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WHY DO PROPOSALS DESIGNED TO CONTROL VARIABILITY IN GENERAL DAMAGES (GENERALLY) FALL ON DEAF EARS? (AND WHY THIS IS TOO BAD)

Joseph Sanders*

INTRODUCTION

What is wrong with American tort law? According to many, almost everything. Unfortunately, many feel the system is not in good health, yet the diagnoses of what ails it vary widely, as do the prescriptions for treatment. The legal and cultural wars that have surrounded tort reform for the last thirty years have so polarized debate that it is difficult to find much common ground. Even within the academic community it is difficult to find anything approaching a consensus about ways in which we might improve the system. Interestingly enough, there is one area where this is not entirely true and it is the topic of this Article: general damages.¹

To be sure, however, there is still plenty of disagreement.² Over the years, a few scholars have called for the complete abolition of general

* Joseph Sanders is A.A. White Professor of Law at the University of Houston Law Center.

1. In this paper, I adopt the common understanding of this term. General damages are those damages designed to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and similar hedonistic damages. They do not include those special damages that are (at least in theory) capable of measurement such as lost wages, medical bills, and the like. For this paper, I am not interested in drawing a bright line between general and special damages or distinguishing among the types of general damages. Thus, I use the terms “noneconomic damages,” “general damages,” and “pain and suffering damages” interchangeably, although some would argue that the latter term is only a subset of the first two.

2. Almost all scholars recognize that jury general damage awards are one of the issues that have driven tort reform efforts. See Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 343 (1993); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 156 (Robert E. Litan ed., 1993) (“The size, equitability, and predictability of civil damage awards appear to be the most salient issues in the civil-jury debate.”); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 75 (1993) (“Compensation for pain and suffering becomes a focal point [in today’s tort reform debate], because it is claimed that allowing it gives juries too much discretion to implement their sympathies with injured plaintiffs at the expense of (what the defense advocates fear that jurors perceive as) corporate deep pockets.”); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1241 (1992) (“Damage awards by juries have long been a central issue in considerations of the tort litigation system.”).

damages.³ Even supporters recognize that the case for general damages is an uneasy one.⁴ The relationship between such damages and the overarching goals of tort law (compensation, deterrence, and corrective justice) is somewhat tenuous.⁵ Justifications, such as they are, are often based on practical considerations such as the frequent observation that pain and suffering damages provide a fund of money with which to pay the plaintiff's lawyer's contingency fees without depriving the plaintiff of funds sufficient to actually pay medical bills or replace lost earnings.⁶ Moreover, awarding money for pain and suffering leaves the legal system open to the criticism that it is monetizing something upon which a dollar value cannot be placed and, therefore, violating our well-found sense of incommensurability.⁷

Regardless of one's position on these issues, nearly everyone agrees that one problem with general damages is that because there is no market for pain and suffering, juries have a difficult time determining the appropriate award. As a result, general damage awards exhibit substantial variability. Moreover, the absence of a market makes it difficult to justify or to criticize any given award.⁸

With respect to this issue, I feel I should begin with a confession. I have always tread lightly over the topic of general damages when teaching tort law, primarily because I had very little to say. When I do address the topic it is generally to confuse first-year students by using cases that drive home the point that there are few, if any, guidelines concerning the reasonable size of general damage awards. For example, I often teach *Green v. Bittner*,⁹ a 1980 New Jersey case involving the wrongful death of an eighteen-year-old high school student, described by the court as "a young woman of average intelligence and cheerful disposition; hard-working and conscientious both at home and at school; level-headed and dependable. As her counsel aptly stated in summation, she was 'everybody's daughter,' not just meaning

3. See, e.g., Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004); Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959).

4. See PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 56-58 (1991).

5. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995).

6. DAN B. DOBBS, *LAW OF REMEDIES* 399 (2d ed. 1993); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 801 (1995).

7. See Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659 (2003); Radin, *supra* note 2.

8. See Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401 (2004).

9. 424 A.2d 210 (N.J. 1980).

normal, but what everybody would want a daughter to be.”¹⁰ Under the New Jersey wrongful death statute in place at the time, beneficiaries were entitled to recover only for “pecuniary injuries resulting from [the] death.”¹¹ These damages included the loss of the value of a child’s anticipated help with household chores or the loss of direct financial contributions by the child after the child becomes a wage earner.¹² Given these instructions, the jury in the *Green* case apparently found that the parents had suffered no pecuniary loss, for they awarded no damages whatsoever.¹³

Both my students and the New Jersey Supreme Court find this to be an intolerable outcome. But many students begrudgingly agree that the jury may have gotten it right in the sense that if Ms. Green were heading for college the following year, the award of zero dollars for pecuniary damages may be correct. The conversation then turns to the real problem, which, according to most students, is that New Jersey did not allow parents to recover general damages (usually discussed in terms of mental anguish, grief, and loss of society and companionship) for the loss of their child.¹⁴ All is well until we begin to discuss exactly how much money would compensate the parents for this loss, and as any torts professor knows, the answers from the class are all over the map.¹⁵ Without some type of anchor, judgments vary widely.¹⁶

Disagreements about the appropriate size of general damage awards occur in the courts as well as in the classroom. To take but one recent example, in *Philip Morris v. French*,¹⁷ the plaintiff, TWA flight attendant Lynn French, sued several tobacco companies for her sinusitis allegedly caused by breathing secondhand smoke on the job.¹⁸ The jury found for the plaintiff and awarded her a total of two million

10. *Id.* at 211.

11. *Id.* at 212 (quoting N.J. STAT. ANN. § 2A:31-5).

12. *Id.*

13. *Id.*

14. The jury instructions typically enumerate these elements of general damages. See, e.g., *Moore v. Lillebo*, 722 S.W.2d 683, 688 (Tex. 1986).

15. The problem of compensation for the wrongful death of a teenager is a recurring one. While I researched this article, a Texas jury in the case of *Garcia v. Ford Motor Company*, 33 Prod. Safety & Liab. Rep. (BNA) No. 12, at 299 (Tex. Dist. Ct. Mar. 1, 2005), awarded the mothers of two teenage daughters killed in a car accident fifteen million dollars each in “actual damages,” a term of art that includes both pecuniary and nonpecuniary loss. Undoubtedly, most of this sum is general damages for the grief, mental distress, and loss of consortium suffered by the parents. *Id.*

16. Anchoring is discussed *infra* notes 40–42 and accompanying text.

17. 897 So. 2d 480 (Fla. Dist. Ct. App. 2004).

18. *Id.* at 485. The plaintiff’s lawsuit was facilitated by an earlier class action settlement between flight attendants and the tobacco industry which, *inter alia*, shifted the burden on the

dollars for past pain and suffering and \$3.5 million for future pain and suffering.¹⁹ The trial judge granted the defendant's motion for a remittitur and reduced the award to \$500,000 after concluding the award was driven in part by prejudice against the tobacco companies that in turn was fueled by comments from plaintiff's counsel.²⁰ Here, as in my classroom examples, differences of an order of magnitude separate judgments about the proper level of general damages compensation.²¹

My confession is that with my *Green* example or other examples such as the one presented in the *French* case, I rarely carry the discussion beyond the obvious points that the law offers only vague and imprecise guidelines as to the appropriate size of the award, that factfinders frequently disagree about the appropriate size of general damages, and that factors such as anchoring or normative arguments about the evil nature of the defendant (or the plaintiff) may alter damage awards in the client's favor.²² Others have done much better. They offer concrete proposals on how to improve the situation. In

causal question of whether secondhand smoke caused the plaintiff's injury to the defendant. See *Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24, 27 (Fla. Dist. Ct. App. 1999).

19. *French*, 897 So. 2d at 487.

20. *Id.*

21. Similar outcomes in other cases are reported in WEILER, *supra* note 4, at 55 n.39. In each of the cases cited by Weiler, the trial or appellate court reduced the original jury awards. In one case, a jury award of twenty-five million dollars for the distress of a mother who witnessed her children killed in a traffic accident was reduced to \$2.5 million. *Id.* As Weiler notes, "Even when a judge decides to intervene, his point of departure is the base established by the jury's original award, so any reduction he imposes will appear moderate only by comparison." *Id.* at 55 (internal citations omitted).

22. Much the same point is made by Dan Dobbs in his torts treatise:

Awards for pain are not easy to evaluate because there is no objective criterion for judgment. For the same reason, it is difficult to set rational limitations on awards. The claim of pain is therefore a serious threat to the defendants since, lacking any highly objective components, it permits juries to roam through their biases in setting an award.

DAN B. DOBBS, *THE LAW OF TORTS* 1051 (2000).

Jurors recognize the difficulty of the task. They report that determining damages is more difficult than deciding liability. They find very little guidance in the law on how they are to compute damages. See Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in *VERDICT*, *supra* note 2, at 282, 297.

In a jury simulation, author Neil Vidmar notes that mock jurors

uniformly commented on the difficulty of putting a price on pain and suffering and used different methods of calculating the awards. Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical expenses. . . . A number of jurors assessed pain and suffering on a per month basis . . .

Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 *DUKE L.J.* 217, 254-55 (1993) [hereinafter Vidmar, *Empirical Evidence*] (internal citations omitted).

Author Edith Greene interviewed jurors who in 1984 decided a products liability case and reports that they used a process of "guesstimation" to determine pain and suffering damages.

this paper, I discuss these proposals and why they have met with so little success.

In Part II of this paper, I summarize the empirical research on general damage awards. In Part III, I review a number of proposals designed to lessen variance and create greater horizontal equity. In Part IV, I discuss why I believe these proposals have met with so little success and in Part V, I suggest why this is unfortunate.

II. EMPIRICAL RESEARCH ON GENERAL DAMAGES

There is significant and sometimes innovative literature focusing on the nature and extent of uncertainty with respect to general damage awards. Key findings with respect to uncertainty follow certain themes. The severity of the injury suffered by the plaintiff is a reasonably good predictor of the level of damages in general, and pain and suffering in particular. For example, analyses of jury awards in personal injury cases in Florida and Kansas City from the mid-1970s to late 1980s indicate that injury severity (as measured on a nine point ordinal scale) is the best available predictor of overall damage awards, explaining approximately forty percent of the variation in overall awards.²³ All objective variables available to the authors explain approximately sixty percent of the variation in awards.²⁴ They explain a slightly less percentage of the noneconomic awards.²⁵ Within each category of damages, pain and suffering awards exhibit considerable variance. For example, for the category "permanent significant"—category six on the nine point scale, a category that includes injuries such

Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 *LAW & CONTEMP. PROBS.* 225, 230 (1989).

Lawyers routinely resolve the question of general damages in settlement by making them some multiple of special damages. See JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* 51 (1975); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 107-08 (1970) (stating that multiple is an "arbitrary coefficient—typically from two to five, depending on the practice of the area"); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 *IOWA L. REV.* 883, 894 (1993) ("Judges and attorneys in North Carolina frequently speak of an informal guideline that suggests that noneconomic damages should be between three and seven times the amount of economic damages."). With respect to this practice, author Mark Geistfeld notes:

As there is no reason why actual pain-and-suffering injuries should be related to some multiple of the plaintiff's economic loss, the practice appears to be a bargaining convention that is acceptable to all parties concerned because it ameliorates the uncertainty that each party would face if a jury were to determine the award.

Geistfeld, *supra* note 6, at 787.

23. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 *Nw. U. L. REV.* 908, 923, 941 n.156 (1989).

24. *Id.*

25. *Id.* at 923, 941 n.156.

as loss of a limb, one eye, kidney, lung, or hearing—the mean pain and suffering award was \$386,000 (in 1987 dollars).²⁶ The award at the twenty-fifth percentile was \$9,000 while the award at the seventy-fifth percentile was \$598,000.²⁷ Other studies have produced similar results.²⁸

In one study, David Leebron examined jury and trial judge awards for pain and suffering in cases where the plaintiff died prior to trial.²⁹ He reviewed 256 reported appellate opinions where general damages were awarded, admittedly a very selective sample. For each case, Leebron knew the length of time each individual lived after the injury. Except for very short survival times (less than half a minute) and relatively longer times (more than a week), duration is not significantly related to the size of the award.³⁰ Even within duration intervals, there is a substantial variation in awards. For example, in a particularly useful analysis, Leebron compared awards of drowning victims who, as a group, suffer a similar fate for a similar duration of time. Awards in these cases varied from nothing to over \$137,000, with the average being \$32,000 and a standard deviation of \$36,000 (in 1987 dollars). After appellate review, the awards ranged from \$4,360 to \$52,800.³¹

An interesting question is whether other factfinders would provide more consistent awards than jurors. Research by Neil Vidmar and Jeffrey Rice indicates that arbitrators and jurors make comparable judgments in terms of their mean and median awards.³² Individual juror awards exhibit more variance.³³ Another study by Roselle Wiss-

26. *Id.* at 921, 936 tbl.3.

27. *Id.* at 937.

28. See, e.g., Mark A. Peterson, *Compensation of Injuries: Civil Jury Verdicts in Cook County* (Rand Corp., Inst. for Civil Justice No. R-3011-ICJ, 1984); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 *LAW & SOC'Y REV.* 997 (1990); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 *INT'L REV. L. & ECON.* 203 (1988); Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 *LAW & HUM. BEHAV.* 181 (1997).

29. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 *N.Y.U. L. REV.* 256 (1989).

30. *Id.* at 294.

31. *Id.* at 297. Other research has also found considerable "horizontal" variance in jury awards. See Audrey Chin & Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (Rand Corp., Inst. for Civil Justice No. R-3249-ICJ, 1985); Sloan & Hsieh, *supra* note 28, at 1026 ("In several respects, payment patterns appear to be inequitable horizontally, but each finding has a possible contrary explanation."); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 *ANNALS INTERNAL MED.* 780, 781 (1992).

32. Vidmar & Rice, *supra* note 22, at 893.

33. *Id.*

ler, Allen Hart, and Michael Saks also compares juror awards with those of legal professionals—judges and lawyers.³⁴ This study adopts a two-step approach. First it asks the subjects to rate the severity of injuries described in vignettes. The groups were remarkably similar in their assessment of both severity and the factors that lead to this assessment.³⁵ Jurors, however, were less able than the other groups to translate this assessment into actual damage awards. The authors' final regression model used to predict awards was able to explain fifty-eight percent of the variance for defense lawyers, forty-eight percent for plaintiff lawyers, forty-two percent for judges, but only twenty-three percent for jurors.³⁶ As the authors noted, "these patterns of predictability and intra-injury variability in awards are not surprising, given that jurors have essentially no experience assigning a dollar value to injuries while the other groups do."³⁷

Both the Vidmar and Rice, and the Wissler, Hart, and Saks articles point out that these studies assess the judgments of jurors, not juries, and that studies comparing juror and jury awards indicate less variance between deliberating jurors.³⁸ Both studies create artificial, "statistical" juries from their data and compare them with the individual awards of legal professionals. In doing so, the variance of the "jury" awards is less than the awards of the professionals.³⁹

These results suggest that neither juries nor other legal actors have agreed upon criteria for assessing general damages for a given level of injury. The research also indicates that decisionmakers are likely to be influenced by other factors such as the culpability of the plaintiff or the defendant, or by initial anchoring points proposed by the parties or by fellow jurors.

Indeed, most explanations of the variability we observe in general damage awards place particular emphasis on how anchoring effects influence decisionmaking.⁴⁰ Whenever people are asked to make nu-

34. Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).

35. *Id.* at 794.

36. *Id.*

37. *Id.*

38. See Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 316 tbl.IV (1998).

39. See, e.g., Wissler et al., *supra* note 34, at 803. The degree to which such statistical juries mimic real jury deliberation is an open question. See David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1168 (2000).

40. Anchoring is not the only variable affecting general damage awards. For example, in Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995), the authors provide a useful discussion on how the way in which the general damages issue is presented to the jury (framing effects) alters judgments. Asking the

merical estimates, initial values tend to “anchor” their final estimate by changing the standard of reference that they use when making their numerical judgment.⁴¹ Anchoring effects occur even when individuals conclude that the anchor contains no useful information. Beginning with the Chicago Jury Project in the 1950s, legal scholars have observed anchoring effects in jury judgments on damages and have been able to produce these effects in the laboratory.⁴²

Given these findings, many scholars have offered specific proposals on steps to take that may create greater certainty and predictability in this area of tort law.⁴³ The next section presents some leading examples.

III. THE PROPOSALS

A. *Bovbjerg, Sloan, and Blumstein*

In a 1989 article, Randall Bovbjerg, Frank Sloan, and James Blumstein provided one of the most detailed sets of proposals on how to

jury to “make the plaintiff whole” is one such frame, which is different from a “selling price” frame that asks the jury to imagine how much the plaintiff “would have to be paid to subject herself to the injury in the first place.” *Id.* at 1342.

41. The following discussion of anchoring is borrowed from Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–89 (2001).

42. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 756 (1959) (reporting that interviews conducted with jurors revealed that plaintiff’s damage requests anchored juror damage determinations in six of seven cases); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, The More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 525–28, 532–33 (1996); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1009–10, 1016 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 495 (1989); Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors’ Decision Making*, 14 LAW & HUM. BEHAV. 385, 390–94 (1990).

Some years, when I have the time, I divide my torts class in half and send the first half out of the room while anchoring the other half by asking them if they think an (imaginary) jury’s award of *X* dollars in another wrongful death case where general damages are permitted is too much or too little and then ask them to write down their own judgment as to the appropriate award in the *Green* case. Then I repeat the process with the other half, but I provide this group with a different anchor. Finally, the whole class has a discussion as to the proper amount. Invariably, the anchors do affect average awards and, more importantly, the ability of many students to see the justice in other awards that differ substantially from their own.

43. I do not mean to argue that everyone thinks that greater certainty in awards is itself a good. My reading of the literature, however, causes me to believe that the great majority of academics believe the present level of inconsistency is a bad thing. Among the reasons commonly given for this opinion are that the ad hoc and unpredictable nature of these awards arguably threatens insurance systems, subverts the credibility of awards, and hinders the efficient operation of tort law’s deterrence function. Bovbjerg et al., *supra* note 23, at 908. Clearly, not all scholars would agree with all of these reasons. For a useful discussion of the concept of consistency, see John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 59–60 (1987).

create greater consistency in general damage awards.⁴⁴ Their article proposes three alternative frameworks that would constrain the operation of vague, open-ended legal rules and the discretion currently afforded legal factfinders.

The first alternative would create a matrix of values that would award fixed damage amounts according to the severity of the injury, the body part affected, and the age of the injured party. Under this proposal, a fifty-four-cell matrix comprised of nine severity categories and six age groupings would be filled in with relative values anchored on the value of one hundred assigned to the death of a person sixty-five years of age or older.⁴⁵ The relative values would be based on past jury findings in cases within each cell, aggregated across all case types: medical malpractice, products liability, and so on.⁴⁶ The actual dollar amounts of awards might vary across jurisdictions and over time.⁴⁷ Factfinders would have no discretion in the size of the award once they placed the plaintiff into appropriate age and injury categories.⁴⁸ This is the most restrictive proposal of the three alternatives. Similar, fixed amount proposals have been set forth by a few other

44. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. REV. 908 (1989).

45. The authors justify the use of age and injury severity because these factors are objective and are relatively good predictors of awards in aggregate studies. An interesting aspect of this matrix is that awards are not linear with age. *Id.* at 944 tbl.5. Plaintiffs between the ages of fifty-one and sixty-four are routinely awarded higher levels of noneconomic compensation than those between thirty-five and fifty. *Id.* It is not obvious what psychological or emotional theories of pain and suffering as a phenomenon would explain these results. If we are to judge by the aggregate data, juries do not view pain and suffering as a phenomenon as a constant over time or even as a harm that diminishes linearly over time.

Commenting on this aspect of the jury driven matrix, the authors suggest that prior to implementing the matrix the legislature may wish to "tempe[r] [the values] in accordance with common sense notions of reasonableness [in order] to eliminate or moderate incongruities." *Id.* at 949.

46. In fact, as the authors note, case type influences noneconomic awards. Awards are higher in medical malpractice cases and lower in automobile accident cases. *Id.* at 943 n.166. This, of course, is another source of horizontal inequality in the award of noneconomic damages.

47. This scheduling proposal is critiqued by Peter H. Schuck, *Scheduled Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Sloan*, 8 YALE J. ON REG. 213 (1991). Schuck suggests a more modest reform that is closer to the Bovbjerg team's second suggested reform scenarios: "[T]he jury might be informed about a range of previous awards without being confined to that range, or it might be informed about a range but be allowed to award outside that range as long as it gives reasons for doing so." Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT, *supra* note 2, at 306, 326 [hereinafter Schuck, *Mapping the Debate*].

48. Bovbjerg et al., *supra* note 44, at 946.

scholars,⁴⁹ and other countries have adopted similar versions using scales.⁵⁰

The authors recognized that this fixed value approach might be too restrictive and therefore proposed one variation that would provide a range of values within each cell, similar to what exists in federal sentencing guidelines.⁵¹ They also suggested the possibility of a posttrial administrative process for considering unusual cases.⁵² In order to avoid too much variation at this stage, the authors proposed the creation of a single, statewide agency empowered to make such adjustments.⁵³

The second reform proposed by Bovbjerg, Sloan, and Blumstein is the introduction of valuation scenarios: "Instead of a numeric matrix, . . . juries [might be given] a limited number of standardized injury 'scenarios,' with associated dollar values of noneconomic loss for each [scenario]." ⁵⁴ Note that the scenarios are designed to assist only in the awarding of noneconomic loss, not special damages. The authors proposed up to ten scenarios that would be included as part of the jury instructions.⁵⁵ Preferably, these scenarios would be in writing and the jury could take them into their deliberations. The jury would be instructed that no single scenario is expected to fit their case perfectly, but that the values presented in the scenarios are approved benchmarks by which to assess the case before the jury.⁵⁶

The key to this proposal, and many like it, is that it provides the jury with potential anchors that actually reflect the "market rate" for these injuries insofar as we can say that previous jury awards constitute a market. As the authors noted, this approach reflects the normal mental response of individuals to problems of valuation in their everyday lives. For example, when buying or selling a house, one wants to know the price of other, similar homes, realizing that no house is ex-

49. See, e.g., Patricia M. Danzon, *Medical Malpractice Liability*, in *LIABILITY: PERSPECTIVES AND POLICY* 101, 122-23 (Robert E. Litan & Clifford Winston eds., 1988); Marcus L. Plant, *Damages for Pain and Suffering*, 19 *OHIO ST. L.J.* 200, 210-11 (1958) (suggesting that general damages should be capped at fifty percent of the plaintiff's proven medical, nursing, and hospital bills).

50. See Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 *DEPAUL L. REV.* 399 (2005), for a discussion of a recently enacted provision in New South Wales, Australia.

51. Bovbjerg et al., *supra* note 44, at 948.

52. *Id.*

53. *Id.*

54. *Id.* at 953.

55. *Id.* at 955 n.208.

56. A similar approach is suggested by WEILER, *supra* note 4. Weiler does not necessarily oppose schedules, but he also advocates an intermediate solution in which "[a] number of standardized profiles [are] developed for cases deemed to be of intermediate severity . . ." *Id.* at 61.

actly like the house under consideration. The prices of the other houses provide a set of benchmarks, or anchors, that are useful in determining what the present house is approximately worth. This very process resembles what trial and appellate court judges may do when reviewing jury awards for excessiveness or inadequacy.⁵⁷

The authors admitted that construction of the scenarios is a complex matter. The scenarios must be detailed enough to be useful, but without features that make the case truly unusual (for example, a concert pianist suffering a severe wrist injury). The authors argued that “[t]he most important factors to reflect in a scenario are the physical severity of the injury, the victim’s age or life expectancy, the extent of pain endured, the extent of incapacity to engage in normal activities, and the duration of each factor.”⁵⁸

Surely Bovbjerg, Sloan, and Blumstein were correct in concluding that jurors should receive no more than approximately ten scenarios. Even ten scenarios may be too many. One suggestion is to have nine stories reflecting the nine levels of injury, but a better suggestion is to have a much larger inventory of scenarios and use a small number of relevant ones in each case. There could, for example, be six or so stories within a given injury category.⁵⁹ The dollar values mentioned in each story could be drawn from the same information used to create the matrix values in the first proposal, and the set of stories could provide a range of possible general damage values similar to the range within each matrix cell suggested above.⁶⁰

The third alternative proposed by Bovbjerg, Sloan, and Blumstein would create a flexible set of upper and lower boundaries that reflect the nature of the plaintiff’s injury and that invalidate awards that are above or below some threshold.⁶¹ The authors suggested placing lim-

57. Bovbjerg et al., *supra* note 44, at 954.

58. *Id.* The authors suggested that the scenarios should describe the circumstances of the injury but should not include any information on responsibility or causation. *Id.* Obviously, the authors are worried that jurors will allow the level of defendant culpability to influence the size of general damage awards, something which formal tort rules forbid, but something that seems to happen with a fair degree of frequency in actual cases. See Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 *LAW & HUM. BEHAV.* 269 (1990).

59. Bovbjerg et al., *supra* note 44, at 956.

60. Oscar Chase proposes a variation on this type of reform. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, in *CIVIL JUSTICE REFORM IN THE 1990s*, at 339 (Larry Kramer ed., 1996). Under Chase’s proposal, jurors would be given a nonbinding chart summarizing the range of awards (low, median, high) in cases of similar severity. In a special interrogatory they would be asked to categorize the level of injury within the frequently used one-to-nine level scale and their general damage award in the case at hand. *Id.* at 349.

61. Bovbjerg et al., *supra* note 44, at 959.

its that would invalidate only extreme outlier awards.⁶² They noted that this proposal might achieve little more than occurs under normal judicial review of awards for excessiveness or inadequacy. The very existence of a published set of floors and ceilings, however, might embolden judges to alter awards more frequently because they would legitimate judicial intervention in the case of awards that fell outside the prescribed range.

B. *Wissler, Hart, and Saks*

The research conducted by Wissler, Hart, and Saks is particularly valuable not only because it offers suggested alternatives to present practice, but also because it offers empirical data on how mock jurors assess damages and then compares these awards to awards suggested by judges and lawyers when each is presented with brief vignettes.⁶³ As noted above, these authors, like others, found substantial vertical equity in the sense that people who are perceived to have suffered more serious injuries receive larger awards on average than people who are perceived to have suffered less serious injuries.⁶⁴ They also reported substantial variance in awards within each scenario, however, and found that individual juror awards exhibited more variance than those of legal professionals.⁶⁵ A key finding is that both jurors and legal professionals generally agree about the severity of a given injury, but there is less agreement about the dollar figure that should be attached to an injury of a given severity.⁶⁶

These findings suggest that commonly voiced speculations about the inability or irrationality of jurors in evaluating injuries are misconceived

If there is any basis for concern, it is the translation from perceptions of injuries into dollar valuations. But that is a problem not with jurors alone, but with the task—judges and lawyers similarly display decreased predictability, albeit a smaller decrease, as they move from severity assessment to damages valuation, and reveal more between-group differences in the models that predict their decisions. Thus, improvements, if justified as desirable policy, should

62. *Id.*

63. Roselle Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).

64. *Id.* at 795. But see Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 LAW & HUM. BEHAV. 189 (1996).

65. Wissler et al., *supra* note 63, at 794. The Wissler group also found that “[m]en and wealthier jurors awarded more [damages] than women and poorer jurors.” *Id.* at 806. These demographic differences, however, accounted for relatively little of the variance in awards.

66. *Id.* at 804–06.

be concerned less with who is to make the decisions about general damages and more with making the task more achievable.⁶⁷

The primary impediment to achieving greater consistency is the vague guidance jurors receive on what is to be compensated and a complete absence of guidelines for how to translate this into dollar awards. Moreover, some studies have shown that awards may be influenced by factors that as a matter of law should not play a role in determining the size of the award. These factors include "concerns about plaintiff's attorney fees, beliefs about the parties' insurance coverage," and perceptions of the defendant's and the plaintiff's responsibility for the incident.⁶⁸ Jury instructions rarely inform jurors that these factors should play no role in their general damages decision.⁶⁹

Because Wissler, Hart, and Saks's research suggests that jurors have the most trouble converting perceptions of harm into dollar awards, they conducted an experiment in which mock jurors were provided information about the distribution of general damage awards in other cases involving similar injuries.⁷⁰ In various conditions of their study, Wissler, Hart, and Saks varied the nature of this information. Sometimes they provided information on the average amount awarded in other cases, sometimes information on the lower and upper award amounts within which eighty percent of awards fell, and sometimes awards from four similar cases.⁷¹ All types of information did reduce variability of awards when compared with a no-guidance condition. Importantly, the information did not affect the size of awards.⁷² Although Wissler, Hart, and Saks recognized the difficulty in placing such information before the jury, they supported plans that "provide jurors with descriptions of a range of injuries as a basis for forming a reference scale against which to compare the case at bar."⁷³ The authors also supported a plan that would "pool jury awards made for similar injuries, and . . . present these cases and their award distributions to juries for guidance in reaching their general damages awards" ⁷⁴ The authors would also support increasing the size of juries

67. *Id.* at 812.

68. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 *PSYCHOL. PUB. POL'Y & L.* 712, 714 (2000).

69. *Id.* The Wissler article includes a valuable discussion of the jury instructions on general damages given in many states. *Id.* at 715-18.

70. Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 *LAW & HUM. BEHAV.* 243, 244-46 (1997).

71. Wissler et al., *supra* note 68, at 719.

72. Saks et al., *supra* note 70, at 254.

73. Wissler et al., *supra* note 63, at 816.

74. *Id.* at 817 (internal citations omitted).

(from six to eight or twelve) in order to increase stability and predictability.⁷⁵

C. *Diamond, Saks, and Landsman*

Another set of proposals that arise from a research project appear in Diamond, Saks, and Landsman's article.⁷⁶ That experiment presents a single stimulus to both six-person mock juries and individual jurors deciding the case alone.⁷⁷ Like others before them, Diamond, Saks, and Landsman reported significant variance in the general damage awards, and neither attitudes about the tort system nor background characteristics of jurors could explain the variation.⁷⁸ Deliberating juries exhibited substantially less variance than individual jurors.⁷⁹ Variance, however, remained high.⁸⁰ As did Wissler, Hart, and Saks, these researchers recommended returning to twelve-person juries as a way to reduce variance.⁸¹ They believed, however, that this will have only a modest effect and that a substantial reduction in variance requires providing the jury with a set of reference points against which they could assess the case at bar.⁸²

In fact, in their study, Diamond, Saks, and Landsman manipulated anchor points. One-fourth of their jurors heard plaintiffs ask for \$250,000.⁸³ This produced significantly lower awards than those arrived at by jurors who had no guidance.⁸⁴ Among the alternative ways of providing jurors with realistic anchors, the authors preferred the idea of allowing attorneys, with some judicial oversight, to present to the jury a set of pain and suffering awards that other juries made in similar cases.⁸⁵ They envisioned a procedure similar to the use of "comparables" in property tax appeals.⁸⁶

75. This assumes that decisions of larger groups exhibit less variance than those of smaller groups. See Michael J. Saks, *The Smaller the Jury, The Greater the Unpredictability*, 79 JUDICATURE 263 (1996); Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 463-64 (1997).

76. See Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 316 tbl.IV (1998).

77. *Id.* at 305.

78. *Id.* at 306-11.

79. *Id.* at 317.

80. See *id.* at 316 tbl.IV. The standard deviation of the award was 185% of the mean award for non-deliberating individual jurors and 147% of the mean award for deliberating jurors. *Id.*

81. Diamond et al., *supra* note 76, at 317.

82. *Id.* at 317-22.

83. *Id.* at 318.

84. Diamond and her colleagues report that James Zuehl achieved similar results in an unpublished study. *Id.* at 319.

85. *Id.* at 321-22.

86. *Id.* at 321.

D. *Baldus, MacQueen, and Woodworth*

Baldus, MacQueen, and Woodworth offered a somewhat different approach to controlling noneconomic awards that focuses on judicial review and a more systematic use of the courts' additur and remittitur powers.⁸⁷ They reviewed data suggesting that additurs and remittiturs are relatively rare.⁸⁸ Moreover, in most jurisdictions the use of the additur or remittitur power relies on the court's intuition and normative judgment about the appropriate quantum of awards. In this sense the judicial adjustment is as highly individualized as the initial jury assessment. Even assuming that the adjustment is informed by the judge's knowledge of jury awards in similar cases, this is rarely discussed in opinions.

New York is apparently the only state that has a statute directing the appellate division to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation"—judged in large part by awards in other similar cases.⁸⁹ This rule replaced the older, common-law "shock the conscience" standard that still exists in many states. In determining if awards "deviate materially," New York courts look to awards approved in similar cases.⁹⁰

Baldus, MacQueen, and Woodworth gave, by way of example, the case of *Martell v. Boardwalk Enterprises, Inc.*⁹¹ The plaintiff lost his arm in a boating accident and was awarded two million dollars in pain and suffering. The appellate court reduced this award to \$1.2 million after comparing the facts of the case to eleven similar cases.⁹² As summarized by the authors, the court engaged in a two-step analysis. First, it compared the case to four other, serious permanent injury New York cases and noted that although the general damages awards

87. David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1994–95).

88. *Id.* at 1120 n.21.

89. N.Y. C.P.L.R. 5501(c) (McKinney 1995).

90. See Charles D. Cole, Jr., *Charging the Jury on Damages in Personal-Injury Cases: How New York Can Benefit From the English Practice*, 31 SYRACUSE J. INT'L L. & COM. 1 (2004); Eva Madison, *The Supreme Court Sets New Standards of Review for Excessive Verdicts in Federal Court in Gasperini v. Center for Humanities, Inc.*, 50 ARK. L. REV. 591, 595 (1997). In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), the Supreme Court ruled that the New York law is a substantive rule and therefore in diversity jurisdiction cases, federal district courts may adjust jury verdicts without detriment to Seventh Amendment's reexamination clause. Not surprisingly, a disproportionate share of reviews occur in New York. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 288–90 (1998).

91. 748 F.2d 740 (2d Cir. 1984).

92. See Baldus et al., *supra* note 87, at 1136–37, for a summary of these cases.

ranged from one to two million dollars, all involved much more serious injuries, such as paraplegia.⁹³ The court, therefore, concluded the award was excessive.⁹⁴ The second step was to determine the "correct" award, and here the court examined seven other cases involving single limb amputations.⁹⁵ The pain and suffering award in those cases ranged from approximately \$250,000 to \$800,000.⁹⁶ The court then ordered a remittitur to \$1.2 million.⁹⁷ Interestingly, the court did not explain why it chose this amount, which was fifty percent greater than the largest single amputation award.⁹⁸

The Baldus, MacQueen, and Woodworth proposal builds on the New York practice. They offered a similar, albeit somewhat more formal, procedure in which the trial or appellate court would first identify the characteristics of the case that may properly affect the level of damages, then identify groups of comparable cases, and finally conduct an analysis. Although the authors did not oppose a qualitative judgment such as occurred in *Martell*, they argued that a set of quantitative tools will produce a more objective, principled, and accurate outcome. These tools include:

- (1) An adjustment of past awards for inflation.
- (2) The creation of a rank ordering of the case under review and a set of comparison cases in terms of their overall level of general damages. Comparison cases would be ranked on a five-point scale from much less to much more severe than the case under review.⁹⁹ (Doing so focuses one's attention on the cases, especially the ones that are most similar in terms of factors that affect damage awards. By this analysis, the awards in the four nearest neighbors in *Martell* ranged from a low of just under \$500,000 to just over one million dollars, substantially less than the two million dollars actually awarded by the jury.)
- (3) An adjustment of the damages in each of the comparison cases to reflect the award that would have been returned if the level of

93. *Id.* at 1138.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 744, 755 (2d. Cir. 1984). More accurately, the court offered the plaintiff the choice of accepting this amount or in the alternative retrying the damages issue. *Id.* In most jurisdictions, the court has no power to reduce a jury judgment but it can order a new trial if it finds that the award is against the weight of the evidence. As a practical matter, parties offered a remittitur nearly always choose this alternative to a new trial.

98. Baldus et al., *supra* note 87, at 1138.

99. In an empirical part of this research project, the authors actually tested this method on a sample of 461 cases involving serious injuries to children. Several individuals rated each case. According to the authors, between-rater reliability indicates that the courts can conduct similar analyses. *Id.* at 1145.

harm in the comparison case had been the same as in the case under review. The most serious comparison case gets a compensable harm score of one hundred and each other case, including the case under review gets a score that is some percentage of one hundred. Then the actual awards in all cases are adjusted as if they had the same compensable harm score as the case under review. At this point the court can compare the actual award in the case under review with the “adjusted” awards in other cases. (Again the authors undertook this analysis for the *Martell* case and found that the highest award in an “adjusted” comparison case was slightly under one million dollars.)

(4) The creation of a range of reasonableness. Verdicts would only be affirmed if they were no more than ten percent higher than the highest award as measured by methods (2) and (3) above.

This is obviously a complex proposal, at least in its initial stages, and as the authors noted, it is something judges, but not juries, might be expected to do.¹⁰⁰

E. Geistfeld

Mark Geistfeld began his paper with the observation that people disagree as to whether general damage awards are too high.¹⁰¹ His goal was to have juries estimate the appropriate size of awards based on the amount a person would pay to eliminate the risk that caused

100. *Id.* at 1143–53.

101. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 801 (1995). For example, Geistfeld compares Vidmar, *Empirical Evidence*, *supra* note 22, at 263 (“It is intriguing to question why belief in the . . . excessiveness of non-economic damages [is] so widespread and why many authors and policymakers have failed to recognize the flimsy or contrary evidence . . .”), with W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 100 (1991) (“[T]he absence of any well-defined criteria for setting compensation levels has led many observers to speculate that there has been an escalation of pain and suffering awards.”). Geistfeld, *supra*, at 777 n.8.

If one uses other legal systems as a base rate, however, there can be little argument that American damages (special and general) are high. As Professor Reimann notes:

A major reason why judgments in the rest of the world are so much lower than in the United States is that most non-American courts will award only the pecuniary damages clearly documented and add comparatively low sums for pain and suffering. There is, as far as the national reports indicate, no jurisdiction outside of the United States where a plaintiff can currently recover more than about \$300,000 for non-pecuniary damages, even in the most catastrophic cases. Courts in many countries also set awards for pain and suffering according to unofficial schedules and thus stay within generally accepted, and usually fairly low, limits.

Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 809 (2003) (internal citations omitted). Reimann further notes that in Canada, the Supreme Court has established a maximum recovery of approximately \$180,000 in 2001 U.S. currency. *Id.* at 809 n.300. The highest known German award is in the range of U.S. \$250,000. *Id.* In the Netherlands the highest recorded figure is U.S. \$140,000 and in France approximately U.S. \$300,000. *Id.*

his or her injury.¹⁰² His analysis is generally restricted to products liability cases where he argued that it is possible to obtain a rough estimate of the probability of an injury of some kind.¹⁰³ For example, a jury would be told that the defendant's wrongdoing resulted in the plaintiff being exposed to a one in 10,000 risk of injury. The jury would then be asked how much the individual would pay to purchase a safety device that would eliminate the one in 10,000 risk that the individual would end up with a pain and suffering injury as severe as the plaintiff's. After determining that amount, the jury is asked to multiply it by 10,000 to come to a final award.¹⁰⁴ Unfortunately, there seems to be no empirical data on the values this approach would generate or on the between-case variability it would produce.

F. Summary of Proposals

The process of awarding general damages faces two fundamental problems. First, there is no market against which to judge whether the awards are too high or too low. Second, partly because there is no market, we observe in practice substantial variation in awards even between cases that present similar facts. Most of the proposals bootstrap a solution to the first problem. They use past jury awards as the market from which to construct a judgment about the appropriate size of any given award. If we believe that the key problem with general damages is one of outliers and unacceptable variation in awards, this method offers a reasonable solution. This approach is not particularly attractive, however, if we believe that jury awards are generally skewed in one direction or the other. If, for example, we believe that jury general damage awards in permanent serious injury cases such as quadriplegia are, on average, insufficient, or that on average pain and suffering awards in minor injury cases are too large, this method of assessing the "correct" amount of damages simply replicates past errors. Geistfeld's alternative is to have juries assess damages from an *ex ante* perspective, asking how much a reasonable person would have paid to eliminate the risk that caused the pain and suffering injury.¹⁰⁵ What is unknown at this time is whether his solution would help at all with respect to the variation problem.

All of the other proposals focus on reducing variance. Although every proposal is somewhat unique, the suggested reforms can be or-

102. *Id.* at 804-05.

103. *Id.* at 806.

104. Geistfeld, *supra* note 101, at 842-43.

105. *Id.* at 779.

ganized into a few general types. The most frequent suggestion would change the way in which juries determine general damages.

Proposals directed at juries vary in the amount of discretion they give jurors. The most restrictive proposals create a mandatory schedule that would award a fixed amount of damages for each category of plaintiff. The categories generally reflect the seriousness of the injury and, perhaps, the age of the plaintiff. Other, less restrictive proposals provide juries with a range of permissible awards for each category of plaintiff, somewhat like sentencing guidelines albeit with far fewer variables. Still less restrictive proposals provide such ranges but tell jurors that they are only suggestions and permit awards outside the suggested range. A variation on this idea is to provide juries with several scenarios that are somewhat similar to the case under consideration. Each scenario would contain a general damage award and together the scenarios would provide the jury with a nonbinding range of awards.

A second type of proposal builds on the judiciary's common-law power to adjust inadequate or excessive awards either by ordering a new trial on damages or through the right to alter the nature and scope of judicial and appellate review of awards. Under these proposed changes the judiciary would compare awards in one given case to other awards in similar cases and would adjust verdicts that are inadequate or excessive when compared to other verdicts.

The variations among these proposals should not obscure their fundamental similarities. Each suggests one or more ways of using aggregate data to estimate the "proper" level of pain and suffering damages in each case. Each then offers a method to convey this information to decisionmakers. Finally, each recommends that the appropriate decisionmaker be given more or less discretion in deviating from the "proper" amount.

IV. WHY THESE PROPOSALS HAVE MET WITH SO LITTLE SUCCESS (IN NON-MASS-TORT SITUATIONS)

Except for the New York statute mentioned above, I know of no state that has adopted any of these proposals. The response to these various, sensible proposals addressing a widely recognized problem has been silence. Why?

A. *Horizontal Equity in Mass Torts*

Part of the answer, strangely, may be that similar procedures have been widely used in one very important corner of tort law. In the area

of mass torts, procedures designed to produce greater horizontal equity are commonplace. If we set aside those mass torts that arise from a single catastrophic event such as an airplane crash and the few medical device, drug, or toxic mass torts that have resulted in substantial defense victories on the merits,¹⁰⁶ a substantial percentage of other mass torts result in defendant bankruptcy or mass settlement, often through the use of a claims facility.¹⁰⁷ This small but highly visible portion of the tort docket is resolved by using such procedures, which systematically impose substantial horizontal equity when paying claims.¹⁰⁸ Horizontal equity was also an important consideration in the resolution of claims under the statute established to compensate victims of the September 11, 2001 terrorist attacks on New York and Washington, D.C.¹⁰⁹

Several factors militate toward placing greater emphasis on horizontal equity in these cases. In ordinary litigation, the arguable injustice of horizontal inequity is largely invisible. When two similarly situated parties receive different general damage awards in separate lawsuits, the plaintiff receiving the lesser amount is unlikely to even know of this inequity. His or her lawyer has little incentive in making a point about this unfortunate outcome that after all could be blamed, at least in part, on the advocacy skills of counsel. Even if the lawyer were to seek redress, achieving any relief by way of an additur or a

106. These include the Bendectin litigation and silicone implants, at least as they relate to systemic injuries. See 4 DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* 396 (2002); MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996); JOSEPH SANDERS, *BENDECTIN ON TRIAL* (1998).

107. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361 (2005), for a discussion of the many claims resolution facilities and other mass tort settlements since Dalkon Shield. See also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961 (1993).

108. McGovern, *supra* note 107, at 1368.

109. See Stephan Landsman, *A Chance To Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 *DEPAUL L. REV.* 393 (2003). Landsman notes that concern for horizontal equity was strongest with respect to noneconomic losses.

Despite a strikingly liberal standard for the calculation of noneconomic losses, the Special Master decreed a *flat and fixed presumed award* for all those who died: "The presumed noneconomic losses for decedents shall be \$250,000 plus an additional \$50,000 for the spouse and each dependent of the deceased victim. Such presumed losses include a noneconomic component of replacement services loss." Claimants could seek to prove "extraordinary circumstances" that might justify departure from this fixed sum, but they were given no guidance or encouragement.

Id. at 402 (quoting September 11th Victim Compensation Fund of 2001, 67 *Fed. Reg.* 11,233, 11,246 (Mar. 13, 2002)).

It is instructive to compare this result with the data presented by Leebron. See *supra* text accompanying notes 29–31.

new trial on damages is remarkably unlikely. And from the court's point of view, the outcome may be rationalized as the result of some unique facts and the inevitable give and take that occurs within the black box of jury deliberations.

Many of the factors that render inequity invisible in ordinary litigation disappear in the mass tort, class action settlement context. In these cases it is often far more difficult to argue that substantial substantive differences exist between the parties. Attorneys are much more likely to object if their clients are treated differently from other, similarly injured individuals. Moreover, judges, masters, or others in charge of settlement processes or claims facilities are, inevitably, pushed toward a bureaucratic justice model in which standards are set by external bodies (not the jury), each case is evaluated in terms of only a limited number of weighted factors, and the standards are based, at least in part, on aggregative and averaging processes.¹¹⁰ As McGovern noted, in many settlement processes a number of variables, generally between five and twenty, may be considered and applied to individual cases by the use of an algorithm or formula.¹¹¹ Within such systems, horizontal equity, especially with respect to general damages, becomes an important criterion of fairness.

The existence of now routine aggregation procedures in the mass-tort context underscores the point that the tort system's general failure to adopt proposals such as those discussed above is not due to any fundamental inability to implement such schemes. The explanation for the failure to adopt such schemes lies elsewhere. In my judgment, two factors seem most important: the relative superiority of damage caps in achieving defendant objectives, and the organizational and normative structure of the plaintiff's bar that causes the bar to treat such proposals with little more than benign neglect.

B. Damage Caps

Suggestions on how we might improve the method of awarding general damages in tort litigation are not being written on a blank slate. Even the earliest of these proposals in the 1980s were being advanced against the background of an alternative solution to uncertain general damages—damage caps. In fact, some of the proposals are offered as an alternative to damage caps as a way of controlling noneconomic awards.¹¹²

110. See Baldus et al., *supra* note 87, at 1124–25. The authors borrow the term from JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

111. McGovern, *supra* note 107, at 1372.

112. See Bovbjerg et al., *supra* note 44, at 956.

Damage caps were first introduced as part of the initial round of tort reform following the hard malpractice insurance market in the late 1970s and early 1980s.¹¹³ By the late 1980s, when the Bovbjerg, Sloan, and Blumstein article was published, many states had already placed caps on noneconomic damages.¹¹⁴ By 1987, twenty-three states had caps ranging from a low of \$150,000 to a high of one million dollars.¹¹⁵ Some states imposed caps only for certain types of cases (such as malpractice), while others imposed caps for all injuries. In recent years, states that avoided caps in earlier rounds of tort reform have now instituted them, at least for some types of cases.¹¹⁶

The criticisms of caps are so well known that a mere listing will suffice here. Caps generally come into play only in cases where the plaintiff has suffered a very severe injury. They do not address the problem of under-evaluation nor do they address the potential for over-evaluation in cases where the plaintiff's injury is not serious. Consequently, this kind of cap does not assist the jury at all in arriving at an appropriate award for noneconomic damages. Even in serious injury cases, caps that are not adjusted for inflation may, over time, impose systematic under-evaluations for some severe, permanent injuries. Caps may have another deleterious consequence for cases that are very expensive to prepare and try. If a plaintiff's injuries, though severe, do not result in large special damages, caps on general damages may limit recovery such that a case may not generate a sufficiently large award to justify litigating the case.

113. The relationship between the tort system and hard insurance markets has been hotly contested over the years. See PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* (1985); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990); Schuck, *Mapping the Debate*, *supra* note 47.

114. See Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989). Only rarely did states cap all damages. *Id.* at 543. *But see* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 536 (Va. 1989) (upholding Virginia's \$750,000 damage cap).

115. In a few states, the caps were struck down as unconstitutional. See *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988).

116. For example, Texas instituted caps on noneconomic damages for medical malpractice actions in 2003. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2005). Because an earlier effort to impose caps was struck down by the Texas Supreme Court, the legislature caused to be placed on the ballot a state Constitutional Amendment permitting caps in all tort cases. The provision narrowly passed. See Michael W. Shore & Judy Shore, *Personal Torts*, 57 SMU L. REV. 1127, 1127 (2004). Washington passed a cap statute that caused the size of the maximum award to vary with the life expectancy of the plaintiff (with a minimum of fifteen years). Bovbjerg et al., *supra* note 44, at 958 n.216. For a discussion of other states that have recently instituted caps, see Finley, *supra* note 113.

If caps are such a poor method for controlling jury variability, why have they been the legislation of choice in many states?¹¹⁷ An important consideration, of course, is that caps are a relatively straightforward reform that may be implemented with only minor changes to the existing tort system. In this regard, caps have an inherent advantage over many of the alternatives discussed above that require an ongoing commitment to data collection concerning average awards in similar cases.

Administrative convenience aside, the most frequently given justification for caps is that they provide a way to control insurance costs. Recall that the early rounds of caps came in the wake of and as a response to the hard malpractice insurance market of the 1970s and 1980s. In this regard, there has been an ongoing debate regarding whether caps actually accomplish this purpose.¹¹⁸ Even if caps do not have a substantial effect on rates, in combination with caps on punitive damages, they substantially reduce the possibility of a truly large award against a defendant. “Bet the company” scenarios are less likely, at least in non-mass-tort situations. There is some evidence, however, that caps do have real bite in more serious cases.¹¹⁹

Defense interests have fought long and hard for caps on punitive and general damages but seem to have expressed little interest in the types of reform proposed in this article. Obviously, in each individual case, defendants do care about potential horizontal inequality. Many defendants and their insurers, however, are repeat players.¹²⁰ This is especially likely among those defendants at the forefront of tort reform. For this group, uncertainty in a given case is not necessarily a large problem because over their entire inventory of cases the average award may approach mean awards. Although a reduction in the vari-

117. See Bovbjerg et al., *supra* note 44, at 958 n.216.

118. See Richard E. Anderson, *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 YALE J. HEALTH POL'Y L. & ETHICS 343 (2005); Finley, *supra* note 113; Donald J. Palmisano, *Health Care in Crisis: The Need For Medical Liability Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 371 (2005); Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFF., Jan. 21, 2004, <http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1>; Kathryn Zeiler, *Turning From Damage Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y L. & ETHICS 385 (2005).

119. See Vidmar, *Empirical Evidence*, *supra* note 22, at 294 (stating that twenty-four of 179 medical malpractice awards were adjusted downward because of caps on general damages); Albert Yoon, *Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South*, 3 AM. L. & ECON. REV. 199, 206–08 (2001) (arguing that caps decrease the average relative recovery by medical malpractice claimants).

120. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

ance of general damage awards presumably is a desirable thing for repeat defendants, it is understandable why this is not a high priority.

Thus, damage caps are an impediment to reforms designed to reduce variation not because they are a reasonable substitute for these reforms, but because they are in some ways superior to these reforms in achieving certain defense goals in the area of tort law. But if the success of caps explains why defendants express little interest in general damage reforms, why is there so little interest on the plaintiffs' side as well?

C. *The Organizational and Normative Structure of the Plaintiffs' Bar*

It is not surprising that the plaintiffs' personal injury bar has actively and continuously opposed general damage caps in state legislatures.¹²¹ These efforts have met with some success primarily because the courts in some states have declared caps to be unconstitutional under state constitutions.¹²² These successes notwithstanding, the general trend over the last twenty years or so has been one of defense success in pushing through various tort reform proposals in many states.

Given this overall trend, it is surprising that plaintiff lawyers rarely seem to have taken anything but a reactive position on general damages reform. I do not know of any states in which the plaintiffs' bar has supported the types of reform suggested here. Potential reasons for this position are many, and unfortunately I know of no research directly on point. It does seem plausible, however, that both the organization of the plaintiffs' bar and the norms of its members play a part in this inaction.

As to organization, numerous studies indicate that similar to other segments of the bar, the plaintiffs' bar is highly stratified. Within the plaintiffs' bar, stratification is determined primarily by the value of the cases a lawyer or a firm handles.¹²³ Stratification is itself highly correlated with active participation in the politics of tort reform. It is the

121. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 237 (2001).

122. See, e.g., *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1081 (Ill. 1997).

123. Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest": *How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POL'Y 377, 377–78 (1999). See also Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiffs' Personal Injury Bar* 36, 65 (2001) (unpublished Ph.D. dissertation, University of Illinois, Chicago) (on file with author). According to Parikh, at least in Chicago, the plaintiffs' personal injury bar lacks a well-delineated middle class as both low-end

high-end section of the plaintiffs' bar that is politically active and that makes most of the contributions to political and judicial campaigns.¹²⁴ This group of lawyers dominates the personal injury bar's legislative strategy, and it is this group of lawyers who has the most to lose when caps are imposed on general damages.¹²⁵ It is not surprising that they focus the lion's share of their attention to defeating such proposals.

Status is not determined entirely by case values. Other components of status include a willingness to try a case and trial advocacy skills.¹²⁶ For these skills to have significant value, however, they require a regime where rhetorical ability can have a significant impact on case outcomes. In a system where damages are largely determined by a set of fixed rules, such skills can have little play.¹²⁷ For highly skilled, elite trial lawyers, schedules and similar devices restrict an important aspect of what sets them apart from other personal injury lawyers.¹²⁸ To the extent that this is the case, it is not surprising that they have not actively supported such reforms.

Nor is this simply an instrumental position. Most people who have spent time with plaintiff personal injury lawyers are struck by their defense of traditional, common-law adversarial processes.¹²⁹ Thomas Galligan offered a compelling review of the virtues of the common-law tort action and its incompatibility with many of the proposals reviewed in this paper.¹³⁰ He explained that in ordinary litigation:

The specific story dominates the stage. The law's generalized standards accommodate the details of the case. Broad standards invite particularistic, event specific versions of what happened. The detailed story matters more than it might in a legal landscape of detailed, particularistic rules. When the story matters, the individuals

practitioners and high-end firms poach the cases that would be the bread and butter of a middle of the road practice. *Id.*

124. Parikh, *supra* note 123, at 104.

125. As Kritzer notes, most personal injury lawyers are working on automobile cases where the primary limiting factor is another driver's insurance policy, and most such policies have damage limits far below the caps imposed in most states. Kritzer, *supra* note 121, at 237.

126. Parikh, *supra* note 123, at 72.

127. See, e.g., Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 *LAW & SOC'Y. REV.* 651 (1990) (discussing judicially imposed damage ranges in Japan).

128. Kritzer notes that given the increasing hostility of jurors to plaintiffs, some form of scheduling might in fact work in favor of clients in some cases. Kritzer, *supra* note 121, at 238. For general discussions of prodefense perspectives among jurors, see Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 *EMORY L.J.* 1225 (2004); Valerie P. Hans & Juliet Dee, *Whiplash: Who's to Blame?*, 68 *BROOK. L. REV.* 1093 (2003).

129. Glen O. Robinson & Kenneth S. Abraham, *Collective Justice In Tort Law*, 78 *VA. L. REV.* 1481, 1482 (1992).

130. Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 *CORNELL J.L. & PUB. POL'Y* 139, 172 (1996).

matter. The litigants and those whom they call as witnesses become actors in a play, a play about what happened, and each of the characters matter.¹³¹

Continuing on this theme, Galligan stated:

Turning to general damages, we see perhaps the most dramatic example of tailoring damage awards to the needs of the particular plaintiff. Juries rendering awards for mental anguish, pain and suffering, and loss of enjoyment of life focus not on the average person but once again, on the particular plaintiff. . . . Fact finders consider the pain the particular plaintiff suffered, the mental anguish this plaintiff has suffered, and the loss of enjoyment of life this plaintiff has suffered. The jury focuses in on the particular plaintiff involved in the particular case. It should be noted that recent proposals to provide jurors with guidelines or schedules for general damages are inconsistent with traditional rules concerning general damages. The proposals would abstract away from the particular plaintiff.¹³²

To the degree that lawyers are normatively committed to the individualized justice model embedded in common-law processes, they are unlikely to champion any proposals that are grounded on aggregative limitations to individualistic justice.

V. AND WHY THIS IS TOO BAD

Most of this Article has been directed at reviewing proposals to ameliorate variance in general damage tort awards and discussing why they have met with so little success. As the title of this article suggests, I think that it is a bad thing. Here is why.

There are few more fundamental principles of justice than the principle that like cases should be treated alike. It is not easy to justify substantial horizontal inequity in any area of law. The problem, of course, is determining which cases are alike. But in an area such as general damages where there is no external standard as to the proper size of any award, the burden is reasonably on those who would justify different awards for similar injuries.

Proponents of current procedures may argue that across all cases the level of inequality is not as large as outliers suggest, and that extreme cases should not dominate our decisions. To some extent, the point is well taken. Whether we wish it or not, however, the outliers play a disproportionate role in the politics of torts. Newspaper articles inevitably focus on such cases, and the story they tell can rarely be

131. *Id.* at 140.

132. *Id.* at 172.

overcome or explained.¹³³ The articles create a perception of unfairness that undermines the legitimacy of tort.

One may take the position that if perceptions are wrong, or at least substantially wrong, we should not allow them to affect existing methods of calculating general damages. It seems clear, however, that perceptions of unfairness have caused most organized defendants to view the tort system as a lottery that exposes them to unknown and perhaps unknowable damages. It is easy to be cynical when listening to professional advocates advance these arguments, but for anyone who has listened to ordinary physicians discuss the medical malpractice system it is difficult to conclude that their sense of injustice is anything but heartfelt. To use Max Weber's categories, the reforms discussed in this paper would increase the sense of formal rationality in a corner of tort law now dominated by what can fairly be described as substantive irrationality.¹³⁴

At a practical level, reforms might ease the pressure for further, defense-oriented legislative change in the tort system. Some will argue, perhaps correctly, that it is too late. No proposed changes in the calculation of damages will cause defense interests to cease their effort to alter the system to their advantage. This gaming, however, is not inevitable. At this juncture, it is worth remembering the fundamental compromise that produced the modern worker's compensation system. Defendants traded greater coverage—the effective end of the contributory negligence and fellow servant rules—for greater cost certainty.¹³⁵ We do not have to go all the way to a worker's compensation model to imagine tradeoffs of coverage for certainty that might ameliorate the tort wars. But, the proposals to modify ways of calculating general damages discussed in this article are an important component of any such compromise.

133. See generally Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64 (1996).

134. See David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

135. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69 (1967).

