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## General Damages

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## GENERAL DAMAGES

Ray C. Simmons\*

### I. PAIN AND SUFFERING

#### A. PAST PAIN AND SUFFERING

Nebraska lawyers often make the comment that juries in our state do not give large verdicts for pain and suffering. This is not always true, as can be readily proved by the extremely large per-hour verdicts for pain and suffering given in two Nebraska cases in the 1930's.

In a 1936 Dodge County personal injury suit,<sup>1</sup> the jury awarded \$6000 on a separate cause of action for pain and suffering for a man who died 36 hours after an automobile accident. On appeal the judgment was reversed on other grounds, but the question of possible excessiveness of the verdict was not discussed in the Supreme Court opinion and there is no indication it was even raised. The \$6000 awarded for 36 hours of pain would average out to \$167 per hour, and if extended for a year would amount to nearly 1½ million dollars!

The jury in a 1937 Douglas County personal injury suit,<sup>2</sup> awarded \$1850 for pain and suffering to a man who died 42 hours after an automobile accident. On appeal the Supreme Court reduced the verdict to \$1350 by remittitur, the court noting that the man was not mentally clear at least two-thirds of the time and was given some relief by morphine. The jury's original award allowed over \$44 per hour for pain and as reduced and sustained by the Supreme Court on appeal amounted to \$32 per hour. These two cases should make it clear that pain and suffering can be a very important element of damage.

Pain and suffering, of course, is not recoverable during a period that an injured man is unconscious.<sup>3</sup> Also, a recent case

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<sup>1</sup> *Suhr v. Lindell*, 133 Neb. 856, 277 N.W. 381 (1938).

<sup>2</sup> *Vanderlippe v. Midwest Studio*, 137 Neb. 289 at 306, 289 N.W. 341 at 349 (1939).

<sup>3</sup> *Vanderlippe v. Midwest Studio*, *supra*; *Dorsey v. Yost*, 151 Neb. 66 at 71, 36 N.W.2d 574 at 577 (1949).

held that pain suffered by the decedent before death is not recoverable in a wrongful death action, recovery being limited to the pecuniary loss suffered by the beneficiaries.<sup>4</sup> This decision in effect overrules the decision in the *Vanderlippe Case*<sup>5</sup> where the Supreme Court permitted recovery of damages for pain and suffering of a decedent and also the *Suhr Case*<sup>6</sup> where the trial court permitted such recovery.

#### B. FUTURE PAIN AND SUFFERING

Damages, of course, are recoverable for future pain and suffering.<sup>7</sup> However, the pain and suffering must be shown with reasonable certainty to justify an instruction thereon.<sup>8</sup> An instruction on pain that a plaintiff will "probably suffer in the future" is erroneous.<sup>9</sup>

Damages for future pain and suffering are based on the life expectancy of the plaintiff in his injured condition and not on his expectancy prior to the accident.<sup>10</sup> That is, if the plaintiff had a life expectancy of 30 years prior to his accident, but only 10 years after the accident, he would recover damages for future pain for 10 years. This differs from damages for loss of earning capacity, which are based on life expectancy immediately before the injury.<sup>11</sup> A recent decision holds that the value of future pain should be reduced to its present worth, though two judges dissented to this opinion.<sup>12</sup>

#### C. MENTAL SUFFERING

The Nebraska court, in accordance with decisions in the other states, has developed some rather complicated rules for determining whether mental suffering is recoverable.

<sup>4</sup> *Kroeger v. Safranek*, 161 Neb. 182 at 192, 72 N.W.2d 831 at 840 (1955).

<sup>5</sup> See note 2 *supra*.

<sup>6</sup> See note 1 *supra*.

<sup>7</sup> *Borcherding v. Eklund*, 156 Neb. 196 at 207, 55 N.W.2d 643 at 650 (1952).

<sup>8</sup> *Bresley v. O'Connor Inc.*, 163 Neb. 565 at 583, 80 N.W.2d 711 at 722 (1957).

<sup>9</sup> *Burkamp v. Roberts Sanitary Dairy*, 177 Neb. 60 at 66, 219 N.W. 805 at 807 (1928).

<sup>10</sup> *Borcherding v. Eklund*, *supra*.

<sup>11</sup> *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N.W. 564 (1917).

<sup>12</sup> *Wolfe v. Mendel*, 165 Neb. 16 at 27, 84 N.W.2d 109 at 115 (1957).

### 1. *Caused by Physical Contact or Injury to Plaintiff*

Mental suffering is properly considered by the jury where it is shown that the plaintiff suffered physical injuries,<sup>13</sup> since physical suffering causes mental suffering.<sup>14</sup> Mental suffering and anxiety caused by physical injury is compensable whether or not the injury was willfully caused.<sup>15</sup> At least in one Nebraska case,<sup>16</sup> the court indicated that only slight physical contact was necessary in order to permit recovery of damages for mental suffering. In this case, the defendant, a man, took plaintiff, a woman, for a ride in his carriage, telling her that he was taking her to the home of a friend whereas he actually intended to take her to his own home for immoral purposes. When she discovered his plans, she jumped from the carriage and later sued him for her mental suffering from the rumors which circulated in the neighborhood about her character after this incident. The court held that there was trespass on the plaintiff's person sufficient to justify damages for mental suffering, humiliation and disgrace.

### 2. *Causes Later Physical Injury to Plaintiff*

Where a plaintiff receives no physical injury but does have mental suffering, which in turn causes physical injuries, he is permitted to recover for those injuries. Thus in one older Nebraska case,<sup>17</sup> a street car which the plaintiff, a woman, was starting to board, was struck in the rear by another street car, frightening her and causing her to jump backwards. She became sick and three days later suffered a miscarriage. It was held that her injuries were compensable. In another case,<sup>18</sup> defendant's dog acted as if it were going to attack plaintiff but did not actually bite her. Plaintiff fainted and later brought suit for nervous prostration, for which she was allowed recovery.

Probably the most extreme example of the rule set forth in the foregoing paragraph is the famous *Rasmussen Case*<sup>19</sup> where

<sup>13</sup> *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 at 245, 77 N.W. 675 at 677 (1898).

<sup>14</sup> *Southwell v. DeBoer*, 163 Neb. 646 at 654, 80 N.W.2d 877 at 883 (1957).

<sup>15</sup> *American Water-Works Co. v. Dougherty*, 37 Neb. 373, 55 N.W. 1051 (1893).

<sup>16</sup> *Kurpgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910).

<sup>17</sup> *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925).

<sup>18</sup> *Netusil v. Novak*, 120 Neb. 751 at 755, 235 N.W. 335 at 337 (1931).

<sup>19</sup> *Rasmussen v. Benson*, 135 Neb. 232, 280 N.W. 890 (1938).

defendant negligently sold plaintiff's decedent a sack of poisoned bran. The decedent fed the bran to his dairy cattle and other livestock and a number died, destroying his dairy business. Decedent allegedly died of a heart condition resulting from shock from the loss. The court, in allowing recovery for the plaintiff's death, held that although recovery could not be allowed for mental anguish without physical injury, the worry here did cause a serious physical injury, a heart condition, so there could be recovery for the death. Two judges dissented, holding that plaintiff could recover for damage to the livestock but not for decedent's death since it could not have been reasonably foreseen that sale of the poisoned bran would cause death.

### 3. *Results from Non-malicious Act Against Plaintiff*

If the wrong to the plaintiff was not malicious the plaintiff cannot recover for mental suffering. In a recent case, plaintiff, an actor, was hired by the defendant store to stage a fake robbery. Plaintiff claimed that defendant had agreed previously to obtain Omaha police permission for the fake robbery but had not done so, and when plaintiff staged his performance, he and his seven employees were arrested by the Omaha police. Plaintiff sued for breach of contract and sought to recover for mental anguish. The court held that plaintiff could not recover, that mental suffering is usually not recoverable in an action for breach of contract unless the breach was a willful or independent tort. Such damages are too remote to have been contemplated by the parties.<sup>20</sup>

In another case,<sup>21</sup> defendant telegraph company failed to deliver a telegram to plaintiff telling him that his father had died. The plaintiff did not learn of the death until after the funeral and sued the telegraph company for mental anguish. The court denied recovery, holding that under federal law, which controls the sending of telegrams, "pain and suffering and mental anguish are too vague for legal redress where no injury is done to person, property, health or reputation." It has also been held that where a person's property is attached erroneously that there can be no recovery for mental suffering as such is not compensable where the personal property is destroyed without fraud, malice or aggravated circumstances.<sup>22</sup>

<sup>20</sup> *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955).

<sup>21</sup> *Burke v. Western Union Telegraph Co.*, 137 Neb. 878, 291 N.W. 555 (1940).

<sup>22</sup> *Henderson v. Weidman*, 88 Neb. 813 at 815, 130 N.W. 579 at 580 (1910).

#### 4. *Results from Malicious Act Against Plaintiff*

Recovery has been allowed where the defendant's acts were malicious even though there was only mental suffering and no prior or subsequent physical injury. In a 1934 case,<sup>23</sup> the defendant extension university attempted to collect from the plaintiff on an alleged debt by threatening to sue plaintiff and complain to plaintiff's employer. The plaintiff sued the university for mental pain and anguish. The court held that the plaintiff could recover for mental pain even though he received no physical injury since the defendant's action in sending plaintiff the letters was malicious and designed to cause mental distress.

Compensation for mental suffering is recoverable in an action for trespass to property where the trespass is inspired by fraud, malice or like motives.<sup>24</sup>

#### 5. *Caused Plaintiff by Death of a Loved One*

Nebraska decisions hold that no damages can be recovered for sorrow from death of a loved one or from bereavement or solace in a wrongful death action.<sup>25</sup> Thus, where a woman suffered a miscarriage, it was held that no damages were recoverable for her sorrow caused by the child's death.<sup>26</sup>

#### 6. *Caused Plaintiff by Suffering of Loved One*

In an early Nebraska case,<sup>27</sup> the defendant newspaper published articles accusing plaintiff of murder. Plaintiff sued for libel and among other damages claimed mental suffering from observing his wife's suffering from mental distress because of the article. The court held that plaintiff could not recover for his wife's misery. "Mental distress caused by sympathy for another's suffering is not a recoverable element of damages."

<sup>23</sup> *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

<sup>24</sup> See *Henderson v. Weidman*, *supra*.

<sup>25</sup> *Johnson County v. Carmen*, 71 Neb. 682 at 685, 99 N.W. 502 at 503 (1904); *Ensor v. Compton*, 110 Neb. 522 at 523, 194 N.W. 458 at 459 (1923).

<sup>26</sup> *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423 at 440, 203 N.W. 643 at 650 (1925).

<sup>27</sup> *Dennison v. Daily News Publishing Co.*, 82 Neb. 675 at 677, 118 N.W. 568 at 569 (1908).

## II. PHYSICAL INJURIES

## A. DISFIGUREMENT

Several Nebraska cases have included disfigurement among the damages described by the plaintiff. Thus in discussing the damages suffered by plaintiffs, cases have mentioned the fact that the plaintiff, a married woman, suffered facial disfigurement,<sup>28</sup> that an unmarried woman had a scarred arm and a crippled hand,<sup>29</sup> that an unmarried woman suffered a scar on her hand and a disabled hand which handicapped her chances of marriage,<sup>30</sup> and that a man had a disfiguring facial scar.<sup>31</sup> Recovery has been permitted under the Workmen's Compensation Act to an employee who suffered severe facial disfigurement from burns and as a result was handicapped in obtaining employment.<sup>32</sup>

## B. NERVOUS CONDITION, PERSONALITY AND APPEARANCE CHANGE

Nebraska cases in discussing personal injuries have mentioned the fact that a plaintiff's personality and appearance were changed,<sup>33</sup> that as a result of the accident the plaintiff was nervous and depressed,<sup>34</sup> that the plaintiff's memory was impaired,<sup>35</sup> and that the plaintiff suffered a nervous condition.<sup>36</sup>

## C. INSANITY, PNEUMONIA AND HEART CONDITION

In a number of Nebraska cases, recovery has been allowed for injuries beyond those ordinarily expected to arise from an accident, where it is shown that they were a result of the acci-

<sup>28</sup> *Remmenga v. Selk*, 152 Neb. 625 at 631, 42 N.W.2d 186 at 190 (1950); *Ziskovsky v. Miller*, 120 Neb. 255 at 261, 231 N.W. 809 at 812 (1930); *Haley v. Deer*, 135 Neb. 459, 282 N.W. 389 (1938). (64 year old widow lost part of an ear).

<sup>29</sup> *Hickey v. Omaha & C. B. Street R. Co.*, 140 Neb. 671, 1 N.W.2d 289 (1941).

<sup>30</sup> *Berg v. Griffiths*, 127 Neb. 501 at 502, 256 N.W. 44 at 45 (1934).

<sup>31</sup> *Fielding v. Publix Cars, Inc.*, 133 Neb. 818 at 824, 277 N.W. 331 at 334 (1938); *City of South Omaha v. Sutcliffe*, 72 Neb. 746 at 754, 101 N.W. 997 at 1000 (1904).

<sup>32</sup> *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938).

<sup>33</sup> *Remmenga v. Selk*, supra.

<sup>34</sup> *Mischo v. Von Dohren*, 126 Neb. 164 at 165, 252 N.W. 830 at 831 (1934).

<sup>35</sup> *Cotten v. Stolley*, 124 Neb. 855 at 863, 248 N.W. 384 at 387 (1933).

<sup>36</sup> *Simonsen v. Thorin*, 120 Neb. 684 at 689, 234 N.W. 628 at 630 (1931).

dent. Thus the court in discussing the damages has mentioned the fact that the plaintiff suffered insanity<sup>37</sup> as a result of the accident, that plaintiff was suffering from dementia praecox,<sup>38</sup> a form of insanity, and that the plaintiff was progressing toward traumatic insanity.<sup>39</sup> In another case<sup>40</sup> however, a collision caused plaintiff's decedent to go insane. Seventeen days later decedent committed suicide. It was held in a wrongful death action that there could be no recovery for the death since the suicide did not come from an uncontrollable impulse.

In discussing the damages a person suffered, pneumonia has been considered where it is shown to have been caused by the accident. Thus recovery has been allowed for pneumonia, without expressly describing the type,<sup>41</sup> where pneumonia set in after the fourth day,<sup>42</sup> and where an ambulance ran off a road and a sick woman who had been riding in the ambulance was exposed for an hour, and two days later died of pneumonia.<sup>43</sup> In still another case, recovery was allowed when an accident caused pneumonia which in turn caused a heart condition.<sup>44</sup> On the other hand, where decedent suffered a fractured collar bone in an accident and eight months later died of bronchial pneumonia, recovery was disallowed because no causal connection was shown between the accident and the pneumonia.<sup>45</sup>

Recovery has been allowed for heart damage resulting from an accident.<sup>46</sup> On the other hand, recovery has been denied for a coronary occlusion of the heart where the latter occurred almost ten months after the accident, recovery being denied because it was too speculative to consider.<sup>47</sup> Recovery was denied

<sup>37</sup> *Omaha Street R. Co. v. Duvall*, 40 Neb. 29 at 30, 58 N.W. 531 at 532 (1894); *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779 at 780, 186 N.W. 1001 at 1002 (1922).

<sup>38</sup> *Faulhaber v. Griswold*, 124 Neb. 357 at 359, 246 N.W. 727 at 728 (1933).

<sup>39</sup> *Schwarting v. Ogram*, 123 Neb. 76 at 87, 242 N.W. 273 at 277 (1932).

<sup>40</sup> *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342, 187 N.W. 930 (1922).

<sup>41</sup> *Moran v. Moran*, 124 Neb. 379 at 384, 246 N.W. 711 at 713 (1933); *Dafoe v. Grantski*, 143 Neb. 344 at 353, 9 N.W.2d 488 at 494 (1943).

<sup>42</sup> *Dougerty v. Omaha & C. B. Street R. Co.*, 113 Neb. 356 at 357, 203 N.W. 538 at 539 (1925).

<sup>43</sup> *Mussman v. Steele*, 126 Neb. 353, 253 N.W. 347 (1934).

<sup>44</sup> *Reals v. Grazis*, 125 Neb. 877 at 879, 252 N.W. 413 at 414 (1934).

<sup>45</sup> *Williams v. Hines*, 109 Neb. 11, 189 N.W. 623 (1922).

<sup>46</sup> *Reals v. Grazis*, supra.

<sup>47</sup> *Harper v. Young*, 139 Neb. 624 at 626, 298 N.W. 342 at 344 (1941).

for appendicitis where it occurred eight weeks after the accident and under the evidence there was merely a possibility that it was caused by the accident.<sup>48</sup> Recovery has been allowed where a miscarriage resulted from an accident.<sup>49</sup>

#### D. REDUCTION OF LIFE EXPECTANCY

Although the plaintiff's recovery for future pain and suffering is limited by his reduced life expectancy,<sup>50</sup> the fact that plaintiff's life expectancy has been reduced does not go unnoticed and has been mentioned as an element of damages.<sup>51</sup>

### III. PLEADING PERSONAL INJURIES

A plaintiff should be liberal in the amount he demands as damages. Otherwise, the jury may award more than he asks and the court will reduce the damages to the amount demanded. Thus in one case plaintiff alleged automobile property damages, loss of use and towing charges of \$1210 and personal injuries of \$1000.<sup>52</sup> The jury awarded plaintiff in excess of \$1977. On appeal it was held that plaintiff had only proven property damage and towing charge of \$415, plus his own personal injuries. As plaintiff only asked \$1000 for personal injuries, his recovery for injuries was limited to this latter amount, so the evidence sustained the verdict only to the extent of \$1415 and a remittitur was ordered for the balance.

A problem may arise even though the jury does not award an amount greater than the plaintiff demands. The jury may award just what the plaintiff requests and the court may find that this suggests that the jury was acting with passion and prejudice.<sup>53</sup> Still another danger arises where the plaintiff does not ask for sufficient damages in his original prayer and dur-

<sup>48</sup> *Frickel v. Lancaster County*, 115 Neb. 506 at 512, 213 N.W. 826 at 828 (1927).

<sup>49</sup> *Bresley v. O'Connor Inc.*, 163 Neb. 565 at 578, 80 N.W.2d 711 at 720 (1957); *Bar v. Post*, 56 Neb. 698, 77 N.W. 123 (1898). But see *Schindler v. Mulhair*, 132 Neb. 809 at 816, 273 N.W. 217 at 219 (1937) where the opinion suggests it may have been improper for the jury to consider miscarriage.

<sup>50</sup> *Supra*, footnote 10.

<sup>51</sup> *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394, 13 N.W.2d 627 (1944).

<sup>52</sup> *Roby v. Auken*, 151 Neb. 421 at 424, 37 N.W.2d 799 at 801 (1949).

<sup>53</sup> *Snyder v. Russell*, 140 Neb. 616 at 623, 1 N.W.2d 125 at 128 (1942).

ing the trial attempts are made to increase the damages requested. Thus in a recent case, it was held to be reversible error where the trial court, without request by plaintiff, increased in its instruction the amount for which the plaintiff sought recovery from over \$119,000 to over \$144,000.<sup>54</sup>

The Nebraska court appears to be liberal in allowing a plaintiff to show damages beyond those specifically pleaded. Thus it has been held that damages for future pain and permanent effect of injuries are recoverable under the general *ad damnum* clause and need not be specifically alleged.<sup>55</sup> Physical pain and mental anguish need not be specifically alleged where the injury imports them.<sup>56</sup> Plaintiff has been allowed to show the following injuries at trial even though he did not specifically allege them in his petition: Plaintiff alleged impairment of health and mental condition, was permitted to show stuttering and loss of control of bladder;<sup>57</sup> Plaintiff alleged injury to head, eye and nose, was permitted to show brain injury;<sup>58</sup> and where the petition alleged total disability the plaintiff was allowed to show a heart condition.<sup>59</sup>

#### IV. ASSESSMENT OF DAMAGES

##### A. WHERE THERE IS MORE THAN ONE DEFENDANT

Where a plaintiff has been injured by the torts of more than one defendant, he is given one judgment against all defendants, and the jury cannot give a verdict in a certain amount against one defendant and in a different amount against another. Thus it has been held that the jury cannot assess \$5000 against one defendant and \$2500 against the other defendant, but rather should enter a verdict of \$7500 against both defendants.<sup>60</sup>

<sup>54</sup> *Kroeger v. Safranek*, 161 Neb. 182 at 188, 72 N.W.2d 831 at 838 (1955).

<sup>55</sup> *Husak v. Omaha National Bank*, 165 Neb. 537 at 545, 86 N.W.2d 604 at 609 (1957).

<sup>56</sup> *Fink v. Busch*, 83 Neb. 599 at 604, 120 N.W. 167 at 169 (1909).

<sup>57</sup> *City of South Omaha v. Sutcliffe*, 72 Neb. 746 at 752, 101 N.W. 977 at 1000 (1904).

<sup>58</sup> *Yost v. Nelson*, 124 Neb. 33 at 36, 245 N.W. 9 at 11 (1932).

<sup>59</sup> *Reals v. Grazis*, *supra*.

<sup>60</sup> *Forslund v. Swenson*, 110 Neb. 188, 192 N.W. 649 (1923). Also see *Olson v. Nebraska Telephone Co.*, 87 Neb. 593 at 603, 127 N.W. 916 at 920 (1910).

## B. WHERE THERE IS ONLY ONE OF SEVERAL POSSIBLE DEFENDANTS

In a few Nebraska cases, a plaintiff had been involved in two or more accidents in close sequence. In such a situation, there is a jury question as to what portion of the plaintiff's damages was caused by each tortfeasor. Thus in a recent Nebraska case,<sup>61</sup> a line of three cars collided, plaintiff being a passenger in the center car. Plaintiff brought suit against the driver of the rear of the three cars but the latter used as a defense that before defendant struck the car in which plaintiff was riding, the car in which the plaintiff was riding struck the rear of the car preceding the plaintiff. The court held that the jury had the duty of determining what damages the defendant had caused. In another case,<sup>62</sup> plaintiff while walking along a highway, was struck by an unidentified car. While lying on the highway, he was struck again, this time by defendant's car, so there was a jury question as to what damages the defendant had caused. In still another case,<sup>63</sup> plaintiff claimed to have received a back injury in a collision, but there was also evidence that he received his injury after the accident while trying to lift the fender of his car.

## V. PROVING PAIN AND INJURIES

Pain and personal injuries can be proved in a number of ways. Following is a discussion of some of the customary, and also of some of the more unusual methods.

### A. MEDICAL TESTIMONY

A doctor can testify to pain suffered by his injured patient.<sup>64</sup> The doctor can testify to statements of a patient during the examination as to subjective symptoms.<sup>65</sup> Statements made to a surgeon for the purpose of receiving treatment are competent when necessary to an examination before treatment.<sup>66</sup> In a classic case,<sup>67</sup> plaintiff's three doctors testified that the plaintiff suffered

<sup>61</sup> *Keiserman v. Lydon*, 153 Neb. 279 at 282, 44 N.W.2d 513 at 516 (1950).

<sup>62</sup> *Weisenmiller v. Nestor*, 153 Neb. 153 at 159, 43 N.W.2d 568 at 572 (1950).

<sup>63</sup> *Simcho v. Omaha & C. B. St. Ry. Co.*, 150 Neb. 634 at 646, 35 N.W.2d 501 at 508 (1949).

<sup>64</sup> *Albrecht v. Morris*, 91 Neb. 442 at 448, 136 N.W. 48 at 50 (1912).

<sup>65</sup> *Turpin v. State*, 135 Neb. 389 at 393, 281 N.W. 800 at 802 (1938).

<sup>66</sup> *Willis v. Order of Railroad Telegraphers*, 139 Neb. 46 at 51, 296 N.W. 443 at 446 (1941).

<sup>67</sup> *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394 at 405, 13 N.W.2d 627 at 633 (1944).

severe and painful injuries that were disabling, and would be progressively so during his lifetime. The testimony of the defendant's three doctors, on the other hand, indicated "that there has been a complete recovery and there are and will be no after effects." The jury could take its choice!

#### B. PLAINTIFF'S EXHIBITION OF WOUNDS

Exhibition of wounds by the plaintiff is permitted in the trial court's discretion.<sup>68</sup> According to an older case,<sup>69</sup> the exhibition of wounds is permitted though "not to be encouraged."

In an early Nebraska case,<sup>70</sup> a young woman, apparently attractive, was injured in a fall from a street car and brought suit against the street car company for her injuries. The defendant argued that it was improper for plaintiff to show her injured limb as plaintiff "a female, was young, handsome, and attractive, and consequently that the sympathies of a jury composed of men were unduly excited in her behalf." The court rejected this argument, holding it was permissible for plaintiff to display her injured limb, that she was entitled to present the same proofs as "if she had been aged, ugly, and repulsive."

#### C. WITNESS' DESCRIPTION OF PLAINTIFFS' PAIN

A very effective way of showing a plaintiff's pain, and a method apparently not used as much as in early Nebraska cases, is for persons who have observed the plaintiff, whether they be members of the family, friends or otherwise, to testify as to plaintiff's expressions and actions showing pain.

Expressions of present existing pain and its locality are exceptions to the general rule which excludes hearsay evidence.<sup>71</sup> Thus it has been held admissible for several non-expert witnesses to testify as to plaintiff's suffering, pain and her nervous condition.<sup>72</sup> Non-expert witnesses have also been permitted to testify

<sup>68</sup> *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579 at 584, 213 N.W. 966 at 968 (1927).

<sup>69</sup> *McKenna v. Omaha & C. B. Street R. Co.*, 97 Neb. 281 at 288, 149 N.W. 826 at 829 (1914).

<sup>70</sup> *Omaha Street R. Co. v. Emminger*, 57 Neb. 240 at 244, 77 N.W. 675 at 676 (1898).

<sup>71</sup> *Turpin v. State*, *supra*.

<sup>72</sup> *Thomas v. Haspel*, 126 Neb. 255 at 260, 253 N.W. 73 at 75 (1934).

to their opinion that plaintiff was sick, hurt and suffered pain.<sup>73</sup> It has been held admissible for the parents of a plaintiff to testify as to his sufferings, the length of time he was sick and that he lay upon his bed moaning until he went out of his head.<sup>74</sup> In this same case, plaintiff's doctor was allowed to testify that plaintiff seemed dazed and that he complained of pain. It was admissible for the plaintiff's mother to testify that plaintiff complained of severe pain in her sides, head and back, and of sleeplessness and want of appetite.<sup>75</sup>

In a number of Nebraska cases, witnesses have described what they observed as to plaintiff's pain, and the question as to admissibility of this testimony was not raised on appeal. Thus in one case,<sup>76</sup> a wife testified that after her husband's accident, he had to sleep in a chair, was unable to bear any weight on his feet, had to be carried from one chair to another, and did not get out of the house for some time and then only to the front porch. In another case,<sup>77</sup> witnesses testified that after the injury, plaintiff sat in a rocking chair or lay on the couch, coughed and spit blood, was unable to eat breakfast, and was weak and had to support himself by holding onto things.

#### D. RES GESTAE STATEMENTS

Statements by an injured person spontaneously and involuntarily made at the time of an accident are admissible under the res gestae rule, but not where they are made after the accident and are merely narratives of past transactions.<sup>78</sup> Vivid testimony by witnesses as to what the injured person said immediately after the accident occurred has been admitted in evidence. Thus in an early case,<sup>79</sup> witnesses sought to testify that immediately after the accident plaintiff was unable to stand and had

<sup>73</sup> McKennan v. Omaha & C. B. Street R. Co., 97 Neb. 281 at 285, 149 N.W. 826 at 828 (1914).

<sup>74</sup> Dore v. Omaha & C. B. Street R. Co., 97 Neb. 250 at 255, 149 N.W. 792 at 794 (1914).

<sup>75</sup> Omaha Street R. Co. v. Emminger, 57 Neb. 240 at 243, 77 N.W. 675 at 676 (1898).

<sup>76</sup> Sharp v. Chicago, B. & Q. R. Co., 110 Neb. 34 at 39, 193 N.W. 150 at 152 (1923).

<sup>77</sup> Lord v. Roberts, 102 Neb. 49 at 51, 165 N.W. 892 at 893 (1917).

<sup>78</sup> Muff v. Grainard, 150 Neb. 650 at 652, 35 N.W.2d 597 at 599 (1949).

<sup>79</sup> Nielsen v. County of Cedar, 5 Neb. Unof. 430 at 432, 98 N.W. 1090 at 1091 (1904).

said that one of her limbs was broken and that she felt great pain in her back, hip, side and limb. The court held that as there was other testimony to this effect, the trial court's action in excluding the above testimony was not reversible error. It has also been held to be admissible evidence for the plaintiff to testify that after being thrown from a street car she told the conductor that she was hurt.<sup>80</sup>

On the other hand, statements made by an injured person some time after an accident are inadmissible under the *res gestae* rule since they are merely narratives of a past event. Thus testimony that plaintiff's decedent had said "I sure hurt myself in the guts as I went over the crossing there.", was inadmissible since it was made 25 or 30 minutes after the accident.<sup>81</sup>

#### E. INJURIES TO PLAINTIFF'S FELLOW PASSENGER

Under the holding in a recent Nebraska case, a plaintiff may now be able to successfully introduce in evidence the fact that other persons involved in an accident received personal injuries. In this case,<sup>82</sup> plaintiff was injured while riding as a guest in an automobile. Another passenger in the car testified that the latter was thrown against and through the windshield of the car and received serious injuries. The driver of the car testified that he was shaken up and bruised on his side and knees. On appeal the court held the above testimony to be admissible in the discretion of the court as tending to show the force of the impact and the extent of the injury inflicted upon the plaintiff.

### VI. PROOF OF MENTAL SUFFERING

As indicated in paragraph I (C) above, physical suffering causes mental suffering and proof of the former suffices as to evidence of the latter. However, where there are no physical injuries, but the case is one where damages are permitted for mental suffering even in the absence of physical injury, evidence must be introduced to show the mental suffering. Thus in an early Nebraska case,<sup>83</sup> the plaintiff, a Negro, had been hired as

<sup>80</sup> *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550 at 551, 113 N.W. 117 (1907).

<sup>81</sup> *Milton v. City of Gordon*, 129 Neb. 888 at 891, 263 N.W. 208 at 210 (1935).

<sup>82</sup> *Jacobsen v. Poland*, 163 Neb. 590 at 608, 80 N.W.2d 891 at 903 (1957).

<sup>83</sup> *Hoover v. Haynes*, 65 Neb. 557 at 565, 91 N.W. 392 at 394 (1902). Also see *Kroeger v. Safranek*, 161 Neb. 182 at 192, 72 N.W.2d 831 at 841 (1955).

a messenger but was refused admission into defendant hotel which he had tried to enter pursuant to his duties. He brought suit against the hotel for alleged suffering and loss of income. The trial court awarded damages to the plaintiff but on appeal the Nebraska Supreme Court ordered a new trial since there was no evidence shown as to the mental pain and anguish suffered by the plaintiff.