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In the

# Supreme Court of the United States

JOHN D. CAREY, ET AL.,

PETITIONERS,

V.

JARIUS PIPHUS, A MINOR, AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

RESPONDENTS.

No. 76-1149

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JOHN D. CAREY, ET AL.,

PETITIONERS,

V.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR, AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

RESPONDENTS.

Washington, D. C.
December 6, 1977

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PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, a Minor, and CATHERINE BRISCO, Guardian ad Litem for Silas Brisco,
Respondents.

Washington, D.C.
Tuesday, December 6, 1977

The above-entitled matter came on for argument at 10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EARL B. HOFFENBERG, Esq., 228 North LaSalle Street, Chicago, Illinois 60601; for the Petitioners.

JOHN S. ELSON, Esq., 360 East Superior Street, Chicago, Illinois 60611; for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 1149, Carey and others against Piphus.

Mr. Hoffenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF EARL B. HOFFENBERG, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HOFFENBERG: Mr. Chief Justice, and may it please the Court:

This case is here today for determination of the right for an award of general compensatory camages in a failure to provide an adequate due process hearing where the plaintiffs neither prove any individualized injury or any pecuniary loss. The issue before this Court is whether or not the Circuit Court of Appeals for the Seventh Circuit erred when it determined as a matter of law that general compensatory damages must be awarded for a violation of the Civil Rights Act and some proof of individualized injury or pecuniary loss.

Briefly, the record reflects the following facts. We have a consolidated matter before the Court. We have two plaintiffs, Mr. Silas Brisco being the first. Mr. Brisco was a student in the Chicago Public School System. During the year 1972-73, the school which he was attending was changing from a predominantly white school to that of a black school. During that time, the school officials noted that there was some gang

activity in the school and around the area and some gang recruitment, and had occasion to observe that during that period some students were wearing earrings during that period of time, and decided on that basis, after conferring with two or three of the school officials, determining that it was necessary in the interests of safety to ban the wearing of earrings.

Mr. Brisco was on actual notice of this ban. In May of 1973, Mr. Brisco was observed wearing an earring. He was told to remove it. He refused to remove it. His mother was called in. After extensive conversation with the District Superintendent, Mr. Brisco removed the earring and no further incident occurred.

In September of '73, when school reconvened, on September 11th Mr. Brisco again wore the earring to school. The assistant principal and the principal instructed Mr. Brisco to remove the earring. He refused to remove the earring. Mr. Brisco's mother was called. She came in and she supported Mr. Brisco's refusal to remove the earring, and Mr. Brisco was suspended for 20 days for his failure to remove the earring. Mr. Brisco served 17 days of that suspension and was voluntarily readmitted, pending motion for a preliminary injunction to trial, District Court level.

Mr. Piphus was a high school student in the Chicago public schools. And on January 23, 1974 Mr. Piphus was observed

on school premises with another young man outside the building but on school premises. He was observed by the principal smoking or passing what the principal characterized as an irregularly shaped cigarette. As the principal approached, he had occasion to observe or smell an odor which he believed to be marijuana. Ase he approached, the cigarette was either discarded or at some point the cigarette was discarded as he was taking the two peoples back to the disciplinary--the assistant principal is the disciplinarian at the school.

The two boys denied any smoking of any marijuana. They were taken back. The principal instructed the assistant principal to follow the usual procedures of the 20-day suspension. This was followed, and Mr. Piphus was suspended along with the other young man for 20 days.

At some time subsequent to this, the District Superintendent reduced the suspension, and Mr. Piphus was out of scool for eight days.

The District Court in this matter, sitting as the trier to fact on a stipulated record, determined that the defendants' failed to provide an adequate due process hearing because he determined that the 20-day suspension triggered a need for a full evidentiary hearing. He further found that there was no good faith defense available to the defendants, although he did observe that in Wood v. Strickland, in which this Court determined a qualified immunity to the

board members and board employees, he did observe that we do not have to predict the future of the constitutional law and since this case arose prior to Wood v. Strickland, he said that necessarily would not apply. But the doctrine of Linwood v. Peoria, a Seventh Circuit case, which said that anything over seven days make sure there is a need for a full evidentiary hearing. He said that based upon that rationale, the board would not be able to have a good faith defense and that that was unavailable to the board. Although he did observe that this was not--that obviously the educators were trying to or were upholding the integrity of the educational process.

He further found that although they were entitled to damages for the violation of the deprivation of an adequate due process hearing, there was no proof of any evidence submitted nor any evidence which would even lead to a speculative inference to perform any measure of damages, and therefore he allowed no damages and the case was dismissed.

There was a motion for reconsideration filed on the issue of damages. The issue of damage was reopened and during the pendancy of the motion for reconsideration, the District Court judge passed away. It was assigned to another District Court judge. After considering the matter, the other District Court judge determined that the motion must be denied on the issue of damages. He stated the same reasons. Basically there

was no proof of any damages, and there was nothing which would lead to any speculative inference which would allow measurement as to the extent of damages. So, he also denied the motion.

The case went up to the Seventh Circuit Court of Appeals on the issue of general compensatory damages and, as I have indicated before, the Seventh Circuit Court of Appeals held that as a matter of law the two individuals were entitled to general compensatory damages, which was inherent in the nature of the wrong, and that as a matter of law the measure of damages were not so small as to trivialize the right or so large as to provide a windfall.

We believe that--

Q I take it that in neither the District Court nor in the Court of Appeals was there any finding or attention given to whether the suspensions were justified?

MR. HOFFENBERG: No. The issue of liability was never questioned on appeal. The main issue that was presented on appeal was the issue of damages.

Q I just want to know as a matter of fact, the District Court did not address the question or make any findings about the validity of the suspension.

MR. HOFFENBERG: No, it did not. It did not reach that issue. It just determined that we violated the adequate due process.

Q And on remand is there going to be any attention

to it?

MR. HOFFENBERG: There will be only with regard to--this Court on remand with regard to special damages. We did not petition. The only regard to whether or not the suspensions were valid would be on remand with regard to the issue that was raised in the Seventh Circuit as to special damages. The Seventh Circuit held also, beside the general compensatory damages, that the claimants who raised this concept of it cost $1.65 per day to educate a child and the concept that it would cost--I do not remember exactly--$1.52 per day to have the student go to an out-of-city school, that was raised in the concept of a special damage. And the Court observed--the Seventh Circuit observed at that point that if the case is remanded to determine what validity that has as a special damages, the petitioner in this case, or the defendants, would be able to defend that position by showing that they would have been suspended in any event had they been afforded an adequate due process. But that was never--

Q Suppose the District Court had addressed the question of the validity of the suspensions and had found the students were properly suspended. How would that change your case?

MR. HOFFENBERG: Of course, obviously if they found they were validly suspended, then the question--I do not think the issue is not really--in front of the Seventh Circuit--is

not really whether the suspensions are valid.

Q I just asked you how would your case be changed if the District Court had found that the suspensions had been validly imposed?

MR. HOFFENBERG: If they found that it was valid and they still did not prove damages, I believe it would not change it because I think the Seventh Circuit dealt with it on the concept that regardless of the consequences of the suspension, we are not dealing with the suspension and its consequences, whether or not it would be justified or whether or not it was valid. The question is whether or not you were entitled to damages just for the proof of the violation of the deprivation of the constitutional right. That is what we are dealing with because the case--the Seventh Circuit held in a prior case which they decided--

Q But it might change the range of your damage, you know, special damages anyway.

MR. HOFFENBERG: Maybe special but not as to general compensatory damages because the Seventh Circuit really left the whole issue of whether or not the suspension was valid. They said that does not matter. There is something inherent in the nature of the deprivation--

Q That issue though will be open in the District Court?

MR. HOFFENBERG: Only in regard to the special

damages, not to the general compensatory damages.

Q But it is still open. It is still open.

MR. HOFFENBERG: That may be open. That is correct. The issue of the suspension, the validity of suspension, will be open as to special damages. And I think we are talking about about, on that point, a total of a hundred and fourteen to the specials and--I do not know--seventy-eight dollars with regard to the other plaintiff as to special damages.

Q Are you telling us now, counsel, that as to the compensatory damages it is the law of the case that it is based on this $1.65 a day?

MR. HOFFENBERG: No. Mr. Chief Justice, the law of the case as it stands now is regardless--we are not here on the special damage issue. We are here on the right to recover for the general compensatory damages for the--inherent in the nature of the wrong, for the deprivation of the constitutional right to an adequate due process hearing. It does not matter. The Court addressed the special issue differently, that $1.65. That is not the issue. That is something which the Court tried to put a measure on some special damages, a ruler, so to speak, in terms of this $1.65. They dealt with that in terms of special damages. They say it does not matter. If you do not have any individualized injury, no pecuniary loss, it does not matter. You are still entitled to general compensatory damages for the deprivation of a constitutional right.

Q That is, a procedural constitutional right.

MR. HOFFENBERG: That is correct.

Q Mr. Hoffenberg, am I right you did not raise liability in the Court of Appeals, you did not contest it?

MR. HOFFENBERG: We did not contest liability.

Q You are only contesting it here?

MR. HOFFENBERG: No, we are not.

Q As I read your brief, I thought you were.

MR. HOFFENBERG: I am not contesting liability. I want to make it clear as I argue, we are not contesting liability. There was some question as to the facts. I do not think it is necessary to get to the issue of liability. We have not raised that issue. The main thrust of the lawsuit below was the question about board rules. The Court did not reach that issue. We did not appeal the issue of liability. And the case is strictly here on damages. Liability was not raised, and we are not here before this Court raising the issue of liability.

Q So, we are to take it here that the District Court and Court of Appeals were correct in deciding or assuming that these people were denied a hearing to which the Constitution entitled them?

MR. HOFFENBERG: Yes, an adequate due process hearing. I want to make that clear because I do not think the Court suggested--I think the record will indicate--they did not say

there was not any hearing. They just said that there was not an adequate due process hearing.

The question is whether or not this holding of the Circuit Court of Appeals for the Seventh Circuit is inconsistent with both the common-law rules for damages and what some have commonly referred to these 42 USC 1983 actions as constitutional torts or indignitary torts. The traditional law of damages--let me start from a case. This Court ruled in Monroe v. Pape in 1961 that 42 USC 1983 must be read against a background of tort liability which makes a man responsible for the natural consequences of his actions. With that concept in mind, we believe as long as we are going to--as long as the basis of liability for these 42 USC 1983 actions should be read against tort liability, we should then look to the relief granted in tort law to determine what relief should be granted for violations of this 42 USC 1983 act.

As this Court is well aware, the traditional law of damages and which counsel concedes, the common-law rule of damages in tort liability does not recognize any loss other than that which is actual loss. The Anglo-American law has always been compensation oriented. That is, we compensate the person to the extent that money can to make that person whole, to put him in the same position when he has been injured, when he establishes legal injury, that he would have been had the deprivation not been, or the wrong not been, committed. To

that extent, we believe that the law regarding compensatory damages has always been that you are entitled to compensatory damages when you establish your actual, your legal injury, your fact of damage. There is a breach. There is a duty. There is a breach of that duty. There is a legal injury. And once you have established that legal injury, you are entitled to recover, based upon that fact of damages.

We have also recognized that just because, once you have established the fact of damage, just because the amount cannot be determined by any measurable standard, that amount has to be passed upon the wrong-doing defendant, once you have established the fact of damage because the Court has recognized that once you have established the fact of damages, you can leave the jury to determine what value they are going to assess upon that injury.

Q Counsel, in your reply brief you quote from the dissenting opinion in Bigelow v. RKO. From what you have just said, I take it that you accept the principle laid down by the Court opinion in that case and in Story Parchment that if some damages are established, the fact that you cannot put a precise dollar value on them does not mean you get no award of damages.

MR. HOFFENBERG: We absolutely agree with that proposition. If you establish your fact of damages, if you establish your legal injury, we cannot be--the defendants cannot

be held to say, "Well, these damages are speculative; therefore, you are not entitled to it." We take the position that once you have established the fact of damages, just because an amount cannot be placed upon it, the jury would still be left to make that determination, what they want to place upon that violation or that breach of their duty.

Q But you say the plaintiffs here did not even establish that.

MR. HOFFENBERG: The plaintiffs--there is no proof in both. Remember two District Courts determined there was no proof of that in the evidence and--

Q No proof of what?

MR. HOFFENBERG: No proof of damages and nothing which would even form any speculative inference which would lead to any measure of damages. In other words--

Q No proof of injury?

MR. HOFFENBERG: No proof of damages. And again the problem we deal with is the concept of the general terms of damage and injury. If I have a duty and I breach the duty, I may be injured. But that is just a general concept. I may be damaged--

Q You may have injured somebody else, is what you are saying.

MR. HOFFENBERG: I am sorry. I may have injured somebody else, and that person may have in fact been injured

in a general sense. But that does not mean on itself entitle to him to relief until he has established that he has in fact been damaged or he has established the fact of damage.

The best example I can give you, Mr. Justice, would be in an automobile accident. If you negligently run into me, you may cause me injury. I am injured. Just the fact that I am injured does not entitle me to recover. I must establish as a result I broke my arm. Then the jury can determine bread in the arm, actual injury, and they can assess an intangible loss, the pain and suffering that may be attached to that actual physical loss or the tangible loss.

We also recognize--and I am going to get into that--we recognize the compensatory damages; the nature of compensatory damages are twofold. The special damage which is to compensate the actual, tangible, out-of-pocket loss, and the general compensatory damages, which is to compensate the actual intangible losses such as mental distress, such as pain and suffering, subjectively pain and suffering, embarrassment, mental anguish, emotional distress. We recognize that once you have established this fact of damage, you have been humiliated, you have suffered some pain and suffering, you suffered some type of embarrassment, then at that point it is up to the trier of the fact to determine what amount they want to assess against the defendant once they have established that fact of damage, that intangible loss.

The tort liability or the tort rules of damage in tort law have recognized that where there is no actual or legal injury there shall be no recovery. However, the common law has recognized--and I think this Court is well aware and I think based upon the petitions for certiorari and the amicus--all the circuits--I should not say all--many of the circuits, the First, the Second, the Third, the Fourth, the Fifth, the Tenth, have recognized that where there is an invasion of some paramount right and you have not established any actual or real injury, you are entitled to nominal damages. A recognition of this, of just of a violation of the right setting up this person, setting up the rights of the parties, and recognize that--in that situation where you have not established any damages, you may--the trier of the fact may award nominal damages.

Q That rule is contrary, is it not, to the common law where if you proved a breach of contract, you were entitled to nominal damages. But in tort, negligence, the existence of damages was part of your claim for relief. And even if you could show a wrong, if you could not show damage, you were not entitled to even nominal damage.

MR. HOFFENBERG: That is correct. But the law has developed in these circuits and in the lower courts, in District Courts, after the Monroe case. By the way--

Q On constitutional torts.

MR. HOFFENBERG: Constitutional torts.

After Monroe, in 1944 I believe there was something like 23 cases filed in the District Courts for violations of 42 USC 1983. In 1961, right prior to the case of Monroe v. Pape that this Court decided, there was something like 283 cases filed. In 1972 there was something like 8,000 cases filed under 42 USC 1983. In 1976 there was something like over 16,000. The reason I bring this up is that during that transitional period the lower courts and the courts of appeal for the circuits started recognizing the right to recover for its intangible loss. They also recognized the right to recover nominal damages. You may recover nominal damages when you have established a breach of the constitutional right or the constitutional tort.

The question also turns around on whether the Seventh Circuit--the Seventh Circuit created a new relief. Our position is that the Seventh Circuit created a new relief for the violation of 42 USC 1983 which had not been previously recognized in our compensation-oriented Anglo-American law.

Q Something called general damages was known to the common law, was it not?

MR. HOFFENBERG: That is correct. I think that in order to make a determination here, we have to break them up in terms of general and special before this Court. We have to determine what--

Q Punitive is not here in this case at all?

MR. HOFFENBERG: No. The Court said--both Courts said it is not punitive.

Q But then we have special and general.

MR. HOFFENBERG: That is correct.

Q And you say there was no proof of any special damage here. Perhaps there was but that is not in this case.

MR. HOFFENBERG: We do not know. The District Court determined that was no proof for any damages. The Seventh Circuit said there was also some indication that it should go back on special. That is not here.

Q That is not here.

MR. HOFFENBERG: We are here on the general, the concept of the general.

Q And the concept of general damages was familiar to the common law, was it not?

MR. HOFFENBERG: That is correct, absolutely.

Q And what did it mean?

MR. HOFFENBERG: General damage is a loss but it is intangible. It is something that you cannot put a monetary value. It is general loss, something that you do not have out of pocket. Not something which you can--

Q And it was more than nominal, was it not? I mean it was not inevitably limited to nominal.

MR. HOFFENBERG: No, it was not, no. If you prove

your fact of damage, then--if you prove that humiliation, if you prove that pain and suffering, then you are entitled to recompense for that.

Q And you did not have to first prove the broken arm either, did you?

MR. HOFFENBERG: I think you did in terms of establishing more than just a general injury. If you establish a deprivation of any right, if you are negligent, if you negligently breach a duty which you owe to me, I have to establish some type of fact of damage. I cannot just--again, the courts have recognized--in common law the courts have recognized that you just cannot let juries speculate, just inform these violations--

Q What does general damages mean in common law?

MR. HOFFENBERG: General damages mean a right to recover, as I see it.

Q Money award.

MR. HOFFENBERG: For a violation of somebody you duly owed where you establish some type of injury as a result.

Q And is that not really all that the Court of Appeals did here?

MR. HOFFENBERG: No, it went farther because it said--it left out the fact of damage. It presumed--it presumed some type of fact of damage just from the mere--from the deprivation of the constitutional right. It went farther and said--the

Court of Appeals said you establish a deprivation of a right. There must be some injury here. But again it is a generalized injury. It has not established that in fact these plaintiffs have been injured. All it did was--well, there must be some injury which is inherent in the nature of the wrong. It did not focus on the individual loss or the fact of damage to that plaintiff.

Q Mr. Hoffenberg, would this case be different if the issue were a denial of either--to give you one example--a right to vote or, secondly, if there were a deprivation of the right to be free of an illegal search--say someone had been searched--but no mental suffering in either case, just the bare injury? Would it be the same issue and, if so, how would you decide those cases?

MR. HOFFENBERG: I think it would be the same issue. I think that the courts--and I think that in my briefs and in counsel's brief it does refer to the voting rights cases and the search and seizure cases. Many of the search and seizure cases all hold, as far as we are concerned, or most of them hold, where there is a deprivation of--of an invasion of a search and seizure or a violation of the Fourth Amendment pursuant to the Fourteenth Amendment, that you are entitled again to show any type of actual damage. I think once you have established the actual damage, you are entitled to relief. Just establish the mere deprivation of an invasion of the right

to be free from the search.

Q In a voting case how would you ever have actual damage?

MR. HOFFENBERG: In a voting right case I think that the actual damages--again, the intangible loss. I suggest two things about the voting right cases that plaintiff has cited. First of all--that we are talking about--many of the courts, the lower courts and the circuits, deal with these voting rights cases. The one that they deal with most of all is the case of Wayne v. Venable. And that one says damages are pursuant from the deprivation. But we look at that case. That case is a conspiracy case. That case goes beyond mere negligence. It goes to wilful. Also that case was decided by the Eighth Circuit in 1919.

Q What difference does wilfulness make if you are not doing it on a punitive theory?

MR. HOFFENBERG: That is the point. That is why I am suggesting that if it is not punitive, we have a different concept. If it is punitive--and many states have recognized you are not entitled to recover for deprivation of a voting right case. The majority of states now take the position that you are not entitled to a right to recover for a deprivation of a voting right unless you establish actual malice or some evil intent.

As far as the Wayne also--the Wayne case I believe, if

the Court looks at that case, it says you are entitled to presume damages even though you have not shown any tangible loss, any monetary loss, could possibly--I think it suggests two things. Number one, the idea that you do not have to show any actual damages to recover punitive damages, the idea that was established in Batista v. Weir, a Third Circuit case, and also I think that it started to recognize, as I indicated before, this right to recover for this intangible loss--you do not have to prove that you have been out of pocket, that you have had any tangible loss. You have a right to recover for this intangible loss.

I think I would like to address myself also to public policy--

Q What loss is there by not being permitted to wear an earring? You do not have the slightest idea what that means to the person, do you?

MR. HOFFENBERG: If it does, Justice Marshall--

Q Should he not have a trial and find out?

MR. HOFFENBERG: If he was injured because he was wearing an earring and he was deprived of something, if he testified to his injury as a result of that, then he may be entitled--maybe there was injury. I am suggesting that maybe there is some injury there. There may very well be. But, on the other hand--

Q Would that not show up when it is tried?

MR. HOFFENBERG: If he testified to it, of course. And it is not here. There is nothing to establish--there is nothing to establish that he has in fact been injured. This Court recognized I believe in the case of--in the dissent, I believe--

Q I think a man has a right to wear whatever he wants to wear.

MR. HOFFENBERG: If he is injured as a result of not being able to wear the earring, if he is injured, then he is entitled to the compensatory--

Q You do not agree that he is.

MR. HOFFENBERG: Not on these facts. Not on this record.

Q How about the Tinker case about the arm band; was that little boy injured?

MR. HOFFENBERG: I do not recall exactly what the relief was granted in that case, the arm-band case.

Q I believe it. But I mean--

MR. HOFFENBERG: The Tinker case. Tinker versus--they talked about material and substantial disruption. You have to show that there is some material and substantial--

Q I know. But I am just saying when people are denied the right to wear the clothing that they want to wear or the jewelry that they want to wear, they are being denied something.

MR. HOFFENBERG: But just being denied does not mean that ipso facto he has been injured.

Q Mr. Hoffenberg, maybe I misunderstood this. I did not think that the damage here was the denial of the right to wear the earring or the denial of the privilege of smoking, on the other hand.

MR. HOFFENBERG: I was going to get to that.

Q But rather the denial of procedural due process.

MR. HOFFENBERG: Exactly.

Q And even if that had been accorded, he might have been deprived of his right to wear the earring--

MR. HOFFENBERG: That is correct.

Q --of his privilege to wear the earring.

MR. HOFFENBERG: That is absolutely correct. The First Amendment right was never reached. In fact, the Court just talked about the adequate due process.

Q It is a denial of procedural due process, is it not?

MR. HOFFENBERG: That is absolutely right.

Q It has nothing to do with the--

MR. HOFFENBERG: It was never reached, the First Amendment right.

Q --deprivation vel non of the privilege of wearing the earring--

MR. HOFFENBERG: It was never reached.

Q --or the deprivation of the privilege of smoking tobacco or marijuana or whatever it was.

MR. HOFFENBERG: That is absolutely correct.

Q Why do we have all the discussion about general and punitive and all the other kinds of damage?

Q The wrong is a deprivation of procedural due process.

MR. HOFFENBERG: That is correct.

Q Is that your answer?

MR. HOFFENBERG: No, my answer to your question--

Q That is what I was trying to get.

MR. HOFFENBERG: The answer to your question in terms of why we talked about general and special, we believe that the laws available under the concept of the tort, general rules of damages allowable in tort law, are enough to compensate the person for a deprivation of his right. But he has got to establish some injury. He has got to establish some fact of damage or the denial of some right.

Q Before.

MR. HOFFENBERG: As far as he is entitled to recover damages.

I would like address myself in the time I have left to the question of public policy also, which should be considered here. And the question before the Court is also whether

the Court should adopt this new relief, faced with this--the Court faced with this question, we have to balance the interest here, and I think we should look to the prior decisions in this Court in Wood v. Strickland and Goss v. Lopez, the right to due process for the suspension and also the qualified immunity. And I think it is clear that the majority opinion in the Wood case suggests that we really should leave management of the schools to the school districts. We really should leave the school district alone to run their schools. And we really should be in a position not to deter qualified people from becoming board members, from becoming board personnel, and we should not impose--

Q Mr. Hoffenberg, if I could interrupt, this argument goes to the procedural due process, the policy involved there. But if I understand your earlier statement, the same problem is raised when you get a Fourth Amendment question or a right to vote question--

MR. HOFFENBERG: That is correct.

Q --where you do not have school boards at all.

MR. HOFFENBERG: That is correct.

Q Should the school board policy cut across the whole spectrum of constitutional rights?

MR. HOFFENBERG: Yes, I think so because again, even in Fourth Amendment rights situations the concept of having these police thwarted with this concept of not being able to--

I do not want to deal with it very much. I know this Court is dealing with the exclusionary rule. I do not want to deal as much with the Fourth Amendment, but I do want to point out that where there is a deprivation of Fourth Amendment right, there are policy considerations there, whether or not you are going to not allow police officers--or you are going to require police officers to almost look towards what they are doing if there is a later determination that what they did, even if it was negligent, caused some deprivation, even if it was negligently. And you have to look for the deterrent effect of the police officer as we do to the deterrent effect here, whether or not we should deter the police officer or whether we should deter the board members, qualified board members, whether we should deter their duties, as opposed to the possible benefits that would accrue to the plintiffs in this matter.

Q This case comes to us, as I understand what you earlier said, that there was a violation of procedural due process, and any good faith defense is out of the case.

MR. HOFFENBERG: That is correct.

Q So, you are saying there is a knowing violation of procedural due process. That is the way the case comes to us.

MR. HOFFENBERG: I believe--

Q Is that it or not?

MR. HOFFENBERG: Yes. But I want to extend that idea

of the immunity also to this policy consideration.

Q I am for that.

MR. HOFFENBERG: Excuse me?

Q But not for a knowing violation.

MR. HOFFENBERG: When you say knowing, it is a constructive knowledge situation. You should have known. In this case observe that--in the dissent of this case--in the case of Goss v. Lopez this concept of should have known deals with--you should have known that you were violating his constitutional rights--deals with the known constitutional law. And as the dissent says, knowing constitutional law, it is a five-to-four decision. Look how close it is when we are talking about knowing the constitutional law.

In conclusion, I would like to point out that we should leave the operation to the school districts. We should also the possibility that money will be taken out of taxpayers' hands if they are indemnified. The taxpayers will have to pay for it as weight against the probability of some damages, speculative damages. One far outweighs the other one.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Elson.

ORAL ARGUMENT OF JOHN S. ELSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ELSON: Mr. Chief Justice, and may it please the Court:

First, it is important to point out that

petitioners' argument is directed against only one of the Seventh Circuit's four grounds for reversing the District Court, is now very clear. The petitioners have not argued that it was error for the Seventh Circuit to reverse the District for its failure to grant declaratory or injunctive relief or for its failure to consider the evidence that was in the record which quantified respondents' injuries from being wrongfully denied educational services for eight and seventeen days of school.

Therefore, regardless of how this Court feels about the question raised on this petition, it would be necessary to remand this case in order that the District Court can enter the appropriate declaratory injunctive relief and can determine the damages which are appropriate for the wrongful deprivation of respondents' educational services.

Q You are going beyond the damages for the denial of a hearing, the due process violation.

MR. ELSON: Yes.

Q And you say there are two elements of damages now to be determined, one for the denial of the hearing and the other for the loss of schooling.

MR. ELSON: Right.

Q That is in the District Court, not here.

MR. ELSON: That is in the District Court, and I was just clarifying that that is not here, and that is not before

this Court. So, this case will have to be remanded back to the District Court for a determination of those damages regardless of how this Court determines the issue raised on the petition.

In view of petitioners' statement of facts in their briefs and party here, I think it is necessary to clarify that certain findings of the District Court are not in issue before this Court. First, as now it is crystal clear there is no question that the petitioners have violated due process and that they are liable for damages under Wood v. Strickland. And, second, despite petitioners' characterizations of the respondents, there is no basis for disputing the District Court's findings that the respondents always denied the wrongdoing with which they were charged and that they were never given an adjudicatory hearing of any type, and the District Court was clear on that point, that specifically they were never given any adjudicatory hearing.

Q I perhaps should not interrupt on this point, but you say it is clear they are entitled to damages. That is not what I understand. It is clear that they are entitled to a hearing at which the school board may offer evidence that they would have been suspended even if they had been given a fair hearing. Then there would have been no actual damages.

MR. ELSON: Yes. The Court of Appeals remanded for a determination of possible consequential injuries. The Court

of Appeals stated that if the school board chose at that time before the District Court to show that they were in fact guilty of what they were charged with, then they do not get compensatory damages.

Q Then your client will recover nothing unless you prevail on the theory that is in dispute here.

MR. ELSON: That is correct.

Q Which is what?

MR. ELSON: What the dispute is here?

Q No. What is your theory here?

MR. ELSON: Our theory is that it is incorrect, as petitioners do, to equate the remedies that are appropriate for constitutional violations with the remedies that are appropriate in breach of contract cases and technical trespass cases. In those cases, as petitioners correctly stated, you cannot presume damages, injury, from the violation of the right itself. You have to have independent evidence of the injury.

Q You mean of the harm.

MR. ELSON: Of the harm.

Q Some deprivation--

MR. ELSON: Right.

Q Some tangible loss.

MR. ELSON: Right, like walking across someone's grass would not be tangible loss. You would have something else

for a technical trespass.

Q What if it hurt your feelings? That is not the kind you are talking about?

MR. ELSON: No, those are the types of injuries we are talking about, that can be presumed from the violation, where the interests which are protected by the right are of an intangible nature, such as liberty, privacy, reputation, peace of mind, dignity. The violation of the rights in those cases proximately and necessarily cause an injury to those intangible interests. In cases of invasions of privacy, of liable and slander per se, false imprisonment and false arrest, harm is presumed from the very violation itself, and no independent evidence of injury is required. You can show such independent evidence of injury in order to increase your damages. But the cases are clear you do not have to show that type of independent evidence.

And many courts have recognized that exactly the same types of intangible interests that are at stake, that are violated in these common law tort categories, are also injured in violation of civil rights, and petitioners--

Q Let me test that out a little bit and see if I understand you. On your illustration of a claim for injury and damages for someone walking across your lawn, if the plaintiff showed merely that the defendant had walked across his lawn and no more, that might justify a jury verdict of $1 or

25 cents, would you agree?

MR. ELSON: Yes.

Q But if it went very much beyond that, do you think, without any other evidence, would you think it would be sustainable?

MR. ELSON: If there were a showing of the actual--

Q No, just that he walked across the grass, no showing that the grass was injured or that the grass died or anything else; just walked across the grass and a jury returned a verdict of $10,000. What would you think an appellate court would do on review?

MR. ELSON: I think an appellate court would reverse and find that that award was not justified by the showing of injury. There are some early, very early, common law tort cases when this theory was being worked out that did say that for the trespass alone, the violation, you can get damages, but that is not the law now, it is fairly clear.

The petitioners have agreed with the many cases that show, that state, that intangible injuries are caused by a violation of civil rights. And the rationale for presuming damages from the violation of the right in these civil rights cases is exactly the same as the rationale for presuming damages in these common-law intangible injury tort cases that I mentioned.

Q Mr. Elson, why is it not certain that a 20-day

suspension is damaging when you are denied your education for 20 days, period?

MR. ELSON: To us it is very certain that that is a very serious injury.

Q But that is not the issue here.

MR. ELSON: No, it is not the issue.

Q That is our point. That is not here.

MR. ELSON: That is not in this case.

Q Right.

MR. ELSON: Because they have not raised that as an issue.

Q When you say civil rights, do you mean any right that is protected by the Constitution?

MR. ELSON: Yes.

Q So that if, for example, in violation of Article I a state official laid a tax or duty on articles exported from any states--

MR. ELSON: I am sorry, I misspoke. I am talking about the Bill of Rights and the Fourteenth Amendment.

Q Why do you limit it to those?

MR. ELSON: Because with respect to those constitutional rights--there may be other constitutional rights, I have not given thought to the whole Constitution--but with respect to those rights, intangible injury can be presumed from the violation itself.

Q Why?

MR. ELSON: Because they were intended to protect important tangible interests, and you cannot violate those rights without harming those interests.

Q Why do you presume that with respect to this particular category that you have delineated and not with respect to the rest of the Constitution?

MR. ELSON: I suppose there would be certain types of rights where you just cannot presume any injury. Within the Bill of Rights an Eighth Amendment violation could not be presumed because in fact there you would have to have a showing of serious tangible types of injury. And I suppose the same might be true of the interstate commerce laws. I am not really sure.

Q What is the principle that enables you to distinguish one from the other?

MR. ELSON: The principle is that if the right in itself is inseparable from important intangible interests--for example, if a school should make a public--speak, say a prayer against his religion, then that violates his First Amendment freedom to pray according to the dictates of his religion. And that in itself is an interest protected by the First Amendment. Or an intangible search is an example that Mr. Justice Harlan gave in his concurrence in Monroe of an unconstitutional search in which the interest invaded there is

the interest of being secure in your home against arbitrary governmental invasion, and that is the essence of the Fourth Amendment. Or in this case--

Q Does this include all the freedoms protected by the Second and Third--

MR. ELSON: I think it very well might.

Q --and Eighth and Ninth and Tenth?

MR. ELSON: The Eighth is a different question.

Q But you do not include the Eighth?

MR. ELSON: I would not think you could in the presumed damage because it is fairly clear that in order to reach an Eighth Amendment standard, you would have to make a showing of fairly serious harm to the person.

Q So, it includes some of the rights and freedoms protected by the Bill of Rights--

MR. ELSON: Yes.

Q --but not all.

MR. ELSON: Not necessarily.

Q And probably not any of the other protections of the Constitution; is that it?

MR. ELSON: Not necessarily. You would have to look at the right and see whether it protects some intangible interest.

Q The Constitution is a written organic structure of the government of our society, and presumably it protects

us all--

MR. ELSON: Yes.

Q --in every one of its provisions. How are you picking and choosing? I am interested in knowing.

MR. ELSON: I do not believe it would be appropriate for this Court to pick and choose and say certain--

Q But you are, are you not?

MR. ELSON: I am not picking and choosing now. I am just saying why I think that injury should be presumed from the violation of the right itself inevitably.

Q Some of the provisions of the Constitution but not all.

MR. ELSON: Possibly all. I certainly--

Q But you say omit the Eighth Amendment.

MR. ELSON: I think it would be difficult because you already have to show objective proof of injury in order to qualify for an Eighth Amendment violation. So, there would be no need to presume damages.

Q Denial of a speedy trial?

MR. ELSON: Yes, certainly.

Q The right to counsel.

MR. ELSON: Definitely.

Q What about, say, denial of a jury trial? He claims that a jury trial right is being violated. He is convicted. He appeals. And it is reversed, saying that he was

entitled to a jury trial in the circumstances of the case. Then he brings a 1983 action and recovers damages.

MR. ELSON: Certainly at the time that he was denied his right to a jury trial, he did suffer a loss. He was treated, unlike other citizens, with these civil rights. I mean, possibly if the jury trial did not make any difference, the damages certainly would not be enormous, would not be that great. But he did suffer loss in that he was not given--he suffered certainly the indignity of not having his right to a jury trial adhered to.

Q Does he not have a tangible loss there? Presumably on appeal, on this hypothesis, a new trial would be ordered because of the denial. And you have one tangible measure of damages, namely, the cost of the first irregular trial. Suppose he could show that he had spent $4,000 in attorneys' fees and lost 11 days of work. Would that not be specific--

MR. ELSON: Yes.

Q --damages, showable under the special damage factor?

MR. ELSON: Yes, that would be one measure of his loss.

Q And then he might get some general damages for the intangible, is that it?

MR. ELSON: Yes, that is right.

Q Mr. Elson, may I ask you a question?

MR. ELSON: Yes.

Q I may have trouble articulating this. I am having some conceptual difficulty with your proposition. The right here to a fair hearing is not something that exists all by itself. There is no constitutional right to due process, period. There is a constitutional right not to be deprived of liberty or property without due process.

MR. ELSON: That is right.

Q So, an essential ingredient of the constitutional violation is harm to either liberty or property. Why should not the harm to the liberty or property interest always be the measure of damages for the violation of the due process right? In other words, why would you bring that which is not before us rather than that which is before us?

MR. ELSON: Because, according to the rationale of the Seventh Circuit--with which of course we agree--there is a separate type of injury from being deprived of the right itself.

Q That assumes there is a separate right to a hearing apart from the protection against some injury.

MR. ELSON: There is no injury, and the injury from the right is not triggered until there is some deprivation of a protected liberty or property interest.

Q Why should not that measure the magnitude of the

harm?

MR. ELSON: Because that is a separate type of injury, and sometimes that would not be available--for instance, in the employment cases.

Q If that is not available, if that is zero, what is the constitutional violation? If that is zero, then there has not been any deprivation of liberty or property without due process of law.

MR. ELSON: There has been at the time that the violation occurred. Certainly a right was taken without--these interests were taken away without giving these procedural rights. If it turns out later that in fact the government official was justified in taking away those rights, then he is not entitled to the damages because it was not unfair. He did not really lose anything by the deprivation of the right.

Q Was he deprived of liberty without due process of law?

MR. ELSON: He was at the time of the deprivation.

Q I still do not see why, if that is true, why that is not an adequate measure of his damages.

MR. ELSON: Maybe I can put an example of say a prisoner who is imprison ed say by a jailer for five years without being brought before a judge, and it subsequently turns out in say his 1983 suit that the jailer can show he was guilty of the crime and he would have been sentenced to the mandatory

minimum of five-year sentence, according to the rationale of no presumed injury, it would be as if the right to a trial did not exist. It would be as if he were not deprived of anything when this is one of the most fundamental of our constitutional rights.

Q Many rights are not necessarily protected by the award of monetary damages. They are protected in other ways. Trial errors of constitutional magnitude are protected by a reversal by a reviewing court, for example, not necessarily by the award of money damages. Not every right in principle is protected by that particular sanction.

MR. ELSON: No, not necessarily. However, where there is a loss, then damages of the traditional common law remedy in order to remedy that loss--

Q In addition to the new trial that is ordered?

MR. ELSON: Yes. Well, they can be. It is a common law principle.

Q I took your answer to mean whenever a new trial is ordered because of trial error that in addition to being compensated by getting a new trial, which is the traditional remedy for that wrong, there is also a 1983 claim for damages?

MR. ELSON: No, certainly not necessarily.

Q I thought that that was what you said.

MR. ELSON: There would have to be a showing that the violation of his right was knowing or negligent or that

it should have been--that they should have known that he was violating the right, and certainly if it were done by a judicial officer with absolute immunity or even a state's attorney. So, it would be very unlikely that that would actually happen.

Q But that is just because of the immunity of a particular defendant. It is not because of the right--

MR. ELSON: Yes, there may be a real loss, as I believe there is a real loss when somebody is deprived of a right to a trial.

Q Or the right, say, to be indicted before you can be tried on a criminal offense in a federal court. That is a constitutional right.

MR. ELSON: Yes, possibly.

Q And if you have not waived it, you have a right of action if you have been tried as a result of an information but not an indictment.

MR. ELSON: Yes.

Q For monetary damages.

MR. ELSON: Possibly if all the requirements have been met.

In further response to Mr. Justice Stevens' question, another measure, another reason for the injury suffered by the deprivation of due process is the lost opportunity to make your case to the initial trier of fact. And that is something

different from the deprivation of the interest itself. You can never know at that time whether the opportunity to make your case to the discretionary judgment of the initial trier of fact would have availed. So, even if it is determined later--

Q I understand why the denial of a fair hearing can cause harm. I am not questioning that proposition. But I still must confess to some uncertainty about your response to the five-year jailer case. Even though you assume the jailer holds the man for five years without due process of law, I would suggest the value of five years' imprisonment is the measure of the damages for that deprivation of a constitutional right. Then you say maybe later on he will be tried and convicted. That still does not seem to me to detract from the proposition that the measure of the harm was that he was deprived of his liberty for five years without any constitutional protection. That still is the measure of the damage for that constitutional wrong, which in this case would mean the eight or twelve days or whatever the children were out of school would be the measure of damages here.

MR. ELSON: That may be one measure, but it would be a very drastic penalty on our government to make them pay for five years imprisonment that should have been served and would have been served had due process not been violated. In this sense, the Seventh Circuit--

Q The protection against that normally is that the judge gets immunity and there are all sorts of defenses. The damages are not awarded automatically in these cases.

MR. ELSON: No, that is correct. But in the rationale of employment cases where those immunities would not occur, if someone was deprived of employment or without a hearing and it turns out that there was all sorts of cause to get rid of that person and the person is out, say, for ten years or something, under that rationale, those injuries being the only measure of damage, the damages would be tremendous for an employee who should have been fired. And the Seventh Circuit's position really is kind of a middle way between that. It just gives damages for the actual harm suffered by the deprivation of the right.

Q Let me put this case to you. Supposing in this case they brought the student before the principal and had summary procedures that were clearly unfair, they quizzed him one way or another, but then they did not suspend him. You would not have any claim then, would you?

MR. ELSON: No, none at all because there was no protected liberty or property interest that was violated.

Q So, obviously there must be harm in the sense of loss of property or liberty before the deprivation of a fair hearing has any constitutional significance.

MR. ELSON: Definitely. It triggers the harm.

Q On that basis, if it is determined now in this case that there never was a violation in the sense that the suspensions were proper, there was no deprivation of liberty.

MR. ELSON: That is right.

Q If that is determined, does that end the case?

MR. ELSON: Yes. If there was no due process violation in the first place--

Q No, no. Let us assume on remand that in the District Court it is determined that the suspensions were quite proper. There were not any procedures, but nonetheless the suspensions were quite proper. In that event, there has been no deprivation of a liberty.

MR. ELSON: No.

Q There has been no deprivation of the right to stay in school.

MR. ELSON: That is right. That would be our position. That is what the Seventh Circuit said. But the Seventh Circuit said nevertheless if there was a deprivation of due process at the time--

Q I understand, but you were deprived of your chance to have a hearing.

MR. ELSON: Right.

Q You think that is compensable?

MR. ELSON: Yes, that in itself is--

Q Is that inconsistent with the answer you gave to

Mr. Justice Stevens?

MR. ELSON: I do not believe it was.

Q Even though the injury to the liberty is zero, the right to stay in school, the thing that triggered your right to a due process hearing--even if it is determined that that invasion was zero, you say that you are entitled to damages?

MR. ELSON: Yes, if it was later determined that it was zero because at the time you were deprived of your interest in having a hearing and making your case to the initial decision-maker besides the indignity that was suffered.

Given that the constitutional rights, in our position, cannot be separated from the intangible interests which those rights are intended to protect, it is not surprising that the common law has long recognized that the damages may be presumed from the violation of civil rights themselves. There are no special remedial rules for civil rights cases which exempt them from this normal rule that damages should be presumed where intangible injuries are the natural and proximate result of the violation. And since 1703 in the English voting rights case of Ashby v. White, the common law has recognized the principle that every injury to a right imports a damage. And Mr. Justice Holmes relied on this principle in Nixon v. Herndon. And that case held that a valid claim for substantial damages was stated when the only harm alleged was the

deprivation of equal protection, which arose out of the denial of the right to vote on the basis of race. I think our brief incorrectly described that as a voting rights case when in fact it is an equal protection case.

And there are also many other American voting rights cases that recognize this principle.

Petitioners' argument is not only contrary to these common law cases, it is also contrary to congressional intent that courts apply the most effective remedies that are available for the purpose of deterring violations of constitutional rights. It is clear from the congressional debates and from many opinions of this Court that the primary purpose of Congress in enacting the Ku Klux Act of 1871 was to deter constitutional rights violations. And in Section 1988 of Title 42, Congress gave the courts specific direction as to how they were to apply remedial principles under the civil rights laws in order to achieve that deterrent purpose. And as this Court stated in Sullivan v. Little Hunting Park, courts were to use whichever federal and state rules on damages would better serve the policies of the federal statutes.

The technical trespass damage rules proposed by petitioners would obviously be less effective in deterring civil rights violations than the damage rules in the voting rights cases and these intangible injury cases in Nixon v. Herndon. A rule that required independent proof of injury for

the award of damages for civil rights violations would give officials absolute immunity from damages where the nature of the constitutional right is such or the circumstances of a violation are such that affirmatively provable injury is unlikely to result from the violation, examples of the First Amendment cases or due process.

It is exactly such absolute immunity that petitioners are asking for in their reply brief on page 28, where they query whether as a result of the Seventh Circuit's decision educators would have to think about--they say research--their own discretionary acts in terms of the possibility that a court might find them liable for damages for violating a person's civil rights. But it was precisely to force officials to give consideration to avoiding constitutional rights that this Court rejected educators' claims of absolute immunity in Wood v. Strickland.

There is nothing about the particular type of compensatory damages awarded for the deprivation of civil rights, which is relevant to whether educators should be allowed to violate civil rights free of any concern for their accountability under the civil rights laws. The rationale of Wood requires that public officials not be given such a zone of immunity for their constitutional violations where the interests protected by the rights are of such an intangible, unquantifiable nature.

Q What if the plaintiff in a civil suit is cross-examined and you ask him about his damages--"Did it hurt your feelings?"--you ask about all the intangible things you can think of. And he says, "No, but I am still entitled to some damages because I think you ought to be deterred from violating my rights."

MR. ELSON: In that case, such evidence certainly would go toward reducing--in mitigation of the damages.

Q Yes, but zero or not?

MR. ELSON: No, not to zero.

Q So, you do espouse openly and frankly you must give some money, some substantial award, to deter.

MR. ELSON: I would point out that is not this case. There is no evidence in this case. But, yes, I would say that the intent of Congress was that.

Q And your submission is?

MR. ELSON: Is that the most effective remedies available inthe common law to be used and the presumption of damages from the violation itself is a remedy that is traditional to the common law and should be used in these cases.

Q So, you do not think damage is limited to what a jury or judge might think the intangible injuries to the plaintiff are?

MR. ELSON: No, certainly they are limited to that, but with the instruction--

Q You say they are limited to that?

MR. ELSON: With the instruction that the damages be not so small, as the Seventh Circuit said, as to trivialize the right.

Q Yes, but I posed to you the case where the plaintiff frankly concedes, "As far as I know, I have had no intangible injury. I just think that I ought to have some damages because you should not violate my rights anymore."

MR. ELSON: First, I would pose that that is an unreal type of situation because there is always injury, it is our position, when these rights are violated. But for purposes of the hypothetical, I would analogize it to liable per se where there is a conclusive presumption of some injury, which of course can be mitigated by such a showing.

Q Yet in liable per se a jury can return a verdict for $1.

MR. ELSON: I believe that might be contrary to what the rule is for liable. Of course they may return it, but I think that he might be entitled to more damages.

Q You think that just could not be upheld on appeal under the normal rules of liable?

MR. ELSON: I think it might well not be. Yes, under the normal rules where there is a conclusive presumption of some injury. Now, it is possible--

Q But I thought you said $1.

MR. ELSON: That would be nominal, not substantial compensatory injury.

Q Suppose you handle this case a long time, 15 or 20 years, the jury is going to award $1 actual damages and $75,000 punitive damages.

MR. ELSON: In that case, if there were substantial evidence mitigating the conclusive presumption of damages, then it could be reduced. Now, to $1 I am not sure because that would conflict in this case with the deterrent policies of Congress.

Q Mr. Elson, in this very case, assuming no wilful misconduct by the defendants and just the facts that you have, what do you regard as the dollar value of the damages to which you client is entitled?

MR. ELSON: If I were a juror?

Q What are you going to ask the jury to give you in this case?

MR. ELSON: I am not really positive. I think in the nature between $500 and $1,000 possibly. I really have not given it--

Q Your complaint requested $5,000.

MR. ELSON: One of the complaints did. One requested $3,000. That was at a time when punitives were also asked for.

Q The amended complaint purports to be a class action complaint in the name of Brisco.

MR. ELSON: Brisco. It was originally filed as a class action. No class was certified.

Q No class was certified. But does that mean that Brisco is the only party before us?

MR. ELSON: No, these are consolidated cases in the District Court with two students.

Q So, you have asked $5,000 for one and $3,000 for the other?

MR. ELSON: Yes, at the time.

Q What is the difference?

MR. ELSON: They were represented by different attorneys, I guess, who valued different amounts. [Laughter] But there are differences in the fact situations, of course, which may justify the juries coming up with different awards of damages. There were First Amendment protected interests implicated in the Brisco case, not implicated in the Piphus case.

Q But those damages also assume some injury from the suspension, unequal suspension.

MR. ELSON: Yes, but the injury that would be presumed from the violation itself would not be the same for all grievance across the board.

Q You think the possibility of a plaintiff securing attorney's fees would not be enough of a deterrent to defendants?

MR. ELSON: No, not necessarily. There is no incentive for plaintiffs to file suits in order to pay off an attorney. There is the removal of a disincentive in that they might have--

Q Mr. Elson, the record will show that there are several cases of liable per se with $1 damages that have been upheld.

MR. ELSON: Perhaps I was in error on that.

Q I know of one in particular in New York where one diamond merchant called the other one a thief, and he sued. And the jury came in and said, "Can we give the defendant damage?" [Laughter] And when the judge told them no, they brought in $1. [Laughter]

MR. ELSON: The point to that is that--yes--

Q Go ahead and respond to Justice Marshall.

MR. ELSON: Oh--that the law presumes conclusively that some damages have occurred, and in rebuttal certainly, in mitigation, those damages can be lowered to a minimal amount.

Q You are not claiming that this deprivation averred in your complaint was the result of malice, are you?

MR. ELSON: No. The complaint makes a claim for malice, but that was not proved and that is not an issue.

Q Right. The District Court found no malice.

MR. ELSON: That is right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The

case is submitted.

[The case was submitted at 11:11 o'clock a.m.]

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