

1960

Louise Olsen v. Preferred Risk Mutual Insurance Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Kipp and Charlier; Carman E. Kipp; Attorneys for Defendant;

Recommended Citation

Brief of Appellant, *Olsen v. Preferred Risk Mutual Insurance Co.*, No. 9179 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3563

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
FEB 1 - 1960

LOUISE OLSEN,

Plaintiff and Respondent,

—vs.—

PREFERRED RISK MUTUAL
INSURANCE COMPANY, An
Iowa Corporation,

Defendant and Appellant.

Supreme Court, Utah

Case No. 9179

APPELLANT'S BRIEF

KIPP AND CHARLIER

CARMAN E. KIPP

Attorneys for Defendant.

TABLE OF CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	3
STATEMENT OF FACTS.....	4
STATEMENT OF POINTS RELIED UPON.....	7
ARGUMENT:	
Point I. The court erred in finding plaintiff free of contributory negligence as a matter of law and in failing to submit this question of fact to the jury for determination.....	7
Point II. The court erred in failing to grant defendant and respondent's motion for a new trial on the basis of the prejudicial and improper argument of counsel for plaintiff in suggesting a mathematical computation or calculation of general damages.	10
Point III. The court erred in failing to restrain counsel for plaintiff from continuing with the line of argument directed to what each juror individually would take for injuries, pain and suffering, and disability of the kind and degree alleged by plaintiff and in failing to instruct the jury on this point.	18
CONCLUSION	19

TABLE OF CASES CITED

Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W. 2d 637 (Sup. Ct. 1944)	18
Berger v. Salt Lake City, 56 Utah 403, 191 P. 233.....	9
Bostwick v. Pittsburgh R. R. Co., 225 Pa. 387, 100 A. 123 (1917)	17
Botta v. Brunner, 26 N.J. 82, 138 A. 2d 713 (1958).....	11, 19
Braddock v. Seaboard Airline RR Co., Sup. Ct. of Fla., 80 Southern 2d 662 (1955)	16
Certified TV & Appliance Co. Inc. v. Harrington, Sup. Ct. of Appeals of Va., 109 S.E. 2d, 126 (1959).....	15
Dean v. Wabash R. Co., 229 Mo. 425, 129 S.W. 953 (Sup. Ct. 1910)	18
Finlayson v. Brady, 121 Utah 204, 240 P.2d 491.....	9
Four-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (Sup. Ct. 1954).....	18

	<i>Page</i>
Gardner v. State Taxi, Inc. et al, 336 Mass. 28, 142 N.E. 2d 586 (1957)	15
Goodhart v. Pa. R.R. Co., 177 Pa. 1, 35 A. 191 (1896).....	17
Goodrich v. Thomas Cort, 80 N.J.L. 653, 657, 77 A. 1049 (Sup. Ct. 1910)	19
Gulf, C. & S. F. R6. Co. v. Carson, 63 S.W 2d 1096 (Tex Civ. App. 1933)	19
Henne et al v. Balick, 146 A. 2d, 394 (1958).....	15
Hub v. Hallowell, 304 Pa. 128, 154 A. 582 (1931).....	17
Kendlee v. Edwards, 126 Ind. App. 261, 130 N.E. 2d 491 (App. Ct. 1955)	17
Kimball v. Noel, 228 S.W. 2d 980 (Tex. Civ. App. 1950).....	18
Krantz v. Nichols, App. Ct. of Ill., II Ill., App. 2d 31, 135 NE 2d 816 (1956)	16
Louisville and N.R. Co. et al v. Preat 174 S.E. 209 (1934) (Ga.)	16
Ravel v. Couravallos, 245 S.W. 2d 731 (Tex. Civ. App. 1952)....	19
Standard Sanitary Mfg. Co. v. Brian's Adm'r, 224 Ky. 419, 6 S.W. 2d 491 (Ct. Appl. 1928).....	18
Stassum v. Chapin, 324 Pa. 125, 188 A. Ill (1936).....	17
Stein v. Meyer, 150 F. Supp. 365 (D.C.E.D. Pa 1957).....	19
Texas Employers' Ins. Ass'n v. Cruz, 280 S.W. 2d 388 (Tex. Civ. App. 1955)	18
Vaughn v. Magee, 218 Fed. 630 (3rd Civ., 1914).....	17
Warren Petroleum Corp. et al v. Pyeatt, 275 S.W. 2d 216 (1955) (Texas)	16
Weenig Bros. v. Manning, 1 Utah 2d 101, 262 P.2d 491.....	9
Wersbe v. Broadway and S.A.R. Co., 2 NY.S. 637 (1893) (NY)	16
White v. Pinney, 99 Utah 484, 108 P.2d 249.....	9
Wright & Son Truck Line v. Chandler, 231 S.W. 2d 786 (Tex. Civ. App. 1950).....	18
Wuth v. U.S., US Dist. Ct., 161 Fed. Supp. 661 (ED Va, 1958)	16

TEXTS CITED

15 Am. Jur., Damages, Sec. 374.....	14
65 C.J.S., Negligence, Sec. 12, 399, 400.....	9
25 C.J.S., Damages, Sec. 93.....	14
Sedgwick, Damages, 9th Ed., 1912, Sec. 171a.....	14

IN THE SUPREME COURT
of the
STATE OF UTAH

LOUISE OLSEN,

Plaintiff and Respondent,

—vs.—

PREFERRED RISK MUTUAL
INSURANCE COMPANY, An
Iowa Corporation,

Defendant and Appellant.

Case No. 9179

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from the verdict and judgment of the Second Judicial District Court, arising out of an action based on the insurance contract between respondent and appellant as that contract relates to accidents in which the insured is involved with uninsured motorists.

Such an accident, involving respondent, occurred on April 5, 1958, on Washington Boulevard in Ogden, Utah. The court denied a motion for new trial and this appeal is taken from the ruling of the court on matters of law during the course of the trial and from the denial of said motion for a new trial.

STATEMENT OF FACTS

Respondent and plaintiff in this case was insured on April 5, 1958, by defendant under automobile insurance policy No. 436-874. In addition to other provisions, the policy contained the following provision:

“Preferred Risk Mutual Insurance Company, Des Moines, Iowa, agrees with the insured . . . : *Coverage U* To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called ‘bodily injury,’ sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.”

That on the said date, plaintiff was driving her automobile in a southerly direction along Washington Boulevard in Ogden, Utah. In the block between Twenty-Sixth and Twenty-Seventh Streets, she observed that she had a

flat tire. She drove toward the right hand or west side of the roadway and stopped her car with its rear end about forty-seven (47) feet north of the north curb of Twenty-Seventh Street and with its right side approximately four to seven (7) feet east from the west curb of Washington Boulevard. At this point, Washington Boulevard has two lanes for southbound traffic and there is an additional space between the outside or western lane and the curb which was unobstructed.

She proceeded to the rear of her car, looked at the tire, and then observed a car which had pulled up behind her car, approximately four or five feet back of the rear end of her car, and which had honked. She went back to this car, which was driven by Clarence LeRoy Nuxoll, rapped on the window and Mr. Nuxoll rolled down the window. She spoke with him briefly and observed his condition, which she described as "looking like he'd been drinking" and that he looked drunk to her and did not seem to understand her. She then walked back to the rear of her car, standing between the rear bumper of her car and the front end of the Nuxoll car, opened the trunk lid and bent over to commence removing the tools from the trunk. The Nuxoll car moved forward and plaintiff was injured by being caught between the bumpers of the two vehicles.

At the trial of this case, and after the conclusion of the evidence of both parties, counsel for the plaintiff argued to the jury. Included in his argument were the writing of figures upon a blackboard placed before the

jury and the mathematical computation of plaintiff's general damages based on various mathematical calculations. Reproduced hereafter is a copy of the figures written upon the blackboard on the basis of which the computation or suggested computation was to be made. Counsel for defendant had previously requested the reporter to report the arguments of counsel and the transcription of proceedings contains from Page 122 to Page 130 the verbatim opening argument of counsel for plaintiff.

The blackboard appeared as below at the conclusion of Counsel's argument.

BLACKBOARD

Gen. Dam.—			
1st Mo.	500.00		
5.00 Per Day	2239.00		
		5.00	5475.00
<div style="border: 1px solid black; padding: 10px; width: fit-content; margin: 10px auto;"> <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> \$ 144.00 Per Day 9,360.00 “ Year </div> </div> </div>			

Figures in brackets are defendant's. Remainder is plaintiff's.

Counsel for plaintiff also referred specifically in this argument to what each juror himself would take for experiencing the injuries, pain and disability claimed by plaintiff and these items are also contained in the record in counsel for plaintiff's opening argument.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN FINDING PLAINTIFF FREE OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND IN FAILING TO SUBMIT THIS QUESTION OF FACT TO THE JURY FOR DETERMINATION.

POINT II

THE COURT ERRED IN FAILING TO GRANT DEFENDANT AND RESPONDENT'S MOTION FOR A NEW TRIAL ON THE BASIS OF THE PREJUDICIAL AND IMPROPER ARGUMENT OF COUNSEL FOR PLAINTIFF IN SUGGESTING A MATHEMATICAL COMPUTATION OR CALCULATION OF GENERAL DAMAGES.

POINT III

THE COURT ERRED IN FAILING TO RESTRAIN COUNSEL FOR PLAINTIFF FROM CONTINUING WITH THE LINE OF ARGUMENT DIRECTED TO WHAT EACH JUROR INDIVIDUALLY WOULD TAKE FOR INJURIES, PAIN AND SUFFERING, AND DISABILITY OF THE KIND AND DEGREE ALLEGED BY PLAINTIFF AND IN FAILING TO INSTRUCT THE JURY ON THIS POINT.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING PLAINTIFF FREE OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND IN FAILING TO SUBMIT THIS QUESTION OF FACT TO THE JURY FOR DETERMINATION.

Plaintiff had parked her car at a point where it was still upon that part of Washington Boulevard normally used by traffic (R. 61, 62). The right side of her car was between three and seven feet from the curb (R. 10, 59). She was still able to drive the car and in fact had driven about one-half block from the point where she first noticed the flat tire. The space between her car and the curb was level, clear and unobstructed (R. 31, 61).

She alighted from her car after stopping it, looked at her tire, talked to another motorist, and then observed the car driven by Clarence LeRoy Nuxoll stopped about five feet from the rear of her car, headed the same way (R. 10, 11, 32). She walked back to the Nuxoll car, rapped on the window and told him she had a flat tire (R. 12, 31).

She then walked to her trunk and opened it to see about her spare tire, thus placing herself between the two cars (R. 12, 33). She did not observe any danger, nor was she aware of the movement of the Nuxoll car until she was struck, although its lights were on and its motor running (R. 32, 33). She was not watching or paying any particular attention to the Nuxoll car, although she was aware that Nuxoll was not in a normal condition, that he did not appear to understand her, and he looked drunk (R. 31, 32).

It is a well-established rule that in considering the question of contributory negligence on the part of plaintiff, the court must view the evidence in the light most favorable to defendant. If, when viewed in this light, the evidence gives rise to a legitimate question of fact, then

this issue must be submitted to the jury for determination. This court has consistently held to this rule. A typical Utah case in point is *Finlayson v. Brady*, 121 Utah 204, 240 P. 2d 491.

Defendant contends that the knowledge on the part of plaintiff of the intoxicated condition of Nuxoll placed upon plaintiff a greater duty of care for her own safety. A statement of the law on this point is found at 65 Corpus Juris Secundum Negl. Sec. 12, 399, 400.

“Intoxication of a person does not relieve others of the obligation to exercise care to avoid injuring him, but may, on the contrary, impose a duty of exercising greater care than would otherwise be sufficient, where his appearance and actions indicate such a degree of intoxication as affects his capacity to care for his own safety.”

It is axiomatic that a person must exercise reasonable care for his own safety, and that failure to do so is negligence. Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such a person would not have done under such circumstances. (*Berger v. Salt Lake City*, 56 Utah 403, 191 P. 233; *White v. Pinney*, 99 Utah 484, 108 P. 2d 249.) It is the duty of all motorists to use reasonable care to keep a lookout for other vehicles and other conditions reasonably to be anticipated (*Weenig Bros. v. Manning*, 1 Utah 2d 101, 262 P. 2d 491).

Defendant contends that the jury could reasonably have found from the facts that plaintiff was guilty of negligence which proximately contributed to the happen-

ing of the accident under the foregoing rules and under the instructions requested by defendant on the issue of negligence.

POINT II

THE COURT ERRED IN FAILING TO GRANT DEFENDANT AND RESPONDENT'S MOTION FOR A NEW TRIAL ON THE BASIS OF THE PREJUDICIAL AND IMPROPER ARGUMENT OF COUNSEL FOR PLAINTIFF IN SUGGESTING A MATHEMATICAL COMPUTATION OR CALCULATION OF GENERAL DAMAGES.

Defendant's contention that the court should have granted a new trial is based on the argument of counsel for plaintiff made to the jury in which counsel wrote figures on the blackboard (R. 128, 129) (See diagram of blackboard in Statement of Facts), which suggested the mathematical computation or calculation by the jury of the general damage verdict for plaintiff. The diagram of the blackboard reproduced in the Statement of Facts is an exact copy of an exhibit submitted to the trial court with defendant's Motion for New Trial, such exhibit being initialled by counsel for both parties and being agreed to accurately portray the figures placed upon the blackboard.

The figures on the upper portion of the diagram were placed on the blackboard in the course of and as a part of the first argument of counsel for plaintiff, made to the jury prior to the submission of this case to the jury. Counsel for defendant objected to this line of argument (R. 128) and reserved an exception on the basis that it constituted error. This question has not been consider-

ed by the Utah Supreme Court prior to this appeal. There have, however, been several cases in other jurisdictions on the question of a suggested method for computing general damages other than that sanctioned by the court in its instructions and given by counsel as a part of the closing argument.

The great weight of authority, as well as the better view, holds that such argument is prejudicial, constitutes error and is grounds for reversal on appeal. The leading case, and one which is cited with approval in many jurisdictions is that of *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958) decided by the Supreme Court of New Jersey. Since this case is directly in point and is typical of the holdings of the other jurisdictions which concur in the law and in the result, we submit herewith a brief of that case.

Facts:

Plaintiff, Nancy Botta, was a passenger in an automobile driven by defendant, Herman Brunner, when it collided with an automobile driven by co-defendant, Leo Frieband. Plaintiff sued both the drivers to recover damages for injuries and monetary losses suffered. Rose DeSantis, another passenger in Brunner's automobile also sued both drivers. The actions were tried together. The jury returned verdicts of \$5,500.00 in favor of Mrs. Botta and \$300.00 in favor of Mrs. DeSantis against Brunner. Frieband was exonerated. Both plaintiffs sought a new trial alleging inadequacy of awards and other errors of the court. Upon denial of the motions, Mrs. Botta appealed, attacking the legal propriety of the order against

her as well as the entire judgment. The Appellate Division concluded that error had been committed in the charge to the jury as to the nature of the burden imposed on the plaintiff with respect to proof of her injuries and ordered a new trial against the defendant Brunner, but limited it to the sole issues of damages. The Trial Court refused to permit the counsel for the plaintiff to suggest to the jury in his summation a mathematical formula for admeasurement of damages for pain and suffering. The plaintiff urged that this was error. The Appellate Division agreed.

Question:

Whether or not it is error on the part of the Trial Court to refuse the counsel permission to suggest to the jury in his summation a mathematical formula for admeasurement of damages for pain and suffering.

Decision:

No error.

Holding:

Counsel for plaintiff or defendant may not state to the jury in the opening or closing, his belief as to pecuniary value or price of pain and suffering per hour or day or week, and ask that such figure be used as part of the mathematical formula for calculating damages to be awarded, since such suggestions by counsel constitute an unwarranted intrusion into the domain of the jury and impart into the trial elements of sheer speculation on a matter, which by universal understanding, is not susceptible of evaluation on any such basis.

Rationale:

Rationale for the court was by Francis, Justice for the court.

For hundreds of years the measure of damages for pain and suffering following the wake of a personal injury has been "fair and reasonable compensation." This general standard was adopted because of universal acknowledgement that a more specific or definitive one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries, and there is no measure by which the amount of pain and suffering endured by a particular human can be calculated.

The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it, and the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded. The standard for measuring damages for personal injuries is reasonable compensation and the administration of this criterion is entrusted to the impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.

There can be no doubt that the prime purpose of suggestions, direct or indirect, in the opening or closing statements of counsel of a per hour or *per diem* sums as the value of or as compensation for pain, suffering and kindred elements associated with injury and disability is to instill in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence.

If the plaintiff's counsel is permitted to make such valuation suggestions to the jury, justice cannot be administered fairly in the trial of this type of case. Can defense counsel argue that pain and

suffering are worth a lesser amount? If he attempts to do so, he must necessarily inject as further factual suggestions valuations which again are incapable of proof. By doing so, he fortifies his adversary's implication that the law recognizes pain and suffering as having been evaluated and as capable of being evaluated on such basis. Suggestions of the sort we are asked to approve here constitute an unwarranted intrusion into the domain of the jury.

Text authorities supporting defendant's position and the position of the court in *Botta v. Brunner*, supra, are as follows:

"The jury is allowed to find the value of pain and suffering upon their own knowledge, since no evidence of the value of pain and suffering can be given." Sedgwick, *Damages*, 9th Ed., 1912, Sec. 171a.

"The court should make it clear to the jury that an award of damages for pain and suffering must be limited to compensation alone. *****"

"Instructions should not put a price or money value on pain and suffering." 15 Am. Jur., *Damages*, Sec. 374.

"There is no standard by which physical pain and suffering may be measured and compensated for in money. It can only be said that an award of damages therefor should be estimated in a fair and reasonable manner, and not by any sentimental or fanciful standard, and should constitute a reasonable compensation to plaintiff on the facts disclosed by the evidence." 25 C.J.S., *Damages*, Sec. 93.

Many recent cases from other jurisdictions have reached the same result. In the case of *Certified TV and Appliance Company, Inc. v. Harrington*, Sup. Ct. of Appeals of Va., 109 S.E. 2d, 126 (1959), the court said:

“The use by plaintiff’s counsel of a mathematical formula for measuring pain, suffering, mental anguish and percentage of disability on a per diem basis involve speculation of counsel unsupported by the evidence, and the setting forth of his calculations on a blackboard amounted to the giving of testimony in his summation argument and constituted error.”

The Delaware Supreme Court in the case of *Henne et al v. Balick* 146 A.2d, 394 (1958) held:

“The use by counsel for plaintiff of a mathematical formula setting forth the claim of pain and suffering on a per diem basis was merely a speculation of counsel for plaintiff unsupported by the evidence and was for that reason improper.”

The Supreme Court of the state of Massachusetts also dealt with this problem in the case of *Gardner v. State Taxi, Inc., et al*, 336 Mass. 28, 142 N.E. 2d 586 (1957) in which case the court said:

“Where plaintiff’s counsel in his argument to the jury improperly asked the jury to award plaintiff \$200.00 per week for total disability and multiply it by six months and award plaintiff \$100.00 per week for four weeks for partial disability, when there was nothing in the evidence that would justify a finding of a total disability of six months or partial disability of one month, and the matter

was seasonably brought to the attention of the trial judge by defendant's counsel, but the trial judge neither stopped plaintiff's counsel at the moment of the offense, nor dealt with the subject later in his charge, and the jury returned a verdict against each defendant in an amount which coincided exactly with that asked for by plaintiff's counsel, the error in the statement of the plaintiff's counsel to the jury was prejudicial."

A good statement of the law is found in *Braddock v. Seaboard Airline RR Company*, Sup. Ct. of Fla. 80 Southern 2d 662 (1955), in which the Florida Supreme Court made the following statement:

"The rule for measuring damages for pain and suffering, past, present and future, is that there is no standard by which to measure it except the enlightened conscience of impartial jurors. Their problem is not one of mathematical calculation but involves the exercise of their sound judgment of what is fair and right."

Other cases in accord include:

Warren Petroleum Corp. et al v. Pyeatt, 275 S.W. 2d 216 (1955) (Texas); *Louisville and N.R. Co. et al v. Prean*, 174 S.E. 209 (1934) (Georgia); *Wersbe v. Broadway and S.A.R. Co.*, 2 N.Y.S. 637 (1893) (New York); and *Krantz v. Nichols*, App. Ct. of Ill., 11 Ill. App. 2d 31, 135 N.E. 2d 816 (1956).

A similar rule has been adopted by the Federal Court in the case of *Wuth v. United States*, U.S. Dist. Ct., 161 Fed. Supp. 661 (E.D. Va., 1958):

“Fixing a per diem valuation for past and future physical pain and mental anguish is not a proper method of computing a final award.

“Pain, suffering and mental anguish, past and future, life expectancy, loss of wages, past and future, and inconvenience and embarrassment are factors which must be carefully weighed in arriving at a final award.”

It is recognized that there is a division of authority on this point; however, both the great numerical weight as well as the better law, modern viewpoint, and better reasoning, are in favor of the proposition advanced by defendant in this case. Following are listed additional citations designated as being in agreement with or against the position argued by defendant in this case and the court's attention is directed to the fact that only five jurisdictions in the United States, four of which are geographically located close together and all in the deep South, have adopted a view that argument of the type used by plaintiff's counsel in this case is acceptable.

Additional cases concurring:

Goodhart v. Penn. Railroad Co., 177 Pa. 1, 35 A. 191 (1896); Bostwick v. Pittsburgh Railroad Co., 255 Pa. 387, 100 A. 123 (1917); Hub v. Hallowell, 304 Pa. 128, 154 A. 582 (1931); Vaughn v. Magee, 218 Fed. 630 (3rd Civ., 1914); Stassum v. Chapin, 324 Pa. 125, 188 A. 111 (1936).

Cases against:

Kendlee v. Edwards, 126 Ind. App. 261, 130 N.E. 2d 491 (App. Ct. 1955); Four-County Electric Power Ass'n.

v. Clardy, 221 Miss. 403, 73 So. 2d 144 (Sup. Ct., 1954); J. D. Wright & Son Truck Line v. Chandler, 231 S.W. 2d 786 (Tex. Civ. App. 1950); Texas Employers' Insurance Ass'n v. Cruz, 280 S.W. 2d 388 (Tex. Civ. App. 1955); Kimball v. Noel, 228 S.W. 2d 980 (Tex. Civ. App. 1950); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W. 2d 637 (Sup. Ct. 1944); Standard Sanitary Mfg. Co. v. Brian's Adm'r, 224 Ky. 419, 6 S.W. 2d 491 (Ct. App. 1928); Dean v. Wabash R. Co., 229 Mo. 425, 129 S.W. 953 (Sup. Ct. 1910).

Respondent therefore contends, on the basis of the record and the authorities on this point, that defendant's position was prejudiced by the improper argument of counsel for plaintiff, that this improper argument constituted error of such magnitude as to be grounds for reversal, and that the trial court erred in failing to grant defendant's Motion for New Trial.

POINT III

THE COURT ERRED IN FAILING TO RESTRAIN COUNSEL FOR PLAINTIFF FROM CONTINUING WITH THE LINE OF ARGUMENT DIRECTED TO WHAT EACH JUROR INDIVIDUALLY WOULD TAKE FOR INJURIES, PAIN AND SUFFERING AND DISABILITY OF THE KIND AND DEGREE ALLEGED BY PLAINTIFF AND IN FAILING TO INSTRUCT THE JURY ON THIS POINT.

The authorities seem to be generally in accord that it is error to apply what has been referred to as the "golden rule" of damages in determining award of general damages as was done in the instant case. The weight

of authorities on this point holds that jurors are not to fix what they themselves would want as compensation if they had sustained the injuries or what the pain and suffering would be worth to them. Such determination must be made under the instructions given by the court and on the basis of each juror computing as best he can what is fair compensation to the plaintiff for such injuries and pain and suffering.

It is a well-recognized fact that different persons have different thresholds of pain and different levels of sensitivity to injury. Also, that a certain disability will have a different value when considered with respect to a person who relies for his livelihood on physical prowess than the same disability would have as related to a person who was only slightly dependent upon his physical prowess in the conduct of his everyday affairs.

Appellant respectfully directs the court's attention to the following authorities in support on this position:

Botta v. Brunner, 26 N.J. 82, 138 A. (2d) 713; Goodrich v. Thomas Cort, 80 N.J.L. 653, 657, 77 A. 1049 (Sup. Ct. 1910); Stein v. Meyer, 150 F. Supp. 365 (D.C.E.D. Pa. 1957); Ravel v. Couravallos, 245 S.W. 2d 731 (Tex. Civ. App. 1952); Gulf, C. & S. F. Ry. Co. v. Carson, 63 S.W. 2d 1096 (Tex. Civ. App. 1933).

CONCLUSION

Defendant believes that the trial court committed prejudicial error on each of the three points urged in this brief, particularly that the issue of plaintiff's contri-

butory negligence should have been submitted to the jury for determination; that the court should have granted a new trial on defendant's motion, based upon prejudice to defendant, resulting from argument of counsel for plaintiff, suggesting a mathematical computation or calculation of general damages; and for the court's failure to restrain counsel for plaintiff from arguing to the jury that damages should be assessed for plaintiff on the basis of what each juror individually would take for such injuries, pain and suffering and disability and the court's failure to instruct the jury on this point.

Each of the assigned errors individually resulted in such prejudice that the jury could not fairly and impartially determine the issues in this case and that, therefore, the judgment of the lower court should be reversed and the case remanded for a new trial.

Respectfully submitted,

KIPP AND CHARLIER

CARMAN E. KIPP

Attorney for Defendant.