

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 5

February 9, 2001

S. 295

By: Senator Kruger
Senate Committee: Codes
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to prayer for damages in negligence actions

LAW AND SECTION REFERRED TO: CPLR 3017

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (# 1)

THIS BILL IS DISAPPROVED

This bill would expand CPLR 3017(c) so as to forbid a request for a specific dollar amount of damages in the prayer for relief in any negligence action. In its present form, CPLR 3017(c) provides that a pleading in a medical or dental malpractice action, or in an action against a municipal corporation, there shall be a prayer for general relief but the pleading "shall not state the amount of damages to which the pleader deems himself entitled." S. 295 would add the words "negligence action" so that the statute would now read, "[i]n an action for medical or dental malpractice, *negligence action* or in an action against a municipal corporation"

As originally enacted in 1976, CPLR 3017(c) applied only to medical and dental malpractice actions. The statute was intended to protect physicians from sensational news reports that a they had been sued for millions of dollars, when in fact the claim might be worth only a few thousand dollars, or devoid of merit altogether. *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473, 479 (2 Dep't 1987.) In 1980, CPLR 3017(c) was amended to apply to actions against municipalities as well. The rationale was again to prevent "'sensationalism' and publicity abuses to which ad damnum clauses are subject." *Id.*

The Third Department has interpreted CPLR 3017(c) as precluding an attorney from suggesting a specific dollar award in the summation as well as the complaint in a medical malpractice action, *Bechard v. Eisinger*, 105 A.D.2d 939, 481 N.Y.S.2d 906, 908-09 (3d Dep't 1984), while the First and Second Departments have held that the statute applies only to the pleadings themselves, and does not prevent counsel from suggesting an appropriate award at summation. *Garcia v. City of New York*, 173 A.D.2d 175, 569 N.Y.S.2d 27 (1st Dep't 1991); *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473, 479-81 (2nd Dep't 1987.) The proposed

bill would not resolve this disagreement, but would simply extend the present wording of CPLR 3017(c) to all negligence actions.

The sponsor's memo to S. 295 states that CPLR 3017(c)

[W]as enacted in an attempt to reduce many of the abuses of the medical malpractice system, such as excessive damage awards. Because plaintiffs frequently made emotional and unrealistic demands in their complaints, juries and courts frequently entered excessive awards.

A similar problem exists today regarding negligence actions. This bill, by extending the restriction on stating a specific damage figure in the pleadings to all negligence actions, would help alleviate this problem.

S. 295 would not solve the problem to which it is addressed, but would create a number of new ones. If as the memo suggests the bill is intended to prevent plaintiffs from making exaggerated claims for inchoate categories of damages such as pain and suffering, *see Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473, 476-77, it is both too broad and too narrow. The bill is too broad because it would apply not just to personal injury actions, but to all negligence actions, including those seeking specific, quantifiable damages for injuries such as the destruction of a chattel or the loss of a negotiable instrument. "Emotional and unrealistic demands" have hardly been a problem in actions of this description. The bill is too narrow because it would not apply to claims for pain and suffering founded in theories other than negligence, *e.g.*, a strict liability action for an elevation-related hazard under Labor Law §240, or a claim for injury from a defective product grounded in strict liability or breach of warranty. In personal injury claims not founded in negligence, plaintiffs could continue to make exorbitant demands bearing no relation to the injuries they had suffered.

Moreover, at least in the First and Second Departments plaintiffs could continue to request specific dollar amounts in their summations if not in their complaints, so that "excessive awards" would not be curbed. It might be argued that the memo to S. 295 is an endorsement of the Third Department approach, whereby a specific damage figure cannot be mentioned either in the complaint or in the summation; but such intention cannot be gleaned from the language of the amendment itself.

Even more problematic would be complaints pleading multiple theories for the same injury, such as a complaint for legal malpractice setting forth causes of action sounding in both negligence and breach of contract. *See* CPLR 214(6). Would such a complaint qualify as a "negligence action" for the purpose of S. 295? Would the plaintiff be able to include a request for a specific dollar amount under the contract claim, but not under the negligence claim, even though identical damages are sought under both theories? Would counsel be permitted to mention such amount at summation with respect to either claim? S. 295 leaves the courts to wrestle with these and other questions that the statute itself should resolve.

Elimination of the dollar amount in the *ad damnum* clause in all negligence actions would also result in unintended, unnecessary complications to pretrial proceedings. A plaintiff in a negligence action could no longer obtain a default judgment upon the verified complaint itself, pursuant to CPLR 3215(f), even where the action was for a "sum certain" within the meaning of CPLR 3215(a), because the complaint could no longer mention the amount due. In an action for property damage, for instance, the plaintiff might have an invoice showing the precise cost of replacement or repair, but she could not plead that amount in her complaint. Upon default, all such damages would have to be proven by separate affidavit or at inquest.

Conversely, a defendant deciding whether to enter an appearance in a negligence action could no longer assess its exposure in the event of default based upon the amount demanded in the complaint, because there would be no amount demanded in the complaint. The defendant would have no way of knowing whether the plaintiff intended to take judgment for \$1,000 or for \$1,000,000 if the defendant defaulted.

Where a negligence action was removed to federal court on the grounds of diversity of citizenship pursuant to 28 U.S.C. §1441, the federal court could no longer determine from the face of the complaint whether the \$75,000 amount in controversy requirement had been satisfied, but would now have to make "an independent appraisal of the monetary value of the claim." As a leading commentator has noted, "[d]ifficult problems are caused for the federal courts and for litigants by the practice in a few states in which no demand for a specific sum is required." C.A. Wright, *Law of Federal Courts* §40, at 245 (5th ed. 1994.)

In summary, there is no principled reason for treating *ad damnum* clauses in negligence actions differently from those in all other actions. S. 295 would increase, not reduce, the cost, complexity and delay of litigation, and would create more problems than it would solve.

For the foregoing reasons, S. 295 is **DISAPPROVED**.

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