

REVIEWS

MODERN DAMAGES. Volume 1. By Melvin M. Belli. Indianapolis: The Bobbs-Merrill Co., 1959. Pp. 1247. \$22.50. Record album (3 discs), \$15.00.

MELVIN BELLI blushingly styles himself The King of Torts, and so he is—or at least of the great province of that noble discipline which is concerned with sudden death and maiming, “of most disastrous chances, of moving accidents by flood and field.”¹ Not for him such quaint, esoteric torts as the wanton, reckless and wilful promulgation of an *Accounting Research Bulletin* on declining-balance depreciation.² But within the field of personal injury, which probably accounts for the bulk of tort litigation, Mr. Belli can fairly claim to be the reigning monarch. His verdicts are the highest, and so, presumably, are his fees; his publications, are the most voluminous; and, it may be added, his publicity is the most flamboyant, in a field whose leading practitioners are rarely shrinking violets.

Moreover, that field is a most important one. In addition to its enormous social and economic significance, it is probably, along with criminal law, the part of the law which impinges most directly on the consciousness of the average citizen and by which that citizen tends to form his judgment of law and lawyers. The problem of compensation for personal injury suffered at another's hands is certainly among the oldest in jurisprudence; *Homo Neanderthalensis* probably exercised his far from backward brain upon it (for we know he had a well developed theology, which implies ideas on ethics), and there is today no tribe of savages so primitive as to lack definite ideas on the subject—and those ideas are often disconcertingly close to the ones still prevalent in the most progressive and high-toned jurisdictions. The one thing, in fact, on which there is nearly complete agreement among plaintiffs' lawyers (including Mr. Belli), defendants' lawyers, and professors is that our present system of compensation is antiquated, clumsy, expensive and frequently unjust in its operation.³ The defects in our system of determining appropriate damages for personal injury (leaving to one side, as outside the scope of *Modern Damages* and therefore of this Review, the prob-

1. *Othello* act I, scene 3.

2. See *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 177 F. Supp. 345 (S.D.N.Y.), *aff'd per curiam*, 268 F.2d 844 (2d Cir. 1959). This pioneering effort to push back the frontier of the law of torts got short shrift from an unimaginative judiciary.

3. See, e.g., James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959); Jones, *Evaluation and Settlement of a Personal Injury Damage Claim*, 1959 INS. L.J. 559.

lems incident to adjudicating liability in the first place) are numerous and obvious; only the most salient need be mentioned.

1. Generally speaking, damages must be awarded once for all and in a lump; the plaintiff must, within a comparatively short time after the accident occurs, recover for *all* of his loss of earnings, medical expense and pain and suffering—including those which he has yet to suffer and may never suffer.⁴ In many cases, of course, it is exceedingly difficult for doctors, let alone jurors, to make such a forecast with even a semblance of accuracy, and the difficulty is raised to the order of impossibility when it is required that this conjectural decrease in income and increase in outgo be capitalized in contemporary dollars. Moreover, while the purpose of the award is, of course, to put the victim in the same economic situation in which he would have been if the accident had never occurred (with appropriate lagniappe for his pain and suffering), the state of mind of the gratified recipient of a sudden and substantial (or even stupendous) bundle of cash is often and regrettably much less like that of a man who has traded future earnings for investment cash than like that of a man who has just won the Irish Sweepstakes.⁵

2. The evaluation of damages is at best inexact and at worst capricious. How can a jury or a judge calculate the effect of a broken nose on a spinster plaintiff's chance of making a profitable marriage? What is the cash value of a four-year-old to his parents? Of an amputated finger to an ambitious but maybe untalented student of the violin? Should a widow who is an overpowering cutie with a wide choice of rich second husbands receive lesser damages for the wrongful death of a husband than a relict who is painfully plain? It is hardly a matter for wonder that lay and judicial assessors wandering in such a maze too frequently give weight to such extraneous but tangible factors as the personality of the plaintiff or the picturesqueness of his injuries.

3. If it is possible to calculate medical expenses with some approach to exactness and to make guesses at loss of earnings which are at least educated, the intrinsic impossibility of pricing pain is such as to cause some commentators simply to throw up their hands and propose that this element of damages be abolished.⁶ The one yardstick which naturally suggests itself to the juror—"what would I charge to suffer this pain myself?"—is also,

4. *Fetter v. Beale*, 1 Raym. 339, 91 Eng. Rep. 1122 (K.B. 1699), *aff'd sub nom. Ferrer v. Beale*, 1 Raym. 602, 91 Eng. Rep. 1361 (K.B. 1702). The plaintiff collected £11 for the defendant's tortious battery upon his skull. Thereafter, he developed alarming sequelae—"part of his skull by reason of the said battery came out of his head"—and sought additional damages. The defendant successfully pleaded in bar the original recovery, Chief Justice Holt remarking that when the case was originally tried before him, "the plaintiff and defendant appeared to be both in drink, and the jury did not well know which of them was in fault, and therefore they gave the less damages." One wonders whether this important principle of the common law would be the same if *Fetter* (or *Ferrer*) had been sober when his cranium was cracked.

5. See James, *supra* note 3, at 412; Jones, *supra* note 3, at 565-66.

6. *E.g.*, GREEN, *TRAFFIC VICTIMS—TORT LAW AND INSURANCE* 88 (1958).

as Mr. Belli points out,⁷ the one which the court firmly instructs him to ignore. Yet damages for pain are often the largest component of an award.⁸

4. As noted above, the sum handed a successful plaintiff in theory is supposed to put him in the financial position he would have occupied if he had suffered no injury. In fact, as Mr. Belli frankly recognizes, a third or a half will normally go to pay his lawyer's contingent fee.⁹ Courts, of course, shelter juries from such information as sternly as Victorian parents sheltered children from sex. Fortunately, the juries (like the children) usually know it anyhow and often take care of this item by inflating the rest of the damages; it has been suggested that in practice "pain and suffering" is frequently a term of art meaning "counsel fees."¹⁰ I intend no pharisaical reprobation of the practice of charging such a substantial contingent fee. Given the present system of awarding compensation, it seems to be about the only way to assure competent representation of an impecunious plaintiff; "it can hardly be said as a general proposition that counsel who conscientiously satisfies himself of the merits before taking on an indigent plaintiff's case on a contingent basis is necessarily any less ethical than counsel who vigorously defends a clearly meritorious case because for so doing he is in receipt of a fat fee from a wealthy defendant."¹¹ Whether a system of compensation which entails such costs can and ought to be radically changed is, of course, quite another question.

5. The upshot is that an award which fairly compensates a claimant for his injuries, which is neither inadequate nor excessive, is so rare as to be practically unheard of. The layman, morosely perusing the insurance company propaganda which accompanies the annual notice that his liability insurance premium has been raised again, develops a stereotype of an imbecile jury, mesmerized by the baroque rhetoric of a wily ambulance chaser, lifting a plausible malingerer to sudden affluence. There is some truth in the picture, but probably not much. Mr. Belli, the Apostle of the Adequate Award, makes out a persuasive case for the proposition that, at least in cases of serious injury or death, the average award in most jurisdictions tends to be far too low. More, he makes the surprising, but apparently accurate, assertion that juries are habitually more niggardly than judges in making awards.¹² On the other hand, the undoubted rise in recent years in the cost of settling personal injury claims (a rise which is too large to be accounted for merely by inflation)¹³

7. Pp. 18-19.

8. See Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 479-80 (1959).

9. P. 29.

10. See Morris, *supra* note 8, at 477-78.

11. *Angoff v. Goldfine*, 270 F.2d 185, 191 (1st Cir. 1959).

12. *E.g.*, pp. 27, 33. Mr. Belli picks up somewhat unexpected support from a veteran member of the defendants' bar, who estimates on the basis of the experience of one large insurance company in the year 1958 that juries on the average give the plaintiff rather less than a fourth of the sum he is demanding. See Jones, *supra* note 3, at 559-60.

13. See James, *supra* note 3, at 411.

may in large measure be attributable to the fact that the comparatively trivial injury is often grossly overcompensated—not so much by judges or juries as by the insurance companies themselves, who, penny-wise and pound-foolish, think to save litigation costs by compromising such claims without regard to merit.¹⁴

The subject matter of *Modern Damages* is therefore of vast importance, and few men are better qualified by experience to discuss that subject than is Mr. Belli. The more, then, is the pity that he has stuffed his opening chapters with claptrap and composed much of them in a style which makes it exceedingly hard to take his really valuable collection of data on damages as seriously as it deserves to be taken.

Of the three chapters of the present volume, chapter I, "Modern Damages in Perspective," is a disorganized editorial devoted to the general proposition that damages for personal injuries ought to be higher than they are. Here and there a nugget of worthwhile information gleams in the heap of dross—for example, the report that some insurance companies now deal with the problem of the future effects of plaintiff's injuries by handing him, along with damages for what he has already suffered, a paid-up insurance policy payable in the event that serious consequences actually develop.¹⁵ But no real attempt is made to discuss or even to describe alternatives to the present system—possibly because Mr. Belli is personally very well satisfied with the essentials of that system, provided only that something is done to increase the size of awards. Specifically, Mr. Belli makes virtually no mention of the principal suggestion for reforming the law of personal injury where it most needs reform—the institution of some sort of Automobile Compensation Plan, analogous to workmen's compensation.¹⁶ Chapter II, "History of the Law of Damages," is an ill-advised effort to give the humble Claimants' Compensation Attorney (as he likes to call himself, in the manner of the Morticians, Realtors, Beauticians, etc., etc.) the illusion that he practices a profession which is not merely useful but full of book learning, by presenting, in somewhat the style of a Hearst Sunday supplement, a history and comparison of the law of torts in different times and places. Leading off with a sonorous misquotation from Shakespeare,¹⁷ Mr. Belli pays his respects, *inter alia*, to Hammurabi, Moses,

14. See Jones, *supra* note 3, at 563-64.

15. Pp. 32-33.

16. Mr. Belli's superficial allusion to the problem is at 26-27. For a concise but informative treatment, see GREGORY & KALVEN, TORTS 743-83 (1959). Interest in such reforms is not limited to professors. The State of Maine, which is not noted for rash sociological experimentation, is seriously considering the creation of a state-administered motor vehicle accident indemnity fund. See Opinion of the Justices, 155 Me. 125, 152 A.2d 494 (1959).

17. Mr. Belli's version, which he attributes simply to an inscription "which appears above the entrance to the Archives Building in Washington," is "The past is but a prologue to the future." P. 64. The actual text is "What is past is prologue," *The Tempest* act II, scene 1, and it is in fact correctly quoted on the pedestal of one of the heroic sculptures which adorn the National Archives Building—all of which Mr. Belli

Confucius, Ulpian, Justinian, Mohammed and the fathers of the Common Law. It is probably impossible adequately to summarize this mass of jurisprudence in eighty-three pages; certainly Mr. Belli has not done so.¹⁸ Moreover, granted that Mr. Belli is a busy man, with no time for such pedantries as proofreading or the employment of a dictionary, I cannot feel that the status of law as a learned profession is enhanced by such astonishing phrases as "appellate judicial circumcision of awards."¹⁹

Chapter III, however, redeems the work. It is simply a state by state tabulation of significantly high awards, many of them unreported elsewhere, for wrongful death and various types of personal injury, accompanied both by shrewd practical comments and by figures on judicial salaries and average lawyers' incomes in the particular jurisdiction (although not, unfortunately, the fees of counsel in the individual cases reported). As might be expected, California (Belli's home ground) and New York set targets for the rest of the nation to shoot at when it comes to adequacy of awards for personal injury—for example, a California verdict of 85,000 dollars for two broken legs and a broken cheekbone.²⁰ The states of the late Confederacy lag badly, particularly if the plaintiff is a Negro,²¹ but show signs of improvement. In some jurisdictions at least, there seems to be an instructive correlation between the size of awards and the size of judicial salaries. These are, of course, merely examples; hundreds and maybe thousands of interesting conclusions can be extracted or deduced from Mr. Belli's figures.

At the very least, his chapter III ought to be a Golconda of information, comparable to Bowditch's *Practical Navigator*, for the lawyer who wants to know what his client ought to settle for, for the student or teacher of torts, and for those who, like myself, merely find facts fascinating.²² Mr Belli's

might have learned by the simple expedient of consulting Bartlett. These errors, which of course are unimportant in themselves, are symptomatic of Mr. Belli's slapdash approach to legal writing.

18. Cf., e.g., the statement that "The Roman Legal System . . . disappeared in about 650 A.D." P. 94. This is assuredly one of the most summary dismissals ever accorded the Byzantine Empire. In particular, it seems most unfair to the memory of Basil I, the Macedonian, who, when not preoccupied with war or theology, turned his forceful personality and considerable talents to the modernization and revivification of Justinian's Code. See I VASILIEV, *HISTORY OF THE BYZANTINE EMPIRE* 339-43 (2d ed. 1958).

19. P. 30. I learn from my own dictionary and the King James version that the word "circumcise," in addition to its primary meaning, has a secondary meaning, to purify spiritually. E.g., *Colossians* 2:11. I doubt, however, that Mr. Belli had in mind this somewhat uncommon usage, for his dislike of remittitur makes it unlikely that he would regard such circumscription of the jury's discretion as "spiritual purification."

20. P. 264.

21. P. 148.

22. I appreciate with peculiar keenness the practical value of *Modern Damages*, for, as it happens, I was once myself a personal injury claimant and would have greatly benefited from Mr. Belli's *vade mecum* if I had had it. A massive marble table, negligently installed by a landlord, lit on my great toe, with excruciating results. I was at the time associated with a corporation law firm which frequently handled private place-

collection of cases—which Professor Harper’s introduction justly terms “a monumental piece of research”²³—is, so far as I know, unique. It goes far toward meeting one of the major prerequisites to intelligent study and solution of the problem of compensation for wrongful death or injury, in that it brings up to date, and amplifies, some of the principal findings of the famous Columbia *Study of Compensation for Automobile Accidents* of 1932.²⁴ We can look forward with keen interest to the publication of volume 2, which will contain further tabulations.

A word or so ought to be said about the album of LP records which accompanies the volume and which preserves for posterity a selection of Mr. Belli’s more successful arguments to juries. On the strength of the first two chapters of *Modern Damages*, I expected to hear some pretty perfervid oratory—something along the line of the late Ol’ Gene Talmadge rousing a rabble. I was completely wrong. Mr. Belli is an exponent of the soft sell, and he does it brilliantly. His statements were reasonable, lucid and factual, and they thoroughly persuaded me; only on a replaying did I pick up here and there a subtle insertion of some fact not legally germane, but likely to affect the jurors, such as incidental mention, in describing the background of a tragedy, of decedent’s membership in a large fraternal organization with which some of the jurors probably had a connection. His voice was soft and pleasing, but not soapily so; he cooed no more than he bellowed. The whole tone was that of a highly competent teacher elucidating facts to a reasonably bright class. It was an impressive performance, and the records might well be a useful adjunct in teaching the art of advocacy.

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ments for insurance companies, and the consensus of my colleagues was, roughly speaking, that I’d be lucky if I collected fifty dollars; the most senior of the lot seemed to think that if I didn’t antagonize the landlord’s insurer with the extortionate demand that it pay my medical expenses, it might be willing to overlook the damage to the table and the disturbance caused the landlord by my unseemly squawks of agony. Had Mr. Belli’s work then been published, I might have learned (p. 780) that in the jurisdiction in question \$4,000, exclusive of loss of earnings, is regarded as “adequate” for an identical injury.

23. P. vi.

24. See James, *supra* note 3, at 412.

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