



Spring 2005

Making the System Work Better: Improving the Process for Determination of Noneconomic Loss

James F. Blumstein

Recommended Citation

James F. Blumstein, *Making the System Work Better: Improving the Process for Determination of Noneconomic Loss*, 35 N.M. L. Rev. 401 (2005).

Available at: <https://digitalrepository.unm.edu/nmlr/vol35/iss2/8>

MAKING THE SYSTEM WORK BETTER: IMPROVING THE PROCESS FOR DETERMINATION OF NONECONOMIC LOSS*

JAMES F. BLUMSTEIN**

I. PRESENTATION

The issue of nonpecuniary damages often arises in the context of medical malpractice claims, and the current proposals for capping nonpecuniary damage awards under consideration by Congress focus exclusively on the medical malpractice arena. My perspective on these issues stems from my background not as a torts scholar but as a health law and policy scholar whose work emphasizes the interrelationship of economics and medical care decision making.

In this presentation, I want to focus initially on proposals for improving the system of determining nonpecuniary loss, the most variable¹ and the most visible part of the tort damages process. But I also want to consider one component of the medical liability system because it is related to the problems of cost containment—a critical concern of those advocating reform of nonpecuniary damages awards in the medical area. So, I will link up liability and damages, since they both contribute to the overall policy concern regarding the costliness of the medical liability process.

Nonpecuniary damages awards pose problems for several reasons. The political energy on the issue stems from provider and insurance company concerns about costs associated with this component of damages, which are often seen as amorphous and peculiarly subjective. This makes such awards conducive to outlier judgments, which pose actuarial problems for insurers. From a broader perspective, concern about nonpecuniary damages derives from considerations of fairness—that individuals in similar circumstances should be treated similarly. This is the principle of horizontal equity, a traditional concern in a common-law, case-by-case process of adjudication, which has few tools for this type of case-to-case comparison or normalization.

With respect to nonpecuniary loss, this type of concern about horizontal equity raises important systemic issues, because nonpecuniary damage awards seem to be the most variable component of tort damage awards, with much of the variation being difficult to explain on readily observable or otherwise objective grounds.² That type of variability can also raise costs for insurers because of the actuarial challenges associated with variability in awards and the potential for unpredictable outlier awards.

The tension I am identifying is that between overall (or macro) systemic concerns and considerations related to achieving customized justice for injured victims in individual case proceedings (micro-level considerations). Systemically, public policy cannot ignore the implications of aggregate levels of expenditure associated

* Presentation delivered at the New Mexico Law Review's Symposium on February 19, 2005, at the University of New Mexico School of Law. Transcription provided by Williams Brazil Court Reporting, LLC.

** B.A. 1966, M.A. Economics 1970, L.L.B. 1970, Yale. James F. Blumstein is the University Professor of Constitutional Law & Health Law & Policy at Vanderbilt University Law School.

1. See, e.g., Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 919–24 (1989).

2. See *id.*

with the tort system; nor should it ignore the seeming unfairness (in terms of horizontal equity) accompanying the hard-to-explain variability in awards for cases that appear to be quite similar. But those systemic concerns must be addressed in a way that accommodates the critical goals of the tort system, assuring appropriate compensation for injury and providing deterrence of poor quality or excessively risky conduct.

This is a tension that exists not just in a common-law case process; the same type of tension exists in medical care decision making. There is a need to allocate resources in a macro sense from a fixed pool of money (through HMOs or other allocating strategies), yet there is a desire to accommodate (at the micro-decision-making level) the customized decisions of individual physicians treating individual patients. That tension is one that I want to focus on. So, my talk will be about both damages and liability.

I want to suggest the need for a preemptive strategy. Tort reform is not just on the agenda as a putative, future policy; nearly half the states, in one form or another, have adopted forms of caps on damages. This is not just happening; this has been going on for twenty years. At the federal level, there is serious consideration of damage caps. One house is almost certain to pass a cap on pain and suffering of \$250,000 for medical malpractice damages. Caps exist in other states; for example, Virginia (Jeff O'Connell's³ state) historically has had a very stringent cap.⁴ The existence of caps is a current reality in a significant number of jurisdictions. So, I think that those of us who are concerned about that approach should think about preemption. Talk about who in the debate over caps has the burden of proof is appropriate in jurisdictions considering imposing such limits, but smart strategy would preemptively recast the debate in recognition of the current reality and prevalence of caps.

My proposal, which is one that co-authors Randall Bovbjerg, Frank Sloan, and I made a number of years ago,⁵ is to better structure decision-making regarding nonpecuniary damages, a key and most variable component of damages. This is beneficial particularly in light of the amorphous nature of the substantive doctrine of nonpecuniary loss itself.⁶ A traditional legal policy tool for responding to ambiguity is to structure the process of decision making as a procedural alternative to a sometimes hard-to-achieve change in the underlying substance of a doctrine. If we can't really get at the substance very well, if we don't have the tools, we can structure the process of decision making in certain ways until we get a better consensus on the substance. And so, that is basically the underlying rationale for our strategy.⁷

3. Jeffrey O'Connell et al., *An Economic Model Costing "Early Offers" Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages*, 35 N.M. L. REV. 259 (2005).

4. See, e.g., *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989) (upholding under the state and federal constitutions Virginia's \$750,000 total cap on damages); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (upholding under the state and federal constitutions Virginia's \$750,000 total cap on damages).

5. See Bovbjerg et al., *supra* note 1.

6. *Id.*; see also James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991).

7. Improving the structure of decision making regarding noneconomic loss also could relieve some of the cost-enhancing pressures that stem from defensive medicine. While defensive medicine is hard to define or to

A. Some Background

My perspective is to focus on the appropriate use of economics in influencing medical decision making. That perspective considers the role of incentives in health care. From an economic perspective, the primacy of third-party payment in health care raises the question whether levels of utilization are appropriate. This is the traditional concern with moral hazard—that levels of expenditure increase when decision makers' financial choices are heavily subsidized when decision makers are (or perceive themselves as) spending someone else's money (a common pool of insurance funding). The ideology of professionalism, which de-emphasizes and even denigrates the role of economics in medical decision making,⁸ has made it difficult to talk seriously about the desirability or the impact of incentives. The professional response, until the last dozen years or so,⁹ was that incentives really don't make a difference in medical care—medical care is a science, and economic incentives are irrelevant to diagnostic or treatment decisions. That assumption about the lack of impact of economic incentives on medical decision making allowed for the widespread adoption of third-party payment, with an emphasis on low deductibles and low rates of co-insurance. The prevalence of third-party payment may well affect practice style and levels of utilization,¹⁰ which in turn can affect overall costs both directly and indirectly (through its impact on utilization through defensive medicine).¹¹

More recently, the professional critique of incentives is less empirical— incentives don't make a difference in medical care—and more normative— incentives are inappropriate and can corrupt medical practice.¹² The fundamental questions remain—what incentives exist, what is their impact, and is their impact appropriate? A lot of the discussion about the issue of liability deals with how the third-party payment incentives have changed and skewed the standard of liability. I plan to make a suggestion on how to deal with that.

Let me turn to nonpecuniary loss. Remedy tracks theory. Damages implement the theory of liability. The problem with developing a theory of nonpecuniary loss is that it is *real*, but it is sometimes hard to determine just what the core of

identify with precision, the system of medical liability creates incentives for performing additional procedures and services. Under conventional medical malpractice doctrine, the determination of the appropriate standard of care is made *ex post* or after-the-fact (in a malpractice trial based on expert testimony) rather than in advance (or *ex ante*). An incentive for additional utilization exists if the provider adjusts practice to a putative standard that is inherently unknowable *ex ante*. An added increment of predictability in the area of nonpecuniary damages—an important element of recovery for liability—may alleviate some of the pressure for additional utilization that stems from defensive medicine.

8. See James F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 CORNELL L. REV. 1459 (1994) (describing the assumptions and consequences of different ways of thinking about medicine).

9. For a contemporary, sophisticated defense of the professional model in medical care, see M. Gregg Bloche, *The Invention of Health Law*, 91 CAL. L. REV. 247 (2003).

10. For consideration of the impact of third-party payment on the customary practice in medical care, see John A. Siliciano, *Wealth, Equity, and the Unitary Medical Malpractice Standard*, 77 VA. L. REV. 439 (1991).

11. For a discussion of defensive medicine and its implications, see OFFICE OF TECHNOLOGY ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE (1994).

12. See, e.g., *Muse v. Charter Hosp. of Winston-Salem, Inc.*, 452 S.E.2d 589, 594–95 (N.C. App. 1995), *aff'd*, 464 S.E.2d 44 (N.C. 1995) (per curiam), *rehearing denied*, 467 S.E.2d 718 (N.C. 1996) (finding liability of hospital for allowing economic considerations to influence or unduly influence medical judgment).

nonpecuniary loss is. There is a need for straightforward simplicity, clearly delineated standards. Since juries typically make these decisions, it is important to have a concept, a standard—something that is understandable and not so amorphous. The result of (a) the amorphousness of the concept of nonpecuniary loss, (b) the lack of a clear substantive definition, and (c) the lack of procedural constraints on jury discretion has been that nonpecuniary loss is the most variable of the damages components (based on evidence that our research team was able to compile).¹³

Standards of uniformity are lacking; there is a lot of discretion for inexperienced juries who decide these cases without a context. The jury, in essence, is expected to appraise a house without looking at comparable sales; the task becomes very, very difficult. The members of the jury are functioning in a vacuum, lacking critical information. The concern that many of us have is that this perceived case-by-case variation at the micro decisionmaking level raises a systemic concern—horizontal equity—at the macro level. That macro-level concern undermines the perception of overall systemic fairness and ultimately threatens support for the existing system.

So, if we focus upon fairness in individual cases—procedural fairness—we also must worry about systemic fairness. The goal I advocate is to improve the functioning of the system in order to defuse the more far-reaching reforms that could threaten the traditional and fundamental premises of the tort system. As President Clinton said with respect to affirmative action, “Mend it, don’t end it.” The goal of reform should be, again, to improve the accuracy, the fairness, and the predictability of the system.

Predictability is important to promote settlement. Unless lawyers have a good sense of what a case is worth, it becomes hard to settle a case. So, to the extent that we can narrow the range of uncertainty, we narrow the variability; that will encourage and promote settlements. Also, if insurers and lawyers do not know what a case is worth, there are higher costs of administration (transactions costs). There are more depositions, more cases may go to trial, and so forth. It is important to build confidence in the system, so that liability becomes a more easily insurable event.

B. Tort: A Link of Individual and Social Goals

Now, let me turn to the link of individual and social or systemic goals. The values or the goals of the tort system are usually stated as compensation, deterrence, and corrective justice or punishment.¹⁴ The liability principle does achieve, in theory at least, some balance. It has a social dimension; it balances costs and benefits of precautions. The reasonable, prudent person concept is an attempt to strike this balance.¹⁵

13. See Bovbjerg et al., *supra* note 1, at 909–17.

14. See M.E. Occhialino, *Examining the Spectrum of Noneconomic Harm: An Introduction*, 35 N.M. L. REV. 391 (2005).

15. In the field of medical malpractice, however, there is a special problem because of the professionally based customary practice standard and the prevalence of third-party payment. See Siliciano, *supra* note 10, at 440–43.

Causation has a social dimension, as well. Proximate cause is a socially determined concept about the scope of responsibility. As a remedy, damages are designed to have a restorative function, a deterrence function, and a corrective function. But the award and magnitude of damages are related to the underlying theory of liability in the first place. So you have to link the award of damages with the theory of liability.

A problem arises, as in the case of noneconomic damages, when the theory of liability is amorphous,¹⁶ when it is akin to Justice Stewart's famous description of obscenity: "I know it when I see it...."¹⁷ Many commentators believe, as I do, that nonpecuniary loss is real,¹⁸ but when we observe the system in operation, we see that the element of damages is highly variable.

In the work we did, we were only able to account by observable factors for sixty percent of the variation—forty percent from severity alone, and a chunk from age.¹⁹ That is not to say that the other forty percent is necessarily inexplicable; that was not our claim. In individual cases, a rational explanation may exist, but, overall, there is a big variation in awards of nonpecuniary damages that is not readily explained by observable factors. "It is not possible to fully and objectively adjust for" all factors that "plausibly influence a jury's valuation, such as the subjective nature of how an injury occurred. No amount of adjusting, however, is likely to fully account for the extreme values."²⁰ So, it is possible that the variability in noneconomic damages awards is, to some significant extent, appropriate; some of the variability is undoubtedly justified in ways that outside researchers just cannot observe.²¹ But much of the variability is likely attributable to systematic deficiencies in the process of assessing noneconomic damages.

The strategy that I propose is to better structure decision making on the remedial side. In the absence of having a clearly delineated substantive standard, the strategic goal is to embed this aspect of decision making in a more structured, less discretionary process. Process can sometimes overcome problems of defining liability theory.

1. The Importance of Context: Identifiable versus Statistical Lives

The context in which these cases come up is extremely important.²² The way these cases arise makes attention to systemic values a real challenge. Doctrines of remedy and of liability develop in litigation. So, in the world of risk management

16. See Bovbjerg et al., *supra* note 1, at 909–17.

17. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

18. See, e.g., Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995). Other commentators reject the case for the legitimacy of damages for noneconomic loss as an element of a damage award. See, e.g., Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004).

19. See Bovbjerg et al., *supra* note 1, at 923 n.81.

20. *Id.* at 923–24.

21. See, e.g., Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonpecuniary Injuries*, 83 CAL. L. REV. 773, 811 (1995) (stating that "there is no objective way to measure the severity" of pain-and-suffering injuries).

22. See Clark C. Havighurst et al., *Strategies in Underwriting the Costs of Catastrophic Disease*, 40 LAW & CONTEMP. PROBS. 122, 138–45 (1976) (noting the importance of context and institutional design in the assessment of risks and benefits).

and evaluation, there is a literature that addresses the distinction between statistical lives and identifiable lives.²³ An example of framing an issue in terms of statistical lives is asking the question of how many mine safety inspectors are needed by a governmental agency, implicitly considering the tradeoff between money (for more safety inspectors) and lives—if the agency has X more mine safety inspectors, then Y more lives will be saved.

Society seems capable of having that type of conversation about statistical lives, as it does as part of budgetary decision making. But when we see a little girl at the bottom of a well—an identifiable life—it becomes rather ghoulish to be talking about how many quality-adjusted life years are at stake and what are they worth in discussing whether we're going to go down and try to save her. We tend to say, "Spare no expense."

So when we have identifiable lives at stake, we tend to look at much more symbolic kinds of issues about our humanity. Therefore, there is a lot more involved in this context in the balancing of costs and benefits; so, it is harder to balance costs and benefits in a systematic way when we deal with identifiable lives than when we deal with statistical lives. Litigation inherently takes place in an identifiable lives context rather than a statistical lives context.

2. The Importance of Context: Ex Ante versus Ex Post Decision Making

Under the common-law tradition, standards for liability and theories of damages arise and become formulated in the context of lawsuits. These are all ex post determinations. If a person is trying to conform to a standard of behavior, that person only knows what the legal standard is ex post—after that person has been through litigation.

Consider the case of a physician trying to determine whether to order an MRI (magnetic resonance imaging scan) in a particular circumstance. The physician is obliged to conform his or her conduct to the appropriate standard of care, but the physician cannot really know what that standard is ex ante. The legal standard of care is only knowable definitively ex post—after the physician has been sued and experts testify to a jury what the standard of care is. That evidence is developed and determined ex post.

What happens in an ex post setting is that risk is being considered, but the risk at issue has already materialized since an injury has occurred. So it can be difficult, ex post, to make an appropriate judgment about what the right rule or risk-benefit trade-off ex ante should be. We might be willing to take certain risks ex ante, but ex post we might have a very different perspective about that risk since it has been realized and injury has occurred.²⁴

And so, to assess risk appropriately, these decisions regarding risk-benefit trade-offs should be structured in an ex ante context. When they are faced ex post, as in

23. *Id.* at 140–43.

24. Consider a person who receives a bad diagnosis from his or her doctor and then complains of the unavailability of medical insurance to treat the illness. After the fact of diagnosis, when a patient knows that he or she has an illness, that patient quite understandably may want to get coverage for medical care, but that certainly is not insurance. Obviously, the ex ante and ex post perspectives regarding reasonable risks and requirements for precaution are quite different.

a lawsuit, they are addressed in the context of an actual loss, not a potential or risk of loss. It makes decisions much more difficult. The liability proposal addresses this ex ante/ex post issue.

3. The Importance of Context: Micro versus Macro

Litigation occurs in a micro-context in which it is difficult to deal with systemic (macro) issues. In the litigation context, there is nobody at the table whose constituency is the broader macro system. Even insurers, who have a macro systemic stake in the outcome, are obliged to act in the interest of their individual clients in the micro context of defending them in a lawsuit. Other defendants are not part of the process; they have no standing to assert broader systemic interests. So, liability and damages rules that are established in the case of A versus B are universally established.²⁵ The micro context of litigation makes it difficult to deal with the systemic issues in a structured way, unlike, say, an administrative hearing or some other forum, where lots of sides are at the table and can make presentations expressing broader systemic considerations. The strategic issue is how to accommodate these various systemic factors within the context of remedy and liability determination and within the framework of individual-case adjudication.

C. Dealing with Systemic Issues in the Context of Individual Cases: The Problem of Horizontal Equity

Let us address systemic issues in the context of litigating individual cases. Horizontal equity—treating similar cases alike—is an important systemic goal in this context. When people see A being treated, for what seems to be similar circumstances, in a very different way than the way B is treated or C is treated, that raises concerns about the credibility and the legitimacy of the tort system. And challenges to the credibility and legitimacy of the tort system threaten its support, and erosion of support could undermine some of the fundamental premises and values of the system.

Maintaining some restraint on overall costs—costs of paying liability claims, insuring against liability claims, and adjudicating liability claims—is another important systemic goal. We should strive to be fair to individual claimants in customized adjudication settings; yet, systemically we must recognize a broader interest in managing the level of overall costs.

The criminal law context provides an example of how government has sought to deal with systemic issues of equity in the context of individualized adjudications of guilt and sentencing. This concern about systemic equity and horizontal equity

25. I remember being involved in litigation where it took a long time for people in the industry to understand that an \$18,000 case was going to establish a liability principle that could bring down many of the banks in Memphis. It was hard for the banking industry to understand that its future depended on the outcome of a case that did not even involve (at least directly) the banks themselves but a cotton broker. The case involved the enforceability of forward contracts for cotton; since the banks had lent money using those contracts as collateral, the unenforceability of the underlying contracts had critical significance to the banks, potentially making the loans non-performing and threatening the financial viability of banks that were heavily invested in the cotton trade. The Supreme Court eventually held the contracts to be enforceable. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

resulted from the observed and largely unexplained variability of sentences across jurisdictions within the federal judicial system.²⁶ This disparity led to gaming the system and considerable suspicion of the system. In the Vietnam War period, for example, well-counseled draftees knew that if they wanted to resist induction into the military, they should go to San Francisco; many judges in that district were well known for their determination not to imprison draft resisters, instead giving them a slap on the wrist. On the other hand, draft resisters prosecuted in other jurisdictions were sent to prison and sometimes given lengthy sentences.

The result in the criminal area was adoption of the federal sentencing guidelines that we have had for twenty years.²⁷ The concern about the systemic value placed on horizontal equity underlies the adoption of the sentencing guidelines. The proposal for structuring decision making regarding noneconomic damage awards draws on principles like those undergirding the federal sentencing guidelines.²⁸

As originally implemented, the sentencing guidelines reduced flexibility and discretion in individual cases. The criticism of those guidelines has been that they undervalue considerations of customized justice, reducing the ability of judges to fine-tune sentences to the particular facts and circumstances of individual defendants. From a structural perspective, it is unlikely that there is a single correct answer to the trade-off between addressing systemic objectives at the macro level and accommodating the individuated claims of particular parties at the micro level. Dealing with the issue requires a balancing; the issues are best seen as a continuum—a more-or-less problem. As you tamp down on case-by-case discretion and fine-tuning in the name of systemic equity, you also run the risk, in some cases, of undervaluing individuated claims of justice in particular cases. That is a real cost of any system that seeks to normalize variability across cases. So there is going to be an inevitable and ongoing pull and push between these competing values of systemic equity and customized fairness to individual claimants.

The result of this pull and push process is that systemic concerns have resulted in state-law tort reform measures. This is not hypothetical; it is real. There are a number of state-enacted damage caps on nonpecuniary loss. Congress has under consideration a national damage cap of \$250,000 for nonpecuniary loss in the medical malpractice area.²⁹ Support for this type of legislation manifests the societal concern for systemic values—horizontal equity and overall restraints on costs—and the need to reach an appropriate accommodation of such systemic objectives and values while pursuing objectives of individual justice within a case-specific system of customized justice.

So, the proposal to be advanced is designed to improve the functioning of the process for determining nonpecuniary damages. The goal is to address the legitimate, systemic concerns related to the present system of assessing nonpecuniary

26. See *Mistretta v. United States*, 488 U.S. 361 (1989) (noting that disparities in sentencing by different federal judges of similarly situated defendants led to enactment of federal sentencing guidelines).

27. The mandatory character of the federal sentencing guidelines was recently held unconstitutional on Sixth Amendment grounds; they are now advisory for federal courts. *United States v. Booker*, 125 S. Ct. 738 (2005).

28. *Booker*, 125 S. Ct. 738, which relied on the Sixth Amendment, does not undermine the viability of a system of guidelines in the context of civil damages awards for noneconomic loss.

29. See, e.g., Help Efficient, Accessible, Low-Cost, Timely Healthcare Act of 2005, S.354, 109th Cong. (2005); H.R. 534, 109th Cong. (2005).

damages, while doing a better job at accommodating the competing values of customized justice than does a flat-cap approach. At the same time, we should use this opportunity for reform as a vehicle for acting preemptively in the area of liability reform, developing a strategy for ex ante standard setting that could help contain some costs attributable to the practice of defensive medicine.

D. The Problem

Nonpecuniary damages are a significant factor in awards; some studies have suggested that they account for about fifty percent of total damage awards in certain types of tort cases.³⁰ Damage awards for some noneconomic loss categories—such as pain and suffering—have been recognized as a legitimate area of recompense since 1763.³¹ Value-of-life research about hedonic values, examining the value assigned to the loss of enjoyment of life, tends to support the legitimacy of intangible factors such as noneconomic loss as elements of damages awards.³² Workers in risky industries secure an economic premium for the work they do, suggesting that the loss of the enjoyment of life is a real loss and that people expect to be compensated for the extra risks of such losses that they bear.

In the literature, some commentators have expressed a concern about the incommensurability problem—“whether the effects of pain and suffering can be monetized and spread.”³³ But in tort law we compensate for all kinds of losses by substituting money for other values. And the value-of-life research shows that people do choose to accept greater risk for a price, in essence trading off risk of loss of enjoyment of life for money. Despite some of the interesting theoretical issues raised,³⁴ by itself, incommensurability should not be a particularly troubling tort policy concern in practical terms.

The issue may become more of a concern when linked to the commodification question: whether we commodify body parts or commodify human life when we compensate for pain and suffering.³⁵ It is often difficult to understand “precisely what is meant by commodification or why it is undesirable.”³⁶ The commodification concept is typically introduced in the debate about the propriety of the use of financial incentives for increasing the availability of organs for transplantation. It is clear that some transactions—slavery, baby selling—are deemed by society to be outside the ken of market transactions.

30. See Geistfeld, *supra* note 21, at 777 & n.10 (“[P]ain-and-suffering damages account for about half of the total tort damages paid in products liability and medical malpractice cases.”); Croley & Hanson, *supra* note 18, at 1789 & nn.14–15 (“[N]onpecuniary-loss damage awards...constitut[e] roughly fifty percent of total damage awards....”).

31. See Bovbjerg et al., *supra* note 1, at 911 & n.18 (“The first award for pain and suffering seems to date from 1763.”).

32. See, e.g., W. KIP VISCUSI, *RISK BY CHOICE* 93–113 (1983).

33. King, *supra* note 18, at 178.

34. See, e.g., Margaret J. Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56 (1993) (addressing theoretical issues related to compensation and commensurability).

35. See generally Margaret J. Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987) (discussing the commodification concept generally).

36. Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, in *ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS* 57, 74 (James F. Blumstein & Frank A. Sloan eds., 1989).

Whatever the proper bounds of the anti-commodification norm, however, it does not seem compromised by compensating for pain and suffering or for nonpecuniary loss. Ultimately, the concern about commodification of human body parts stems from the introduction of market transactions for those body parts. The anti-commodification concern starts with the perspective that something is being sold *ex ante*. The question is whether a market transaction is appropriate. That is, when someone has an entitlement (property), that person is not obliged to sell that interest in property. The concern about commodification focuses on whether the matter at hand—for example, human body parts—should, normatively, be considered “property” and be subject to purchase and sale.

In the context of compensating for noneconomic loss such as pain and suffering, there is no purchase or sale in an *ex ante* sense. A person is injured; as a result of that injury, the person suffers loss. The question is whether the loss is compensable. There is a compensable interest in the injured party, but the tort system’s award of damages protects that interest by establishing *ex post* liability. The victim’s ability to walk without assistance, even if characterized as a legally cognizable ownership or property interest, is something that has already been taken away by the tortfeasor. The victim is not selling it; the award of noneconomic damages is an *ex post* remedy for something that has already been taken.

In short, there is no question about a barter or exchange *ex ante*. The victim’s interest, however characterized, has already been taken away by some wrongdoer, and the victim is seeking compensation after the fact. So, alienability—and the proper subjects of market-based transactions—which is what the anti-commodification concern seems to be about, should not really be a problem in this context.

While the award of damages for noneconomic loss does seem warranted, the evidence shows that nonpecuniary damages are the most variable component of damages awards, and that nonpecuniary awards are not readily explainable by observable factors.³⁷ There is also a societal concern that there is an excess dose of Robin Hoodism—implicit wealth or income transfer on the part of juries. Jurors are not repeat players with a good handle on other precedents. Juries come into the process without information, without experience, without context, and without a sense of historical continuity. A fear is that jurors have a limited horizon of authority, knowledge, and experience. They see an injured victim and a wrongdoer, and most everyone knows, although it cannot be discussed or admitted into evidence, that there is insurance involved. The reasonable concern is that members of the jury will take the opportunity, consistent with their limited scope of authority, to transfer money from A to B, without taking into account the broader systemic considerations.

That perception of juror behavior, linked to the evidence of unexplained variability of awards for noneconomic loss, contributes to the support for tort reform by undermining the credibility and legitimacy of the system. So, what should be done?

37. See Bovbjerg et al., *supra* note 1, at 919–24.

I think we should focus upon the existing lack of standards; the system revels in the current imprecision. There is imprecision in substantive law related to noneconomic loss, and that imprecision is reflected in the enormous discretion juries have in calculating the award of noneconomic damages.

The substantive law allows for jury consideration of multiple factors. And juries are basically a black box with little accountability. We have heard the story about how judicial review is disfavored through remittitur.³⁸ There is a strong presumption that what the juries find will be affirmed by trial judges in the remittitur process and by appellate judges on appeal. So I think that part of the goal is to build in some methods to enhance the opportunity for accountability.

Juries do not typically have a duty to explain their reasoning or the standards that they apply. When the underlying substantive theory is so underdeveloped, variability in awards raises real problems. An award is a remedy and should track the underlying substantive theory of liability. Accountability is particularly difficult to achieve in such circumstances, yet accountability is of particular importance in that milieu. And accommodating systemic concerns of horizontal equity and overall cost restraint becomes all the more difficult in such a loosey-goosey legal environment.

The variability in awards for noneconomic loss raises costs of all kinds, including costs of administration, impedes settlements, makes insurance less available or more expensive, and undercuts the deterrent factor of tort law (which is enhanced with more precision in outcome). So the goals of reform should be to develop improved techniques for accountability, to provide a context for deliberation and decision making through the furnishing of information, and to control or structure the discretion of juries.

E. The Scenario Proposal

The proposal advanced here is designed to provide more structure, to narrow discretion, to provide better opportunity for judicial review, and to provide a better context and more information for juries. Severity of injury is by far the biggest factor and explains about forty percent of variation in nonpecuniary loss.³⁹ Age is the second factor.⁴⁰ The approach being advanced is to establish a categorical, step-by-step decision-making approach. The goal is to constrain but not eliminate discretion, to provide information, and, if liability is established, to have juries determine a category at the time that liability is established.

A category could be an existing scale, like the National Association of Insurance Commissioners (NAIC) scale,⁴¹ or it could be one that is developed specifically for this purpose. The NAIC scale relies on severity of injury, and that makes sense since severity of injury is the most significant factor in the award of noneconomic damages. The NAIC uses a nine-factor scale. In earlier work, our group proposed that one of those categories could be disaggregated, and we could have a ten-factor

38. See Occhialino, *supra* note 14, at 395.

39. See Bovbjerg et al., *supra* note 1, at 923.

40. *Id.* at 941.

41. For a description of the NAIC scale, see *id.* at 921.

scale. But apart from this important detail, the overall goal here is to have a threshold screen that has descriptions of each category. Juries would determine which category the injury fell into, relying on the category descriptors.

So, let's assume that there is a ten-category set. For each category in the set, the legislature or the judiciary (as in the process of formulating pattern jury instructions) would develop a certain number of scenarios. For the sake of symmetry, assume that each category would have ten scenarios associated with it, a total of one hundred scenarios overall. The scenarios would be formulated based upon experience, data regarding past jury awards (to the extent available), judgment, calculations and appraisals of hedonic values, etc. The goal is to have the scenarios capture the array of considerations and concerns associated with the award of noneconomic damages.

In the process of determining the other elements of loss, the jury would find, for example, "This is a category-seven for nonpecuniary loss." Then in the same trial—this is a sequential process, not a bifurcated trial—the jury would receive for deliberation the ten scenarios related to category seven. The jury would then be asked to say which of those ten scenarios best fits the injury to this particular plaintiff.

Once the jury selects the appropriate applicable scenario, it would receive information about the range of damage awards built into each scenario. The range of awards would show a floor and a ceiling amount. It would also show the twenty-fifth percentile valuation, the fiftieth percentile valuation, and the seventy-fifth percentile valuation.

The range of awards for each scenario would be established either legislatively or by the judiciary (as occurs in the process of developing pattern jury instructions). These award ranges could be the result of a political judgment by the legislature or, if prepared through the judiciary, through use of experience, judgment, past jury awards (if available), and independent calculations of hedonic values.

Within the range of damage awards associated with each scenario, presumptive validity would attach to a jury determination that fell between the twenty-fifth and the seventy-fifth percentile of damage awards for the chosen scenario. The idea would be, if the jury low-balls below the twenty-fifth percentile, it would have a burden of explanation, and there would be a minimum award for the scenario. If the jury went over the seventy-fifth percentile, it would also have a burden of explanation. So there is balance, a symmetry, in this proposal. But, if the award is within the twenty-fifth to the seventy-fifth percentile, then it would be accorded presumptive validity. If the jury departs upward or downward, the jury would face presumptive invalidity and it would have to explain its departure to the judge, subject to appellate review. If the jury's explanation were sufficiently convincing, then the departure would be upheld.

The idea is to create some flexibility, but to avoid or minimize gaming. That's why the numbers associated with each scenario should only be revealed after the jury makes the two previous categorical decisions: first, selecting the appropriate category (primarily based on severity), and then, secondly, selecting the appropriate scenario that best fits the particular facts and circumstances of the case. The system would be built on the concept and the model of the original federal sentencing guidelines, creating presumptive validity for the twenty-fifth to the seventy-fifth

percentile. The goal is to provide more information, more structure, more accountability, yet to retain the jury's role so that the jury is making these threshold categorical decisions, and at the end of the day, is making a (more structured) damage decision as well.

F. Liability: Ex Ante Standard Setting

Let me turn, finally, to the liability issue from a medical malpractice, defensive medicine perspective. Defensive medicine adds cost to the overall medical care marketplace. It is an appropriate factor to consider in the context of a discussion about noneconomic damages, which are a concern in part because of considerations of cost imposed on the overall tort system, and particularly on the medical care arena. It is no accident that medical malpractice is where political pressures are exerted to constrain the cost of the system.

"In a medical malpractice action, the plaintiff has the burden of establishing (a) the appropriate standard of care, (b) breach of that standard of care, and (c) a causal relationship between the breach of the standard and the medical injury."⁴² The first element, the standard of care, is typically based on the "customary practices of the medical profession as the benchmark of acceptable behavior."⁴³ However, one commentator contends, based on a comprehensive study of cases, that "[j]udicial deference to physicians' customs is quietly eroding," with a significant number of courts "phras[ing] the duty owed by physicians in terms of reasonability,"⁴⁴ and moving toward a "reasonable physician standard."⁴⁵

In practical terms, then, the standard of care is "typically based on professional norms" established "by use of expert testimony"⁴⁶ at trial after an injury has occurred. And the apparent erosion of deference means that the standard of care is an increasingly imprecise standard. This raises concerns about the impact of ex post standard setting on costs through the practice of defensive medicine.

Consider the situation of a doctor in an emergency room. A patient comes in with head trauma. Does the physician order an MRI, or does he or she do watchful waiting for a few hours? Assume that there is not a good protocol for that decision.⁴⁷ The doctor is facing an ex ante versus ex post problem. The doctor is confronting a malpractice standard that is established ex post. The doctor only really knows what the standard is when, after an injury has occurred, he or she has been sued, and the plaintiff's expert physician witness has said, "This is the standard of care, and it was breached here, causing injury."

42. See, e.g., James F. Blumstein, *Cost Containment and Medical Malpractice*, in *HEALTH CARE DELIVERY AND TORT: SYSTEMS ON A COLLISION COURSE?* 75, 89 (Elizabeth Rolph ed., 1992).

43. James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 *CORNELL L. REV.* 1382, 1384 (1994).

44. See Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millenium*, 57 *WASH. & LEE L. REV.* 163, 170 (2000).

45. *Id.* at 187-88.

46. James F. Blumstein, *The Legal Liability Regime: How Well Is It Doing in Assuring Quality, Accounting for Costs, and Coping with an Evolving Reality in the Health Care Marketplace?*, 11 *ANNALS HEALTH L.* 125, 130 (2002).

47. See, e.g., *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872 (4th Cir. 1992) (failure to order an x-ray in emergency room in context of Emergency Medical Treatment and Active Labor Act).

The initial threshold requirement is the establishment through professional standards of the standard of care. If this is only established after the fact, as in the current system of medical negligence, the doctor in the emergency room faces a question: "What do I do when I am trying to determine what the standard is?" The safest thing to do is to order the MRI—especially if someone else (a third-party payer) is going to pay for it. The balancing of costs and benefits is very risky at that point. Having the standards of practice set after the fact rather than before the fact arguably causes more utilization and expense than might be appropriate under the circumstances. Expensive precautions that might not be warranted might nevertheless be taken because of the uncertainty of an unknown standard of practice that is to be set in an after-the-fact context when a particular risk has in fact resulted in injury to an identifiable patient.

How can this problem be solved? One approach is to look at standard setting in advance, so that a protocol in the emergency room allows a doctor to conform his or her behavior to a defined standard, not to an amorphous and unknowable moving target. That protocol would be developed by appropriately balancing costs and benefits.

The problem is that these standards have always failed. The reason that these standards have not caught on is that they can serve as just another tripwire for liability for providers. They are a sword in the sense that their breach is evidence that the standard of care has not been adhered to. But they are not, symmetrically, a shield, since plaintiff can always adduce evidence that the protocol did not properly evidence the standard of care under the circumstances.

A standard that is set in advance does not necessarily become the controlling standard of care. Plaintiff can use the standard to persuade a jury that the protocol has been disregarded and that the standard is evidence of what the standard of practice is or should be. Seen this way, the advanced standard is just another protocol that can serve as a landmine for doctors to step on and detonate to their detriment. At the same time, the doctors do not get the symmetrical benefit, which would be an assurance that compliance with the particular protocol satisfies the requirement of conforming to the appropriate standard of care and is not subject to after-the-fact relitigation.

So, in order to make the *ex ante* standard-setting approach work, there must be a process by which the standard that is set *ex ante* becomes the controlling standard, not to be revisited *ex post* in the course of litigation, rather than just evidence of the standard. Federal law actually provides a potential solution for this. A provision of federal law that has hardly been utilized during its thirty-three year lifetime may well provide a vehicle for establishing professionally developed norms of practice that would set the standard of care.⁴⁸

48. 42 U.S.C. § 1320c-6(c) (2000):

No doctor of medicine or osteopathy and no provider (including directors, trustees, employers, or officials thereof) of health care services shall be civilly liable to any person under any law of the United States or any state (or political subdivision thereof) on account of any action taken by him in compliance with or reliance upon professionally developed norms of care and treatment applied by an organization under contract pursuant to section 1153 [42 USCS § 1320C-2] operating in the area where such doctor of medicine or osteopathy or provider took

This provision provides for immunity for providers, doctors, and hospitals when they act in compliance with or in reliance upon professionally developed norms of care and treatment. The immunity is from state or federal liability. This suggests that the key first element in a medical malpractice lawsuit—establishing the standard of care—might be subject to ex ante development in a process the outcome of which would result in a standard binding in subsequent litigation.

The federal law is drafted very broadly so that it would seem to cover all medical malpractice cases, but there are no litigated cases to provide guidance or comfort. But at least the federal provision would cover practice under Medicare, Medicaid, and the federal employee health benefits program; that part would seem quite clear. Whether the federal provision can be construed to cover medical malpractice cases outside the federal funding sphere requires more investigation. But patients covered by federal financing programs constitute a substantial number of people and a substantial component of medical practice for many providers.

If federal law provides a vehicle and a process for establishing an ex ante standard that is both a sword and a shield, so that symmetry exists, that compromise might well become acceptable to the medical malpractice defense community. And such a process would very likely provide some relief on the cost pressures that now animate some of the political support for the much broader tort reforms under consideration in Congress.

If we can target the areas of special concern for defensive medicine and alleviate some of the costs of defensive medicine by adopting binding ex ante standards of practice, the cost savings from reduced defensive medicine will likely dwarf the fiscal consequences associated with awards of damages for nonpecuniary loss. If we can generate real savings in the practice of medicine by the adoption of clear and definitive protocols of practice, then that might well alleviate some pressure from—and be a safety valve for—some of the other cost-based criticisms of the award of nonpecuniary damages.

II. SUMMARIZED QUESTIONS AND ANSWERS

DR. RUSTAD:⁴⁹ James, you mentioned that you can already explain, with the present system, the nonscheduled pain and suffering, or noneconomic damages, as sixty percent of the variance.

BLUMSTEIN: By observable criteria.

RUSTAD: I was trained as a sociologist in a former life, and we were overwhelmed when we had twenty-five percent variance. Which leads me to say this system seems to be working fairly well—that if it's related to the severity of injury, it's related to age, it's doing what we need it to do. I think that to have that

such action, but only if—

- (1) he takes such action in the exercise of his profession as a doctor of medicine or osteopathy or in the exercise of his functions as a provider of health care services; and (2)
- he exercised due care in all professional conduct taken or directed by him and reasonably related to, and resulting from, the actions taken in compliance with or reliance upon such professionally accepted norms of care and treatment.

49. Michael L. Rustad, *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Towards Nursing Home Practices, Tort Reform, and Noneconomic Damages*, 35 N.M.L. REV. 337 (2005).

amount of the system operating in that fashion empirically demonstrates that—why schedule the damages? The burden of persuasion and proof is on the advocates of reform. I do think that your scheduling is a superior mechanism; I would support it over caps. But before I would support either proposal, I'd want to see that the present system has so much variability.

BLUMSTEIN: I used the word “structuring” rather than “scheduling.” I want to move away from scheduling. It's not a schedule; it's a structuring process.

RUSTAD: What's the difference?

BLUMSTEIN: Well, one of the proposals that was in our original work looked more like a schedule—where there were matrices. But here, what you have is a range established where the jury—if it can defend itself, if this is a true outlier case—has the freedom to show why the award should be above the seventy-fifth percentile. There is flexibility. It's not a hard cap; it's not a hard schedule. It's a flexible schedule. It's a flexible protocol, shall we say. But it does create the kinds of central tendencies that we're talking about. So, it's not a schedule in the sense of rigidity.

Now, maybe we're quibbling over words; it is what it is. I described it as a structured process, where there are two categorical decisions and then a decision on the noneconomic damage claim within some parameters. So the proposal is trying to cabin discretion at each stage. As far as variability is concerned, the evidence we developed established that the noneconomic damages component of awards was much more variable and unexplained based on observable factors than other components. The award of noneconomic damages is much more variable and much more visible.

AUDIENCE MEMBER: More variability than punitive damages?

BLUMSTEIN: Well, we didn't study punitives, because in medical malpractice cases in our data set, they were very—or relatively—rare.

AUDIENCE MEMBER: What was the data you looked at, on the sixty percent? What type of cases? I heard you mention workers' cases, and I was wondering if it involved employment or injured workers' cases.

BLUMSTEIN: No, no, not workers' comp.

AUDIENCE MEMBER: So it seems to me like your categorical approach is not much different than a workers' comp approach.

BLUMSTEIN: There is a certain analogy to workers' compensation, because workers' comp does try to structure damages claims to some degree. But, where the injury is to a scheduled member, workers' comp tends to be a much harder schedule than what we have proposed. And the data did not come from workers' comp cases.

AUDIENCE MEMBER: You mentioned when you talked about the range of damage awards that would be available, two things; that the jury wouldn't know in advance before it picked the number, in terms of the category that would apply, what damage range would be tied to that particular category. So the jury is sort of flying blind in terms of ultimate outcome. First, they have to pick the category, then they get—

BLUMSTEIN: And that's the goal.

AUDIENCE MEMBER: Well, maybe that's a good goal, and maybe it's not. It seems to me in order to put this kind of system into effect, you're talking about legislation, correct?

BLUMSTEIN: Well, some form of legislation. Some of it could well be done through judicial management, at least in some jurisdictions. But I think legislation is a superior process.

AUDIENCE MEMBER: Well, that would be an interesting usurpation of a jury trial right, and goes all the way to the problem of comparability review in the federal courts. At the appellate level, remittitur is becoming an even more frequent phenomenon. And I want to talk about that, just for a second, but it seems to me that to the extent that you're going to have some legislation that would effectuate this, it's going to be subject to the meat grinder of the political process. Now, you used the term, quote, "political overlay" in the range of damage awards. The reason why that concerns me, and it takes me back to workers' compensation, is that it seems to me the tendency will be, in any legislative arena in which the forces for tort reform already have significant power, that the damage ranges are likely going to be set at under compensatory levels, as they are in workers' compensation.

BLUMSTEIN: Well, workers' comp reflects a different deal.

AUDIENCE MEMBER: I understand what the deal is supposed to be in workers' comp, and yet I think people can still make the argument that it results in some pretty severe injustices. But going back to the point that there's already a high degree of explainability for the difference in jury awards on nonpecuniary harms, and if this approach would run the risk of a political solution that would be under compensatory, then I start to worry about whether it's worth going down that road.

BLUMSTEIN: Well, again, the goal that we had when we did this work was to develop a reporting system on damages, and to try to use an empirical basis of past awards to help put the numbers into the system that we're talking about, with some normative overlay. Because there has to be some judgment that this may—since it's a systemic concern, it's a political process—include a political dimension. It's hard to know what the right outcome on workers' comp is. Whether it's a right answer or wrong answer, it goes to the legitimacy of the political process, in which there are lots of different players. I think it's important that there be a check, because there's legitimate criticism. Geistfeld and others raised the question whether a system should rely on empirical evidence. Geistfeld's piece is really interesting.⁵⁰ He said, "Oh, I hate the idea of empirical, because these juries may have gotten it wrong in the first place." And at the end of the day, he comes back and says, "Oh, there's no better way. You need to do empirical, even if we recognize that that's a problem." Well, all of these are compromises. And I think—I'd like to see a commission that builds upon past practice on the hedonic value literature, but ultimately that makes some normative judgments. I think that any kind of balance or trade-off in that systemic versus individual arena is going to have a political dimension. I think that the concern about being fearful of a political process basically is skepticism of democracy. It may not be to your political taste, but that's the system we have to resolve these issues.

50. See Geistfeld, *supra* note 21, at 840 ("As juries appear to be a better 'survey mechanism' than the alternatives, prior jury determinations... would provide the best method for deriving the scheduled awards should it become necessary to resort to a damages schedule.").