the petition for review.

### **III. ISSUE PRESENTED**

Whether an appellate court can reverse an award of damages in a jury verdict after the trial court denied a motion for a new trial or remittitur

solely on the basis that the amount of the damages award “shocks the conscience” of the appellate court.

#### IV. SUMMARY OF ARGUMENT

The Washington State Constitution guarantees the right to have a jury determine the amount of damages for personal injuries. A trial court may grant a new trial or a remittitur if it concludes that the amount of damages is so excessive as to indicate the verdict must have been the result of passion or prejudice, or finds there is insufficient evidence to justify the verdict. A jury’s verdict determining the amount of damages is strengthened by the trial court’s denial of a motion seeking a new trial. Because of the trial judge’s attendance through trial, the trial court is in a favored position when compared to an appellate court to determine whether the amount of a verdict is excessive. The role of an appellate court is different, and a trial court’s ruling denying a motion seeking a new trial for excessiveness will not be reversed unless the trial court abused its discretion. Because an appellate court strongly presumes the jury’s verdict is correct and will give deference to the trial court’s discretion in denying a motion for a new trial, appellate review is narrow and is rarely exercised.

In *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005), this Court stated: “Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard as articulated in precedent.” Pursuant to that precedent, the “shocks the

conscience” element should operate merely as a focusing tool to determine whether there is insufficient evidence to support a damages award or whether the verdict was tainted with passion or prejudice. The “shocks the conscience” test should not serve as an independent basis for reversing a jury’s damages award and a trial court’s denial of a motion for a new trial.

## V. ARGUMENT

### A. Overview Of The Standards For Overturning A Jury’s Damage Award For Excessiveness.

#### *Re: The Role of the Jury*

The Washington State Constitution provides: “The right of trial by jury shall remain inviolate.” Wash. Const. Art. 1 § 21. This provision gives the jury the role to determine questions of fact, and the amount of damages is a question of fact. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 648, 771 P.2d 711, 780 P.2d 260 (1989); *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). “[I]nviolat[e]’ connotes deserving of the highest protection.” *Sofie*, 112 Wn.2d at 656 (brackets added). The State Constitution provides an essential guaranty that the jury is tasked with deciding the amount of damages in a civil case. *See id.* The determination of the amount of noneconomic damages is particularly within the jury’s function. *See Sofie*, 112 Wn.2d at 646; *Bingaman*, 103 Wn.2d at 835.

This Court has described the right to have a jury determine the amount of damages for personal injuries as “a fundamental principle” of Washington law. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 267, 840 P.2d 860 (1992). “[T]he jury is the final arbiter of the effect of the evidence,

for it determines the credibility of the witnesses, the weight of their testimony, and the consequence of all other evidence.” *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967). While the trial court may reduce the amount of a verdict, there is a “strong presumption” in the validity of the amount of damages awarded by a jury. *See Sofie*, 112 Wn.2d at 654; *Robeck*, 79 Wn.2d at 868; RCW 4.76.030.

***Re: The Authority of the Trial Court***

Pursuant to CR 59, the trial court may grant a new trial on all, or some, of the issues if the trial court finds “[d]amages so excessive... as unmistakably to indicate that the verdict must have been the result of passion or prejudice,” or “[t]hat there is no evidence or reasonable inference from the evidence to justify the verdict or the decision,” or “[t]hat substantial justice has not been done.” CR 59 (a)(5), (7), (9) (brackets added). Pursuant to RCW 4.76.030, the trial court may order a new trial or a remittitur if it finds the damages awarded by the jury “to be so excessive... as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice.”

Regarding the sufficiency of the evidence, this Court has stated: “The fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss.” *Washington State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 331, 858 P.2d 1054 (1993) (citations omitted). The required substantial evidence must be such “that it would convince ‘an unprejudiced, thinking mind.’” *Bunch*, 155 Wn.2d at 179

(citations omitted). A trial court's order of remittitur "is, in effect, the result of a legal conclusion that the jury's finding of damages is unsupported by the evidence." *Sofie*, 112 Wn.2d at 654.

"For a court to find passion or prejudice, it must 'be of such manifest clarity as to make it unmistakable.'" *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 457, 191 P.3d 879 (2008) (quoting *Robeck*, 79 Wn.2d at 870). "Where an award is not contrary to the evidence, this court will not find it to be the result of 'passion and prejudice' based solely on the award amount." *Brundridge*, 164 Wn.2d at 454. In *Robeck*, the Court held:

[W]here it can be said that the jury... could believe or disbelieve some of [the evidence] and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.

79 Wn.2d at 870-71 (brackets added).

A jury's verdict determining the amount of damages is strengthened by the trial court's denial of a motion seeking a new trial on a claim of excessiveness. *See Fisons*, 122 Wn.2d at 330; *Washburn*, 120 Wn.2d at 271. The trial court is in "the favored position" to exercise its discretion as to whether the amount of a verdict is excessive. *See Bingaman*, 103 Wn.2d at 835. "The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents." *Id.*, 103 Wn.2d at 835.

***Re: Authority of the Appellate Court***

This Court has recognized the difference between the authority of the trial court and that of an appellate court to review the verdict of a jury, as the trial judge has a unique vantage point from which to judge the fairness of the trial:

[Art. I § 21] is pregnant with meaning. The courts have no right to trench upon the province of the jury upon questions of fact. It is only where there is no evidence, either direct or circumstantial, which warrants the verdict of the jury that the courts may interfere... However, in the application of this constitutional provision, only appellate courts have no right to ‘trench upon the province of the jury upon questions of fact.’... [W]e have always upheld the right of the trial judge to grant a new trial when he is convinced that substantial justice has not been done, on the theory that it is an exercise of the trial court’s inherent power.

*Coppo v. Van Wieringen*, 36 Wn.2d 120, 121, 124, 217 P.2d 294 (1950)

(brackets added; citations omitted). In *Norland v Peterson*, 169 Wash. 380, 13 P.2d 483 (1932), the Court noted:

The trial court, in passing upon a motion for new trial based upon the ground that the verdict of the jury is inadequate or excessive, will consider the evidence, and, if that court is of the opinion that substantial justice has not been done, it will, in the exercise of its duty, grant a new trial.... But the function of this court is different, and the ruling of the trial court upon the motion will not be disturbed upon appeal, unless it can be said that the verdict is so far inadequate or so excessive as to be without support in the evidence, or it must appear that the verdict was the result of some extrinsic consideration, such as bias, passion, or prejudice on the part of the jury.

*Norland*, 169 Wash. at 382.

An appellate court reviewing a jury’s damages award on a claim of excessiveness “does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court’s discretion

in denying a new trial on a claim of excessive damages.” *Fisons*, 122 Wn.2d at 330. “[A]n appellate court, ‘tied to the written record,’ cannot share the experiences of the jury or the trial court.” *Washburn*, 120 Wn.2d at 270 (citing *Bingaman*, 103 Wn.2d at 835). Accordingly, “appellate review is most narrow and restrained,” and the appellate court “rarely exercises” the power to overrule the jury. *Fisons*, 122 Wn.2d at 330 (quoting *Washburn*, 120 Wn.2d at 269 (quoting *Bingaman*, 103 Wn.2d at 835)).

An appellate court employs an abuse of discretion standard of review for an order denying a motion for a new trial. *See Brundridge*, 164 Wn.2d at 454. The standard specific to motions for a new trial is: “[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?” *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (citations omitted); *see also Brundridge*, 164 Wn.2d at 454.

“Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent.” *Bunch*, 155 Wn.2d at 176; *see also Bingaman*, 103 Wn.2d at 835.

**B. In Keeping With This Court’s Practice And Precedent, The “Shocks The Conscience” Element Should Operate Merely As A Focusing Tool To Determine Whether There Is Insufficient Evidence To Support An Award Or Whether The Verdict Was Tainted With Passion Or Prejudice.**

In *Bunch*, when the trial court denied a motion for a reduction of a jury’s award for noneconomic damages or a new trial, this Court stated the trial court order would be reviewed “using the substantial evidence, shocks

the conscience, and passion and prejudice standard *articulated in precedent.*" *Bunch*, 155 Wn.2d at 176 (emphasis added). What is that *precedent*, and how was that standard *articulated* in that precedent?

This Court in *Bunch* relies principally upon its earlier opinion in *Bingaman* as precedent for the substantial evidence, shocks the conscience and passion and prejudice standard. *See Bunch*, 155 Wn.2d at 175, 179 (quoting *Bingaman*, 103 Wn.2d at 835). In turn, in *Bingaman*, the Court relies significantly on its previous decision in *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 261 P.2d 692 (1953), regarding the substantial evidence, shocks the conscience and passion and prejudice standard. *See Bingaman*, 103 Wn.2d at 835 n.2 & n.5, 837 n.12, 838 n.16.<sup>1</sup> The Court in *Bunch* also quotes from *Kramer* regarding the "shocks the conscience" test. *See Bunch*, 155 Wn.2d at 179 (quoting *Kramer*, 43 Wn.2d at 395). Accordingly, in order to determine how the substantial evidence, shocks the conscience, passion and prejudice standard should be applied, it is necessary to review how that standard was articulated in *Kramer*.

In *Kramer*, the defendant appealed a wrongful death verdict, contending the trial court erred in denying the motion for a new trial based on a claim of excessive noneconomic damages. *See Kramer*, 43 Wn.2d at

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<sup>1</sup> The Court in *Bingaman* also cites *Johnson v. Marshall Field & Co.*, 78 Wn.2d 609, 617-18, 470 P.2d 735 (1970), and *Hogenson v. Service Armament Co.*, 77 Wn.2d 209, 218, 461 P.2d 311 (1969), regarding the "shocks the conscience of the court" test. *See Bingaman*, 103 Wn.2d at 837 n.11, 838 n.17. *Johnson* relies upon *Hogenson* regarding the "conscience of the court" factor. *See Johnson*, 78 Wn.2d at 618 (quoting *Hogenson*, 77 Wn.2d at 218). In turn, *Hogenson* relies completely upon, and quotes extensively from, *Kramer* with respect to the conscience of the appellate court as a factor in considering whether a jury's verdict is excessive. *See Hogenson*, 77 Wn.2d at 217-18 (quoting *Kramer*, 43 Wn.2d at 395).

389. In considering whether it would disturb the jury verdict, the Court noted: "It is but a conclusion to say that a jury's verdict is excessive. Before the conclusion can be reached, it must be supported by the record." *Id.*, 43 Wn.2d at 392. Rejecting the defendant's argument that the amount of the verdict required a conclusion that the verdict must have been the result of passion and prejudice, the Court found that the record affirmatively refuted the claim that the jury was influenced by passion and prejudice. *See id.* at 394.<sup>2</sup>

The Court framed the remaining issue before it as whether it should order a reduction in the verdict or a new trial, even though the jury was not influenced by passion and prejudice. *Id.* at 394. The Court stated that the conclusion reached by an appellate court in reviewing the excessiveness of a verdict for damages for wrongful death "must be the result of tipping the balance between two sets of factors":

On the one hand, the following must be considered: Each cause depends, to a large extent, upon its own facts and circumstances. The verdict must be compensatory of a pecuniary loss.... It can be substantial... but not out of proportion to actual damages. The amount of the damage is within the discretion of the jury, under proper instructions. The jury is given considerable latitude in making such determination as to it seems just.... The subject matter

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<sup>2</sup> The Court cited nine cases where it "reduced verdicts for damages for wrongful death (or, in the alternative granted a new trial)... when passion and prejudice were either not discussed or were found not to exist." *Kramer*, 43 Wn.2d at 394. In each of those nine cases, the Court reduced the verdict after reviewing the evidence in the case that supported the damages award and concluding that evidence was not sufficient to sustain the amount of the verdict. *See Walker v. McNeill*, 17 Wash. 582, 594-95, 50 P. 518 (1897); *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 110-11, 71 P. 725 (1903); *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 641, 84 P. 592 (1906); *Ohrstrom v. Tacoma*, 57 Wash. 121, 129, 106 P. 629 (1910); *Walters v. Spokane International R. Co.*, 58 Wash. 293, 301-02, 108 P. 593 (1910); *Delaski v. Northwestern Improvement Co.*, 70 Wash. 143, 146-47, 126 P. 421 (1912); *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 564, 135 P. 209 (1913); *Graham v. Allen & Nelson Mill Co.*, 78 Wash. 589, 597, 139 P. 591 (1914); *Thompson v. Fiorito*, 167 Wash. 495, 503-04, 9 P.2d 789, 12 P.2d 1119 (1932).

being difficult of proof, it cannot be fixed with mathematical certainty by the proof. Once the determination is made, an appellate court will give great weight to, and is reluctant to interfere with, the jury's verdict.

On the other hand, the balancing factor is the conscience of the appellate court, when there is an affirmative showing that passion and prejudice played no part in a jury's determination. Is the amount flagrantly outrageous and extravagant? *Is it unjustified in light of the evidence?* Does it disclose circumstances foreign to proper jury deliberations? If it is and does, then can it be said to shock the sense of justice and sound judgment, and the verdict of the jury is excessive.

*Id.* at 396 (emphasis added). Hence, in *Kramer*, the "conscience of the appellate court" and whether the amount of the jury's verdict "shock[ed] the sense of justice and sound judgment" depended on whether that verdict was excessive "*in light of the evidence.*" *Id.* (brackets and emphasis added). Whether the jury's damages award "shocks the conscience" of the court is incorporated into the court's analysis in determining whether there is sufficient evidence to support the amount of damages.

In *Kramer*, the Court asked: "Can it be said, as a matter of law, under the facts, that the verdict carries its own death warrant, solely by reason of its size?" *Id.* at 394. Applying *Kramer*'s two sets of factors for appellate review of the claimed excessiveness of a jury's award of damages for wrongful death provides an answer to the Court's question: in the absence of a determination that the damages were not established with sufficient certainty to provide the jury with a reasonable basis for estimating those damages, there is no logical basis for granting a new trial on the ground that a judgment is excessive. In *Washburn*, this Court held:

It is apparent that the amount of the verdict in and of itself cannot sustain a conclusion that it is excessive. Rather inquiry relates to a particular case, a particular plaintiff with those injuries and damages proved at trial. Amount alone cannot equal excessiveness; the fact that \$8 million is a large sum of money is beside the point.

120 Wn.2d at 278.

Cases subsequent to *Kramer* have generally not employed the “shocks the conscience” criterion as an independent, stand-alone basis for testing the excessiveness of a jury’s damages award. For example, in *Fisons*, in reviewing the standards for an appellate court overturning a jury’s damage award, the Court stated “our inquiry is whether the award is outside the range of substantial evidence in the record, shocks the conscience of the court or clearly appears to have been arrived at as a result of passion or prejudice.” 122 Wn.2d at 330. The Court then proceeded to review the rules in Washington on the question of sufficiency of evidence to prove damages and the requirements for overturning a jury’s verdict based on passion or prejudice, and the evidence and argument presented at trial. *See id.* at 331-34. The Court then based its holding on the sufficiency of the evidence and the lack of evidence of passion and prejudice, without any discussion as to whether the amount of the verdict shocked its conscience. *See id.* at 334.

Similarly, in *Robeck*, the Court reviewed a trial court’s order reducing a jury’s award of damages as an alternative to granting a new trial. The trial judge concluded the verdict “was so great as to shock the court’s conscience; was unsupported by the evidence; had been induced by passion and prejudice; and that substantial justice had not been done.” *Robeck*, 79

Wn.2d at 865. The Supreme Court proceeded to review whether there was substantial evidence to support the verdict and whether the verdict was unmistakably so excessive as to show the jury had been motivated by passion or prejudice. *See id.* at 866-71. It concluded the jury's verdict "was substantially supported by and reasonably within the range of the evidence of damages" and "was not, therefore, as a matter of law, so excessive in size as to show unmistakably that it was based on passion and prejudice," and reinstated the verdict. *Id.* at 871. The Court did not discuss whether the amount of the verdict shocked the Court's conscience. It held:

If the evidence supports the verdict and the trial has been conducted without error of sufficient gravity to warrant a reversal, the trial court cannot substitute its views of damages for those of the jury. To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts – and the amount of damages in a particular case is an ultimate fact.

*Id.* at 869.

In *Bingaman*, the Court does appear to consider the "shocks the conscience" standard to be a separate test of the validity of a jury's damages award. The Court noted that the court of appeals "concluded that the jury's damage award was not outside the range of substantial evidence in the record, and that nothing so untoward occurred at the trial to arouse the passion and prejudice of the jury," and that "[o]ther than the amount of the verdict, the record in this case discloses nothing to suggest that the jury was prejudiced against the defendants or that it was incited by passion to regard the defense case unfairly." 103 Wn.2d at 836 (brackets added). The Court then stated: "The issue thus becomes whether the size of the award for pain

and suffering in and of itself ‘shocks the conscience of the court.’ Stated otherwise, were the damages flagrantly outrageous and extravagant?” *Id.* at 836-37 (citing, *inter alia*, *Kramer*, 43 Wn.2d at 395).

However, in considering whether the amount of the damages for pain and suffering was “flagrantly outrageous and extravagant,”<sup>3</sup> the Court did not separately analyze whether the jury’s damages award shocked its conscience, but rather considered the jury’s verdict in the context of whether there was sufficient evidence to support the amount of the verdict. The Court reviewed the evidence presented at trial and determined “substantial evidence was presented” to support the award for pain and suffering. *Id.* at 837. The Court then concluded:

The verdict of a jury does not carry its own death warrant solely by reason of its size. It is admittedly difficult to assess in monetary terms damages for such pain and suffering, but although the damages for the decedent’s pain and suffering awarded by the jury were very substantial, that award does not *under the facts and circumstances established by the evidence* shock our sense of justice and sound judgment.

*Id.* at 838 (emphasis added; citations omitted). Again, the “shocks the conscience” standard was applied as an element of the “substantial evidence” basis rather than as an independent basis for overturning the jury’s award of damages.

And, in *Bunch*, in its consideration of whether the award of noneconomic damages shocked its conscience, the Court reviewed the

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<sup>3</sup> The phrase “flagrantly outrageous and extravagant” derives from a quote in *Kramer* in the context of whether the damages are so excessive as to manifestly show the jury to have been actuated by passion or prejudice. *See Kramer*, 43 Wn.2d at 395 (quoting *Coleman v. Southwick*, 9 Johnson (N.Y.) 45, 6 Am. Dec. 253 (1812)).

particular evidence produced at trial – the amount of economic damages, and the length of time the plaintiff was subjected to discrimination. *See Bunch*, 155 Wn.2d at 181-82. In the context of its review of the evidence, the Court found the jury’s award of noneconomic damages did not shock its conscience. *See id.*

Washington common law generally does not permit awards of punitive damages. *See Tabingo v. American Triumph LLC*, 188 Wn.2d 41, 52, 391 P.3d 434 (2017). Instead, loss must be compensatory of a pecuniary loss. *See Kramer*, 43 Wn.2d at 396. Pain and suffering constitute noneconomic loss and are recognized bases for general damages in Washington. *See Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 597 (1997). In cases involving pain and suffering damages, there are unique problems of proof, as such harms are not easily susceptible to precise measurement. *See Stevens v. Gordon*, 118 Wn.2d 43, 59, 74 P.3d 653 (2003). The finder of fact is given no fixed standards by which to calculate what is fundamentally a noneconomic loss. *See Washburn*, 120 Wn.2d at 279; *see also Dyal v. Fire Companies Adjustment Bureau, Inc.*, 23 Wn.2d 515, 521, 161 P.2d 321 (1945) (recognizing “there can be no exact standard by which damages for physical injuries can be measured”).

In such cases, the role of the jury in calculating the loss is critical. *See Washburn*, 120 Wn.2d at 269 (recognizing that “determination of the amount of damages, *particularly in actions of this nature* [pain and suffering], is primarily and peculiarly within the province of the jury ... and

the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made” (citations omitted)). Courts, particularly appellate courts, simply have no basis for conducting the necessary review to measure the accuracy of the factfinder’s valuation of a plaintiff’s loss. *Restatement (Second) of Torts* § 912 cmt. b (1965) examines in some detail the inexact nature of noneconomic loss and the need to defer to the fact-finder in this context:

For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation. In these cases the trier of fact can properly award substantial damages as compensation for harms that normally flow from the tortious injury even without specific proof of their existence. . . . The most that can be done is to note such factors as the intensity of the pain or humiliation, its actual or probable duration and the expectable consequences. Since these factors are all indefinite (see § 905), it is impossible to require anything approximating certainty of amount.

*Restatement (Second) of Torts* § 912 cmt. b. The *Restatement* goes on to observe that to the extent there is a measure of uncertainty or inaccuracy in the measure of loss, the burden of this uncertainty should be borne by the tortfeasor, and not the innocent victim of the tortious conduct:

It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial

compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations where there can not be any real equivalence between the harm and compensation in money, as in case of emotional disturbance, or where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented.

*Restatement (Second) of Torts* § 912 cmt. a.

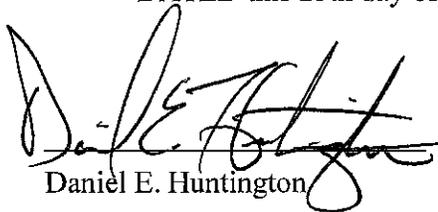
In light of the inexact nature of the requisite proof in cases of noneconomic loss, the appellate court's application of the substantial evidence standard has rightfully been deferential to the factfinder and the trial court in this context. Where the plaintiff has proven the "fact of loss," e.g., pain and suffering, the question of valuation will generally be left to the trier of fact. *See Fisons*, 122 Wn.2d at 331. While the appellate court must determine whether the fact of loss was documented with "sufficient certainty to provide a reasonable basis for estimating" the loss, this test is concerned more with verifying the existence, rather than the value, of the loss. *See id.*, 122 Wn.2d at 331 n.53 (citing *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993)). Mindful that such damages are not generally susceptible to mathematical calculation, "appellate review is most narrow and restrained," and any asserted error challenging the sufficiency of the evidence must be grounded in an analysis of the plaintiff's particular injuries. *See Fisons*, 122 Wn.2d at 330. Doubts as to the measure of harm should benefit not the tortfeasor, but the victim of the tortious conduct who has suffered harm.

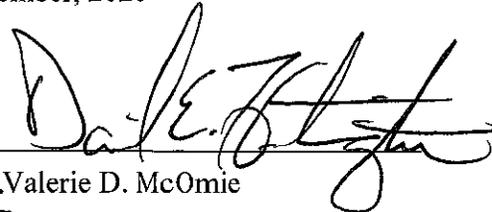
In light of these considerations and this Court’s precedent, whether the amount of a jury’s verdict “shocks the conscience” of an appellate court should not and cannot be an independent, stand-alone basis for reversal. Rather, in order to be a basis for reversal, the claimed excessive amount of a jury’s verdict must be tethered to either a determination that the amount of the verdict is outside the range of substantial evidence in the record, or a determination that the amount of the verdict is unmistakably the result of passion or prejudice. Whether the amount of a jury’s verdict is excessive cannot be determined in a vacuum. “The verdict of a jury does not carry its own death warrant solely by reason of its size.” *Bunch*, 155 Wn.2d at 183 (quoting *Bingaman*, 103 Wn.2d at 838).

**VI. CONCLUSION**

The Court should adopt the analysis in this brief in the course of resolving the issues on appeal.

DATED this 25th day of September, 2020

  
Daniel E. Huntington

  
for Valerie D. McOmie

On behalf of WSAJ Foundation

# Appendix

CR 59

Wash. Const. Art. 1 § 21

RCW 4.76.030

*Restatement (Second) of Torts* § 912 (1965)

**NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS**

**(a) Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

**(b) Time for Motion; Contents of Motion.** A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

**(c) Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

**(d) On Initiative of Court.** Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in

a motion, the court shall specify the grounds in its order.

**(e) Hearing on Motion.** When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment;

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

**(f) Statement of Reasons.** In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

**(g) Reopening Judgment.** On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

**(h) Motion To Alter or Amend Judgment.** A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

**(i) Alternative Motions, etc.** Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

**(j) Limit on Motions.** If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Adopted effective July 1 1967; Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005; April 28, 2015.]

West's Revised Code of Washington Annotated  
Constitution of the State of Washington (Refs & Annos)  
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 21

## § 21. Trial by Jury

### Currentness

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

### Credits

Adopted 1889.

### Notes of Decisions (621)

West's RCWA Const. Art. 1, § 21, WA CONST Art. 1, § 21

Current through amendments approved 11-5-2019

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West's Revised Code of Washington Annotated  
Title 4. Civil Procedure (Refs & Annos)  
Chapter 4.76. New Trials

West's RCWA 4.76.030

## 4.76.030. Increase or reduction of verdict as alternative to new trial

### Currentness

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

### Credits

[1971 c 81 § 19; 1933 c 138 § 2; RRS § 399-1.]

### OFFICIAL NOTES

**Severability--1933 c 138:** “Adjudication of invalidity of any of the sections of this act, or any part of any section, shall not impair or otherwise affect the validity of any other of said sections or remaining part of any section.” [1933 c 138 § 3.]

### Notes of Decisions (111)

West's RCWA 4.76.030, WA ST 4.76.030

Current with all legislation from the 2020 Regular Session of the Washington Legislature.

## Restatement (Second) of Torts § 912 (1979)

Restatement of the Law - Torts | June 2020 Update

Restatement (Second) of Torts

Division Thirteen. Remedies

Chapter 47. Damages

Topic 1. General Statements

### § 912 Certainty

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

**One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.**

#### **Comment:**

*a.* When one seeks to recover damages for a particular harm that he claims has resulted to his person or to a tangible thing belonging to him, he has the burden of proving that the other has invaded a legally protected interest of his, that he has suffered the harm and that the act of the other was a legal cause of the harm. Thus when a person has been wounded by another and subsequently blood poisoning develops in any portion of his body, he has the burden of showing that it is more probable than not that the initial wrongful contact was a substantial factor in producing the malady. So when one has been libeled and seeks to prove as a basis for special damages the loss of a particular marriage, he has the burden of establishing that the publication of the libel was a substantial factor in preventing the marriage. In all of these cases the recovery of damages for a particular harm is dependent upon proof that the harm occurred as the result of the tortious conduct, and normally the plaintiff can recover damages for the harm only by proving this with the same degree of certainty as that required in proving the existence of the cause of action.

There is, however, no general requirement that the injured person should prove with like definiteness the extent of harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations where there can not be any real equivalence

between the harm and compensation in money, as in case of emotional disturbance, or where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented.

The requirements vary with the possibilities for making a reasonably exact estimate of the amount of harm measured in terms of money. The following Comments segregate the common types of situations that arise.

*b. Harm to body, feelings or reputation.* For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation. In these cases the trier of fact can properly award substantial damages as compensation for harms that normally flow from the tortious injury even without specific proof of their existence, such as pain from a blow or humiliation from a scar. Evidence to prove that the harm is greater or less than that which ordinarily follows is admissible. The most that can be done is to note such factors as the intensity of the pain or humiliation, its actual or probable duration and the expectable consequences. Since these factors are all indefinite (see § 905), it is impossible to require anything approximating certainty of amount even as to past harm. On the recovery for harm to feelings threatened from harm already caused by the tortious conduct there is even more indefiniteness. (See Comment *e*). It must be noted on the other hand that certain pecuniary harms such as loss of earnings may result from harm to the body (see § 924) and that as to these reasonable certainty of proof of the extent of damage is required.

Efforts to provide suggestions or formulas for measuring with more certainty the amount of damages for pain and suffering have met with varying degrees of success. It is consistently held to be improper to suggest to the jury that they place themselves in the position of the injured person and determine the sum of money that they would require to incur his injuries. Substantial disagreement has developed among the courts, however, on the so-called “per-diem argument”—asking the jury to estimate the value of the pain and suffering for a day (or some other short period of time) and then to multiply that figure by the length of time that the pain may be expected to continue. Three views are taken: (1) some courts forbid the practice on the ground of its potential prejudice in giving the jury an illusion of precision in calculation and in substituting a formula for evidence; (2) other courts find the practice not unfair or unjust in providing a mathematical formula to aid the jury in making a reasonable award since the parties should have the opportunity to explain the components of the lump sum; and (3) still other courts treat the matter as in the sound discretion of the trial judge so long as he gives appropriate cautionary instructions that the formula is not proof and should be treated merely as suggestive. There is also a division of authority on whether counsel may state to the jury the amount of damages claimed or expected by the plaintiff, but a substantial majority of the courts do not treat this as improper.

*c. Harm to chattels or to land.* One who converts or destroys a chattel is liable for its value, which normally is the exchange value. (See §§ 911 and 927). If there is no evidence of the value of the chattel, damages to a substantial amount can not be granted. (See Illustration 1). Even in the matter of value there may be serious elements of uncertainty, as when there have been no recent sales of similar things in the vicinity. When the value to the user is the measure of recovery, especially when the subject matter cannot be replaced, the measure of recovery is left very largely to the discretion of the trier of fact. (See § 911, Comment *e*).

When there has been harm to land or structures on land from a past invasion, the damages for permanent harm are normally the difference between the market value of the land before and after the harm, as indicated in § 929. The value thus ascribed to the land is ordinarily determined by the opinion of experts, which may vary widely, so that the application of the standard is often far from certain. In cases in which the plaintiff is living upon land affected by a nuisance and hence is allowed to recover for inconvenience or discomfort (see § 929, Comment *e*), the jury is as unrestrained in its estimate of this element of damages as in other cases of damages for personal harm.

When the question is one of the apportionment of a divisible harm among two or more causes, each of which is shown to have contributed to some extent to the total harm, the rule stated in § 433B places upon each defendant the burden of proof for the

apportionment. This is true, for example, of many cases of private nuisance resulting from the flooding of land, or the pollution of air or water; and it is true occasionally of other types of harm. (See § 433B, Comments *c* and *d*). When the defendant thus has the burden of proof, he is required to sustain it by evidence sufficient to afford a reasonable basis for the apportionment but he is not required to establish with any greater degree of definiteness or certainty the exact proportion of the harm which he has caused. (See Illustrations 2, 3, 4 and 5).

**Illustrations:**

1. A intentionally kills B's dog. No evidence is introduced as to the value of the dog. B is entitled only to nominal damages, unless the description of the dog by witnesses indicates that it has some substantial value.
2. Cattle owned by A and B trespass on the land of C, and destroy crops, causing total damage in the amount of \$3,000. In C's action joining A and B as defendants, no evidence is introduced bearing on the question of the extent of the harm done by the cattle of each defendant. The burden of proof as to apportionment has not been sustained, and A and B are both subject to liability to C in the amount of \$3,000.
3. The same facts as in Illustration 2, except that the defendants introduce evidence that A's cattle were twice as numerous as B's, and that all of the cattle were of the same age and general size. On the basis of this evidence, A may be held liable for \$2,000, and B for \$1,000.
4. A, B and C each operates a mine on a small stream flowing through D's land. Each mine dumps refuse into the stream and the combined pollution of the stream does harm to D's rights as a riparian owner. In an action by D against A, no evidence is introduced to show the extent of the harm caused by the refuse from each source. The burden of proof for apportionment is not sustained and A is subject to liability to C for the entire harm.
5. The same facts as in Illustration 4, except that A introduces evidence showing that the output of refuse from the mines is in the following proportions: A, five; B, three; and C, two. On the basis of this evidence, A may be held liable for 50 per cent of the total harm.

*d. Loss of earnings and profits.* As a condition to recovery for loss of earnings or for harm to earning capacity, the person harmed must offer evidence, convincing to the trier of fact, that a significant amount of earnings has been lost, or that his earning capacity has been significantly harmed. To do this he must introduce evidence of the amount of earnings received prior to the time of the injury, or the amount that he was capable of obtaining, and at least some evidence having a tendency to show that he could have earned something during the period in which loss of earnings is claimed. (See Illustrations 6 and 7 and § 924, Comments *c*, *d* and *e*).

If there is an interference with intangible rights, such as an interference with a business, there may be great difficulty in proving the existence or amount of loss with any degree of certainty. It is necessary to show at least that the right is valuable. Thus, if a person has tortiously prevented another from entering into or continuing a business or entering into a particular transaction in which there is not only a likelihood of profit but also a chance for loss, it is essential to the recovery of compensatory damages that the injured person prove that the enterprise was or was likely to be profitable and that the chance for profits has been

interfered with. (See Illustrations 8 and 9). In determining this, the same elements of proof used in proving the value of a chattel are relevant. Thus, if the business is one that has something approximating a market value, the value before and after the loss can be shown. (See Illustration 10). So, too, whether or not the business or transaction has a market value, the income before and after the wrongful act can be shown. In some cases, in order to show that the loss was attributable to the wrongful act rather than to other circumstances, proof may be necessary that the other conditions continued equally favorable. Ordinarily, however, in the absence of evidence to the contrary, it may be assumed that similar conditions continued after the tort. (See Illustration 11). When the tortfeasor has prevented the beginning of a new business or the prosecution of a single transaction, all factors relevant to the likelihood of the success or lack of success of the business or transaction that are reasonably provable are to be considered, including general business conditions and the degree of success of similar enterprises. Because of a justifiable doubt as to the success of new and untried enterprises, more specific evidence of their probable profits is required than when the claim is for harm to an established business. (See Illustration 12).

Although the burden is on the injured person to prove with a fair degree of certainty that the business or transaction was or would have been profitable, it is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm that the defendant has caused. It is only essential that he present such evidence as might reasonably be expected to be available under the circumstances. (See Illustrations 13 and 14). A physical injury to the owner of a business that is harmed by the owner's absence is only indirectly an injury to the business and unless the harm to the business was intended, the owner of the business is entitled to damages only for harm to his earning capacity that may be different from the amount of harm to the business. (See § 924, Comment c).

**Illustrations:**

6. A negligently harms B, a physician, who as a result is unable to attend to his patients. No evidence is offered of his income except that he had been practicing medicine in a small town for eight years. B is entitled only to nominal damages for loss of earnings.

7. The same facts as in Illustration 6, except that evidence is introduced to show that B's average income for the two years preceding the injury was \$20,000, and that during his incapacity, while he employed a substitute at an expense of \$10,000 yearly, the receipts from the practice dropped to \$7,500 yearly. B is entitled to damages for loss of earnings based upon this evidence.

8. A has a contract with B by the terms of which A is to arrange for a boxing match between B and C. D tortiously causes B to break his contract before A has incurred any expenses with reference to it. A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him and would have been a financial success, and if his proof offers a reasonable basis for estimating the profits.

9. A contracts with B, a manufacturer, to introduce and to sell B's goods for a period of one year. C tortiously causes B to refuse to perform the contract. A is entitled to recover from C only if he can prove by a preponderance of evidence that the profits from the enterprise would have been greater than the expenses, and can give a reasonable basis for estimating their amount.

10. A is conducting a grocery store, renting the premises on a month-to-month basis. He has received a standing offer of \$25,000 from B, a financially responsible person, for the stock on hand and good will. Failing to secure the store, C fraudulently causes A's landlord to terminate the lease and A is ejected. He cannot secure

another advantageous location for a store in the town. A is entitled to damages from C in the amount of at least \$25,000, less the value of the stock of goods.

11. While A is operating a boarding house, B makes defamatory statements concerning the edibility of the food, as a result of which many of A's boarders leave. The profits for the six months immediately preceding these statements were \$200 per week. After the statements there were no profits for a period of thirty weeks. In an action for the loss caused by the statements, A is entitled to recover the amount of profits thus lost, unless B proves that there has been a change of conditions, such as a change in the character of the neighborhood or of the food offered to the boarders, or unless it was unreasonable for A to continue to operate the boarding house during this period, in which latter event the damages would include an amount equal to the value of the business.

12. A pays B \$10,000 for a license to sell in specified territory a new drink, produced and extensively advertised by B. Before a shipment has been made, C tortiously causes B to refuse to make delivery. A is not entitled to substantial damages from C on proof that the gross profit would have been 20 per cent., that other drinks have had a ready sale in the same locality, that in other localities large quantities of the same drink have been sold, and that in the past A has been successful in other enterprises.

13. A has a contract with B for the introduction into Mexico of B's product, A to receive 10 per cent. of the commissions obtained by the local agents whom A is to appoint and who are to sell the product at a price fixed in the agreement. C, by fraud, prevents A from obtaining agents and hence from performing the contract, as a result of which B rescinds the contract. A is entitled to recover compensatory damages upon proof that before the tortious conduct of C he had established a number of subagencies, that the subagents had made a certain number of sales per month at the agreed price and that in other sections of Mexico the situation was so substantially similar that it would be reasonable to expect that other subagents would make a similar number of sales.

14. A is conducting a manufacturing business in which the net profits are approximately \$50,000 per year. B, a competitor, is guilty of unfair trade practices and the demand for A's goods begins to fall off instead of to increase as had been true hitherto. Some of the changes may be ascribed to competition by new competitors. The amount of harm that has been done by B cannot be told with any substantial degree of accuracy. A is nevertheless entitled to compensatory damages based upon such facts and figures as are reasonably available.

*e. Damages for future harm.* When an injured person seeks to recover for harms that may result in the future, he is entitled to damages based upon the probability that harm of one sort or another will ensue and upon its probable seriousness if it should ensue. When a person has suffered physical harm that is more or less permanent in nature, as stated in § 910, he is entitled to recover damages not only for harm already suffered, but also for that which probably will result in the future. At the time of trial, while some form of harm may be anticipated, its nature, extent and duration ordinarily cannot be foretold with accuracy. There is no mathematical formula that will determine the chance of the harm occurring or that will gauge the monetary equivalent of the chance of loss. This is true with reference to anticipated harm to feelings and to earning capacity. This fact does not, however, prevent recovery for money damages, even though in the great majority of cases the amount will not correspond even approximately to the harm that will be suffered, since the amount is arrived at by considering probabilities, both favorable and unfavorable, that seldom forecast what will happen to a single individual. Special rules for estimating the probable loss

of earnings in the future and the length of time during which the losses as well as permanent bodily injuries may continue, including the expectancy of life, are stated in § 924, Comments *d* and *e*.

The same principle is applicable in ascertaining the damages to be awarded because of the erection of a structure by the defendant because of which future physical damage to the plaintiff's land may result. (See § 930).

*f. Interference with a gift or chance for gain.* If a person can prove that but for the tortious interference of another, he would have received a gift or a specific profit from a transaction, he is entitled to full damages for the loss that has thus been caused to him. (See Illustration 15). On the other hand, in many cases it is impossible for this to be proved with any certainty, as when a person is in a class of beneficiaries, one of whom would have received a gift but for the wrongful conduct and there is no evidence to indicate which one would have been the recipient. In these cases the injured person, in order to recover, has the burden of proving that the gift would have been made to one of the class; having satisfied this burden, he is then entitled to receive an amount commensurate for the chance that he had of receiving the gift. (See Illustration 16).

The requirements of certainty are also met when the injured person would have had a substantial and measurable chance of a profit without chance of loss if the defendant had not acted improperly, the damages being based upon the amount of the profit that might have resulted and the chance that the injured person had to make it. This situation is to be distinguished from that in which there is a substantial chance of loss as well as a chance of gain. (See Comment *d*).

In cases in which there has been an interference with property from which a profit was expected, it may clearly appear at the trial that no profit would have been made. If so, the injured person is entitled to, but no more than, the diminution in the value of the property caused by the interference, or the total value if destroyed. Since, however, this value will normally be taken as of the time of the tort (see § 927, conversion of chattels, and §§ 928 and 929, harms to land and chattels), damages will be awarded proportionate to the chance, as the situation appeared at the time of the tort, that profits would be made. (See Illustration 17). When, however, there has been an interference with a right that is nontransferable and it subsequently appears that the exercise of the right would not have been profitable, the plaintiff is not entitled to substantial damages. (See Illustration 18).

**Illustrations:**

15. A is a favorite nephew of B in whose favor B tells C, an attorney, to draw a will, devising a half of B's property to A. C, who is B's son and heir, pretending compliance with his mother's wishes, intentionally draws an ineffective will. B dies believing that a half of her property will go to A. A is entitled to damages from C to the extent of the net value to A of a half of the property of which B died possessed.

16. A is one of the three remaining contestants for a prize to be awarded in a newspaper popularity contest, all three remaining contestants having received substantially the same number of votes. For the purpose of discrediting A, B, a friend of one of the other contestants, causes A to be arrested, thus destroying A's chance of winning the prize, \$3000. Assuming that there was more than a mere possibility that A might have won the prize, A is entitled to damages from B based on the value of the chance that he would have received the prize, that is, in the absence of further evidence, \$1000.

17. A is a tenant for a year who has planted his crop. B, the landlord, tortiously drives him from the land in May, at which time the weather and other conditions indicate that the crop will be a very profitable one. In August an excessively dry spell burns up all the crops in the immediate neighborhood. A is nevertheless entitled to recover the value of the crop of which he was dispossessed, the value being based upon the May prices for the crop.

18. A is one of three young women who have been selected by popular vote to take screen tests for the purpose of determining which one is to be starred in a picture. B tortiously prevents A from taking the test and another of the contestants is selected. Later, however, A is given a screen test, as a result of which it is admitted that A could not have been successful in the contest. A is not entitled to substantial damages from B.

*g. Interference with use of land or chattels.* When a person has deprived another of the use of land or chattels, if the profits to be derived from their use cannot be ascertained with substantial certainty or even if it can now be proved that there would have been no profits from the use of the subject matter, the injured person is nevertheless entitled either to interest upon the value of the land or chattels or to their rental value during the period of deprivation. (See §§ 928- 931). Further, the fact that there is available this alternative measure of recovery is an element in denying recovery for damages based upon uncertain proof as to the probability of profits.

### Reporter's Note

*Comment b:* Harm to person. Improper to tell jury to estimate how much they would charge to be in plaintiff's shoes ("The Golden Rule"): [Shroyer v. Kaufman](#), 426 F.2d 1032 (7th Cir.1970); [Stanley v. Ellegood](#), 382 S.W.2d 572 (Ky.1964); [Smith v. Musgrove](#), 372 Mich. 329, 125 N.W.2d 869 (1964); [Danner v. Mid-State Paving Co.](#), 252 Miss. 776, 173 So.2d 608 (1965).

Per diem argument allowed, subject to appropriate restrictions: [Baron Tube Co. v. Transport Ins. Co.](#), 365 F.2d 858 (5th Cir.1966), overruling [Johnson v. Colglazier](#), 348 F.2d 420 (5th Cir.1965) (contains extensive citations of cases and review comments); [Clissold v. St. Louis-San Francisco Ry. Co.](#), 600 F.2d 35 (6th Cir.1979); [Beaulieu v. Elliott](#), 434 P.2d 665 (Alaska 1967); [Beagle v. Vasold](#), 65 Cal.2d 166, 53 Cal.Rptr. 129, 417 P.2d 673 (1963); [Christy v. Saliterman](#), 288 Minn. 144, 179 N.W.2d 288 (1970); [Four County Electric Power Ass'n v. Clardy](#), 221 Miss. 403, 73 So.2d 144, 44 A.L.R.2d 1191 (1954); [DeMaris v. Whittier](#), 280 Or. 25, 569 P.2d 605 (1977).

Per diem argument held improper: [McDonald v. United Airlines, Inc.](#), 365 F.2d 593 (10th Cir.1966); [Franco v. Fujimoto](#), 47 Haw. 408, 390 P.2d 740 (1964); [Caylor v. Atchison, T. & S.F.R. Co.](#), 190 Kan. 261, 374 P.2d 53 (1962); [Certified T.V. & Appliance Co. v. Harrington](#), 201 Va. 109, 109 S.E.2d 126 (1959); [Affett v. Milwaukee & Suburban Transp. Corp.](#), 11 Wis.2d 604, 106 N.W.2d 274 (1960).

Counsel's statement to jury as to amount claimed by client held permissible: [Beagle v. Vasold](#), 65 Cal.2d 166, 53 Cal.Rptr. 129, 417 P.2d 673 (1966); [Caley v. Manicke](#), 24 Ill.2d 390, 182 N.E.2d 206 (1962); [Shockman v. Union Transfer Co.](#), 220 Minn. 334, 19 N.W.2d 812 (1945); [Graeff v. Baptist Temple of Springfield](#), 576 S.W.2d 291 (Mo.1978); [Yount v. Seager](#), 181 Neb. 665, 150 N.W.2d 245 (1967); [Rice v. Ninacs](#), 34 App.Div. 388, 312 N.Y.S.2d 246 (4th Dept.1970).

Statement held improper: [Botta v. Brunner](#), 26 N.J. 82, 138 A.2d 713 (1959); [Carother v. Pittsburgh R. Co.](#), 229 Pa. 558, 79 A. 134 (1911).

*Comment c:* Harm to property. Illustration 1. See [Demeo v. Manville](#), 68 Ill.App.3d 843, 25 Ill.Dec. 443, 386 N.E.2d 917 (1979).

For cases supporting Illustrations 2 to 5, see the Notes to § 433A.

*Comment d:* Loss of earnings or profits.

## CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of September, 2020, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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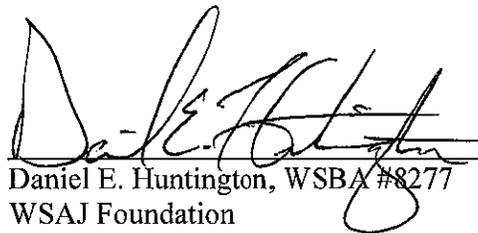
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