PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 1 | Issue 1 Article 6

12-15-1973

Infant Pain and Suffering: The Valuation Dilemma

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Case Notes

Infant Pain and Suffering: The Valuation Dilemma*

The Supreme Court of California has recently granted the request of an infant plaintiff seeking damages for pain and suffering incidental to an illness contracted during birth and lasting only throughout the first year of the child's life. The opinion, through necessary reliance on vague precedent, reaches a logical and humane result. But the potential problems of valuation of such damages can only add to the burden the trial courts face in attempting to equate pain and suffering with monetary awards; and the case underscores the need for clearer guidelines.

Kim Capelouto, the infant plaintiff, was born at a Kaiser Foundation hospital on July 30, 1964. During her stay in the hospital nursery ward Kim became infected with a contagious disease caused by salmonella bacteria. The disease originated from the mother of another baby in the ward, whose child contracted the bacteria at birth. Salmonella spreads by transmission from the stools of an infected person to the mouth of the recipient, generally via some neutral medium such as unwashed hands. The unwashed hands in this case belonged to hospital employees working in the nursery; this eventually led to the infection of Kim and thirteen other babies in the hospital nursery.

* Capelouto v. Kaiser Foundation Hospitals, 7 Cal. 3d 889, 103 Cal. Rptr. 856 (1972).

The illness contracted by Kim in the nursery persisted throughout her entire first year, and necessitated hospitalization six times before she was completely cured. During her illness Kim suffered from projectile vomiting, severe diarrhea, dehydration, cramps and shock. The dehydration necessitated intravenous feeding, and at one point her condition was sufficiently deteriorated to endanger her life. Kim ultimately recovered completely from the illness, suffering no permanent disability physically or mentally.

Through her guardian ad litem, Kim brought suit against the defendant hospital to recover both general and special damages. At the trial a number of experts testified on behalf of the plaintiffs, including Kim's doctor, a public health nurse consultant and representatives of the State Department of Health, doctors from the hospital, and an expert on salmonella infection and epidemics. But none of these witnesses testified that pain would be a consequence of the infection, that a newborn baby would experience pain from the infection, or that Kim had in fact experienced pain from the infection. Accordingly, the court granted defendant hospital's request to instruct the jury as follows: "You are not permitted to award Kim Capelouto damages for physical pain and mental suffering which, although possible, is under the law incapable of proof because of the age of the child."[1] The jury returned a verdict for the plaintiff for the exact amount of medical expenses, $1,510.24. After the trial court denied Kim's motion for a new trial the Capeloutos appealed.

The main issue on appeal was the propriety of the jury instruction precluding an award for pain and suffering.[2] The Second District Court discussed the source of the instruction, *Babb v. Murray*,[3] and concluded that although the instruction was erroneous, it did not constitute reversible error. The notion of inferring pain and suffering was rejected; in the absence of direct proof of pain, Kim could not recover.[4] In *Babb*, a three and one-half month old baby girl suffered a fracture of both femurs in an automobile accident; she underwent traction and remained in the hospital for five

1. 7 Cal. 3d at 892, 103 Cal. Rptr. at 858.
2. Capelouto v. Kaiser Foundation Hospitals, 21 Cal. App. 3d 568, 98 Cal. Rptr. 631 (1971).
3. 26 Cal. App. 2d 153, 79 P.2d 159 (1938).
4. 98 Cal. Rptr. at 633.

weeks. That court held that an infant so young did not know what happened to her, and not knowing, was without fear or anguish. In examining this reasoning, the Appellate Court decided the *Babb* court was wrong. An infant who cannot suffer fear or mental anguish can nevertheless experience pain; but damages for pain may be recovered only upon proof of its existence, and the Capeloutos had failed to offer such proof. Perhaps the most remarkable example of the Appellate Court's rationale is this statement regarding the type of distress suffered by Kim Capelouto: "Nor were Kim's injuries such that pain could necessarily be inferred. The symptoms of crying, vomiting, and diarrhea are hardly distinguishable from characteristics exhibited by other newborn children."[5]

Undaunted by the Appellate Court's logic, the Capeloutos appealed to the California Supreme Court, where Justice Tobriner, writing for a unanimous court, reversed the lower decisions and granted a new trial limited to the issue of damages.[6]

The Supreme Court considered three issues on appeal: the propriety of the instruction, the viability of recovery for pain and suffering in the absence of expert testimony, and the proper scope of a possible new trial.

Reviewing the reasons for allowing pain and suffering damages in cases involving personal injury, the court pointed out that the unitary concept of pain and suffering has served as a convenient label under which a plaintiff may recover not only for physical pain, but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.[7] Although these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty, the detriment, nevertheless, is a genuine one that requires compensation.[8] "The issue generally must be resolved by the impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence."[9]

The court then reasoned that since recovery for mental pain and

5. *Id.* at 633-34.

6. 7 Cal. 3d at 898, 103 Cal. Rptr. at 863.

7. *Id.* at 892; *see* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal.Rptr. 135, 140, (1967).

8. 7 Cal. 3d at 893. Compare 1 CALIFORNIA JURY INSTRUCTIONS, Civil sec. 14.13 (5th ed. 1969), and ALEXANDER, JURY INSTRUCTIONS ON MEDICAL ISSUES sec. 3-436 to 3-441.

9. 7 Cal. 3d at 893; *see* Beagle v. Vasold, 65 Cal. 2d 166, 181, 417 P.2d 673, 681, 53 Cal. Rptr. 129, 137 (1966); *cf.* Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 507, 364 P.2d 337, 343, 15 Cal. Rptr. 161, 167 (1961).

suffering is often the principal amount of damages sought in tort actions, the instruction allowed by the trial court was contra to the basic principles governing damages in tort cases. Turning to the source of the instruction, Justice Tobriner launched a vigorous attack on *Babb v. Murray*. Certainly the fact that an infant of such tender age could not understand the cause of pain and suffering did not justify the ultimate conclusion of *Babb*. In reference to that case, Witkin noted that "the court seems to have confused capacity to suffer with ability to discover the cause of the pain."[10] The *Capelouto* court reasoned that we know from human experience that infants can feel pain and discomfort even if they do not know the source of it.

> The infant's inability to explain the cause of pain or to describe the extent of it does not affect the sting of it. Indeed, the infant's cry of hurt is as poignant as the most detailed exposition. The moan of the injured child, who may even be unconscious, needs no elaboration in descriptive language. Communication flows from all manner of sounds and gestures; it is not confined to brittle or inadequate words. The inarticulate anguish of the infant serves as much a ground for recovery as the adult's most sophisticated description.[11]

Justice Tobriner concluded by saying that "*Babb* deserves no resurrection from its well-earned obscurity."[12] The obscurity referred to is that enjoyed by a case decided in 1938 and yet never once cited, as controlling or otherwise, until the instant case.

At this point the court made a statement not entirely consistent with its prior line of reasoning. The statement is disturbing not because it is invalid, but because of its doubtful relevance in the instant case. The court said that "Since *Babb*, the decisions have upheld recoveries by young children for pain and suffering and have encountered no special problem in so doing."[13] In support of this statement two cases were cited: *Crane v. Smith*,[14] and *Chinnis v. Pomona Pump Co.*[15] But upon an analysis of these cases we find that they involve situations far removed from the critical issues presented by the facts of *Capelouto*. *Crane* does not even mention

10. 2 WITKIN, SUMMARY OF CAL. LAW (7th ed. 1960) Torts, § 411, at 1615.
11. 7 Cal. 3d at 894, 103 Cal. Rptr. at 860.
12. *Id.* at 895, 103 Cal. Rptr. at 860.
13. *Id.* at 894-95, 103 Cal. Rptr. at 860.
14. 23 Cal. 2d 288, 144 P.2d 356 (1943).
15. 36 Cal. App. 2d 633, 98 P.2d 560 (1940).

pain and suffering, and bases its award on a permanent disfigurement of a three-year-old girl (loss of a finger), "considering the effect which such a physical defect may have upon the child's mental state as well as her choice of future employment."[16] In *Chinnis*, two children, ages five and ten years, were injured in an automobile accident. Again there is no mention of pain and suffering, but merely a description of injuries involving multiple fractures and some slight permanent disfigurements (including a caved-in cheek bone and a slight knock-knee condition).[17] Note that in each case the children were much older than Kim Capelouto, and their damage awards were based largely on compensation for permanent injuries. This distinction will be discussed at length *infra*.

Turning to the question of the absence of medical testimony, Justice Tobriner discounted its significance. Although expert testimony is helpful, it should not be required to establish a basis for an award for pain. The significance of lay testimony was stressed, noting that courts have long upheld the admissibility of such evidence. "Even if the infant may not be able to testify as to his own pain, his burden should not be made heavier by foreclosure of non-expert testimony."[18]

And finally, the court ruled that "even in the absence of any explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain."[19] Here the Supreme Court expanded the rationale begun by the Appellate Court, for it was willing to forego the necessity of direct testimony of the existence of pain, and to infer its existence from the description of the child's symptoms alone. The sumptoms of Kim's illness, i.e., evidence of extreme dehydration, diarrhea, vomiting, weight loss requiring intravenous feeding and the insertion of catheters into her stomach, together compel an inference of her pain and suffering. "Thus we do not face a situation in which the jury was given only the cold medical diagnosis of salmonellosis; we have here, instead, detailed descriptions of symptoms from which the jury would be impelled to infer some pain and suffering."[20]

Regarding the scope of a possible new trial, the court reasoned that since defendant's liability for negligence was so clear-cut, (evidence at the trial court supported this conclusion), the only neces-

16. 23 Cal. 2d at 302, 144 P.2d at 364.
17. 36 Cal. App. 2d at 642-43, 98 P.2d at 566-67.
18. 7 Cal. 3d at 895-96, 103 Cal. Rptr. at 861.
19. *Id.* at 896, 103 Cal. Rptr. at 861.
20. *Id.* at 897, 103 Cal. Rptr. at 862.

sary issue on a new trial is that of the damages recovered. Such a result is logical where the jury returned a verdict on the exact amount of medical expenses incurred, which was the most it could award plaintiff pursuant to the trial judge's instructions. "The instruction to the jury precluding an award of damages for pain and suffering was both erroneous and prejudicial, requiring the order of a limited new trial on the issue of damages."[21]

It is not the purpose of this note to criticize the final *Capelouto* decision; the opinion deserves merit, for it reaches a sound result. My purpose is twofold: First, it is to give notice to the legal as well as lay community that a decision has been rendered allowing recovery for pain and suffering by an infant plaintiff, proof of which may in some cases be inferred from both expert and lay testimony. But it is the second objective, to which we now turn our discussion, to note the potentially difficult problems of valuation of pain and suffering awards in cases similar to the *Capelouto* situation.

Both the Court of Appeals and the Supreme Court surveyed the area of pain and suffering awards; however, neither tribunal considered, nor was it asked to consider, the problems of valuation presented to the trial courts where such awards are fashioned. The subject was given the usual cursory examination, and it is presumed that the general rule of allowing a "reasonable" award for pain and suffering damages is to be applied at the subsequent damage issue trial.[22] Let us now explore the applicability of such a general rule where the plaintiff is an infant of the tender age of Kim Capelouto.

Crane v. Smith and *Chinnis v. Pomona Pump Co.*, cited by the Supreme Court as evidence that California has allowed pain and suffering recoveries for infant plaintiffs in the past, are good examples of the scant case law on infant pain and suffering available in this state. As mentioned *supra*, neither case should be considered as controlling where the narrow issue of *Capelouto* is involved; the ages of the plaintiffs and the injuries they suffered clearly distinguish them. The significance of this distinction becomes appar-

21. *Id.* at 898, 103 Cal. Rptr. at 863.
22. *Cf.* Beagle v. Vasold, *supra*, note 9, 65 Cal. 2d 166, 172, 417 P.2d 673, 675, 53 Cal. Rptr. 129, 131 (1966).

ent when we recall that Kim Capelouto was ill only during the first twelve months of her life, and that she recovered completely from the illness, with no lasting effects.[23] In the *Crane* and *Chinnis* cases, as in all instances where there is a possibility of some future pain and suffering flowing from the original harm, the award for those damages was based on the reasonable compensation for the distress the plaintiffs would suffer in the future, as well as that experienced during the illness or original trauma. The *Capelouto* facts warrant a recovery for pain suffered during the course of the illness only, for Kim was not permanently injured.

The *Capelouto* decision leaves us with the problem of determining a "reasonable" value, in dollars and cents, of a damage recovery that will fully compensate the infant plaintiff. But there are no real guidelines from which a reasonable amount can be calculated. California law on this particular subject is practically nonexistent; most cases involving recoveries by infant plaintiffs for pain and suffering have little to do with the actual compensation for having suffered pain, but are more concerned with compensation for lasting physical deformities, loss of future wages, future pain and suffering, embarrassment due to physical defects, and other factors which indeed warrant monetary consideration, but which were not in issue in the *Capelouto* case.[24]

Because pain is subjective, the difficulty in proving its existence and measuring its severity are major obstacles in attempting to fashion a realistic damage award. Proof of the existence of pain has received adequate attention; the *Capelouto* court allowed an inference of its existence from the symptoms of the plaintiff's illness. But methods of measurement are conspicuously absent in most cases, due primarily to the subjectivity enigma. According to one authority on the grading of pain, it is classified as a subjective symptom which necessarily varies with the pain tolerance of the individual. A slight impairment may cause severe pain, and the reverse situation is also possible. There is no standard of measurement, but it may be possible to grade levels of pain according to how the subject's normal functions are affected.[25] Another writer, discussing the tolerance of patients to discomfort, notes:

> There is no method by which pain can be weighed, measured, assayed or reasonably estimated, because the variables and its abil-

23. 7 Cal. 3d at 891, 103 Cal. Rptr. at 858.

24. *See* Crane v. Smith, 23 Cal. 2d 288, 144 P.2d 356 (1943); Chinnis v. Pomona Pump Co., 36 Cal. App. 2d 633, 98 P.2d 560 (1940); and Martinez v. Moore, 221 Cal. App. 2d 516, 34 Cal. Rptr. 606 (1963).

25. E. McBRIDE, DISABILITY EVALUATION AND PRINCIPLES OF TREATMENT OF COMPENSABLE INJURIES 52-53 (6th ed. 1963).

> ity to affect an individual vary not only from person to person but from day to day in the same person. All one can do is draw on his experience and state that other patients with other injuries reacted thus and so. In this fashion one can compare roughly the extent of discomfort and of pain.[26]

One result of this measurement problem is the dispute among members of the legal community over the propriety of awarding money damages for pain and suffering. Those favoring such awards argue that a monetary judgment is the only plausible means of compensating the aggrieved plaintiff. Since money is considered a "good" by our society, it should be given the victim in an attempt to repay him for his loss of a pain-free life. "The award of money is, at best, only an attempt at compensation, but it is better than nothing. How much is given, of course, must depend upon the current attitude of society as represented by the jury or other fact-finder."[27] Taking the opposite stand, Louis L. Jaffe makes an impressive argument against pain and suffering awards because of their impact on insurance. Jaffe claims that pain and suffering is nothing more than "parasitic damage". The plaintiff should not be compensated in money for an experience which involves no financial loss. Considering the insurance ramifications, "it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function."[28] However, Jaffe notes that since the plaintiff doesn't usually get full compensation for the costs incurred by litigation, "the award for pain and suffering might be measured and justified in terms of a contribution to the real costs of the litigation."[29]

Perhaps the best example of the current trend of the law regarding pain and suffering recoveries is evidenced by the Jack H. Werchick article, *Unmeasurable Damages and a Yardstick*,[30] which was cited by the Supreme Court in *Capelouto*.[31] Werchick begins by noting that damages for pain and suffering are not "unmeasurable

26. J. BROOKE, IN THE WAKE OF TRAUMA 350-51 (1957).
27. J. Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 3 DUKE L.J. 344, 377-78 (1962).
28. L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW AND CONTEMP. PROB. 219, 223-25 (1953).
29. *Id.* at 234-35.
30. 17 HAST. L.J. 263 (1965).
31. 7 Cal. 3d at 893.

damages" at all, but that they are required to be compensated for when proximately resulting from the defendant's tortious conduct. He cites the *Restatement of Torts*, Sec. 910, which says: "A person injured by the tort of another is entitled to recover damages from him for all harm, past, present and prospective, legally caused by the tort."[32] Werchick stresses the need for a uniform method for valuation by the judge or jury of damages for pain and suffering. The large number of personal injury cases demands such a system. "Since the valuation of damages for pain and suffering presents one of the greatest and most unique challenges to the successful administration of justice, it is necessary that our judicial system adopt a uniform solution."[33]

Regarding methods of proof and the use of expert testimony, Mr. Werchick mentions something of particular importance to our discussion:

> Even if it be assumed that the particular injuries, although painful or debilitating, are common or are difficult to describe in terms of psychological and somatic effects, the physician can offer analogies within the ready comprehension of the jury. In any event, the medical expert can be asked to explain the mechanics of the particular injury and the effects of that injury on the nervous, mental, and somatic state of the plaintiff. Comparison with the commonly experienced disabilities is then possible.[34]

Note the reference to "analogies within the ready comprehension of the jury," and to "comparison with the commonly experienced disabilities." Query what standard the jury can use to refer and compare to, when the plaintiff is a newborn infant.

In his conclusion the author makes several pertinent observations. As an alternative to the "per diem" argument (discussed *infra*) he suggests either "legislation eliminating compensation for pain and suffering or substitution of a 'commission' or 'master' or 'referee' system for court and jury trials in determining awards in tort cases."[35] But such practices, he says, are contrary to our mores and sense of fair play. And trials by jury tend to be more equitable than trials by commission. Finally, Mr. Werchick urges greater confidence in our judicial system and in our trial judges. The courts are well equipped to protect the jury from bias or prejudice. "The argument that jurors may mistake the arguments of plaintiff's counsel for evidence is not persuasive; the law presumes that jurors have sufficient mental capacity to discriminate between

32. RESTATEMENT, TORTS § 910 (1939).
33. 17 HAST. L.J. at 266.
34. *Id.* at 272-73.
35. *Id.* at 284.

evidence and argument."[36]

California has consistently endorsed the use of the jury to determine a fair and reasonable recovery for damages for pain and suffering. In a 1966 case, styled *Beagle v. Vasold*,[37] the current California view was expressed by Justice Mosk. Pain and suffering damages present one of the most difficult compensation problems, because no method is available by which the jury can objectively evaluate such damages. "In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy."[38] Citing McCormick's text on *Damages*, Justice Mosk emphasized the reliance on the jury:

> Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. . . .
> The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury. . . .[39]

Once the jury has made a determination, presumably through impartial conscience and reasonable judgment, an appellate court will hesitate to reverse or revise a pain and suffering award. "An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury."[40] So an appellate court will not act unless the verdict is so out of line with reason that it could only be the result of passion and prejudice.[41] The question of whether an award is so great as to shock the conscience of the appellate judges and necessarily imply prejudicial jury involvement "depends upon the nature and extent of the victim's injuries, his pain, suffering and humiliation, and the amount of special damages that may have been incorporated in the total award."[42]

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36. *Id.* at 284-85.
37. 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966).
38. *Id.* at 172, 417 P.2d at 675, 53 Cal. Rptr. at 131.
39. *Id.*
40. Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 507, 364 P.2d 337, 343, 15 Cal. Rptr. 161, 167 (1961).
41. Henninger v. Southern Pacific Co., 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (1967).
42. *Id.* at 882-83, 59 Cal. Rptr. at 80.

Three methods have been developed to facilitate the task of the jury charged with fashioning a pain and suffering award: they include (1) reading the prayer, (2) the "golden rule" argument, and (3) the "per diem" argument. The first system allows plaintiff's counsel, in argument, to inform the jury of the total amount demanded in the prayer of the complaint. This is a commonly accepted practice, and was given express judicial approval by the *Beagle v. Vasold* opinion.[43] The second method, which essentially asks the jurors to place themselves in the shoes of the plaintiff in order to determine the value they would place on undergoing equivalent pain and suffering, was treated with indifference in *Beagle,* where the court observed "We do not imply that we also approve the so-called 'golden rule' argument."[44] The third argument, published in 1951 by Melvin Belli,[45] is aptly described by Witkin:

> The 'per diem' argument is a strategic device, conceived by plaintiffs' lawyers, which suggests to the jury that a stated sum be awarded for each day or other chosen period of suffering undergone by the plaintiff. Its object is to overcome the inherent uncertainty in this element of damages by giving the jury something which appears more certain—a mathematical formula.[46]

Although generally associated with calculating a sum which will compensate the plaintiff for pain to be suffered in the future, the "per diem" method can be used to convert any period of painful experience into a monetary figure. As a crude example, if the plaintiff suffered pain valued at one dollar per day for a full year, the pain and suffering award, via the "per diem" formula, would be 365 dollars (or 366 for a leap year).

As one might expect, the "per diem "argument has been the subject of vigorous controversy since its inception.[47] Perhaps the best expression of the opposition to allowing "per diem" calculations is found in two dissenting opinions written by Justice Traynor. The first, in *Seffert v. Los Angeles Transit Lines,* warns of the dangers of arriving at a specific sum for a particular period of pain and suffering. Multiplying that figure by the plaintiff's estimated life expectancy only multiplies the hazards of conjecture. "Counsel could arrive at any amount he wished by adjusting either the period of time to be taken as the measure or the amount surmised for the

43. 65 Cal. 2d at 172, 417 P.2d at 675, 53 Cal. Rptr. at 131.
44. *Id.* at 182, 417 P.2d at 682, 53 Cal. Rptr. at 138.
45. M. Belli, *Demonstrative Evidence and the Adequate Award,* 22 MISS. L.J. 284 (1951).
46. WITKIN, SUMMARY OF CAL. LAW (1969 Supp. to Vol. 2) Torts, § 411-B, at 785.
47. For a list of related articles, *see* Beagle v. Vasold, 65 Cal. 2d at 175, 417 P.2d at 677, 53 Cal. Rptr. at 133.

pain for that period."[48] The second dissent appeared in *Beagle v. Vasold*, where California formally accepted the "per diem" argument:

> Since the jury must convert pain and suffering into dollars and cents, counsel should be permitted to advance any reasonable argument as to what its decision should be. Since there is no mathematical formula for such conversion, however, an argument that the jury should use such a formula is suspect, and an argument that damages for pain and suffering should be computed at so much per unit of time is so misleading that it should never be allowed . . . .
>
> None of these formulas appears unreasonable on its face, for there is no basis in human experience for testing their reasonableness . . . It is therefore unrealistic to seek an appropriate award for pain and suffering by the use of any so-called per diem formula.[49]

Although the jury is not bound to apply the formula suggested by plaintiff's counsel, the choice is tempting. The "per diem" formula appears deceptively accurate, and it is this illusion of certainty that is its most objectionable aspect. A jury might easily be impressed with a mathematical formula that offers a simple solution to an almost insurmountable problem.[50]

The decisions above, concerning problems of valuation and measurement of pain and suffering recoveries, did not involve infant plaintiffs. None approach the limited *Capelouto* situation, and the lack of California law on this subject has already been noted. Most cases dealing with young children inevitably include lasting injuries, and the same appears to be true for many other jurisdictions.[51] However, there is a recent Federal Court decision for the Southern District of New York which provides a good example of a case at least partly on point with *Capelouto*.[52] There the defendant drug company manufactured a defective vaccine which was administered to the three-month-old plaintiff. As a result of the drug the child developed convulsive seizures, permanent paralysis in both right limbs, and suffered brain damage resulting in a permanent mental age of five months.

48. 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161, (dissenting opinion).
49. 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129, (concurring and dissenting opinion).
50. *"Per Diem" Damages: The Controversy Continues*, 18 HAST. L.J. 684, 688 (1967).
51. The three cases cited by the *Capelouto* court, 7 Cal. 3d at 894, note 4, each involve older children with permanent injuries.
52. Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969).

After an extensive examination of the factors considered by the trial court (including past and future medical expenses, loss of child's services, and loss of future earnings) the Court of Appeals upheld a pain and suffering award of 400,000 dollars. In so doing the court noted the drastic medical treatments the child had suffered through, and concluded that the ability to reason and understand, or the lack of such ability, would not diminish the amount of pain the infant had experienced and must continue to endure. "Since the infant plaintiff is estimated to have a mental age of five months, and he is not comatose, there is ample support for the finding that he was capable of suffering 'pain' in its direct, primary sense."[53] This enormous award was obviously based on the future suffering of the plaintiff (the trial court found he had a reasonable life expectancy of fifty years), but the rationale for allowing any recovery at all is the significant point, not the extent to which it was allowed. In essence, the court held that a person with the mental capabilities of a five-month-old infant can feel and suffer pain which is legally compensable. Unfortunately the only apparent standards of valuation, aside from the projected life expectancy, were the shocking extent of the damages suffered by the infant, and the failure of the other damages awarded to ease the conscience of the court.

Whenever an infant plaintiff is involved, the problems of valuation and measurement of pain and suffering damages are magnified beyond the usual levels reached in cases dealing with adult plaintiffs. Our discussion of the "per diem" argument indicates that such magnification is not necessary in an area already plagued by speculation and uncertainty. Justice Traynor's dissent in the *Beagle* case (*supra*) becomes particularly cogent when applied to a "per diem" calculation of a very young infant's pain and suffering. Note the key phrase: "None of these formulas appears unreasonable on its face, for there is no basis in human experience for testing their reasonableness."[54] What basis is there in human experience for attempting to correlate the pain suffered by a newborn baby to an adult's endurance or threshold for pain? And taking the next logical step, how can we put a dollar value on that basis? The jury has no way of relating to the plaintiff in a manner which will allow any rational means of calculating a fair recovery. What standard can be used? How much would the child spend to be free from the pain it endures? If the usual procedures for measure-

53. *Id.* at 55.

54. Beagle v. Vasold, *supra* note 49, at 183-84, 417 P.2d at 683, 53 Cal. Rptr. at 139.

ment are used, which amount to nothing more than a guess tempered by the common sense of the jurors, then aren't we paving the way for emotional and prejudicial involvement to distort and complicate the jury's task?

Our discussion has placed considerable emphasis on the tender age of Kim Capelouto. We have referred to her age, and the fact that she suffered no lasting effects of her illness, as comprising the limited issues distinguishing the *Capelouto* situation from the more common infact pain and suffering cases. The remainder of our analysis will be directed, in an admittedly theoretical context, toward the importance of this age factor.

The emphasis on age is critical for these reasons. After a child reaches two, or perhaps three years, we are dealing with more of a "person", capable of expressing to some degree of rationality the existence and severity of pain caused by illness or injury. But a newborn baby has no way to communicate these feelings to its parents or doctor, and certainly not to a jury. Is it not possible for such a child, whose perception of the real world may be limited to nothing more than a blur of light and sound and tactile response, to be acutely aware of the painful illness or injury it endures—perhaps even more so than an adult or older child with the ability to comprehend the nature of the discomfort and alleviate its distress to some degree?

Cases involving children in this age range will be encountered more frequently as the law begins to expand the rights of juveniles to a level commensurate with those of adults. If the infant plaintiff is to be afforded the same status as an adult in all aspects of the law, then our courts should be prepared to cope with, or at least for now, to recognize the special problems these cases pose. Prospective defendants (hospitals, physicians, insurance companies, etc.) may benefit as well by a better definition of their rights and liabilities, particularly in an area where substantial monetary judgments are not uncommon. Certainly any effort to minimize speculation and formulate more specific guidelines for the trial courts and juries charged with fashioning pain and suffering awards would be encouraged and appreciated.

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