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## Foreward

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*Justice, Illinois Appellate Court, First District*

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# Foreward

*Honorable Mel R. Jiganti\**

The law of damages deals with the standards, rules, and processes used by the courts in measuring compensation for losses and injuries.<sup>1</sup> One who suffers a legally recognized injury is usually entitled to an award of damages. . . . The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money.<sup>2</sup>

Perhaps the most compelling aspect of any lawsuit is the issue of liability: whether one party has stated a viable cause of action against the other and is therefore entitled to some form of relief. Once this threshold query has been examined from all angles, however, the practitioner encounters a more pragmatic concern involving the issue of damages. Not only must the practitioner set out the elements of his client's loss in a manner recognized as grounds for compensation, but he must also determine the formulas of measurement that shall be used for fixing compensation, study the limits upon application of those formulas, inquire into the applicable procedural rules and digest the standards to be used by the trial and appellate judges in reviewing a jury's award.<sup>3</sup> All of these concerns will often seem secondary to the broad issue of liability in the first blush of a new lawsuit; however, the articles that follow strongly suggest that the practitioner initially consider the issue of damages in conjunction with that of liability. The entire structure of a lawsuit, including an attorney's trial strategies and pleadings, may indeed hinge upon the issue of damages and whether the initial steps of the lawsuit are compatible with the relief that the attorney ultimately seeks for his client.

With this caveat in mind, the following articles in this Damages Symposium issue become all the more practical and useful

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\* Justice, Illinois Appellate Court, First District; B.S. 1954, University of Notre Dame; LL.B. 1956, DePaul University School of Law.

1. C. MCCORMICK, LAW OF DAMAGES § 1, at 1 (1935).
2. D. DOBBS, REMEDIES § 3.1, at 135 (1983).
3. See C. MCCORMICK, *supra* note 1, § 1, at 1-3.

for the practicing lawyer. While an exhaustive review of the seemingly infinite area of damages is impossible in a forum such as this, the following articles mesh the areas of liability and damages to the extent necessary for a practitioner to thoroughly grasp the interdependency of each aspect of a lawsuit upon the other.

The lead article included in this volume of the Law Journal is written by Kevin M. Forde who examines the issue of punitive damages in mass tort cases, a legal concept which has expanded dramatically in the past twenty years. Forde advocates judicial acceptance of certifying such punitive damages cases as class actions under Federal Rule 23(b)(1)(B).<sup>4</sup> The advantages of this procedural vehicle, Forde urges, would include increased fairness to both plaintiffs and defendants, as well as improved judicial supervision, standards, economy and control. Forde further sets forth a thorough history of the law of punitive damages and suggests that the class action is a particularly suitable method to address punitive damages in mass tort situations.

Seven student articles have also been included in this issue of the Law Journal. The content of these articles covers a broad spectrum of topical damages issues, ranging from concerns which have become pertinent in common law tort litigation to damage remedies which arise under certain Illinois and Federal statutes. Each article reflects an area of damages law which is currently shifting and evolving as the result of public policy considerations or changing national moods embodied in court decisions and statutory enactments.

Two of the student articles examine common law tort damages in Illinois. Jeanette Watson addresses *Froud v. Celotex Corp.*,<sup>5</sup> a recent Illinois Supreme Court case in which the court ruled that punitive damages cannot be imposed against the defendant following the death of a tort victim, even though the victim's representatives may continue to pursue an action for compensatory damages against the defendant. Bystander recovery for negligent infliction of emotional distress is the topic of the article prepared by Hilda C. Contreras. Contreras addresses *Rickey v. Chicago Transit Authority*,<sup>6</sup> the recent Illinois Supreme Court

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4. FED. R. CIV. P. 23(b)(1)(B).

5. 98 Ill. 2d 324, 456 N.E.2d 1316 (1983).

6. 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

case which abandoned the impact rule and developed a zone of physical danger test.

Seth M. Hemming discusses actions for damages brought by an insured against his insurer for the wrongful refusal to settle an insurance case. This cause of action has been considered as a hybrid of tort and contract law and arises when an insured suffers an adverse judgment which renders him personally liable for amounts in excess of his policy limits. Hemming discusses the duty of the insurer to act in good faith toward its insured's interests and examines the sometimes conflicting standards employed by the Illinois courts to determine whether an insurer has wrongfully refused to settle.

The four remaining student articles examine statutory damage remedies. Anne E. Seman addresses pecuniary injuries under the Illinois Wrongful Death Act.<sup>7</sup> The article concludes that the loss of a child's society should be included as an item of pecuniary injury, based upon statutory interpretation and public policy. Michael J. Martin advocates a limited approach for awarding prejudgment interest in Illinois. After weighing the compensatory purpose of tort damages with considerations of judicial efficiency, Martin presents his proposals for developing legislative inroads in the area.

Statutory damages for copyright infringement under the Copyright Act of 1976<sup>8</sup> are addressed by Priscilla A. Ferch. Ferch discusses problems that have carried over from the 1909 Act and offers her recommendations for uniform application of the new Act. Finally, Carole Schecter discusses tax shelter litigation under the securities laws and the manner in which such litigation has evolved under changing Internal Revenue Code provisions, the high failure rate of many tax shelters and the Internal Revenue Service's increased investigation and litigation concerning "abusive" tax shelters. The article reviews the inconsistent approaches taken by different courts and suggests a uniform approach to be used by the courts in addressing remedies in a tax shelter case.

In sum, the articles included in this issue of the Law Journal present a comprehensive sample of those cases comprising the current state of the law on damages. Not only do they reflect the

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7. ILL. REV. STAT. ch. 70, § 1 (1983).

8. 17 U.S.C. §§ 101-810 (1982).

concerns a practitioner encounters when determining how to plead or prove damages in a given case, but they also interlace the concepts of damages and liability, thus providing the practitioner with the tools necessary to initially and comprehensively prepare his litigation strategy.