2006

# Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation

Jody L. Madeira
*Indiana University Maurer School of Law - Bloomington*, jmadeira@indiana.edu

# Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation

*Jody Lyneé Madeira*[*]

*Arguing from the premise that personal injury plaintiffs and injury evidence do not taint proceedings by encouraging jurors to adjudicate based on emotion rather than evidence, this article reviews and challenges judicial attempts to constrain jurors' emotive responses to an injured plaintiff in three areas of personal injury litigation: voir dire, admissibility of evidence, and restrictions on damages arguments and assessment. The judicial abhorrence of sympathy as a ground for substantive decision making during some phases of the trial clashes with judicial tolerance of the emotion during others, giving rise to a pattern of "sympathy in, sympathy out" where the propriety of empathic identification decreases as the trial action builds to a stage requiring jury deliberation. Numerous judicial constraints upon emotive identification prove to be unnatural or unworkable because they are grounded in a shallow understanding of emotion and its interpersonal propriety that directly contradicts the role of emotion in lay interpersonal relations.*

*Yet, at the same time lay patterns of emotive response are brought into the adjudicative mix by the jury trial model, which relies upon the judgment of lay jurors who are asked to abandon their socio-cultural understandings of emotional response for a substitute logic of emotive form and content that directly contradicts their pre-existing lay socio-cultural practices. Moreover, although jurors are told that evidence, not empathy, is the proper basis for substantive decision making, the personal*

* Climenko Fellow and Lecturer in Law, Harvard Law School. J.D., University of Pennsylvania; A.B.D., University of Pennsylvania, Annenberg School of Communication; M.S., Georgetown University. I would like to thank Martha Minow, Adriaan Lani, Jack Goldsmith, Bruce Mann, and Simon Stern for their invaluable comments on this piece.

*injury trial is framed within a lay conception of emotive identification. Jurors are picked on the basis of their potential to identify with the plaintiff, and asked to rely upon life experiences in adjudicating the plaintiff's claim. These inconsistencies compel the conclusion that the role of emotive response in adjudication should be reconceptualized, since it is both a natural and rational response to evidence of injury.*

TABLE OF CONTENTS

## INTRODUCTION

*Men, we're making good headway,*
*but the Island of the Sirens looms.*
*On pain of death, don't let their songs*
*enter your head . . . .*
*Now get the strongest rope on board*
*and lash me tightly to the mast . . . .*
*Bind me in coils of rope . . . .*
*And then row and row and row.*
*Dig into the waves as if you were drunk*
*and digging for gold. No — tunneling*
*out of a grave. As if you were buried alive.*
*And whatever I say, however much I scream*
*or threaten or plead — ignore every word.*[1]

It is one of Western literature's epic stories of temptation, the confrontation between the homeward-bound Odysseus and the Sirens as told in Book 12 of Homer's *The Odyssey*. Forced to pass by the island of the Sirens, Odysseus orders his men to stop their ears and has himself bound to his ship's mast lest the Siren song bewitch the sailors and the vessel be dashed upon the rocks. Though the beguiling song enchants Odysseus to the point of madness, the ship at last passes the island, and the ravishing song grows fainter until it dies away altogether, at which point Odysseus is set free once more.

In criminal and civil litigation, jurors are perceived to be as vulnerable to appeals for sympathy as Odysseus was to the Sirens' song. In adjudicating a personal injury claim, jurors are exposed to evidence thought likely to lure them into treacherous, irrational waters, necessitating that legal practice make every effort to lash their judgment to the evidentiary mast. Thus, a number of constraining principles and rule systems have evolved to escort jurors safely through perilous seas of sentiment, lest reason be wrecked.

This article examines the ways in which the plaintiff as a vulnerable sufferer is perceived to threaten the legitimacy of proceedings by inviting empathic identification, an emotion which purportedly distracts jurors from rendering rational, evidence-based decisions. Arguing from the premise that courts improperly frame an emotive response as irrational, leading them to view decisions based on

---

[1] SIMON ARMITAGE, HOMER'S ODYSSEY 151-52 (2006) (contemporary retelling).

evidence and those based on empathy as mutually exclusive, this article will review and challenge judicial attempts to constrain jurors' empathic identification with the personal injury plaintiff in the contexts of voir dire, admissibility of evidence, and restrictions on damages, arguments, and assessment. This framing process begins in jury selection, in which candidates are chosen or rejected from a jury pool based on their perceived odds of identifying with the plaintiff. It continues through the trial proper, when the court must rule on the admissibility of evidence which naturally evokes multiple meanings and reactions. This framing culminates in the processes by which courts determine which damages arguments and what forms of juror behavior during damages assessment constitute misconduct.

As this Article will show, judicial abhorrence of sympathy as a ground for substantive decision making during some phases of the trial clashes with judicial tolerance of the emotion during others, giving rise to a pattern of "sympathy in, sympathy out" where judicial tolerance of sympathy as a factor in substantive decision making during voir dire clashes with judicial abhorrence of sympathy as a ground for substantive decision making during the trial proper. In addition, numerous constraints upon emotive identification are unnatural or unworkable because they are grounded in a shallow judicial understanding of emotive response and its interpersonal propriety that fails to incorporate lay understandings of interpersonal identification. This failure is critical, for legal adjudication rests upon the judgment of lay jurors who cannot simply abandon such socio-cultural interpretations. Yet legal practice does not provide jurors with a substitute logic of emotive form and content that aligns with lay socio-cultural practices. In addition, although jurors are told that evidence, not empathy, is the proper grounds for substantive decision making, the personal injury trial is framed within a lay conception of emotive identification. Jurors are picked on the basis of their potential to identify with the plaintiff, and asked to rely upon life experiences in adjudicating the plaintiff's claim. These inconsistencies compel the conclusion that the role of emotive response in adjudication should be reconceptualized, since it is both a natural and rational response to evidence of injury.

Legal attempts to constrain the prejudicial effect of evidence thought likely to induce an emotive response are just one means by which law as a sociological force melds people together into communities, defines proper and improper behaviors, and prescribes certain frameworks for thinking about and evaluating conduct. Inherent in this process of definition is a need to erect proprietary boundaries within certain evaluative contexts, such as trials which

guide adjudication, safeguard favored means of interpretation, and proscribe other disfavored evaluative methods. One popular distinction is that between reason and emotion. The depth of this distinction is somewhat illusory. Emotion may be defined as:

> [A] complex set of interactions . . . mediated by neural/hormonal systems, which can (a) give rise to affective experiences such as feelings of arousal, pleasure/displeasure; (b) generate cognitive processes such as emotionally relevant perceptual effects [and] appraisals . . . ; (c) activate widespread physiological adjustments to the arousing conditions; and (d) lead to behavior that is often, but not always, expressive, goal directed, and adaptive.[2]

Thus, although many of its workings are subconscious, an emotive response is profoundly cognitive.[3] Empathy in particular is better characterized as an evaluative process rather than an emotion; instead of an immediate response to environmental stimuli, it is an appraisal of such stimuli, and as an assessment "may be modified by reappraisal of the environment in other ways."[4] Thus, research has shown that cognitive emotions such as empathy are less likely to disrupt reasoned deliberation because they are "less strongly valenced" and "produce less arousal" than other emotions, such as anger.[5] In addition, the time-intensive processes of hearing and evaluating evidence likely diminish whatever emotional arousal is present.[6] Empathy is also one of the sentiments inherent in the social ties that bind people to one another, a connective emotion that is particularly essential in times of crisis. As a reasoned, moral response to pain's subjectivity (and to the subject of pain), empathy provides a vantage point from which to perceive how law attempts to ensure that rational considerations remain uppermost at trial. Empathy organizes the personal injury trial from its opening salvoes so as to best combat improper emotive identification lest the plaintiff's apparent vulnerability taint proceedings.[7] Trials are unique forums of pain, not only because they call for its narrative expression, but also because they bring before

---

[2] NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 70 (2001).

[3] *Id.* at 71.

[4] *Id.* at 72.

[5] *Id.*

[6] *Id.*

[7] Jody Lyneé Madeira, *Pained Sympathy for Sympathy Pains: The Reasoned Morality of Empathy in Adjudicating Pain*, 58 S.C. L. REV. (forthcoming Dec. 2006).

jurors one who is in pain, and ask jurors to confront a painful[8] phenomenological reality — what pain is in the life world inside *and* outside of language, in its linguistic, metalinguistic, and visible forms. Meaningful expressions of pain are not confined to narrative, but include gestures, gaps between narratives, awkwardness, silence, metalinguistic sounds — all the behaviors that together substantiate or disrupt a narrative, render it complete or incomplete. Moreover, performance necessarily incorporates the plaintiff's way of being in the world, a phenomenological presence that goes deeper than mere physical appearance and visible indicia of injury. Painful sights and sounds become especially crucial in litigation, a forum for negotiation between narratives, and so present unique evidentiary concerns: how best to circumscribe the sight of pain unveiled in the courtroom so that it does not become overly prejudicial? What is the meaning of "prejudice" in personal injury litigation, and how does it intersect (or disrupt) jurors' responses to a suffering plaintiff?

In answering these queries, this article incorporates a textual analysis of practitioners' texts, such as *American Jurisprudence* and *Corpus Juris Secundum*, as well as case law. Such sources constitute authoritative statements in their own right and reveal how lawyers see pain as a sensation and what arguments (or narrative constructions of pain) are most successful.[9] Textual analysis, a cousin of content analysis, is a qualitative communication research methodology.[10] This

---

[8] Within this article, the adjective "painful" is not used merely in the sense of "causing pain" but to denote a suffusion with pain, or, literally, "pain-full."

[9] Short of interviewing trial lawyers, there is no easier way to acquire or compile such information.

[10] Although some recent articles purport to use content analysis, they may not define exactly its methodological contours. *See, e.g.*, Henry F. Fradella, *A Content Analysis of Federal Judicial Views of Social Science: "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 116-18 (2003) (conducting content analysis of all published federal decisions to gauge the federal judiciary's use of social science research). But other articles do effectively define this technique. *See, e.g.*, Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501, 517-18 (2004) (applying constructionist content analysis to 41 United States Supreme Court opinions regarding gender discrimination to ascertain how Court defined gender and equality). Communication scholars have defined content analysis in a rather specialized sense as a systematic method of compressing text into a few content-driven categories. *See generally* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (1980) (discussing epistemology, logic, and methodology of content analysis). I, however, refer to content analysis in its broader form, which refers to "any technique for making inferences by objectively and systematically identifying specified characteristics of messages." *See* O.R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES 14 (1969). Such a technique involves surveying text for

textual analysis is oriented toward the perspective of the social construction of reality, which posits that there is never one Truth, because truth is largely a matter of one's social epistemology, such that our opinions are formed or constructed by social factors, including culture, upbringing, and life experiences.[11]

## I. CHOOSING THOSE WHO WILL ADJUDICATE PAIN

A juror's potential empathic response is the object of inquiry in voir dire, the first stage in which law recognizes and responds to the possibility that individuals will improperly react to painful accounts on the basis of personal characteristics which render them more or less likely to credit and compensate such claims. The goal of the plaintiff's attorney is to establish the best fit between her client's narrative facts, the decision-maker's cultural experience, and the law. It is commonly recognized that jury trials are especially attractive to the plaintiff, who "might enlist the sympathies of the jurors and improve his chances of recovery."[12]

The potential for empathic identification, however, has not undermined the regard in which the jury as an institution is held. The jury as an institution has been ennobled as the ultimate impartial trier of fact. Legal authorities establish that jurors are endowed with "an impartial conscience and judgment," and "may be expected to act reasonably, intelligently and in harmony with the evidence."[13] Due to its "restraint"[14] and "experience and good sense," courts have refused to interfere with the jury's "honest and intelligent exercise of

---

manifest (as opposed to latent) content which renders data comparable across many different sources. In researching this article, my own categories emerged from preexisting divisions within practitioners' texts, and I then filtered the text of all sources and case law through this categorical list.

[11] For a discussion of the social construction of reality as a research perspective, see PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966). Berger and Luckmann posit that social order is a human product, and that when we participate in the social we engage in a continuous intrapersonal maintenance cycle of self-incorporation, negotiation, and reflection, so that one's subjective reality undergoes perpetual modification. *Id.* at 149-53. Thus, Berger and Luckmann tie the formation of the self in society to the formation of one's private (or non-public) self.

[12] Washington v. Chi. Transit Auth., 534 N.E.2d 423, 424 (Ill. App. Ct. 1988).

[13] Voilas v. Gen. Motors Corp., 73 F. Supp. 2d 452, 467 (D.N.J. 1999).

[14] Beagle v. Vasold, 65 Cal. 2d 166, 172 (1966) ("The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury.").

judgment."[15] Jurors' lauded powers of judgment, stemming not only from objectivity but also from expertise based on past exposure to pain and suffering through life experience, are seen as so significant that jury instructions may emphasize the propriety of reliance upon such factors in rendering a verdict.[16] Jurors' personal experiences of pain are socially constructed. These experiential narratives may be constructed and reconstructed during the processes of deliberation when jurors share stories with one another to ascertain how their own experiences compare to facts of the case at hand. Perhaps because of these constructive processes, legal authorities recognize that the jury's broad discretion "necessarily carries with it the risks of passion, prejudice, speculation, and bias."[17]

It is this risk of passion within an institution valued for its democratic adjudication that motivates texts such as *American Jurisprudence* to advise plaintiffs' attorneys to make every effort to ensure as sympathetic an audience as possible.[18] This is likely a tacit admission that law in practice relies on empathic potential more than it would admit. The crucial factor is a prospective juror's ability to conceive of pain in general, and the plaintiff's pain specifically, as unique and compensable. To that end, the first rule of jury selection is to select potential jurors who are similar to the plaintiff and witnesses in "education, occupation, family situation, organizational and recreational activities, manner, and dress" to gain a leg up in the persuasive contest due to such jurors' perceived receptivity to the plaintiff's claims.[19] In short, "The more each juror has in common with the plaintiff, the more favorable the result."[20]

In addition to being receptive to the plaintiff as a person, jurors should be able to evaluate claims of pain in as unbiased a manner as possible, without preconceived biases against certain types or forms of pain. Not surprisingly, practitioners' texts connect this ability to the

---

[15] Mansfield Ry. L. & P. Co. v. Barr, 2 Ohio App. 367, 382 (Ohio Ct. App. 1914); *see also* Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995) ("The jury, guided by its judgment and everyday life experiences, is in the best position to make a fair assessment of these damages.").

[16] 5 AM. JUR. *Trials* 921 § 100 (2006).

[17] Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 90 (Tex. App. 1998).

[18] *See, e.g.*, 5 AM. JUR., *supra* note 16, § 51 (discussing impact of age and sex upon juror selection); JAMES T. O'REILLY, OHIO PERSONAL INJURY PRACTICE § 8:15 (2006) (stating that "best" juror is similar to plaintiff in factors such as "education, occupation, family situation, organizational and recreational activities, manner, and dress").

[19] O'REILLY, *supra* note 18, § 8:15.

[20] *Id.*

demographics and personal characteristics of potential jurors, including age, sex, occupation and income, career, personal experiences, and previous involvement in or exposure to litigation. There are two primary theories as to what impact these various factors have upon a potential juror's willingness to empathically identify with the plaintiff.

### *A. Jurors' Previous Exposure to Pain as Undesirable*

The most popular theory regarding the selection of prospective jurors assumes that in most circumstances previous exposure to pain and suffering reduces one's ability to see pain and suffering as unique and compensable states. Prospective jurors who are elderly may be comparatively insensitive to pain and suffering and more likely to disregard it because "they have undergone the pains of old age" as well as other "life" pains, such as childbirth, so that "pain is a common phenomenon to them rather than an unusual and terrifying experience justifying compensation."[21] Similarly, farm workers and retired military officers, due to the degree to which their occupation exposes them to the "rigors of nature" and daily pain and suffering, are perceived to be less willing to award monetary compensation.[22]

Legal practitioners are also advised to exclude candidates with medical backgrounds who routinely interact with the injured, for although they may be "more likely to appreciate the authenticity of pain and suffering," they may "expect pain and suffering as a common everyday phenomenon and so discount its value."[23] Prospective jurors who have experienced similar accidents or who share the plaintiff's condition also may be dangerous to both the plaintiff and defendant. Such persons may reward the defense if they feel that the plaintiff's injury should not be compensated because their own injuries were not compensated. These persons may also reward the plaintiff if they feel that "all injured persons should be vindicated."[24]

Finally, a "newly empaneled jury is likely to be more plaintiff-minded in cases where the appeal to their sympathy is a strong one," since a jury who has heard many personal injury cases is repeatedly exposed to pain and suffering and no longer see it as novel.[25] Exposure to anti-plaintiff material as a result of a juror's career track

---

[21] 5 AM. JUR., *supra* note 16, § 51.

[22] *Id.* § 52.

[23] *Id.* § 53.

[24] *Id.* § 54.

[25] *Id.* § 55.

also provides a reason to "unselect most corporate, executive, and managerial persons," as well as spouses of such candidates.[26]

### *B. Jurors' Previous Exposure to Pain as Desirable*

A second guiding theory, however, suggests that familiarity breeds empathy, not contempt. The "emotional make-up" of women allegedly makes them more likely than men to react to pain and suffering, and women are thought to have a "greater appreciation" of pain due to "their interest in caring for their families, the likelihood that they visit friends in hospitals, and the greater contact with sickrooms and injuries."[27] But while women are highly coveted as jurors for plaintiffs who are young children or male, practitioners are warned that "women are particularly unsympathetic to claimed injuries that are of a female nature," (whatever injuries of a "female nature" might be) since these harms may be familiar to them through their own experience.[28] This marks a resurgence of the perspective that previous exposure to certain types of pain and suffering — particularly pervasive ones such as the exhausting pains of labor and the seemingly inevitable aches and pains of old age — renders jurors unwilling to see such forms of pain and suffering as compensable.

It is apparent that the plaintiff's litigation strategy in voir dire is designed to ensure that potential jurors whose characteristics, life experiences, and career tracks have not cultivated empathic willingness will be excluded if at all possible. From its beginning, the personal injury trial incorporates a tug of war with both the plaintiff and defendant attempting to exclude those potential jurors who appear unable to empathize with their side. Ironically, at this stage of litigation, potential for emotive response is seen as being a part of the adversary litigation model, and not as a way of packing the jury with people who will likely decide a case on improper evidence. From its onset, the trial evolves into a forum for introducing multiple subjectivities, where an amalgam of experience may produce a plurality of interpretations.

---

[26] O'REILLY, *supra* note 18, § 8:7. However, a potential juror whose occupation involves much human contact. *Id.* § 8:15.

[27] 5 AM. JUR., *supra* note 16, § 51.

[28] *Id.*

## II. THE ADMISSIBILITY OF EVIDENCE AND TESTIMONY OF PAIN AND SUFFERING

Judicial concern over empathic identification heightens significantly once a personal injury trial is under way. Here, we move on from considering how law recognizes and responds to potential vulnerabilities to a painful account to address how certain evidence may contain great expressive power, and why and how this power is constrained under the auspices of undue prejudice. It is ironic that "sympathy," the judicial synonym for an empathic reaction, is a permissible factor in substantive decision making in voir dire under the rubric of the adversarial litigation model, but impermissible at trial under the rubric of evidentiary restrictions on unduly prejudicial materials. Here the "adversarial model of litigation" refers to the ability of one party, the plaintiff, to counter the actions of the other, the defense.[29] This model is particularly strong when attorneys can play tit for tat, such as during voir dire and closing arguments.[30]

As the counterpoint to jury selection, where candidates are chosen for their potential capacity to be moved to empathy, evidence is chosen for its persuasiveness. Evidence brings an adjudicative audience close to the experience of pain as it is constructed in an expressive sense. To that end, practitioners must heed the somewhat vague strictures of Rule 403 of the Federal Rules of Evidence, or its equivalent, and take care lest qualities of their evidence render it more prejudicial than probative. Rule 403 requires "balancing the probative value of and need for the evidence against the harm likely to result from its admission."[31] The following section will discuss in what ways Rule 403 places unrealistic limitations on evidence admissibility. It will also explain how, under a socio-anthropological theory of ritual, the emotionally beguiling qualities of the suffering body are thought to have the potential to induce irrationality, necessitating that a rules-based system be imposed to thwart emotive response and preserve logical order.

---

[29] FEIGENSON, *supra* note 2, at 97.

[30] *Id.* (stating that "the adversarial system ensures that jurors will hear competing versions of the case, making it less likely that the plaintiff's version of the case will be accepted without qualification").

[31] FED. R. EVID. 403 advisory committee's note.

### *A. Understanding the Dimensions of Undue Prejudice*

Generally, parties have broad discretion to introduce evidence in personal injury actions.[32] Not surprisingly, forms of evidence that show pain visually, such as medical evidence, photographs, or video, merit special attention. Such documentation does not have to relate to the plaintiff's body, but can also consist of other artifacts from injurious circumstances that gave rise to the pain, such as "seat dislocation, windshield punching, steering wheel collapse and instrument panel dents."[33] But any evidence that brings the trier of fact too close to the experience of an injury — prejudicially close — is likely to be challenged as impermissible.[34] Courts weigh claims that particular evidence has unduly prejudicial power under Rule 403, which addresses the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.[35] Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[36] Rule 403 is the judicial tool of choice in erecting a rational fence around the plaintiff so as to hold within permissible bounds the sentimentalized body and its empathy-inducing vulnerability, effect interpersonal distance between this body and the trier of fact, and insulate the jury from the experience of pain itself.

The constraints of Rule 403 are fascinating in that they correspond directly to concerns that narrative power will induce sympathy and pathos rather than a reasoned assessment of the evidence. Under Rule 403 "prejudice" refers to decisions based either on illegitimate

---

[32] 25 C.J.S. *Damages* § 266 (2006) (stating that "as a broad general rule any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts is admissible").

[33] 5 AM. JUR., *supra* note 16, § 57 (2006).

[34] For instance, courts have found demonstrations or exhibitions of an injured body part inadmissible when they produce cries of pain. *See, e.g.*, Fravel v. Burlington N. R.R., 671 S.W.2d 339, 342 (Mo. Ct. App. 1984) (holding that plaintiff was entitled to show jury his injured leg and restricted mobility). In addition, damage awards arguments that encourage jurors to put themselves in the plaintiff's shoes — so-called "Golden Rule" arguments — are impermissible in most jurisdictions. *See, e.g.*, Marcoux v. Farm Serv. & Supplies, Inc., 290 F. Supp. 2d 457, 463 (S.D.N.Y. 2003) (holding that plaintiff's attorney's remarks were permissible because they invited jury to consider gravity of plaintiff's injuries, and not to substitute sympathy for judgment).

[35] FED. R. EVID. 403.

[36] *Id.*

emotions or bad logic. The Advisory Committee Notes to the Federal Rules of Evidence define "prejudice" as "a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[37] Thus, Rule 403 appears to delineate two types of evidence: evidence that authentically documents an injury and its consequences, and evidence that may authentically document the injury but also induces an inappropriate emotion. Law's task lies in separating the two, admitting the former while either restricting or excluding the latter. A superficial reading of Rule 403 indicates a clear division between bolstering the credibility of a plaintiff's claims and keeping out evidence which only increases sympathy. As "sympathy" is the legal term of art for "empathy," this interpretation appears to be mistaken in assuming that emotion is opposed to reason, and therefore improper.

A more sophisticated understanding of Rule 403 prejudice is possible but is likely to be equally unworkable. Wright and Miller's *Federal Practice and Procedure* treatise comments on the inadequacy of the advisory committee definition, noting that "the emphasis on emotion is regrettable" because "bad logic" can also contribute to prejudice and because "fairness — a concept dripping with emotive content" is also "invoked to bar other forms of sentiment."[38]

---

[37] FED. R. EVID. 403 advisory committee's note. Courts have cited this language. *See, e.g.*, Crawford v. Edmonson, 764 F.2d 479, 484 (7th Cir. 1985) (defining "unfair prejudice"); Gross v. Black & Decker, Inc., 695 F.2d 858, 863 (5th Cir. 1983) (citing Advisory Committee Note to Rule 403 to define "unfair prejudice"); Cohn v. Papke, 655 F.2d 191 (9th Cir. 1981) (defining "unfair prejudice").

[38] 22 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5215 (1995). Wright and Miller state:

> It will be unfortunate indeed if Rule 403 is to be based on the flawed conception of justice as an affair of the head and not of the heart. Most citizens would be appalled to discover that some writers feel that "human feeling and sentiment" are out of place in the courtroom. And what could be more illogical than to suggest that for purposes of Rule 403 hatred and sympathy are to be equated. Fairness is not, as some would have it, a question of "emotion" vs. "reason." Rather it is the yoking of the highest intellect and the noblest emotions in the work of weeding out inhuman logic and infamous sentiments. The object is not to stamp out all feeling but to eliminate "illegitimate emotional appeal."
>
> The conventional opposition of "reason" to "emotion" may well be a false dichotomy used to conceal a preference for some kinds of feelings over others. . . . Just as there is a logical basis for sympathy toward a party, so is there an emotional basis for taking a logical attitude toward his predicament.
>
> One who insists on the primacy of the sentimental component in one situation and not in the other is making an aesthetic judgment that cannot be defended on purely logical grounds.

Therefore, the question is whether prejudice can be defined in a way that does not exclude all emotional responses, but instead excludes only those that are unsupported by the evidence. In attempting to refine the notion of "unfair prejudice" in more apt terms than the emotion-reason dichotomy, Wright and Miller suggest that the phrase refers to whether evidence fosters "illegitimate method of persuasion" that either appeal "to an inappropriate logic" not based on the evidence or "to an undesirable emotion" such as hatred.[39] In order to measure prejudice, Wright and Miller (rather unhelpfully) point the reader to Wigmore's attempt to define "undue prejudice," which asks whether "excessive emotion" operates to the exclusion of logic. Wright and Miller approve of this formulation, asserting that it "recognizes that in some cases it is impossible for the evidence not to evoke horror or sympathy." [40]

The trouble with Wright and Miller's approach is that, while it is easy to understand their assertions in principle, it is difficult to understand how this approach can be incorporated into judicial practice. It is unlikely that a court opinion would specify which vision of emotion its author espouses: emotion that is opposed to logic and so is unreasonable per se, or Wright and Miller's more refined conception of an "undesirable emotion" that is only unreasonable when it flies in the face of the evidence. Moreover, the question of whether something is unduly prejudicial may be circular: emotion is accused of hijacking the interpretation of evidence, but it is evidence that engenders an emotive response in the first place. In other words, if the evidence supports an emotive response, then that response is perceived as legitimate and the evidence is nonprejudicial. But that analysis overlooks the problem that the emotive response itself is aroused by the evidence. This is compounded by the fact that evidence of injury — that form of evidence that is most likely to engender an improper emotive response — is necessary to prove liability, for one cannot be liable for pain if there is no pain to begin with. Thus, evidence and emotion are difficult to tease apart in all cases except those rare instances in which there is little to no evidence of liability to begin with.

In a case in which evidence and emotion are intertwined, the fitness of an appellate court's review of the role of emotion is dependent upon its conception of emotion. If it regards emotion as something that is

---

*Id.*

[39] *Id.*

[40] *Id.*

inherently irrational, then it will not give fair consideration to a jury's (purportedly) emotive response; if it regards emotion as irrational only when unsupported by the evidence, then it will correctly consider the jury's (purportedly) emotive response in light of the evidence. This latter scenario likely represents the vast majority of personal injury cases; because personal injury law is infamous for its contingent fee agreements, it is reasonable to infer that the vast majority of such cases are close calls and not open and shut. Therefore, the judicial product of this vague language is likely to be an oversensitivity to emotive responses due to an unsophisticated understanding of Rule 403's premise, as well as an inconsistent application of Rule 403 itself.

The following section examines two illustrative evidentiary contexts: displays of plaintiffs' bodies, including wounds, prosthetic devices, and the plaintiff's injured appearance in its entirety; and "day in the life" videos.

### *B. Injured Bodies as Dangerous Bodies*

Perhaps the most moving and credible documentary evidence comes from the plaintiff's body, the ultimate evidence of painful visibility.[41] Bodies themselves have a great deal of expressive potential simply because they can be texts in their own right.[42] It is a frequent point of emphasis in *American Jurisprudence* that the plaintiff's appearance cues the jury to the presence or absence of pain, meriting a warning that it is contrary to the plaintiff's interest to come to court so nattily dressed or so made up "as to convey the impression of great vitality and perfect health."[43] Lawyers are especially cautioned that a female plaintiff's efforts to "enhance her appearance artificially should be suppressed."[44] The plaintiff's appearance forces the court to confront three questions: whether the plaintiff herself should be entirely

---

[41] *See, e.g.*, Alliant Hosps., Inc. v. Benham, 105 S.W.3d 473, 477 (Ky. Ct. App. 2003) (finding that father's presentation of child to jury during which child was awake and responsive supported award of general damages for pain and suffering).

[42] For a discussion of the body-as-text in the context of performative sexual orientation behaviors, see KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 12 (1994); Jody Lyneé Madeira, Note, *Law as Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128 (2002); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto in* BODY GUARDS 292, 295 (Julia Epstein & Kristina Straub eds., 1991); Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 J. LESBIAN & GAY STUD. 237, 238 (1994).

[43] 5 AM. JUR., *supra* note 16, § 70.

[44] *Id.*

excluded from the liability stage of the trial; whether the plaintiff is permitted to display injuries or prosthetic devices; and whether actual body parts that have been removed as a result of the injury are relevant.

1. Exclusion of the Injured Plaintiff from the Courtroom

Ideally, the severity of a plaintiff's injuries should not affect jurors' decisions as to causality and liability because it is irrelevant to such determinations, but is relevant only to the assessment of damages.[45] Despite this irrelevancy, at least one experiment has demonstrated a so-called "severity effect."[46] The severity effect refers to a general belief that the more severe the consequences of an act, the more responsibility jurors place on the party who is allegedly responsible. The strength of this effect, however, has been gauged to be weakest on liability judgments,[47] and some mock juror experiments have "failed to replicate the severity effect."[48] A recent study even found that the severity of the plaintiff's injuries prompted mock jurors to attribute a greater percentage of fault to the plaintiff.[49] Thus, while severity does affect attributions of fault, it is not clear whether this bias prejudices the jury against the defendant. Nonetheless, for over a century, defendants have objected to the plaintiff's presence during the liability phase of proceedings on the grounds that it improperly excites jurors' sympathy.

---

[45] FEIGENSON, *supra* note 2, at 64.

[46] *See generally* E. Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73 (1966) (showing how information about extent of accident victim's injuries can affect decision-making about causality and responsibility). In 1966, Walster gave two participant groups two nearly identical scenarios featuring a man who parked his car on a hill which it later rolled down. In the first scenario, the car hit a tree stump; in the second, it hit and injured a person. The second group found the car owner more responsible for the accident; it is this attribution that has been termed the "severity effect." *Id.*

[47] FEIGENSON, *supra* note 2, at 64-65.

[48] Neil Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 599 (1997) (citing Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 1 LAW & SOC. REV. 241 (1968); K. Shaver, *Defense Attribution: Effects of Severity and Relevance on the Responsibility Assigned For an Accident*, 14 J. PERSONALITY & SOC. PSYCHOL. 101 (1970); E. Thomas & M. Parpal, *Liability as a Function of Plaintiff and Defendant Fault*, 53 J. PERSONALITY & SOC. PSYCHOL. 843 (1987)).

[49] *Id.* at 608.

Currently, there is disagreement over whether injured plaintiffs can be excluded from legal proceedings on the grounds of undue prejudice. While two state supreme courts have ruled that state constitutional provisions guaranteeing the right to trial by jury preclude any exclusion, a federal circuit court has sparked another line of case law holding that incompetent plaintiffs who are unable to follow proceedings or assist attorneys at trial may properly be excluded from the liability phase.[50]

The case law on whether personal injury plaintiffs can or should be excluded from proceedings has had an interesting evolution. Early decisions on whether the mere presence of an injured plaintiff unduly prejudiced the jury against the defendant adopted a liberal stance towards a plaintiff's right to be present. An 1897 ruling by the Colorado Supreme Court held that the plaintiff, a railroad employee whose eye was gouged by an iron shard in a work accident, had a right to be present notwithstanding his injury, "and the fact that he was a pitiful looking object certainly did not deprive him of this right."[51] Similarly, the Supreme Court of South Dakota held in 1898 that a plaintiff who was injured after tripping on a sidewalk, and carried into court on a cot, was properly present despite the potential for prejudice.[52] A case in the early twentieth century allowed an injured plaintiff to be present in the courtroom: the Missouri Supreme Court held in somewhat brusque terms in 1921 that the presence of a four-year-old plaintiff with an amputated leg was proper so long as he was not paraded before the jury to gain sympathy:

> Because this plaintiff was too young to testify was no reason for excluding him from the courtroom. He was the plaintiff in the case, and had a right to be in the courtroom. We know of no court which ever excluded the parties to an action from the presence of the jury, and the authorities cited by appellant do not go so far. If they did, we would not follow them.[53]

Nearly twenty years later, in 1945, the Eighth Circuit also held that a child plaintiff under age three who had been struck by a train properly remained in the courtroom despite the defendant's objection, stating that it could find no support for exclusion.[54]

---

[50] Dickson v. Bober, 130 N.W.2d 526, 529 (Minn. 1964).

[51] Denver, Tex. & Ft. Worth R.R. Co. v. Smock, 48 P. 681, 683 (Colo. 1897).

[52] Sherwood v. City of Sioux Falls, 73 N.W. 913, 914 (S.D. 1898).

[53] Bryant v. Kan. City Rys. Co., 228 S.W. 472, 475 (Mo. 1921).

[54] Chi. Great W. Ry. Co. v. Beecher, 150 F.2d 394, 399 (8th Cir.1945).

These early precedents informed the 1952 decision of the Florida Supreme Court in *Florida Greyhound Lines, Inc. v. Jones*, in which a plaintiff injured in an automobile accident was carried into court on a stretcher accompanied by a nurse and hospital attendant.[55] Confronted with the question of whether the trial court properly overruled a defense objection that this action was unduly prejudicial, the court stated that "one who institutes an action is entitled to be present when it is tried."[56] The court stated that it is "a right that should not be tempered by the physical condition of the litigant."[57] The court further commented upon the impropriety of excluding a plaintiff due to his physical condition: "It would be strange, indeed, to promulgate a rule that a plaintiff's right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused."[58] The *Florida Greyhound* decision became an emblematic decision for courts reaching anti-exclusion conclusions.

Judicial willingness to allow any and all injured plaintiffs into the courtroom regardless of age or mode of entry hit a speed bump with the Minnesota Supreme Court's 1964 ruling in *Dickson v. Bober*.[59] In Dickson, the court upheld a trial court's exclusion of a plaintiff who was a "depressing spectacle" and who uttered "hideous and agonizing groans and sounds" on the basis that the plaintiff was unable to testify or comprehend the proceedings and possessed no absolute right to be present at trial so long as his rights were protected by his attorney and guardian.[60] *Purvis v. Inter-County Telephone and Telegraph Co.* followed the *Dickson* decision.[61] In this case a Florida appellate court reversed the trial court's exclusion of the plaintiff on the grounds that he was "argumentative, somewhat irrational and of such mental attitude and physical appearance that the jury might be influenced."[62] Although the *Purvis* court acknowledged that under *Florida Greyhound* the plaintiff had a right to be present, it incorporated the *Dickson* caveat that a plaintiff's right to be present was tied to his ability to

---

[55] 60 So. 2d 396, 397 (Fla. 1952).

[56] *Id.* at 397.

[57] *Id.*

[58] *Id.*

[59] Dickson v. Bober, 130 N.W.2d 526, 528 (Minn. 1964).

[60] *Id.* at 529.

[61] Purvis v. Inter-County Tel. & Tel. Co., 203 So. 2d 508, 516 (Fla. Dist. Ct. App. 1967).

[62] *Id.* at 511 (internal quotation marks omitted).

comprehend proceedings.[63] However, in the 1969 case of *Talcott v. Holl*, a Florida appellate court did not extend the *Dickson* caveat to an exhibition of a brain-damaged, quadriplegic plaintiff on a stretcher, although it relied upon *Florida Greyhound* to support that plaintiff's right to be present during legal proceedings.[64] *Talcott* also held that the plaintiff's exclusion was a matter within the trial court's sound discretion.[65] By 1975, however, the *Dickson* caveat was firmly entrenched in Florida, and plaintiffs had a right to be present absent a showing that they were so incapacitated that they could not understand the proceedings.[66]

Many courts confronted with the exclusion issue began to incorporate the *Dickson* competency caveat into their own opinions. In 1974, the California Supreme Court held that the trial court properly exercised its discretion in excluding a substantially paralyzed seventeen-year-old plaintiff who could barely communicate from all but ten minutes of an unbifurcated trial.[67] Similarly, in 1981, the Arizona Supreme Court upheld the plaintiff's exclusion from the liability phase of a bifurcated trial, where the plaintiff was comatose and required a tracheostomy to breathe, was fed via a feeding tube, and was unable to communicate with his lawyers, on the grounds that the plaintiff's presence would prejudice the jury.[68] The court stated:

> If . . . the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally irrelevant to the liability issue.[69]

The court, however, stated that a plaintiff's exclusion was never proper during the damages phase because the plaintiff's physical condition was the most direct evidence supporting damages awards.[70] The court reasoned that the "bias in the damages phase is grounded on relevant evidence" and so "[a] jury should not decide liability based on the

---

63 *Id.*

64 Talcott v. Holl, 224 So. 2d 420, 421 (Fla. Dist. Ct. App. 1969).

65 *Id.*

66 Freeman v. Rubin, 318 So. 2d 540, 544 (Fla. Dist. Ct. App. 1975).

67 Whitfield v. Roth, 10 Cal. 3d 874, 896 n.27 (1974).

68 Morley v. Superior Court, 638 P.2d 1331 (Ariz. 1981).

69 *Id.* at 1334.

70 *Id.*

severity of the plaintiff's injury, but certainly the jury should award damages based on the severity of the plaintiff's injuries."[71]

Other courts imposed other caveats for plaintiffs' presence. For instance, the District Court for the Eastern District of Pennsylvania held in 1983 that a plaintiff rendered incompetent, spastic, and paraplegic by an auto accident could not be excluded from the courtroom during the liability phase of his trial because "a party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary."[72] The court stated that the plaintiff's behavior had not been disruptive.[73] Not every court employed a caveat: In 1978 a New York appellate court found that the trial court unconstitutionally excluded a paraplegic plaintiff in a wheelchair because the right to trial by jury was guaranteed by the state constitution, stating that "a judicial determination that the physical appearance of a party, which he has not affected, may be the basis for precluding such party from any stage of a trial, is fraught with danger in its implications."[74]

In 1985, the Sixth Circuit decided the landmark case *Helminski v. Ayerst Laboratories*, in which the defense objected on the grounds of undue prejudice after a minor plaintiff with autism and arrested neurological development was called as a witness for five minutes.[75] Finding that neither the Due Process Clause of the Fifth Amendment nor the Seventh Amendment's guarantee of a jury trial granted a civil plaintiff an absolute right to be present, the Sixth Circuit stated, "Consistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver."[76] Thus, a plaintiff who is "presumably healthy" would always be entitled to be present, as would an injured plaintiff, for "a plaintiff's physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings."[77] A plaintiff whose mental condition "renders him unable to comprehend the proceedings or aid counsel," however, may be excluded.[78]

---

[71] *Id.*

[72] Marks v. Mobil Oil Corp., 562 F. Supp. 759, 768 (E.D. Pa. 1983).

[73] *Id.* The court also noted that the testimony of the plaintiff's damaged witnesses had "painted a grimmer picture of the injuries than the actual sight of Marks." *Id.*

[74] Carlisle v. Nassau County, 408 N.Y.S.2d 114, 118 (App. Div. 1978).

[75] 766 F.2d 208 (6th Cir. 1985).

[76] *Id.* at 216-17.

[77] *Id.* at 214-17.

[78] *Id.* at 215.

The Sixth Circuit then enunciated a procedure for exclusion, consisting of a hearing to determine whether the party's presence would "'prevent or substantially impair the jury from performing its duties 'in accordance with [its] instructions and [its] oath.'"[79] The court would observe the injured plaintiff in a pretrial hearing, with the defendant bearing the burden of showing that the plaintiff's mere presence would prejudice the jury.[80] If the defense succeeded in showing prejudice, then the court must consider whether the plaintiff could comprehend the proceedings and assist counsel; if so, he could not be involuntarily excluded.[81] Applying this standard to the facts of *Helminski*, the Sixth Circuit found that the minor plaintiff was improperly excluded because the district court never observed him to determine whether his appearance or behavior would create prejudice.[82] The court did not reverse the decision; however, it found that the plaintiff would have been unable to comprehend the proceedings or aid counsel.[83]

In the years following *Helminski*, three cases either excluded incompetent plaintiffs or upheld the need for the *Helminski* hearing: a California appellate court excluded a minor plaintiff of normal intelligence but who was severely brain damaged, confined to a wheelchair, could not control bodily movements, and could not communicate;[84] a Maryland appellate court excluded a minor plaintiff in a vegetative state;[85] and the First Circuit held that a minor plaintiff with cerebral palsy was improperly excluded because the trial court had not held a *Helminski* hearing, and because the plaintiff's physician could have best demonstrated that the condition was not genetic through an examination of the plaintiff.[86]

Even in the wake of *Helminski*, state courts still held that exclusion was per se improper.[87] In 1996, a New York appellate court held that a severely brain damaged infant plaintiff was properly present during

---

[79] *Id.* at 217-18.

[80] *Id.* (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[81] *Id.* at 218-19.

[82] *Id.*

[83] *Id.*

[84] Province v. Ctr. for Women's Health & Family Birth, 25 Cal. Rptr. 2d 667, 677 (Ct. App. 1993).

[85] Green v. N. Arundel Hosp. Ass'n, 730 A.2d 221, 234-35 (Md. Ct. Spec. App. 1999).

[86] Rubert-Torres v. Hosp. San Pablo, Inc., 205 F.3d 472, 478-80 (1st Cir. 2000).

[87] Jordan *ex rel.* Jordan v. Deery, 778 N.E.2d 1264, 1271 (Ind. 2002); Mason v. Moore, 641 N.Y.S.2d 195, 197 (App. Div. 1996); Cary v. Oneok, Inc., 940 P.2d 201, 203-04 (Okla. 1997).

trial, because "absent an express waiver or unusual circumstances, a party to a civil action is entitled to be present during all stages of the trial."[88] In a 1997 case, the Oklahoma Supreme Court ruled that a severely burned and physically scarred six-year-old plaintiff who had no mental handicap could not be excluded during the liability phase of trial because the "open courts" provision in the Oklahoma Constitution allowed plaintiffs to be present without waiver or extreme circumstances.[89] Similarly, the Indiana Supreme Court ruled in 2002 that the trial court's exclusion of a plaintiff with cerebral palsy who could not talk, made involuntary movements and sounds, walked with braces and a walker, and who may not have been able to understand proceedings was improper under the Indiana Constitution guaranteeing right to trial by jury.[90]

Not surprisingly, practitioners' texts have their own perspective on the implications of an injured plaintiff's presence. Like courts, such authorities are concerned that plaintiff's presence may threaten the maintenance of a proper expressive and emotive distance — but to the detriment of the plaintiff, not the defendant. The plaintiff's tearful response to evidence or the memory of the anguish caused by the pain may serve as the basis for monetary damages.[91] However, *American Jurisprudence* cautions that the disadvantage of such displays is that jurors may become too accustomed to seeing the injury, particularly if it is revolting or repulsive, causing it to lose its dramatic evidentiary effect.[92] Practitioners are thus advised to keep a horribly injured plaintiff out of the courtroom except during opening and closing statements and when the plaintiff is providing testimony so that the jury does not become inured to the plaintiff's appearance. However, "out of sight, out of mind" may not always be the best course: *American Jurisprudence* covers all of its bases by stating that there is a possibility that confronting the jury throughout the trial with a badly injured plaintiff may prevent the jury from banishing the image of the plaintiff from their presence.[93]

It is sobering to realize that there is such a judicial discrepancy as to whether plaintiffs allegedly injured by the defendant are entitled to

---

[88] *Mason*, 641 N.Y.S.2d at 197. The court also stated, "where, as here, the movant relies solely on a stereotypical assumption that a party's disability will prejudice the jury, there are insufficient grounds for excluding that party from the trial." *Id.*

[89] *Cary*, 940 P.2d at 203-04.

[90] *Jordan*, 778 N.E.2d at 1271.

[91] Sears, Roebuck & Co. v. Hartley, 160 F.2d 1019, 1020 (9th Cir. 1947).

[92] 5 AM. JUR., *supra* note 16, § 59 (2006).

[93] *Id.* § 70.

attend all phases of their personal injury trial. The exclusion of the plaintiff is likely to be intertwined with the severity of the injury, because the plaintiff is alleging either that the defendant's conduct is the cause of his severely injured state in its entirety, or that the defendant's conduct had unusually harsh consequences on an excessively vulnerable plaintiff even though the plaintiff may have already been in an injured state (such as a quadriplegic). Admittedly, the sight of a severely injured plaintiff could be very prejudicial for a defendant. However, excluding the plaintiff seems to be too harsh a response in view of what exclusion says about the human worth of an incompetent plaintiff; exclusion treats an incompetent plaintiff like so much rotten meat, whose unpleasantness is best hidden until an exhibition of the level of decomposition is proper.

Given current laws that were promulgated to allow disabled Americans to enjoy so many rights previously denied to them, it is shocking that a plaintiff injured to the point of incompetency would be barred from trial due to the objection of the very person who allegedly put him in that state. The exclusion of such plaintiffs cultivates the sense that they are regarded as "lesser" human beings, that they are nothing more than an eyesore, a sad sack of sub-humanity whose very sight inspires irrationality.[94] It is also evident that the application of *Helminski* leads to an absurd result; it makes little sense to allow a competent paraplegic plaintiff to attend her trial, but to exclude a paraplegic plaintiff whose outward appearance may be identical for all practical purposes to that of the competent paraplegic plaintiff. If the defense is prejudiced to the same degree in either case, then the plaintiff's right to attend should also be identical in each situation. *Helminski* also grants a windfall to defendants who are sued by incompetent plaintiffs, because they do not have to combat the prejudicial effect of the injured plaintiff's presence during the liability phase of the trial. Moreover, the link between sympathy and prejudice is shoddily forged; despite judicial language to the contrary, it is not a sympathetic reaction that is the real prejudicial villain, but a chain of other emotions that follow sympathy, such as

---

[94] The perspective that this article takes is based on the idea that all humans are equal regardless of incompetency and thus deserve equal access to proceedings brought in their name. *See* David G. Owen, *The Moral Foundations of Product Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 446 (1993) ("Ultimately, the final shape of products liability law should be defined by moral values. Among such values, the most fundamental are freedom, including truth and equality, and community, including utility and sharing."); *see also* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 586 (1983); Krent Greenawelt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1184 (1983).

anger, blame, and vengeance, that lead jurors to hold a defendant liable. Thus, the unfortunate judicial willingness to exclude injured plaintiffs on the grounds of incompetency testifies to a judicial hypersensitivity towards jurors' potential sympathetic reaction to disfigurement or handicap.

2. Displays of Injuries, Prosthetic Devices, and Body Parts

The evidentiary capacity of the plaintiff's body is also utilized in exhibitions or demonstrations of the injury and its effects, of prosthetic devices, or of removed body parts. Judicial commentary on these forms of evidence establishes that there is something inappropriately fascinating about a damaged and therefore dangerous body and its extensions of sundered parts — that the body is a source of irrational mystery, emitting an innate powerful force that undermines logic.

In addition, there is a palpable distinction in judicial treatment of such indicia of pain in terms of its relevance. Theoretically, in personal injury litigation, evidence of injury would be overwhelmingly likely to be relevant under the broad guidelines of Federal Rule of Evidence 401 which state that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[95] Some appellate courts reviewing challenges to exhibitions or demonstrations or prosthetic devices on grounds of undue prejudice hold that the objectionable evidence is inadmissible because it does not relate to a matter in dispute, but omit an express determination of relevancy or any reference to Rule 401. Other appellate courts, however, do not read in such a requirement, and allow in evidence whether or not it relates to a matter in dispute.

*a. Injuries*

Though some courts confuse the terms "exhibition" and "demonstration," others distinguish the two, defining exhibitions as "a mere passive act, such as merely exposing an injured limb, etc. to the jury," and demonstrations as overt "[a]cts done by the injured person . . . or . . . acts done by another person, such as a medical expert, directly on or with respect to the plaintiff's body or one of its parts or members."[96] Courts that do distinguish between the two actions

---

[95] FED. R. EVID. 401.

[96] Gray v. L-M Chevrolet Co., 368 S.W.2d 861, 864 (Tex. App. 1963).

construe the harmful effects of an exhibition more liberally than those of a demonstration.[97] Moreover, injuries need not be visible to be exhibited or demonstrated; nonvisible injuries may be ingeniously demonstrated. For instance, when a plaintiff's injury includes brain damage, someone may communicate with the plaintiff in the presence of the jury to demonstrate the extent of the harm.[98] The possibility of demonstrating an injury has facilitated the classification of injuries as "objective" or independently verifiable, or "subjective" or nondemonstrable. Objectivity does not necessarily correlate with visibility; though headaches are subjective, brain damage would be objective, as would the loss of a limb or a shoulder injury that causes a demonstrably limited range of motion.[99] The subjective-objective demarcation is particularly important when determining whether expert testimony is needed before a jury may award damages for future pain and suffering; presumably, the injury must be objectively verified during the trial before it can be assumed that the plaintiff will suffer from it, in the post trial future.[100]

The general rule governing exhibitions or demonstrations of injuries is that "[a] mere demonstration 'of the nature and extent of plaintiff's injuries' is not in and of itself improper or prejudicial in a personal injury suit. The nature and extent of plaintiff's injuries are essential to his proof and necessary for the jury's determination."[101] Whether such evidence is admitted is within the discretion of the trial court,

---

[97] *Id.* For cases holding that exhibitions of an injury are sometimes permissible but that demonstrations are error, see Riepe v. Green, 65 S.W.2d 667, 668 (Mo. Ct. App. 1933); Willis v. City of Browning, 143 S.W. 516, 517 (Mo. Ct. App. 1912).

[98] Ensor v. Wilson, 519 So. 2d 1244, 1257-58 (Ala. 1987); *see also* Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 585-87 (Tex. App. 1997) (holding that it was proper to allow minor plaintiff to demonstrate nature of neurological defects to jury by showing motor skills, ability to perform simple tasks, and communication skills); Heidbreder v. Northampton Twp. Trs., 411 N.E.2d 825, 829 (Oh. Ct. App. 1979) (finding no error in allowing child to demonstrate extent of motor paralysis and ability to communicate and do simple tasks to jury); Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835, 841 (Wash. 1962) (finding no error in allowing minor plaintiff to show extent of mental ability to jury).

[99] Krause Inc. v. Little, 34 P.3d 566, 572 (Nev. 2001); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 546 (Ohio Ct. App. 1999).

[100] *Id.* at 572 (holding that broken bone is closer to objective injury and does not require expert testimony for future damages). Generally, expert testimony is not necessary when the "permanency of an injury which is objective in character may be established by the testimony of laypeople where the injury is exhibited to the jury and its permanency is clearly obvious." 25 C.J.S. *Damages* § 315 (2005).

[101] Fravel v. Burlington N. R.R., 671 S.W.2d 339, 342 (Mo. Ct. App. 1984) (quoting Happy v. Walz, 244 S.W.2d 380, 383 (Mo. Ct. App. 1951)).

although exhibition of the injury is favored because the defendant is alleged to have caused the injury, and so the injury is "highly relevant" and should be seen by jurors "in a dignified manner."[102] Demonstrations are improper, however, when they are responsible for "[e]liciting cries of pain, inducing pitiful attempts at locomotion, or . . . seek to dramatize the plaintiff's injuries in a manner calculated to inflame the jury."[103] For instance, a plaintiff's joints may often not be manipulated if it prompts the plaintiff to exclaim in pain.[104] Prohibited demonstrations include explaining in unnecessary detail the surgical procedures associated with a plaintiff's injury.[105] For instance, the Montana Supreme Court held that it was improper for the plaintiff's attorney to ask defense witnesses to demonstrate with a scalpel how an excision of a "nucleus pulposus" and a laminectory would be performed because there was "no controverted fact issue regarding the performance" of those procedures.[106]

Courts take two different approaches in determining when exhibitions and demonstrations are proper; while some require that the nature of the injury be a disputed issue of fact, others hold it need not be. In a holding illustrating the former perspective, a Montana appellate court reversed and remanded a case on the grounds of undue prejudice after a plaintiff was permitted to demonstrate her ability to walk, stating, "A defendant . . . suffers many unavoidable disadvantages, which makes it only the more necessary to shield him from those which may be avoided. The maimed, the widow, and the orphan draw strongly enough on the hearts of jurymen without affirmative effort to arouse sympathy. Human nature needs no artificial aid in this respect."[107] Similarly, in 1980, an Illinois appellate court found that the trial court did not err in denying the plaintiff's attorney's request to allow the plaintiff to demonstrate what happened with her arm during a doctor's examination, stating that "the allowance of such demonstrations by an injured party is generally frowned upon."[108] Yet in 1993, the Montana Supreme Court declared

---

[102] *Id.*

[103] *Id.*

[104] Landro v. Great N. Ry. Co., 135 N.W. 991, 992 (Minn. 1912) (concerning sacroiliac joint); Cass v. Pac. Mut. Life Ins. Co., 253 N.W. 626, 627 (S.D. 1934) (concerning disability caused by arthritis).

[105] *See* Kickam v. Carter, 314 S.W.2d 902, 907-08 (Mo. 1958); Taylor v. Kansas City S. Ry. Co., 266 S.W.2d 732, 736 (Mo. 1954).

[106] *Taylor*, 266 S.W.2d at 736.

[107] Willis v. City of Browning, 143 S.W. 516, 517 (Mo. Ct. App. 1912).

[108] Hehir v. Bowers, 407 N.E.2d 149, 152 (Ill. App. Ct. 1980).

en banc that "[g]enerally, exhibition of a plaintiff's injury is highly relevant."[109] In addition, several courts, following Wigmore, have held that "as a general rule, a plaintiff's exhibition of his or her injury to the jury in a personal injury action is always proper, unless specific reasons of policy apply to prohibit it."[110] Some even go so far as to hold that "it is common and correct practice to exhibit the wound or injury to the jury, even where there is no dispute as to the fact and nature of the injury."[111]

Indecency often, but not always, constitutes another reason to prevent exhibition of an injury. Some courts are more conservative than others, despite the fact that "only in 'extreme cases' will courts rely on the indecency of the showing to deny the proffer."[112] For example, in 2004, a New York appellate court upheld the trial court's decision to preclude the plaintiff from exhibiting a scar on his hip because the "plaintiff would have had to partially remove his pants to do so" and he had already exhibited scars on his neck and lower back to the jury.[113] Yet, in 1986 the Court of Appeals for the District of Columbia reversed a trial court determination that a plaintiff alleging injury from breast enhancement could not exhibit her breasts to the jury because it would be "embarrassed by viewing," finding that "[t]here was nothing gruesome or inflammatory involved" and the exhibition could have been conducted in a "private anteroom under appropriately controlled circumstances, without a risk for uncalled for indecency."[114]

Courts are also especially cautious with respect to the exhibition of wounds or disfigurement.[115] As one Illinois appellate court held, "The possibility that the demonstration may be unpleasant or gruesome is not determinative, but should be considered and weighed against the possible usefulness to the jury."[116] Exhibitions are most likely to be

---

109 Lester v. Sayles, 850 S.W.2d 858, 870 (Mo. 1993) (en banc).

110 Hillman v. Funderburk, 504 A.2d 596, 599-601 (D.C. 1986) (quoting 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1151 (Chadbourn rev. 1972)).

111 *See* LeMaster v. Chi. Rock Island & Pac. R.R. Co., 343 N.E.2d 65, 84 (Ill. App. Ct. 1976); Burnett v. Caho, 285 N.E.2d 619, 623-24 (Ill. App. Ct. 1972) (citing Minnis v. Friend, 196 N.E. 191 (Ill. 1935)).

112 *Hillman*, 504 A.2d at 599-600.

113 Schou v. Whiteley, 780 N.Y.S.2d 659, 662 (App. Div. 2004).

114 *Hillman*, 504 A.2d at 601.

115 *See, e.g.*, Smith v. Thompson, 142 S.W.2d 70, 74 (Mo. 1940) (holding that permitting demonstration of injuries was not reversible error because no wounds or deformities had been disclosed).

116 Darling v. Charleston Cmty. Mem'l Hosp., 200 N.E.2d 149, 185 (Ill. App. Ct. 1964).

permitted when they "aid the jury in understanding the evidence and assessing damages,"[117] which includes comprehending the "exact nature and extent of the claimed injury."[118] Accordingly, it was not error to exhibit the entire body of a fourteen-year-old boy who had been badly burned by electricity or to show to the jury the healed over stumps of a three-year-old boy to demonstrate that another amputation was necessary because the bone had grown and was pressing against the skin.[119] Similarly, in 1960, the Supreme Court of New Mexico upheld the trial court's denial of the defendant's request to permit the display of severely disfigured plaintiffs with burned-out features who wore glasses, wrappings, and artificial ears.[120] The court allowed the plaintiffs to be present, at times unwrapped, during trial, stating that the trial court had described plaintiffs' injuries as "hideous" during voir dire and the defense attorneys had been permitted to question prospective jurors extensively on sympathy.[121]

While demonstrations eliciting painful cries are usually condemned, they may sometimes be permitted.[122] A defendant who objects to the manner in which a demonstration is carried out must point to specific expressions of pain made by the plaintiff, for courts are unwilling to infer that the plaintiff was in pain during a demonstration absent record evidence. A Montana appellate court overruled a defendant's claim that a plaintiff with a deformed kneecap, tilted hip, restricted movement, and scarring suffered pain when his physician manipulated the leg before the jury, noting that it could not infer that the plaintiff "cried out and grimaced."[123] Similarly, the Montana Supreme Court declared en banc that it was not improper for a mother to demonstrate the physical therapy she performed on her minor daughter absent record evidence that the daughter cried out or grimaced in pain, despite the defendant's assertion that eliciting cries of pain or pitiful attempts at locomotion are condemned.[124]

---

[117] *Hillman*, 504 A.2d at 600.

[118] LeMaster v. Chi. Rock Island & Pac. R.R. Co., 343 N.E.2d 65, 84 (Ill. App. Ct. 1976).

[119] Meeker v. Union Elec. Light & Power Co., 216 S.W. 933, 935 (Mo. 1919); Turnbow v. Kan. City Rys. Co., 211 S.W. 41, 45 (Mo. 1919).

[120] Beal v. S. Union Gas Co., 349 P.2d 337, 343-44 (N.M. 1960).

[121] *Id.*

[122] *See* Meyer v. Johnson, 30 S.W.2d 641, 642 (Mo. Ct. App. 1930) (describing demonstration accompanied by expressions of pain from plaintiff); 5 AM. JUR., *supra* note 16, § 59.

[123] Fravel v. Burlington N. R.R., 671 S.W.2d 339, 343 (Mo. Ct. App. 1984).

[124] Lester v. Sayles, 850 S.W.2d 858, 870 (Mo. 1993).

*b. Prosthetic Devices and Sundered Body Parts*

Demonstrations of bodies extend to bodily accoutrements. Appliances which the plaintiff requires to cope with his injury, such as artificial limbs and glass eyes, may also substantiate suffering.[125] What is fascinating is that, perhaps because these items are extensions of a damaged body, they acquire its mysteries. There is an attribute of these devices, some innate, powerful force, that induces an evidentiary concern that the display of such objects will induce irrationality in onlookers. An *American Law Reports* annotation, for instance, notes that such items may be exhibited so long as the sight of them is not a "mere histrionic display of no relevancy or instructiveness and tends to inflame and prejudice the jury" against the defendant.[126] Prostheses are thus invoked like a spell, and the reason behind their invocation determines admissibility. Proper rationales evince a concern for supporting the plaintiff's claim, promoting identification with the plaintiff. This explains why such devices have long been admissible as evidence of course of treatment and of additional pain and inconvenience.[127] And it also explains exceptions to that rule, though only a few courts draw distinctions between exhibitions of the appliances and demonstrations of how they connect to a body and are used by that body, as if the appliance turns indecent when attached to the flesh. In *Brown v. Billy Marlar Chevrolet, Inc.*, for instance, the Alabama Supreme Court held that the plaintiff was permitted to show his artificial leg to the jury but was not permitted to demonstrate how it was connected to his body or how it functioned.[128] Similarly, the removal of prosthetic devices is improper when it causes the plaintiff to cry out in pain or discomfort, and a physician may not remove a plaintiff's bandages when the plaintiff cries out.[129] One Illinois appellate court has upheld the removal of a plaintiff's neck brace,

---

[125] Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958).

[126] W. C. Crais III, Annotation, *Admissibility in Evidence of Braces, Crutches, or Other Prosthetic or Orthopedic Devices Used by Injured Party*, 83 A.L.R.2d 1271, § 2 (1962).

[127] *See, e.g.*, Hampton v. Rautenstrauch, 338 S.W.2d 105 (Mo. 1960) (exhibiting Thomas collar, back brace, and pelvic traction brace allowable because devices were necessary to plaintiff's course of treatment and caused her additional discomfort, pain, and inconvenience); Glowacki v. Holste, 295 S.W.2d 135 (Mo. 1956) (permitting jury to view leg brace that plaintiff wore for five months).

[128] Brown v. Billy Marlar Chevrolet, Inc., 381 So. 2d 191, 193-94 (Ala. 1980) (allowing plaintiff to show artificial leg to jury by rolling up pants leg, but not permitting plaintiff to demonstrate how artificial limb was attached to body or how it functioned).

[129] Browne v. Creek, 209 S.W.2d 900, 906 (Mo. 1948).

however, to demonstrate the need for the brace and the plaintiff's pain in having it removed.[130]

Most courts adhere to the rule of probity, and consistently hold that the plaintiff may remove a device, including a glass eye, to demonstrate the effect of the injury in court under the rationale that jurors are entitled to see the wound and the routines forced upon the plaintiff by the injury, even if the sight is gruesome.[131] Here, documentation is seen as eclipsing the potential for improper pathos. But some exhibitions have been permitted to become quite dramatic. In one especially curious unreported case, *Jeffers v. City of San Francisco*, the defendant streetcar company that owned the car that had caused the loss of the plaintiff's leg introduced testimony concerning the advances made in modern prostheses. The plaintiff's attorney, however, kept on the counsel table throughout trial a large package wrapped in paper similar to that used by butchers to wrap meat, and during closing argument unwrapped the package to reveal an artificial leg which he allowed jurors to handle, asking them to "feel the warm blood coursing through its veins" and enjoy "the fine texture of its skin."[132] This technique netted a $100,000 jury verdict for the plaintiff that was never appealed.

Case law addressing the admissibility of body parts is predictably less voluminous than that addressing plaintiff exclusion, demonstrations, or prosthetic devices. Surprisingly, though body parts have a much closer connection to the dangerous body of the plaintiff than prosthetic devices, judicial language addressing the prejudicial potential of body parts does not provide as clear a window into how the judicial mind characterizes bodies and their potential for prejudice. What precedent there is somewhat dryly establishes that body parts that have been removed from the plaintiff's body can only be exhibited to the jury if there is some "disputed or controverted fact in issue."[133]

---

[130] Howard v. Gulf, Mobile & Ohio Ry. Co., 142 N.E.2d 825, 828 (Ill. App. Ct. 1957).

[131] *See, e.g.*, Le Master v. Chi. Rock Island & Pac. Ry. Co., 343 N.E.2d 65, 83 (Ill. App. Ct. 1976) (removal of artificial limb); Burnett v. Caho, 285 N.E.2d 619, 624 (Ill. App. Ct. 1972) (removal of glass eye); Shell Petroleum Corp. v. Perrin, 64 P.2d 310 (Okla. 1936) (same); Bowerman v. Columbia Gorge Motor Coach Sys., Inc., 284 P. 579, 581 (Or. 1930) (same); Davis v. Christmas, 248 S.W. 126, 127 (Tex. App. 1923) (same).

[132] Melvin Belli, Address at the 46th Annual Meeting of the Mississippi State Bar: Demonstrative Evidence and the Adequate Award (June 2, 1951) *in* 22 MISS. L.J. 263, 299 (1951) (describing Belli's trying of *Jeffers* for plaintiff).

[133] *See* Harper v. Bolton, 124 S.E.2d 54, 56 (S.C. 1962).

Thus, the South Carolina Supreme Court determined in 1962 that the plaintiff's removed eye could not be admitted into evidence because there was no issue as to its removal.[134] Similarly, a plaintiff's preserved, amputated hand offered into evidence only to show damages and pain and suffering was held to be properly excluded,[135] and the admittance into evidence of the mangled foot of a small child run over by an electric car, for the purpose of showing the size of the child at the time of the accident, was held to be error where the defendant admitted the foot that had been amputated and the child was present at trial.[136] However, it was not error to admit into evidence skull bone fragments in a case in which there was a controversy over the character of the plaintiff's head injury.[137] A plaintiff's amputated toes were held to be properly exhibited to the jury since it was presumably made for the purpose of "proving some disputed fact material to the issue."[138]

Together, these authorities show that support for pain expressed cannot be allowed to approximate too closely the painful experience itself, but in most cases must maintain a distance from the suffering body, as if evidence's proximity to the body somehow reduces emotive distance as well. Accordingly, such exhibitions become too prejudicial when their connections to the presence of embodied pain become palpable and obvious. A Texas appellate court actively enforced such a distance by stating that a "lady juror" could not palpate the muscle and a sunken hollow on the plaintiff's back because this would have constituted an objectionable demonstration, exceeding "a mere passive presentation" of injury.[139] In contrast, exhibitions lose their prejudicial qualities when used to establish pain's absence, and so demonstrations of the plaintiff's lack of sensitivity to pain and discomfort are most often permissible, perhaps because a lack of pain is not so likely to cause an empathic reaction. Thus, a plaintiff may be pricked with a pin to demonstrate lack of sensitivity to touch,[140] and

---

134 *Id.*

135 Evans v. Chi., Milkaukee & St. Paul Ry. Co., 158 N.W. 335, 336 (Minn. 1916).

136 Rost v. Brooklyn Heights Ry. Co., 41 N.Y.S. 1069, 1070, 1072 (N.Y. App. Div. 1896).

137 Johnston v. Selfe, 251 N.W. 525, 528 (Minn., 1933).

138 Nebonne v. Concord R.R., 44 A. 521 (N.H. 1895).

139 Gray v. L-M Chevrolet Co., 368 S.W.2d 861, 865 (Tex. App. 1963).

140 *See* Osborne v. City of Detroit, 32 F. 36, 37 (C.C.E.D. Mich. 1886) (applying Michigan law), *rev'd on other* grounds, City of Detroit v. Osborne, 135 U.S. 492 (1890); Stephens v. Eliot, 92 P. 45, 47 (Mont. 1907) (applying Montana law); Anthony v. Pub. Transit Co., 130 A. 895, 896 (N.J. 1925) (applying New Jersey law); Wilson & Co. v. Campbell, 157 P.2d 465, 466 (Okla. 1945) (applying Oklahoma

an attorney has been allowed to thrust a knife at the plaintiff's eye to demonstrate blindness.[141]

*c. Bodies and the Power of Firsthand Observation*

Significantly, the power and drama that bodily displays can bring to trial can also bear upon appellate evaluations of the sufficiency of evidence, as in cases involving challenges that a jury verdict was excessive. Such challenges require an appellate court to assess the plaintiff's condition during court appearances, prompting appellate deference to the trial court's conclusions due to the appellate court's inability to see the plaintiff as the trial court did. In one remarkable asbestos case, the strength of this bodily presence led the Southern District of New York to assert a claim of right over the Second Circuit as to its ability to more accurately determine whether a jury verdict was excessive. The crux of the district court's reasoning concerned its firsthand observation of the plaintiff's rapid and advanced deterioration from mesothelioma:

> [N]ot only did this Court — and the jury — have the opportunity to observe [plaintiff] during his courtroom appearances, but because of photographic evidence, as well as his videotape testimony recorded months before the trial, the Court — and the jury — saw the devastating deterioration of his condition over time. This, the Second Circuit did not see.
>
> For example, while the "cold paper record" reflected that [plaintiff's] "circulatory system was impaired, causing painful and disfiguring swelling of his head and neck," . . . the Court and jury actually saw this swelling in the context of a body that had recently lost 38 pounds. Also, the Second Circuit did not see [plaintiff's] profuse sweating caused by the air conditioning that provided relief to everyone else in the courtroom. Likewise, it did not see [plaintiff's] futile attempts to walk up to the witness stand without the assistance of a cane.
>
> . . . In sharp contrast, the Court in the instant manner is able to compare [plaintiff] with three other mesothelioma

law); Mo. Kan. & Tex. Ry. Co. v. Lynch, 90 S.W. 511, 546 (Tex. Civ. App. 1905) (applying Texas law).

[141] *See* Del Monte Banana Co. v. Chacon, 466 So. 2d 1167, 1175 (Fla. Dist. Ct. App. 1985).

cases and the other asbestos plaintiffs over whose cases it has presided.[142]

3. Video: Dangerous Bodies in Motion

The dangerous contours of an injured body attain a heightened prejudicial capacity in "day in the life" videos, which transport the jury outside of the sedate realm of the courtroom directly into the plaintiff's world. Case law has recognized that day in the life videos are demonstrative evidence similar to a photograph.[143] The prejudicial dimensions of a photograph may be more familiar than those of day in the life videos; in criminal and civil litigation, attorneys are often cautioned of the potentially prejudicial power of color to bring injuries to life graphically, and a prepared lawyer always has black and white prints available should the court determine that color prints inflame the jury.[144] But even colorless x-rays can invoke the jury's sympathy; the New York Superior Court noted in a 2004 case that x-rays of a rod that had entered and embedded itself in the plaintiff's body encouraged the jury to award a "huge verdict" that was intended to "compensate the plaintiff not only for pain and suffering he sustained but the grief experienced by the impact of the steel rod entering his body."[145] Here too, then, must the plaintiff's body be bound into "safe" images.

Unlike photographs, however, bodies captured on camera move, live, and breathe in habitats far removed from the practiced, interpersonal distance cultivated by the courtroom. We bring cultural expectations to the act of watching a video; our technological awareness encourages us to rely upon the medium of film and video in pursuit of novelty, as a means of encountering the unfamiliar. We know, therefore, that the video camera can satisfy our natural, human desire to know the body in an intimate but not in an overtly erotic sense, and that it is possible to get to know a character through witnessing that character interact with others on tape. What we view on video is a "sentimentalized body" in action, a body which is simultaneously a sign of difference and a summons of empathy.[146] A

---

[142] *In re* Joint E. and S. Dist. Asbestos Litig., 9 F. Supp. 2d 307, 308 (S.D.N.Y. 1998).

[143] *E.g.*, Cisarik v. Palos Cmty. Hosp., 579 N.E.2d 873, 874 (Ill. 1991).

[144] *Id.*

[145] *See* Miraglia v. H & L Holding Corp., No. 25228/00 (N.Y. Sup. Ct. Sept. 28, 2004).

[146] ALAN HYDE, BODIES OF LAW 192-93 (1997).

body in pain is by its nature a different body, distinct from a population that by and large does not suffer from pain. Because of the horrible reason for its difference, the body invites others to attempt to recognize and comprehend that pain. The sentimentalized body thus sparks pangs of empathy, allowing pain expressed to temporarily overcome interpersonal discontinuities.

Because it brings us into deeper intimacy with the suffering body, it is easy to see how a day in the life video can be an even more powerful evidentiary tool than color photographs, documenting as it does the injured plaintiff in motion accomplishing daily activities, and thus how it is potentially more prejudicial due to its capacity for conveying the body's expressive activity and behaviors.[147] Such behaviors include metalinguistic expressions; in *Thomas v. C.G. Tate Construction Co.*, for example, the District Court for the District of Columbia held that a twenty-seven minute video of the plaintiff moaning and grimacing in pain during physical therapy was too prejudicial to be shown.[148] Day in the life videos can also incorporate communicative behaviors, such as displays of affection, that are held to be unduly prejudicial even if they are routine activities. The District Court of Alaska held in 1977 that portions of a video showing the plaintiff hugging his daughter and placing a cigarette in the mouth of his quadriplegic brother served "little purpose other than to create sympathy," determining that other scenes showing him "loading a gun while not actually hunting, and operating a fishing reel while not actually fishing" had greater probative value, and that scenes showing the plaintiff performing clinical tests were the most probative.[149]

The nature of the prejudicial potential of a day in the life video is also more subtle than that of color photographs. Thus, *American Jurisprudence* warns that such a video must never be seen as partial, and advises practitioners to take care to produce the video in a demonstrably objective matter, so that the final product truly and accurately depicts elements of the plaintiff's life — as if the camera's presence adds nothing to allegedly routine behavior, and as if the act of filming could be accomplished without adding to or modifying the expressive context of such behavior. Again, it is as if the very sight of

---

[147] *See* Thomas v. C. G. Tate Constr. Co., Inc., 465 F. Supp. 566, 568-69 (D.C. Cir. 1979) (holding that 19 color photographs of plaintiff in early states of recovery from burn injuries were admissible, but that probative value of 27 minute video of plaintiff moaning and grimacing in pain during physical therapy session was outweighed by danger of unfair prejudice to jury).

[148] *Id.* at 570-71.

[149] Grimes v. Mut. Liab. Ins. Co. of Wis., 73 F.R.D. 607, 609-10 (D. Alaska 1977).

the injured body contains a powerful and captivating allure. Attorneys are also advised to avoid certain techniques known to elicit emotional reactions from viewers. Zooming in on the plaintiff during a particular scene can bring viewers closer; altering the way a subject is lighted can confer importance on a subject or create the illusion of a wasted or sickly subject; and editing can distort recorded events by juxtaposing two unrelated segments of video.[150] Because the day in the life video can be a source of continuity, it is especially vulnerable to attack under Rule 403; if defense counsel succeeds in having segments of the video excluded from evidence, its narrative continuity can be spoiled by "hav[ing] so many small portions excluded that the final product admissible contains information so disjointed as to negate the producer's intended effect."[151]

Evidentiary requirements purport to ensure the accuracy of day in the life videos by requiring practitioners to lay a foundation for such documentary evidence prior to its admission.[152] To combat the subtlety of this potential prejudice, however, courts impose a more complicated authentication process. However, it is readily apparent that even as courts recognize the potential prejudice of such videos, they still are willing to accord such videos objective status as evidence captured by a neutral observing eye. Practitioners' texts, however, have a more sophisticated view of such materials, recognizing that day in the life videos most often fall short as truly documentary evidence because they can "rarely be presented as the plaintiff's actual or even typical day" but at most can only strive to be a "fair and accurate representation."[153] Authentication of such evidence is shorthand for verifying that it is objective — that is, requiring "identification of the persons, objects or places pictured, proof that the film is a true and accurate representation, and evidence as to the circumstances of taking, developing, and projection" that can "be provided by the testimony of the photographer or any person having sufficient knowledge."[154] Assuming that they reflect activities routinely performed by the plaintiff, videos are likely to be admitted into evidence if they are filmed by a professional using a camera in good mechanical condition, if "the material filmed was not rehearsed," if

---

150 40 AM. JUR. *Trials* 249 §§ 58-59 (2006).

151 *Id.* § 48.

152 *Id.* For instance, lawyers are advised to rely upon the producer's testimony to lay a foundation for its admissibility to establish that the situations shown have been filmed as the producer found them, without attempts to direct the action. *Id.* § 35.

153 *Id.* § 1.

154 *See Grimes*, 73 F.R.D. at 609-10.

"no special camera effects were used," if footage was not edited, and if "the film accurately portrays what he personally observed while making the film."[155]

Despite this potential, however, courts still find that "day in the life" videos are the most effective way of demonstrating the everyday problems that a plaintiff with a particular injury must overcome, as well as of "explain[ing] to the jury the extent of the assistance and medical attention required as a result of" the injury.[156] Such videos offer evidence of a particularly intimate nature, exposing jurors to the plaintiff as a person and a suffering body, bringing them into direct confrontation with the pain and its routine experience.[157] Practitioners are therefore advised to unlock the great expressive potential of the film medium because it lends a demonstrable continuity to the plaintiff's case "which helps achieve the captivating effect of the story and the medium."[158]

### *C. Judicial Assessments of Undue Prejudice as Restrictive Rituals*

Having documented the restrictions that courts place upon the plaintiff's body, upon bodily evidence, and upon videos that purport to document those bodies in the context of everyday activity, it is possible to address the implications of such constraints. Applying a socio-anthropological theory of ritual, such as that enunciated by Mary Douglas in *Purity and Danger*, adds insight into the emotionally beguiling qualities of bodies that have the potential to induce irrationality.

Evidentiary rules are windows into the philosophical underpinnings of the law, in particular its reliance upon reason. Ideally, jury verdicts reflect consensus, a unity of reasoned experience, for "by their means, symbolic patterns are worked out and publicly displayed," and "within these patterns disparate elements are related and disparate experience given meaning."[159] But what is the need for an ordered system of rules, absent a potential for disorder? Rituals are ways of ordering experience, placing restrictions upon some categories of objects to facilitate the interpretation or utilization of others. Like rituals, evidentiary rules "recognize[] the potency of disorder" and evolve to

---

155 *See id.*

156 Jones v. City of Los Angeles, 24 Cal. Rptr. 2d 528, 534 (Ct. App. 1993).

157 *See Grimes*, 73 F.R.D. at 609-10.

158 40 AM. JUR., *supra* note 150, § 48.

159 MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 3 (Routledge Classic ed. 2002).

erect boundaries around dangerous elements so as to keep them at a safe and predictable distance.[160] Rules of evidence become rites when they constrain or exclude altogether that which threatens reasoned decision making. In the context of Rule 403, for instance, courts must determine what is unduly prejudicial, what threatens to taint or has tainted the legitimacy of ensuing legal proceedings. That which does not fit within the bounds of legal custom or precedent is held to be a proper ritual exclusion. Thus, evidentiary "ritual provides a frame" for how to reasonably evaluate a legal claim.[161]

A function of ritual is that it formulates experience in the sense that "it can permit knowledge of what would otherwise not be known at all," and thus as a logical corollary can also limit forms of knowledge which would otherwise be relevant.[162] As evidentiary gatekeeper, the judiciary shapes the interpretation of parties' arguments, for these acts of "framing and boxing limit experience, shut in desired themes or shut out intruding ones."[163] Evidence challenged as prejudicial becomes charged with a symbolic potential that emphasizes those attributes which may necessitate exclusion.

Regulation of prejudicial materials under Rule 403 is essential when a party asks a court to adjudicate the presence and implications of pain. Adjudicating pain embodied as a physical sensation requires us to "venture into the disordered regions of the mind," apparently beyond what is objectively verifiable.[164] There is a legal perception that reasoned deliberation reflects forethought and is the product of an outline or strategy, whereas emotive response is not, and that accordingly what is rational has form and what is emotional is formless. In law, rational form is perceived to have more substance and is thus allotted more value than emotional formlessness. This allocation of value, however, is an allocation of judicial and therefore evidentiary priorities and not an assessment of power; to say that the "formless" is devalued is not to say that it is powerless, for "there is a power in the forms and other power in the inarticulate area, margins, confused lines, and beyond the external boundaries."[165] In fact, the power that is accorded to an emotive response is formidable.

Because reason must always control the judicial result, the power of what is formless is somehow dangerous, threatening to undermine or

---

160 *Id.* at 117.

161 *Id.* at 78.

162 *Id.* at 79.

163 *Id.* at 78.

164 *Id.* at 118.

165 *Id.* at 122.

pollute what is rational. The "contrast between form and surrounding non-form accounts for the distribution of symbolic and psychic powers: external symbolism upholds the explicit social structure, and internal, unformed psychic powers threaten it from non-structure."[166] Therefore, systems like the rules of evidence are needed so as to effectively police the pollutive threat of formlessness. In policing such threats, the dichotomy between form and formlessness is exploited and reinforced: "[T]he articulate, conscious points in the social structure are armed with articulate, conscious powers to protect the system; the inarticulate, unstructured areas emanate unconscious powers which provoke others to demand that ambiguity be reduced."[167] For these reasons, pollution must be identified, which in turn gives rise to a need to "provide instructions for manipulating it."[168] A party's rule-governed objection to evidence as unduly prejudicial, therefore, is "an accusation [that] is itself a weapon for clarifying and strengthening the structure. It enables guilt to be pinned on the source of confusion and ambiguity."[169] Appellate rulings on whether a lower court's assessment of prejudice was proper reflect the way in which evidentiary rulings as pollution theories uphold a code of reason, "determining *post hoc* whether infraction has taken place, or not."[170]

It is against the backdrop of the divide between rational form and emotional formlessness that Rule 403 restrictions on prejudicial material require judicial analysis of the presence of or physical evidence from a person who asserts sickness or injury. In personal injury litigation, injured plaintiffs are seen simultaneously as persons and as reactive currency that may be spent in rational or emotive transactions. Such currency is precious, however, and according to the rule of law it is crucial that jurors save their currency to spend in rational deliberation. Injury is a realm of purportedly private meaning and physical sensation, a state from which one must either recover or succumb, heal or perish.[171] Situated between the presence of health

---

166 *Id.* at 124.

167 *Id.* at 127.

168 *Id.* at 140.

169 *Id.* at 133.

170 *Id.* at 165.

171 Though commonly thought to be an interior and private experience, the sensation of pain is actually public, as Wittgenstein's refutation of Cartesian dualism illustrates. *See* Jody Lyneé Madeira, *Recognizing Odysseus' Scar: Reconceptualizing Pain and Its Empathic Role in Civil Adjudication*, 34 FLA. ST. U. L. REV. (forthcoming Nov. 2006).

and the absence of death, the injured state is ambiguous, transitional, and therefore dangerous, for "danger lies in transitional states, simply because transition is neither one state nor the next, it is undefinable."[172] The injured state is also socially unacceptable in the sense that the healing process may be unresolved, and legally unacceptable in the sense that it has transformative and reactive potential beyond rationality. Either way, one who is injured journeys from one physical state to another, and so in a ritual sense "is himself in danger and emanates danger to others."[173] The liminality of personal injury plaintiffs is particularly heightened because their bodies and behaviors are subjected to scrutiny for purposes of judgment, a process for characterizing their injuries and the implications of those injuries. Significantly, when an injured plaintiff is subjected to judicial scrutiny, he is either still in the liminal state of injury or has moved beyond it into a healthy or deceased state, but is still somehow scarred by it. This liminality and its accompanying dangers are controlled by rituals that outline how the examination of injury is to take place and which signs of injury are proper subjects of scrutiny.[174]

## III. CONSTRAINED EMPATHY AND ASSESSMENT OF DAMAGES

The end of the liability phase of a personal injury trial does not mark the end of judicial concern over prejudice. Rather, this preoccupation assumes prominence in an expressive context instead of an evidentiary one, regulating the types of damages arguments that plaintiffs can make to juries as well as the propriety of jurors' responses to such arguments. It is at this stage of the trial that the judicial abhorrence of sympathy as a ground for substantive decision making, as evidenced by Rule 403's restrictions on unduly prejudicial evidence and by restrictions on damage arguments that ask plaintiffs to put themselves in the plaintiffs' shoes, clashes with the judicial willingness to allow attorneys to filter juror candidates in voir dire on the basis of their perceived likelihood of identifying with the plaintiff under the guise of the adversarial model of litigation. Courts are willing to let capacity for sympathy be a factor in substantive decision making during that preliminary stage of the trial, but they foreclose such an emotive response not only through Rule 403 but also through constraints on "Golden Rule" damages arguments and use of vaguely-

---

[172] DOUGLAS, *supra* note 159, at 119.

[173] *Id.*

[174] *Id.*

defined "outside evidence" during damage assessments. If jurors' experience is part of the evidence at trial because they were chosen in part on the basis of their similarity to the plaintiff during voir dire, how can we now expect them to somehow set aside the emotive consequences of that similarity? Moreover, what can we conclude from this apparent judicial wavering as to the propriety of an emotive response towards a personal injury plaintiff?

### *A. A Damages Award as an Empathic Response*

An award of damages constitutes material evidence of the human response motivated by the successful construction and expression of another's pain and suffering. Although expressive constructions of pain optimally produce empathic engagement, their ultimate goal is not emotive but economic. Adjudicators turn just pain into just gain, depriving another of property upon an articulated understanding of the painful experience. Dollars are perceived to drive healing in paying for needed medical treatment, in compensating the plaintiff for more direct economic harms suffered from the injury, and in signifying recognizing the nature and extent of the suffering. At this stage of the personal injury trial, jurors are invited into the pain-racked body and allowed to contribute a protective layer of skin that smoothes over and conceals a wound, and potentially heals it as well, closing to the extent possible the rent in the sentient body.

A damage award thus imputes active meaning to pain and suffering, demonstrating that the meaning of pain lies not only in constructing and expressing it but in acting upon it. In awarding damages, the jury ceases to interrogate the plaintiff, but is moved by the plaintiff's pain and suffering to question themselves, to measure their own responses and the implications of these self-perceptions. Damages celebrate the successful expression of pain by composing an appropriate ending for it. As vessels of interpersonal meaning, damage awards render concrete pain's subjective dimensions in providing material evidence of suffering. But damages are compensation for pain, and there is always a fundamental disconnect between dollars and suffering; applying an economic bandage can never literally turn back the clock on an injury. Thus, *American Jurisprudence* emphasizes that jury instructions in personal injury trials must convey that the injuries are being compensated, and not cured, relegating the jury's role from interpersonal intimates to bodily appraisers, a context which invites

the related economic concepts of price and worth.[175] Nonetheless, as a narrative response, a jury verdict not only talks but walks, because jurors actively participate in its expressive creation. When a jury elects to award damages, they have already labored to apprehend another's pain — to literally perceive and arrest it — and so have long since embarked upon a journey in which empathic feeling surmounts the interpersonal distance separating them from the suffering plaintiff.

The investiture of meaning into painful narrative does not occur as a matter of course; pain expressed does not entail human connectedness in and of itself, but may certainly facilitate connectedness. The compensation of pain demonstrates that this connectedness has been achieved. Empathy is never accidental but is always a matter of orchestration, such as when a talented author moves the reader of a powerful literary work to empathize with the protagonist's pain. Damage arguments, then, like certain literary works, "take[] as [their] main social function an extended meditation on human pain and suffering."[176]

### *B. The Valuation of Pain*

Damage awards may be seen as a reflection of the legal propriety of a jury's empathic relationship with the plaintiff. If the damage award fits the injury, then the jury acted within the scope of its authority in forming appropriate conclusions based on the evidence or proper emotive responses. Conversely, if the damage award is too high, then appellate courts conclude the jury formed inappropriate conclusions outside the evidence on the basis of improper emotive responses. How do courts incorporate rationality into attempts to constrain the types of appeals that plaintiffs' damage arguments may make?

First and foremost, damages must always be "reasonable." Reasonable compensation is defined as "compensation that would make a plaintiff whole, as if he or she had never suffered the injury."[177] This wholeness is of course a fiction, and theories of compensation do reflect an awareness that pain is somehow different from other legal injuries. An economic award, like a narrative, is experientially incomplete; while it possesses curative qualities, it cannot in itself

---

[175] 5 AM. JUR., *supra* note 16, § 95; *see also* Herb v. Hallowell, 154 A. 582, 584 (Pa. 1931) (stating that there was no appreciable difference between terms "compensation," "price," or "worth" as used in jury instructions).

[176] DAVID B. MORRIS, THE CULTURE OF PAIN 46 (1991).

[177] *In re* Joint E. and S. Dist. Asbestos Litigation, 9 F. Supp. 2d 307, 311 (S.D.N.Y. 1998).

alleviate pain. Moreover, the reasonableness requirement does not function in the context of personal injury law as it does in other contexts, such as contract law. As *American Jurisprudence* emphasizes, "[p]ain and suffering are not like 'loss of bargain'" in the sense that "the money awarded cannot really compensate or be equivalent to loss of 'Y,'" that "specific performance cannot be had."[178] Nor is life "a stock, car, home, or other such item bought and sold in some marketplace."[179] Pain is a detriment for which there can only be "an arbitrary allowance, and not a process of measurement" more precise than reasonableness.[180] If anything, pain has an intangible value, as its experience seems to rob plaintiffs of something priceless. The author of one *American Jurisprudence* article on pain and suffering urges that "most would consider it more valuable [than 'possessions that can be bought and sold'], even though its value is not easily calculated in dollars" and thus that "money should be given the victim in an attempt to counteract his loss of something good."[181] Ultimately, however, courts are all too aware that "recovery for noneconomic losses such as pain and suffering . . . rests on the legal fiction that money damages can compensate for a victim's injury," and "accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong" because "a monetary award may provide a measure of solace for the condition created."[182] The reasonableness requirement is not unworkable, for jury studies indicate that juries may be less responsive to pain and suffering than is popularly supposed, and are likely to be suspicious when the damages do not "add up."[183]

This is not to say that certain characteristics of pain render it in some sense quantifiable. The degree of pain may be gauged by the quantity of pain-deadening medication needed to obtain relief.[184] But such attempts to quantify pain can only be fuzzy at best. For instance, degrees of pain have been ranked for purposes of disability evaluation into minimal, slight, moderate, and severe pain, with minimal pain

---

178 5 AM. JUR., *supra* note 16, § 30.

179 Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 578 (Ct. App. 1998).

180 CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88, at 318-19 (1935).

181 5 AM. JUR., *supra* note 16, § 30.

182 McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989).

183 Harry Kalven, Jr., *The Jury, the Law, and the Personal Damage Award*, 19 OHIO ST. L.J. 158, 170 (1958).

184 5 AM. JUR., *supra* note 16, § 30.

constituting a "mere annoyance that causes no handicap in the performance of a particular activity," and severe pain precluding the plaintiff from engaging in an activity altogether.[185] Or lawyers may defer in the first instance to medical professionals; pain can be detected by using the body's systems as a cipher.[186] The medical profession has evolved any number of specialized tests, including the Illness Behavior Questionnaire, or IBQ, which measures hypochondria, somatic concerns, and denial,[187] or the McGill Pain Questionnaire, which analyzes verbal pain behaviors,[188] and nonverbal responses can be evaluated by observation of behaviors such as limping, grimacing, and posture.[189] Valuing pain is especially daunting with respect to claims of mental suffering. Fright, shock, embarrassment, mental distress, and other factors are properly classified as pain and suffering but are certainly not as immediately verifiable as physical injury. There may not even be costs incurred from treatment, such as therapy expenses, from which to calculate an award for someone who experiences mental suffering as a result of physical injury, for which a plaintiff will likely incur medical expenses. Sometimes, all an advocate can do is emphasize the conscious suffering of pain.[190] *American Jurisprudence* underscores the importance of this, for a lack of conscious suffering may be used to deny the presence of physical pain, as in defense strategies in wrongful death actions that argue that a suffering body was in such severe shock

---

185 *Id.* § 34.

186 One may inquire into whether the sufferer exhibits pallor, sweating, gooseflesh, dilated pupils, a rise in blood pressure, nausea, vomiting, hypotension, weak muscles, mental confusion, blood in the urine, an increase in temperature, increased respiratory rate and accompanying decrease in respiratory volume, cutaneous tenderness, or muscular spasms. *Id.* § 13.

187 ISSY PILOWSKY & NEIL SPENCE, MANUAL FOR THE ILLNESS BEHAVIOR QUESTIONNAIRE (IBQ) (3d ed. 1994).

188 Ronald Melazck, *The McGill Pain Questionnaire: Major Properties and Scoring Methods*, 1 PAIN 277, 278 (1975).

189 *See, e.g.*, Francis J. Keefe & Robert W. Hill, *An Objective Approach to Quantifying Pain Behavior and Gait Patterns in Low Back Pain Patients*, 21 PAIN 153 (1985) (stating that nonverbal behaviors can provide evidence of pain).

190 Such consciousness is especially imperative when the sufferer is no longer present himself to testify to the degree of pain, such as in wrongful death actions, where "death cannot be instantaneous, and the victim must have been conscious at least part of the time." 5 AM. JUR., *supra* note 16, § 36; *see also* 25 C.J.S. *Damages* § 92 (2002) (stating that "an allowance can be made only for pain and suffering of which the injured person is conscious, and damages for pain during the time that the injured person is unconscious are not allowable").

that no pain was felt before death.[191] Conscious suffering can be indicated by several factors, all involving behavioral indications that one is trying to verbalize or somehow escape the pain-producing trauma.[192] Because objective evidence of pain and its treatment, such as medical expenses from tests, examinations, hospitalization, surgery, medications, and orthopedic appliances do not encapsulate an experiential component, one is assumed; a jury cannot award damages for medical bills and not have awarded damages for the pain that required the medical treatment in the first place.[193]

A successful damages argument will have certain predictable elements. Not surprisingly, practitioners are advised that juries base substantial awards on the seriousness of the asserted disability or the degree of pain and suffering.[194] According to *American Jurisprudence*, the personal injury cases that are most likely to terminate successfully for the plaintiff are those in which there is serious or permanent disfigurement or injury, "an episode of pain and suffering of more than 90 days' duration," a plaintiff "relatively free of the psychological 'need' or 'desire' of the victim to enjoy the presence of chronic pain," and where "the plaintiff is relatively free of preexisting emotional illness."[195] A lack of objective medical evidence to substantiate symptoms or limitations does not always lead to the conclusion that a plaintiff is not disabled, and an absence of medical bills and testimony does not always translate into zero recovery for pain and suffering.[196] Similarly, plaintiffs can recover even if pain is psychological in origin or magnified by psychogenic factors so long as no evidence of malingering exists.[197] Above all, damages narratives must be internally

---

[191] 5 AM. JUR., *supra* note 16, § 35.

[192] Such signs, again in the context of wrongful death actions, include the following: injuries not usually associated with instant loss of consciousness, injury associated with painful consequences (deep lacerations, fractures, severance of limbs), mental anguish or terror experienced for brief but substantial period before the fatal injury, physical signs that the injured moved himself from the place of injury, attempts to communicate, attempts to escape, difficulty of cooperating in rescue attempts, expressions declarations of pain, facial expressions associated with pain, bodily movements (twisting, writing, etc.) associated with pain, gasping for breath, involuntary expressions of pain, or cringing or attempted avoidance of stimuli not painful in themselves (lifting, touching). *Id.*

[193] Mason v. Dist. Bd. of Trustees, 644 So. 2d 160, 160 (Fla. Dist. Ct. App. 1994); Urban v. Zeigler, 634 N.E.2d 1237, 1242 (Ill. App. Ct. 1994).

[194] 5 AM. JUR., *supra* note 16, § 1.

[195] 23 AM. JUR. *Proof of Facts 2d* 1 § 10 (2006).

[196] Westphal v. Wal-Mart Stores, Inc., 81 Cal. Rptr. 2d 46, 51 (Ct. App. 1998) (concerning fibromyalgia).

[197] *See, e.g.*, O'Donnell v. Barnhart, 318 F.3d 811, 817-18 (8th Cir. 2003) (holding

consistent in outlining whether damages are sought under a "curative" theory or for the alleged permanency of the current levels of pain and suffering, for a plaintiff cannot be awarded damages under both theories.[198]

### *C. Types of Damages Narratives*

Intangibles such as pain and suffering are not easily translatable into dollars, imposing a difficult task upon the legal practitioner who has succeeded in establishing pain and liability and who must now ask jurors to place a material value upon that painful experience. Practitioners' texts advise the plaintiff's counsel to be frank about the subjective nature of pain and its unquantifiability, and to explain these concepts "to jurors who are accustomed to thinking only of material goods as having a price tag."[199] Whether or not jurors are indeed so naive in this litigious era, the continuing difficulty of affixing such a price tag to suffering is novel and intimidating.

Here, as in jury selection, an emotive response becomes a factor in substantive decision making that is permissible within certain judicial guidelines. A damages argument is merely the last link in an evidentiary and expressive chain by which the plaintiff seeks to anchor the need for empathic engagement. The most successful jury arguments are those that endeavor to tie the jury to the plaintiff by empathic ties, supporting the theory that damages are a very real symbol of human connectedness. Winning stratagems include those that warn jurors that while there is no yardstick for the measurement of damages and pain and suffering other than medical bills and loss of income, such experiences are very real, and experiences to which all jurors can relate. The plaintiff's counsel is advised to tell the jury that the plaintiff has understated his pain, and that he is no longer the

---

that administrative law judge improperly discounted allegations of disabling pain asserted by applicant seeking social security disability benefits; doctors suggested pain might be magnified by psychogenic factors, but board-certified psychologist found little evidence of malingering or magnification and objective medical evidence supported allegations of pain and had persisted in seeking medical treatment); Carraher v. Sullivan, 796 F. Supp. 1207, 1211-12 (S.D. Iowa 1992) (holding that disability judge erred in finding claimant not disabled by pain from numerous physical ailments and symptoms with unknown cause where there was uncontradicted testimony that claimant was incapable of gainful employment).

[198] *See, e.g.*, Hammerschmidt v. Mignogna, 685 N.E.2d 281, 285 (Ohio Ct. App. 1996) (stating that motorist injured in auto accident could not recover for both surgical procedure that would relieve symptoms and alleged permanency of current level of pain and suffering).

[199] 5 AM. JUR., *supra* note 16, § 79.

person he once was; that the plaintiff is unable to enjoy the same relationships, perform the same physical tasks, and fulfill the same social roles that he once did; and to emphasize the helplessness of the plaintiff's life, stating that he now merely exists, and that nothing can be done to make him whole.[200] Jurors may also be reminded of the medical procedures which the plaintiff endured or still has to endure, and of the fact that his pain cannot be localized.

But damage narratives may also bring jurors inappropriately or unreasonably close to the suffering body. Proper arguments, after all, help maintain and enforce a proper distance between the experience of pain and its compensation, between adjudicator and sufferer. There is a perceived likelihood that a party may confuse empathic or experiential constructions for economic evidence. The potential for such error is particularly high when noneconomic damages are involved, as they often are in personal injury litigation. As Randall R. Bovbjerg notes, "[T]he problem with non-economic damages is, in sum, not that they are inappropriate or unreal, but rather that they are extremely difficult to consistently monetize in the absence of quantitative standards."[201] The reliance upon the jury in personal injury cases means that "[t]his difficulty is, of course, exacerbated by a sort of sympathetic moral hazard that juries face when making awards on an ad hoc basis and spending money that is not their own."[202] This concern implies that certain constraints need to be placed upon damages narratives lest sympathy be equated with irrationality and both be opposed to intellectual empiricism, with improper narrative consequences. Accordingly, while attorneys are allowed great latitude in arguing personal injury cases, they are forbidden from making "statements calculated to inflame, prejudice, or mislead the jury."[203] And jurors, in turn, are charged not to vote damages from sympathy, but from a reasoned analysis of several factors. As one court has humorously remarked, a jury "may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket."[204]

These empathic engagement-centered narratives of pain's consequences take four forms. The first, the "whole man" narrative,

---

200 *Id.* § 81.

201 Randall R. Bovbjergetal, *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 936 (1989).

202 *Id.*

203 Farmer v. Knight, 536 S.E.2d 140, 146 (W. Va. 2000) (citations omitted).

204 Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (citation omitted).

argues that the plaintiff can no longer enjoy activities or hobbies that he once did — and in which jurors are presumably still able to engage. The second, the "per diem" argument, quantifies the costs of the plaintiff's pain. Finally, the "Golden Rule" damages argument asks jurors to compensate the plaintiff as they themselves would like to be compensated.

1. Whole Man Arguments

In making a whole man argument, the plaintiff's attorney asserts that "the plaintiff has been reduced from being his entire person to something less," and "the value of that reduction is assessed and measured in a lump sum."[205] This technique summons the ghost of the pre-injured plaintiff to stand beside him in his present condition. Common whole man themes include a plaintiff who is no longer able to continue normal activities he had previously enjoyed, such as playing with his children and engaging in beloved hobbies, or a plaintiff whose injury itself renders a formerly cherished pleasure impossible.[206]

2. Per Diem Arguments

A more empirical empathic strategy asks jurors to confront in numeric terms the duration and expense of the plaintiff's agonies. If the jurisdiction permits, plaintiffs' lawyers may use a per diem argument, under which the immeasurability of pain is fixed in reference to a mathematical formula. In making a per diem argument, "a value is set for one pain-free day, and the plaintiff's life expectancy is reduced to the total days remaining to the plaintiff."[207] A plaintiff's lawyer may utilize the plaintiff's wage to supply a proper per diem rate, as if suffering itself carried a salary.[208] A per diem rate can also be suggested by referring to either the daily cost that people would willingly pay to avoid pain or the actual costs incurred daily by the plaintiff to remain pain-free.[209] Sometimes these techniques reduce

---

205 23 AM. JUR., *supra* note 195, § 10.

206 *See, e.g.*, Huff v. Tracy, 129 Cal. Rptr. 551, 553 (Ct. App. 1976) (holding that scarring of plaintiff's tongue, which resulted in permanent loss of taste but was no longer painful, constituted suffering due to loss of ability to enjoy food).

207 23 AM. JUR., *supra* note 195, § 10.

208 5 AM. JUR., *supra* note 16, § 85.

209 *Id.* §§ 86, 87; *see also* 25 C.J.S. *Damages* § 282 (2006) (stating that evidence of actual or reasonable costs of medical, hospital, nursing, and other expenses that "naturally flow and proximately flow from the wrong or injury at issue").

pain to its present worth, which is another means of reducing the subjective to quantifiable terms; [210] under this reasoning, if pain in the present is unknowable and its degree subjective, then ascertaining the future qualities of that pain in the future is impossible.

Per diem arguments become valuable narrative strategies when it is thought that "the concept of pain and suffering may become more meaningful when it is measured in short periods of time than over a span of many years, perhaps into infinity" because "the 'worth' of pain over a period of decades is often more difficult to grasp as a concept of reality than is the same experience limited to a day, a week or a month."[211] But the fact that such arguments are impermissible in many jurisdictions prompts one to think about what this prohibition says about the nature of pain and thus the potential for its narrative construction. One would think that jurisdictions allowing such arguments perceive that pain is somewhat quantifiable, while those that do not allow such arguments view pain as immeasurable. Ironically, however, both approaches are protective of pain's immeasurability, but in different ways. Allowing per diem arguments indicates that pain is so immeasurable that the jury should be free to develop a fixed standard to further the quantification of the incalculable.[212] Forbidding such arguments sends a message that it is illogical to impose mathematical formulas on such intangible concepts.[213] Jurisdictions that permit per diem arguments even remind the jury of pain's immeasurability, by often requiring that jurors be instructed that the proposed per diem formula is not evidence, but merely a method for calculating damages.[214]

---

[210] 5 AM. JUR., *supra* note 16, § 91.

[211] Beagle v. Vasold, 65 Cal. 2d 166, 181 (1966).

[212] *See, e.g.*, Crawford v. Regents, 13 Cal. Rptr. 2d 278, 291, 292 (Ct. App. 1992) (holding that jury's use of formula was permissible and within jury's discretion); Newbury v. Vogel, 379 P.2d 811, 814 (Colo. 1963) (holding per diem arguments permissible).

[213] *See, e.g.*, Botta v. Brunner, 138 A.2d 713 (N.J. 1958) (holding per diem arguments impermissible).

[214] *See, e.g.*, Giant Food v. Satterfield, 603 A.2d 877, 881 (Md. 1992) (holding that, although per diem arguments are permissible, general instructions warning jury that counsel's statements were not evidence were insufficient to place per diem argument in proper perspective); Rimsky v. Snider, 701 N.E.2d 710, 715 (Ohio Ct. App. 1997) (holding that there was no prejudicial error where jury used "mathematical" formula to calculate damages where trial court instructed jurors that formula was not evidence).

3. The Impermissible Golden Rule Argument

Courts associate the Golden Rule with excessive verdicts to such a degree that the Golden Rule is also known as the "bag of gold" rule.[215] Under the Golden Rule, which is only applicable to damages, the plaintiff's counsel is prohibited from "telling the jurors, either directly or by implication, that they should put themselves in the plaintiff's place and render a verdict as they would wish to receive were they in the plaintiff's position."[216] Jurisprudential disapproval of the Golden Rule of economic damages — reward plaintiffs as you yourself would like to be rewarded — suggests that damages narratives should be oriented more toward rational elucidation and less towards empathic, relational identification. As does prejudicial evidence, the Golden Rule presents a danger because it encourages empathic identification, prompting "the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."[217] The rule "in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence," and "may tend to induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing."[218] The "subver[sion] [of] the jurors' objectivity"[219] clearly violates the principled judicial opposition to emotive response.

While the Golden Rule sounds fairly straightforward in principle, in practice it is not so easy to ascertain when a jury is being asked to step into a plaintiff's shoes. Counsel's remarks only violate the Golden Rule when they either directly or indirectly instruct jurors that they should award the plaintiff damages, not when they merely "invite[] the jury to focus on the gravity of plaintiff's injuries."[220] Among those

---

[215] *See* Marcoux v. Farm Serv. & Supplies, Inc., 290 F. Supp. 2d 457, 463 (S.D.N.Y. 2003).

[216] *Id.* at 463 (quotation marks and citations omitted); *see also* Johnson v. Celotex Corp., 899 F.2d 1281, 1289 (2d Cir. 1990).

[217] *Marcoux*, 290 F. Supp. 2d at 463 (quoting Forrestal v. Magendantz, 848 F.2d 303, 309 (1st Cir. 1988)).

[218] Browne v. Assured Aggregates Co., 2003 WL 22422426, at *5 (Cal. Ct. App. Oct. 24, 2003) (quoting Neumann v. Bishop, 130 Cal. Rptr. 786, 809 (Ct. App. 1976)).

[219] Mueller v. Sigmond, 486 N.W.2d 841, 844 (Minn. Ct. App. 1992).

[220] *Marcoux*, 209 F. Supp. 2d at 465. For instance, in *McNally v. Eckman*, the Delaware Supreme Court held that remarks by plaintiff's counsel asking jurors how they would "come to grips" with the plaintiff's pain and whether they could imagine lying in bed for ten weeks with their back supported by a ten-inch roll did not violate the Golden Rule because the attorney "intended to ask the jury to focus on both the

statements that have been held impermissible are those that invite the jury to "give us the kind of deal that you would want to get," those that ask "what is the [injured body part] worth and what could you get anybody to give it to you for,"[221] and those that state "this life of independence is gone. What would it be worth to you?"[222] However, the statement that "some of you have sprained or strained your ankles; how bad did it hurt right then? These are all bones and muscles and ligaments; it's the same thing" was not held to be an impermissible Golden Rule argument.[223] The Arkansas Supreme Court interpreted it as asking jurors to use their own everyday experiences to decide when an injury would begin to hurt, not one that urged jurors to award the same recovery they would wish to receive in the plaintiff's position.[224]

Finally, it is difficult to understand the basis on which Golden Rule arguments are prohibited outside of the conclusion that such arguments are impermissible because they explicitly condone empathic identification, whereas other arguments only implicitly condone such an emotive response. This suggests that in the damages phase of a bifurcated trial, the propriety of sympathy is not a black or white matter but a gray issue, a question of degree in which some emotive response is tolerated, but too much threatens to cloud the judgment.[225] Or perhaps courts cannot explicitly condone sympathy even at this stage of the trial, but must implicitly accept its role in damages assessment within certain bounds, as in voir dire. This distinction may superficially preserve the legal distinction between rational and emotive decision making; however, it is odd in a pragmatic sense, because, as Nussbaum emphasizes, processes of compassion necessitate that we see ourselves as similar to the sufferer, putting ourselves in the other person's shoes — the very position advocated by the forbidden Golden Rule for purposes of assessing damages.[226]

---

nature of the injuries involved and on the claim for general damages as well as lost earnings." 466 A.2d 363, 371-73 (Del. 1983).

221 Klotz v. Sears, Roebuck & Co., 267 F.2d 53, 54 (7th Cir. 1959) (involving products liability case in which plaintiff lost his left eye).

222 *Browne*, 2003 WL 22422426, at *7.

223 Smith v. Pettit, 778 S.W.2d 616, 618 (Ark. 1989).

224 *Id.*

225 I am grateful to Adriaan Lani for succinctly summarizing this interesting development.

226 MARTHA NUSSBAUM, HIDING FROM HUMANITY: SHAME, DISGUST, AND THE LAW 50 (2004).

### *D. Untethered Sympathy and Juror Reliance upon "Outside Evidence"*

"Untethered sympathy" — sympathy allegedly divorced from the evidence — can raise legal hackles as well, such as in cases in which one party challenges as prejudicial statements made by jurors during deliberation on the grounds that such statements constitute either instances of narrative misuse or improper interpersonal identification. Legal constructions of the plaintiff's pain can prompt jurors to convey similar stories from their own experience in order to compare to or contrast them with those of the plaintiff.[227] Misconduct is perceived as arising not from the consideration of others' experiences, but instead from the fact that the narrative was introduced from a source outside the trial. The ingredients of juror misconduct exist in cases when a juror has suffered from an injury similar to the plaintiff's, or has otherwise encountered and acquired knowledge of such an injury, and proffers a description of this experience to other jurors, especially during deliberation. If the juror's statements constitute new evidence from sources outside the trial, prejudicial misconduct has occurred. What is tricky is determining what constitutes juror experience versus new or outside evidence. As the California Supreme Court has stated, "it is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial."[228] This opinion, however, cannot be based on specialized information obtained from outside sources. Consideration of outside evidence would cultivate what the United States Supreme Court has termed in the capital sentencing context to be untethered sympathy, a sentiment "unrelated to the circumstances of the offense or the defendant."[229] Prohibiting untethered sympathy in damage narratives bars "emotional responses that are not rooted in the . . . evidence introduced."[230]

To illustrate, in *Shackleford v. Mega Enterprises*, where the plaintiff suffered from a knee injury, a juror who had endured a similar injury commented on his own personal experiences with his injury, concluding that the plaintiff would probably suffer from knee pain for

---

[227] *See, e.g.*, Shackleford v. Mega Enters., No. E033039 2004 WL 1260243 (Cal. Ct. App. June 9, 2004) (finding no prejudicial juror misconduct where juror with knee injury similar to plaintiff's described experiences during deliberations, stating pain would be lifelong, because juror did not conceal history of injury in voir dire and remarks were offered to explain juror's reasoning process).

[228] McDonald v. S. Pac. Transp. Co., 83 Cal. Rptr. 2d 734, 738 (Ct. App. 1999).

[229] California v. Brown, 479 U.S. 538, 548 (1987).

[230] *Id.* at 549.

the remainder of his days.[231] Thereafter, the jury found for and awarded compensation to the plaintiff. After the defendant challenged these statements on the grounds that they improperly influenced the jury verdict, the court determined that, although such remarks may not have been appropriate, the statements were not prejudicial misconduct since they did not contain "new" evidence.

The question arises whether this constitutes an unreasonable or unenforceable constraint on the narrative processes of deliberation. Clearly, it is illogical to assert that all experiential opinion is unavoidable. Courts even acknowledge the value of such opinion, because "[j]urors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work."[232] The distinction between personal experience and new evidence from an outside source is not at all problematic when the situation at hand involves a juror who has read technical publications on the type of injury suffered by the plaintiff, and who attempts to bring these writings into the deliberation room. Clearly such technical second-hand expertise constitutes new evidence obtained from an outside source. But most questions of jury misconduct do not pose such easy questions. Rather they involve information derived from experience, and not technical publications. When the potentially improper information involves the juror's personal experience with a similar injury, it becomes much more difficult to ascertain whether or not such information constitutes specialized information obtained from outside sources. After all, in relaying his experience, the juror shares information not in the experience of other jurors, and thus imparts a form of specialized information — and the juror himself as a font of knowledge is very much an outside source.

Courts have attempted to distinguish between the two by stating that new evidence is offered to prove the existence or nonexistence of a fact, while personal experience is not;[233] but this seems oversimplistic because a juror's sharing of personal experience is always a comment made in relation to the plaintiff's injury, contributed to undermine or bolster the plaintiff's claims. Another unhelpful distinction involves whether the juror's remarks are offered to explain the juror's reasoning process, and therefore admissible. Again, this is oversimplistic because statements made to explain to others why a juror has assumed a certain attitude toward an issue also

---

231 2004 WL 1260243, at *2.

232 *Id.* at *4.

233 *Id.* at *6.

convey the impression that there is a factual evidentiary basis for this perspective.[234] The sole, helpful ground that courts have proffered is whether the juror's remark concerns a critical issue in the case.[235] Courts are quick to note that parties can control for errant juror statements through voir dire, which is conducted "to provide counsel the opportunity to learn about a prospective juror's background, experiences, and philosophy as it relates to the matter to be heard."[236] If a party does not want jurors with personal experience of pain and suffering who might feel compelled to share during deliberations, then that party must question prospective jurors about such experiences.

The unworkable distinction between new or outside evidence and juror experience pales in comparison to a more significant question: why should sympathy pose any danger in the damages phase of a bifurcated trial? Presumably, any reliance upon sympathy is correctly based in evidence, because the jury has already found for the plaintiff as to liability. Even if such an emotive response is grounded in the plaintiff's appearance, that appearance is evidence that the jury may properly consider during the damages phase, because even an incompetent plaintiff may not be excluded after the jury has determined that the defendant should be held liable. Thus, the emotive identification would be anchored in the (now legitimately) sentimentalized body of the plaintiff.

### *E. The Pattern of "Sympathy In, Sympathy Out"*

It is here that the judicial abhorrence of sympathy as a ground for substantive decision making during the trial clashes with the judicial tolerance of sympathy as a candidate filter in voir dire.[237] Previously, this described how the judicial tolerance towards sympathy as a factor in substantive decision making during voir dire changes radically in the liability phase, in which sympathy purportedly is improper because it creates undue prejudice.[238] We may identify the same pattern in the damages phase of the trial, where plaintiffs' attorneys may invoke a range of arguments specifically designed to inspire an

---

[234] *Id; see also* English v. Lin, 31 Cal. Rptr. 2d 906, 910 (Ct. App. 1994) (stating that remarks challenged as misconduct could have been part of juror's reasoning process).

[235] *Shackleford*, 2004 WL 1260243, at *6.

[236] Moore v. Preventive Med. Med. Group, Inc., 223 Cal. Rptr. 859, 866 (Ct. App. 1986).

[237] *See supra* Part I.

[238] *See supra* Part II.A.

empathic reaction (short of asking jurors outright to put themselves in the plaintiffs' shoes) but in which jurors' assessment of damages cannot be founded in sympathy.[239] Here, as in voir dire, the parties' damages arguments create the illusion that sympathy is permitted to be a factor in substantive decision making, because the arguments of the plaintiff may be balanced by those of the defendant.[240] This pattern can be explained partially by the judicial belief that the adversarial model of litigation is a sufficient control in some stages of the trial, such as during voir dire and damages arguments, but that additional precautions are warranted during other phases. There is a comparative willingness to accept that empathy plays a substantive role when the actions of one party can balance the actions of the other, as when each party can exclude potential jurors on the basis of their likelihood or resistance to empathic identification.

However, the presence of adversarial interaction cannot be the only explanation for this pattern of sympathy in, sympathy out. If it were, then the level of judicial concern over sympathy would be constant throughout trial and would be as heightened when jurors assess damages as when jurors determine whether a defendant should be held liable. But the judicial attitude towards sympathy or the potential for empathic identification does change over the course of the trial; there appear to be fewer constraints on the use of sympathy in damages assessment than in the determination of liability. Thus, there must be a more involved explanation for this waxing and waning of judicial concern.

Examining when the adversarial model controls reliance upon sympathy, we find that the model organizes what effects attorneys' arguments have upon the jury by providing opportunities for response and redirection, thus promoting balanced adjudication. In open court one attorney may directly respond to or attempt to counter another's use of sympathetic argument or evidence. The adversarial model, however, is not effective once juries begin to deliberate, for at that stage neither party can ascertain or respond to the propriety of jurors' predilections for the arguments of one party over another. This suggests that we need to further refine our understanding of who substantive decision making sympathy should or should not affect. Casting the inquiry in these terms, we see that (so long as attorneys do not expressly advocate empathic identification as a basis for decision making) judicial concern over sympathy is not tied so much to

---

239 *See supra* Part III.C.

240 *See* FEIGENSON, *supra* note 2, at 97.

attorneys' invocation of sympathy arguments or evidence as it is to jurors' reliance on sympathy to find for the plaintiff in assessing liability or damages.[241]

This also explains why judicial concern is stronger during the argument stage of the liability phase than in the damages phase of a bifurcated trial. Sympathy is allowed to factor into voir dire simply because attorneys for both parties are relying upon its potential exercise to include or exclude candidates.[242] But as the trial gets underway, heightened concern is necessary to guide jurors' determination of the pivotal legal issue: liability. At this stage evidence that could taint proceedings is seen as polluting or dangerous, and must be contained through an ordered system of rules such as Rule 403 in order to prevent an imbalance of reason. But after a finding of liability, judicial concern may relax and the court need no longer flex its prohibitory muscle so strongly. Perhaps this is an acknowledgment that the plaintiff is to some extent entitled to some form of an emotive reaction after the jury actually recognizes that another caused his injury, and so damages arguments may unleash empathic identification so long as they do not do so expressly. Thus, damages arguments can implicitly evoke sympathy so long as they do not overtly request jurors to identify with the plaintiff, accounting for the universal impermissibility of Golden Rule arguments. Most importantly, the fact that attorneys may utilize sympathy in assessing jurors' fitness or in delivering effective arguments, but that jurors may not rely upon it in adjudication, brings us to the heart of this quandary: current legal practice permits lawyers to adhere to one set of interactional rules, but jurors must adhere to another.

---

[241] That is why courts are manifestly concerned with jurors' susceptibility to improper arguments or exhibitions that are perceived to threaten their ability to make rational, evidence-based decisions. In the case of damages assessment, for instance, courts rarely mention jurors explicitly, but their expressed concern over certain damages arguments such as "per diem" arguments or "Golden Rule" arguments are founded upon the effects of these arguments *on jurors*, namely the interpersonal identification those arguments encourage. *See, e.g.*, Marcoux v. Farm Serv. & Supplies, Inc., 290 F. Supp. 2d 457, 463 (S.D.N.Y. 2003) (finding Golden Rule arguments impermissible); Botta v. Brunner, 138 A.2d 713 (N.J. 1958) (holding per diem arguments impermissible).

[242] *See, e.g.*, O'REILLY, *supra* note 18, § 8:15 (stating that "best" or most sympathetic juror is similar to plaintiff); 5 AM. JUR., *supra* note 16, § 51 (discussing impact of age and sex upon juror selection in terms of similarity to plaintiff).

## CONCLUSION: REINVENTING THE EMOTIONAL WHEEL

Our explanations for the waning and waxing of judicial tolerance for sympathy make sense only if we evaluate the propriety of empathic identification by adopting the current judicial mindset and looking upon the phenomenon through the eyes of legal practice. From the perspective of one standing outside the legal practice looking in, however, the quirks in this logic are obvious.

Current judicial perceptions of emotive identification are legal fictions in which emotive response and empathic identification are the bogeymen of personal injury litigation. Whenever something goes wrong, an emotive response is to blame. Concerns over judicial perceptions of emotive response and empathy in particular suggest not only that judicial constraints upon such factors are faulty, but also that the very judicial understandings of these concepts are flawed. The shallowness of judicial comprehension of emotive response and its proper role explains why legal attempts to constrain empathic identification are so shaky. Because there is no firm doctrinal ground in which to sink them, judicial attempts to constrain empathy are necessarily ineffective, inefficient, and unworkable.

The current judicial conception of emotive response and its propriety is flawed because it curtails or altogether denies such a response the play and power that it has in interpersonal relations outside of law. This is not to say that it is necessarily improper for legal practice to reinvent concepts that have profound lay meaning in a manner that is more convoluted than or wholly alien to lay understanding. After all, culture is often pervasive in law, and law in culture. Law exists in part to define and explicate socio-cultural institutions such as family and events such as death that are undeniably meaningful apart from their legal status and ramifications; after all, legal practice influences and in turn is influenced by lay beliefs and practices pertaining to such fundamental constructs and phenomena. But in the examples of family and death, there is a coming together of legal and lay understanding, a negotiation of form and content informed by both law and lay practice, a mutually reinforcing and coherent amalgamation of culture and doctrine. The judicial understanding of pain in personal injury litigation, however, has not only failed to penetrate lay culture, but is altogether foreign to it.

In effect, in the context of personal injury litigation, the rule of law creates its own emotional culture in which substantive legal norms are threatened by alternative values such as those of empathy. This is contrary to empathy's role in other emotional cultures, such as those

of routine social interaction, where empathy is a natural, rational, interpersonal response — natural in the sense that its arousal is not contrived, and rational in the sense that it emerges in a patterned and not a random manner, and is the predictable outcome of certain interpersonal situations. In extra-legal contexts, empathy is unavoidable because it is woven into the fabric underlying interpersonal interaction, rendering inter-subjectivity a communicative norm.

This empathic inter-subjectivity is tied to the ontological strength of the duty to relieve another's suffering. I would argue that the obligation to relieve suffering is a prima facie duty because suffering is innately undesirable, a proposition for which it is difficult to submit a concise argument. In essence, implicit in suffering is an appeal for relief: We might say . . . that suffering cries out for its own abolition or cancellation."[243] The very fact that another is suffering is potentially sufficient to spark empathic identification. Because empathic identification is natural and grounded in the experience of suffering itself, the most important question is whether suffering exists. Questions such as who caused the suffering and how and why it arose do not spark empathic identification, but merely alter its course and strength. These circumstances can modify our empathic response. For instance, if someone is suffering as a result of committing a bad act, then the strength of our empathic identification will be overwhelmed by other considerations, such as whether suffering is indeed merited. Or our inquiry may focus instead on whether the commission of a certain bad act merits a particular degree of suffering. Even when someone is sentenced to execution or life imprisonment for murder, we feel "for" that person although we realize that the suffering may be just because his crime merits such a sentence. All the same, however, we acknowledge that execution and life imprisonment as experiences are harsh, and we regret that human nature is such that severe punishment is necessary. Though we may not rue the application of the punishment, we rue its purpose. Law simplifies this prima facie duty to relieve suffering by confining its exercise to a context in which another is held civilly liable for that suffering under a legal theory of causation. In effect, jurors sit in judgment on the question of whether there is in fact a duty to prevent suffering in a particular instance. This necessarily transforms the duty to relieve suffering in an ontological sense from an objective prima facie duty into a subjective determination.

---

[243] JAMIE MAYERFELD, SUFFERING AND MORAL RESPONSIBILITY 111 (1999).

Moreover, in creating its own emotional culture and precisely defining the proper role of emotive response and of empathy, law also evolves a code of moral worth which its actors must follow. Legal parties must play by the rules or they are chastised. The jury is emblematic of moral worth, for it is an institution lauded for its capacity for objective and reasoned judgment. To preserve this sense of worth, it is essential that jurors adhere to their moral (and legal) duty to adjudicate on the basis of evidence and not emotive response. This presumption of moral worth is so strong that any indication that jurors did not grasp it, utilize it, and thereby reinforce it is cause for serious judicial concern and, likely, grounds for a mistrial. A trial not conducted in accordance with tenets of legal culture loses its legitimacy. Hence the need for evidentiary rules, organizing and restrictive rituals that assist in containing emotional and therefore pollutive potential. However, it is one thing to understand these strictures in principle, and quite another to put them into practice, particularly when the roles of emotive response and empathy in the emotional cultures of law and routine interpersonal engagement conflict to such a degree.

The difficulty, then, stems not from relying on the judgments of lay jurors but asking them to leave behind lay assumptions without giving them a substitute logic of emotive form and content that makes sense according to social and cultural practice. This is compounded by the fact that the personal injury trial is framed within a conception of emotive identification that is comprehensible within social and legal practice. Jurors are selected on the basis of their potential to identify with the plaintiff as measured by similarity, the same basis of interpersonal identification that guides the formation of social relationships, and jurors are asked to rely upon their own life experiences of pain and suffering in evaluating the plaintiff's claims, which again brings lay conceptions of emotive response into the mix of legal decision making. At some point, however, there is a judicial bait-and-switch; jurors are told that such identification is improper, and are asked instead to adopt a foreign and hollow understanding of emotive response and its proper role. As a result, some constraints upon empathic identification go against the grain of human nature, such as the prohibition against Golden Rule arguments. Other constraints are not merely unnatural but are altogether incoherent, like the division between outside evidence and juror experience. Asked to rely upon both lay and legal understandings of emotive response, juries are unlikely to be able to distinguish the propriety of consideration of experiential data introduced by other jurors — and

the emotional, interpersonal engagement such accounts invite — from impermissible evidence from an outside source.

Determinations of what is unduly prejudicial must be discretionary, for it would be impossible to outline precisely what forms of evidence are prejudicial and which are not. And there is admittedly ample cause for judicial anxiety over prejudice. Instead of cobbling together constraints to keep in rational deliberation and to keep out empathic identification, however, justice would be better served if courts were to fit their overly narrow conception of emotive propriety more closely to that comprehensible to lay culture. Jurors, after all, cannot check their life experience at the courtroom door, particularly when they were invited to enter the courtroom in the first place on the basis of those experiences. Judicial constraints that are wound too tightly undermine the very balance that they are evolved to establish and preserve. Attempts to ensure rationality must, therefore, themselves be sensible, designed specifically to counter imbalance from emotive response, and must not be permitted to evolve into specious inquisitions designed to unrealistically eliminate any and all emotive response from the trial. Only then can courts encourage jurors to empathically identify with a plaintiff in so far as the evidence sustains such an identification.

Similarly, courts must be very careful to ensure that there is no basis for the admissibility of potentially prejudicial evidence; excluding evidence merely because it could encourage empathic identification is improper, because empathic identification is part of the (rational) decision making process. Judicial caution is especially warranted because a number of weapons in the judicial arsenal may be readily employed to cure prejudice before it taints the trial outcome. So long as there is not extreme prejudice, a curative jury instruction reminding jurors that they must not be influenced by sympathy, prejudice, or passion is seen as successfully removing such empathic considerations from the calculation of damages.[244] Such an instruction reminds jurors to "do your duty as jurors regardless of any personal likes or dislikes, opinions, prejudices or sympathy."[245] A typical instruction reads as follows:

> Your decision should be based on the evidence and the rules of law I've given you with respect to the measure of damages. You're not required to accept the amounts of damages suggested by the parties or their attorneys. Your award should

---

[244] Mueller v. Sigmond, 486 N.W.2d 841, 844 (Minn. Ct. App. 1992).

[245] *Id.*

> be fair and just. You should remember that you're not seeking to punish either party and you're not awarding or withholding anything on the basis of sympathy or pity.[246]

Research suggests that jurors are particularly likely to follow such instruction when evidence is excluded for irrelevance or unreliability.[247] Still another weapon is the bifurcation of a personal injury trial; a trial court in its discretion may order separate trials on liability and damages to reduce the possibility that the jury will be prejudiced.[248] This is particularly crucial when "the evidence pointing to the two issues is wholly unrelated" and evidences relevant only to damages could have a prejudicial impact upon the jury's liability determination.[249]

In the end, no piece of evidence is value free, and so there is conflict whenever value determinations are made according to a normative judgment that is in accordance with legal norms, but not those of ordinary interpersonal interaction. Such conflicts are likely to arise because legal advocacy is an art that necessitates appealing to the humanity within the law and compels the introduction of evidence for purposes other than furthering empirical knowledge, ones more in line with extra-legal, interpersonal values, such as illustrating the sheer human impact of the plaintiff's claim — what Wigmore terms "legitimate moral force."[250] This is particularly true in personal injury trials; "evidence is 'morally significant, and such moral considerations especially pressing, where the legally determined central "factual" issue . . . is so elusive, almost a will-o'-the-wisp.'"[251] If emotion informs legal judgment, as it must, then doing justice requires something more than applying empirical rules; adjudicators must push beyond the logical significance of the plaintiff's arguments to their moral significance. Concerns of the heart are therefore always properly at the heart of personal injury litigation: Judges exercise their own moral judgment to balance probative value with prejudice, illustrating in the clearest possible sense that a moral compass is

---

246 Osetek v. Jeremiah, 621 S.E.2d 202, 206 (N.C. Ct. App. 2005).

247 FEIGENSON, *supra* note 2, at 105.

248 *See, e.g.*, *In re* Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982) (holding that bifurcation was proper where trial on causation took 32 days and that it was reasonable for trial judge to consider that proof of liability among numerous defendants and damages would be irrelevant in event of adverse causality finding).

249 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390 (1995).

250 9 WIGMORE ON EVIDENCE § 2591 (Chadbourn rev. 1972).

251 MAYERFELD, *supra* note 243.

needed in addition to legal reasoning to ensure that the verdict points to the truest lodestar.[252] Indeed, "the jury decides the meta-level questions from the perspective of commonsense morality, rigorously applied, criticized, and sometimes challenged by the devices of the trial."[253] By excluding emotion altogether on the grounds of undue prejudice, the rule of law loses accuracy in its very struggle to attain it, undermining its legitimacy. Though it is easy to fall into such "oversimplified notions of 'emotional' decision making," law is about accuracy, not ease of judgment.[254] The efficacy of hermeneutics and of law itself demands that unworkable dichotomies such as that between emotion and rationality be broken down. Because there is no longer any need to question in "theoretical innocence" whether jurors can fulfill their legal duty in the face of emotion, it is (quite logically) time to assist them in doing so.[255]

---

252 *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 95 (1999).

253 *Id.* at 244.

254 *Id.* at 157.

255 *Id.*

***