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# TOWARDS A GLOBAL MODEL FOR ADJUDICATING PERSONAL INJURY DAMAGES: BRIDGING EUROPE AND THE UNITED STATES\*

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## ABSTRACT

Techniques for awarding personal injury damages assume an increasing interest in times of frequent mobility of individuals. Assessing non-economic damages might require more harmonized answers to provide justice and equal treatment across the world. Indeed, in most countries a lasting debate surrounds non-economic damages for personal injury. Specifically, an alleged constant increase in awards and the difficulties linked to the subjectivity of their assessment, and the selection of the institution that is best suited to award these damages and how it should do so are but a few problems that are addressed by contemporary scholarship. However, this extensive debate has not sufficiently explored the techniques for awarding intangible loss damages in personal injury by using a comparative law methodology. Filling this gap, this article explores the latest developments in awarding non-economic damages. It proposes an analysis of the American and European experiences that aims to bridge the two legal cultures for mutual benefit.

By way of comparative and historical analysis, Part I highlights the significant trend in American and European jurisdictions, which consists of distinguishing non-economic damages based on objective criteria stemming from an ascertainable medical condition. Building on these results, Parts II and III develop a more efficient conceptual framework and further propose better assessment tools in awarding these damages. This method demonstrates the benefits the United States could gain by introducing innovative judicial scheduling, without triggering either constitutional concerns or statutory intervention while building upon the existing strengths of the European experience and the American judicial system. For instance, Normalized Value Scheduling would endow actual judges and jurors with the necessary expertise, increasing horizontal and vertical equality without necessarily impeding an inevitable variability of awards among different jurisdictions.

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## INTRODUCTION

Non-pecuniary damages for personal injury lie at the very center of contemporary legal debates primarily because of the alleged constant increase in awards, but also because of the difficulties that stem from the inherent subjectivity of their assessment.

Scholars have focused on denying or justifying the legitimacy of non-economic damages<sup>1</sup> for personal injury; or scholars have debated about which institution is better suited to award these damages and how it should do so. Indeed, several authors have proposed statutory intervention aimed at better management of non-pecuniary loss assessment, regardless of the scholars' underlying wish to curtail them. Though undoubtedly relevant, this extensive debate has not sufficiently explored the techniques for awarding intangible loss damages in personal injury suits by using comparative law methodology. Filling this gap, this article explores the latest developments in awarding non-economic damages and further proposes an analysis of the American and European experiences.

In particular, this article describes both the developments underpinning the incremental evolution of these damages, and the tools used by different legal orders in managing intangible loss in personal injury. It is asserted that awarding damages for non-pecuniary loss has acquired a different rationale in personal injury suits that is aimed at protecting against damage to one's health and bodily integrity. Hence, Part I focuses on the debate over non-economic damages, emphasizing their social functions in light of an expanding economic context and stressing the need for more American-European comparison. Further, the subsequent sections highlight the significant trend in American and European jurisdictions, which consists of distinguishing non-economic damages with an "objective"<sup>2</sup>

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1. Non-economic damages are "general damages," and "include such items as physical pain and suffering, inconvenience, and loss of enjoyment which cannot be measured definitively in monetary terms." *Sprague v. Cal. Pac. Bankers & Ins. Ltd.*, 74 P.3d 12, 22-23 (Haw. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Dacanay*, 952 P.2d 893, 896 n.3 (Haw. Ct. App. 1998)). At least one jurisdiction also includes the loss of intellectual gratification and physical enjoyment in this category of damages. *Este v. Roussel*, 833 So. 2d 999, 1010 (La. Ct. App. 2002); see also *Engles v. City of New Orleans*, 872 So. 2d 1166, 1178 (La. Ct. App. 2004); *Ford v. Bazile*, 871 So. 2d 612, 617 (La. Ct. App. 2004); *Marks v. OHMEDA, Inc.*, 871 So. 2d 1148, 1161 (La. Ct. App. 2004); *Plaisance v. McDonald*, 865 So. 2d 1004, 1008 (La. Ct. App. 2004); *Scramuzza v. River Oaks Inc.*, 871 So. 2d 522, 531 (La. Ct. App. 2004); *Simon v. Reel*, 867 So. 2d 174, 178 (La. Ct. App. 2004); *Flint v. Trolley Stop*, 843 So. 2d 635, 640 (La. Ct. App. 2003); *Simmons v. King*, 833 So. 2d 1148, 1153 (La. Ct. App. 2002). According to one author, general damages constitute about fifty-five to sixty percent of personal injury damages awards. See Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 296 (1998).

2. The use of "objective" refers to a general de-personalization of the assessment process. According to the Collins Dictionary, "objective" means: "1. existing independently of perception or an individual's conceptions . . . ; 2. undistorted by emotion or personal bias[;] 3. of or relating to actual and external phenomena as opposed to thoughts, feelings, etc." Collins Word Exchange, <http://www.collins.co.uk/wordexchange/Sections/DicSrchrSult.aspx?word=objective> (last visited Nov. 21, 2005). This is the meaning intended here. In light of the European conception of non-economic damages, medical condition is an "objective" parameter to avoid "subjective" (meaning distorted by emotion or personal bias) description. Indeed, the Collins dictionary defines "objec-

basis in an ascertainable medical condition from other non-economic damages. Some countries, such as the United Kingdom, France, and Italy, have adopted a clear distinction between pain and suffering (or *pretium doloris*, which relies upon a subjective perception of pain and suffering) and loss of enjoyment of life (perceived as a more “objective” category of non-pecuniary damages susceptible of assessment according to the severity of the resulting injury). Based on this distinction, the evidence of a condition — an illness or disability that a medical doctor can ascertain in light of scientific knowledge — is a coherent screening test for intangible loss, accompanying both physical injury and emotional distress, were the latter to be recognized by law.<sup>3</sup>

Part II seeks to highlight the second main thesis: that understanding the new rationale for non-pecuniary damages in personal injury cases leads to a more efficient framework and better assessment tools. Drawing on the examples offered, Part III demonstrates the benefits the United States could gain, without triggering constitutional concerns or statutory intervention. For instance, it envisages one possible innovation in judicial scheduling in the United States: adopting a Normalized Values Schedule at the court level, in order to increase horizontal and vertical equality,<sup>4</sup> without necessarily preventing variability of awards among different jurisdictions. Moreover, courts could implement the Normalized Values Schedule autonomously and without forgoing jurors’ freedom in assessing damages.

Through the lens of comparative research, the explicit goal of this article is to explore ways of improving the process of converting intangible loss into money. The challenge is not to relinquish the task of awarding damages to technocrats, but rather to endow actual judges and jurors with the necessary expertise, building

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tive” as it applies to “disease symptoms” as meaning “perceptible to persons other than the individual affected.” Collins Word Exchange, <http://www.collins.co.uk/wordexchange/Sections/DicSrchRsult.aspx?word=objective> (last visited Nov. 21, 2005).

3. For a recent account of the latest developments on pure emotional distress, see Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713 (2004). On the historical changes in American personal injury law, see Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403 (2000). Furthermore, intentional infliction of emotional distress was acknowledged only late in the 20th century. See *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282, 285-86 (Cal. 1952) (providing the landmark opinion of Justice Roger Traynor).

4. The principle of horizontal justice or equality imposes the avoidance of unjustified variations within levels of injury seriousness; the principle of vertical justice requires differentiation according to injury seriousness and duration. This principle clearly guided the most recent innovations in the U.K. regarding assessment of non-economic damages. See, e.g., *Heil v. Rankin*, [2001] Q.B. 272, 309 (U.K.) stating:

We are satisfied that it is in the case of the most catastrophic injuries that awards are most in need of adjustment and that the scale of adjustment which is required reduces as the level of existing awards decreases. At the highest level, we see a need for the awards to be increased by in the region of one third. We see no need for an increase in awards which are at present below £ 10,000. It is our view that between those awards at the highest level, which requires an upwards adjustment of one third, and those awards where no adjustment is required, the extent of the adjustment should taper downwards as illustrated by our decisions on the individual appeals.

See *infra* Part I.C.2.

upon the existing strengths of the European experience and the American judicial system.

## I. THE HISTORICAL DEVELOPMENT OF INTANGIBLE LOSS RECOVERY: DISCOVERING THE EXISTING FRAMEWORK.

### A. *Non-Pecuniary Damages for Personal Injury in Context*

#### 1. Intangible Loss and Personal Injury: A Comparative Perspective.

Is there a better way of framing non-pecuniary damages for personal injury suits and awarding compensation? Can comparative research offer useful hints for application in the United States to these heated issues?<sup>5</sup>

Attempting to answer these questions, we will use the terms non-pecuniary loss or damages and non-economic damages or general damages indifferently, making it clear that they are different from lost earnings or material damages.<sup>6</sup> As emphasized in a recent comparative contribution, by these expressions:

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5. See, e.g., Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 325 (Robert E. Litan ed., 1994) (accurately summarizing the problematic argument we tackle in this article: "Quite apart from its unfairness, . . . variability [of damages] has undesirable effects on the behavioral incentives of primary actors and on settlements. If it can be reduced without unduly sacrificing other important values, justice requires that we try to do so."); see also 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, 20 (2004) (advocating that, if properly applied, the English system of providing the jury with a reasonable compensation bracket does not eliminate the jury's role in awarding damages, a necessarily nuanced and highly individualized determination in every case).

6. For a similar definition, see Steven. P. Croley & Jon D. Hanson, *The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 (1995), who concludes that, although several significant impediments prevent the emergence of a robust market for insurance against pain and suffering, consumers do demand such insurance, thus, some amount of compensation for consumers' pain and suffering serves tort law's insurance goal of providing insurance that consumers demand.

To receive damages for physical impairment, the injured party must prove that the effect of his physical impairment extends beyond any impediment to his earning capacity and beyond any pain and suffering to the extent that it produces a separate and distinct loss that is substantial and for which he should be compensated.

Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 412 (Tex. App. 2001) (citing Peter v. Ogden Ground Serv., Inc., 915 S.W.2d 648, 650 (Tex. App. 1996)), *overruled on other grounds* by Roberts v. Williamson, 111 S.W.3d 113 (Tex. 2003). The term "hedonic damages" refers to "damages for loss of enjoyment of life . . . [which] are included in the concept of general damages," which also includes pain and suffering. Abadie v. Metropolitan Life Ins. Co., 804 So. 2d 11, 23 (La. Ct. App. 2001); see also Clement v. Consolidated Rail Corp, 734 F. Supp. 151, 154-55 (D.N.J. 1989); Ogden v. J.M. Steel Erecting, Inc., 31 P.3d 806, 813 (Ariz. Ct. App. 2001); Eyoma v. Falco, 589 A.2d 653, 658 (N.J. Super. Ct. App. Div. 1991). For a further critical review of the notion of hedonic damages, see Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037 (2004) (concluding that hedonic damages are problematic, especially when assessed as a separate element of an award, and lead to excessive awards).

[W]e understand what is also referred to as non-patrimonial loss, that is to say, loss which is not damage to a person's assets or wealth or income and which is therefore incapable of being quantified in any objective financial manner by reference to a market. What remains, however, is a very broad field. It covers, for example, not only physical bodily injury and injury to physical and mental health, except in so far as these matters produce loss of income or generate expenses . . . but also anxiety and mental distress.<sup>7</sup>

This definition allows us to refer to diverse title of damages in different countries to capture a wider picture.<sup>8</sup>

Based upon a comparative analysis of American and European experiences, the proposed reasoning elaborates a comprehensive theoretical and operational framework.<sup>9</sup> However, this article does not attempt to justify the existence of non-economic damages in tort law, nor does it challenge the actual level of damages awarded. By contrast, we ascertain the rising importance of these damages in the legal systems as a reality that should be investigated, in order to conceptualize the trends emerging over a number of years and to forecast their logical and beneficial consequences. The main trend shows that damages for non-pecuniary loss have acquired a different rationale in personal injury, which aims at protecting against damage to one's health and bodily integrity.

Both the United States and Europe have always recognized non-pecuniary loss as a proper title of damages. However, the last decades have witnessed an escalation in the amounts awarded for the non-pecuniary component of damages in cases of personal injury<sup>10</sup> — at least this is a shared perception in most western

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7. W. V. Horton Rogers, *Comparative Report*, in *DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE* 246 (W. V. Horton Rogers ed., 2001).

8. For a similar argument in the U.K., see the emblematic work of P. S. ATIYAH, *THE DAMAGES LOTTERY* 14-15 (1997), who comments that "there is no way of putting any real financial figure [on pain and suffering] — there is no market for these 'losses.'" Similarly in the United States, such an argument can be found within the *RESTATEMENT (SECOND) OF TORTS* § 912 cmt. b (1977), where it is stated that "[t]here is no market price for a scar . . . since the damages are not measured by the amount for which one would be willing to suffer the harm." See also David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 272 (1989); Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303, 308 (1989).

9. The use of the comparative methodology in tort law has long been acknowledged by scholars. Paradigmatic work includes RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* (3d ed. 1980), who proposes in a civil law context comparison tools such as "legal formants" in order to propose a dynamic approach which shall not be limited to black-letter law, but rather expand to case law. For an account of his proposals, see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 343 (1991).

10. For support on this argument, see, for example, Robert Litan et al., *The U.S. Liability System, Backgrounds and Trends*, in *LIABILITY: PERSPECTIVES AND POLICY* 7-13 (Robert Litan & Clifford Winston eds., 1988); George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1536 (1987). Raising serious doubts about the accuracy of this conclusion, compare, for example, Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 263 (1993), who states that "[i]t is intriguing to question why belief in the . . . excessiveness of non-



countries.<sup>11</sup> Similarly, most of these countries are experiencing a deeply divided debate on the proper methods of awarding non-pecuniary damages and of defining their theoretical boundaries.<sup>12</sup> To a significant degree, this growth is one response of legal systems' demand for protection of individual interests originating in society,<sup>13</sup> and it has triggered important modifications in the conceptualization of intangible loss accompanying both physical and emotional harm.

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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), who states that "[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."

11. In this sense, see Giovanni Comand , *Risarcimento del Danno alla Persona e Alternative Istituzionali*, Torino, Giappichelli, 1999, 3-45; DAMAGES FOR PERSONAL INJURIES: A EUROPEAN PERSPECTIVE 1 (Frederick J. Holding & Peter Kaye eds., 1993); A. GEERTS ET AL., COMPENSATION FOR BODILY HARM: A COMPARATIVE STUDY 95-98 (1977); WERNER PFENNINGTORF & DONALD G. GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES 9-14, 77, 155-57 (1991); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 64 (2002). But see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 775, 777 (1995) ("Reforms limiting pain-and-suffering damages have succeeded despite the lack of evidence (and, more fundamentally, the lack of objective standards) establishing that such awards tend to be excessively high."). Of course, recognition of non-pecuniary damages as a proper title of damages does not preclude this expansive trend from having experienced both misuses and abuses or, at least, misunderstandings. See generally PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991).

12. For a much more detailed clarification, see Comand , *supra* note 11, at 3ff. According to the formula emphasized by Izhak Englard, "personal injuries call for social solidarity," though the idea is not entirely new to U.S. scholars. IZHAK ENGLARD, *PHILOSOPHY OF TORT LAW* 110 (1993); see also N.K. Komesar, *Toward a General Theory of Personal Injury Loss*, 3 J. LEGAL STUD. 457, 459 (1974). For further commentary on these same issues, see P.S. Atiyah, *Personal Injuries in the Twenty-First Century: Thinking the Unthinkable*, in *WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY*, (Peter Birks ed., 1996); ATIYAH, *supra* note 8, at 138 (criticizing the U.K. tort system sharply). For a survey of different theories and policies on non economic damages, see Bruce Chapman, *Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 409 (David G. Owen ed., 1995). For a recent critical perspective on awarding pain and suffering, see Paul V. Niemeyer, *Awards For Pain And Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1401 (2004), who argues that awarding damages for pain and suffering "without rational criteria for measuring [them undermines] the tort law's rationality and predictability," and advocates legislative intervention.

13. As Roscoe Pound observed nearly one century ago:

A man's rights multiply as his opportunities and capacities develop . . . The more 'civilized' the nation, the richer he is in rights . . . The idea here is that interests — that is, demands of the individual — increase with increasing civilization, and hence the pressure upon the law to meet these interests increases the scope and character of legal rights.

Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 343 n.2 (1915) (quoting LUIGI MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS* 324 (John Lisle trans., 1921)).

The different levels at which supply and demand (to borrow a term from economics) of legal protection meet, reflect the legal and economic development that a country has achieved. In so-called rich societies, it is conceivable to grant greater economic protection to individual interests, because there are more resources to dedicate to them.<sup>14</sup> At first, society established a form of compensation for soldiers. Society then took time to develop an acceptable compensation scheme for workers as well.<sup>15</sup> It was not just a matter of political or social struggle; it was, and it still is, a matter of resources. When a society can devote more resources to single individuals, there is a tendency to characterize these individuals' new interests as legal rights and to develop juridical tools to protect these rights by way of building on the pre-existent legal framework. In a way, both the demand for protection of individual interests and the supply of protection depend greatly upon the amount of available resources. These resources are comprised of individual and social assets (both economic and non-economic), such as legal expertise and social awareness.<sup>16</sup> Consequently, the increase in awards for non-pecuniary loss, and its conceptual metamorphosis, may well be an attempt to match demand for an offer of protection for specific interests.

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14. The microeconomic argument is that "the higher a person's income, the larger will be his or her purchases of most goods." LLOYD G. REYNOLDS, *MICROECONOMICS: ANALYSIS AND POLICY* 33 (6th ed. 1988). This same argument could reasonably be used for the endowment a society can offer to its citizens. Hence, for the demand of hedonistic purchases or possibility of purchases an individual has in a given wealth of his or her society there will be a shift upward. See A.M. Honoré, *Causation and Remoteness of Damages*, in XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 97 (1972) ("Although it is dangerous to generalize about the varied experience of different countries, it is possible to discern, at least in developed societies, a progression by which compensation becomes fuller as the economy expands. The fault of the injured party, at first complete bar to recovery, later leads only to a reduction of damages and, finally, is completely disregarded unless it is especially serious or flagrant.").

15. It is not the goal of this paper to investigate whether such losses should stem from tort principles or other different systems moving towards pure insurance or social insurance. For further commentary on this topic, see MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 788 (7th ed. 2001), who states that in all, some 48 state legislatures have enacted tort reform legislation of one sort or another. See generally Stephen D. Sugarman, *Proposals for Reform*, 15 U. HAW. L. REV. 659, (1993); Stephen D. Sugarman, *Alternative Compensation Schemes and Tort Theory: Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985) (illustrating the shortcomings of the traditional negligence system and instead advocating for insurance mechanisms). For a different perspective, see George L. Priest, *Beyond Compensation: Economic Problems of Accidents and Compensation*, 15 U. HAW. L. REV. 544 (1993), who criticizes alternative approaches to tort law, such as workers' compensation, and even predicts a reduction of their scope.

16. See, for example, Peter H. Schuck, *Introduction: The Context of the Controversy*, in *TORT LAW AND THE PUBLIC INTEREST COMPETITION, INNOVATION, AND CONSUMER WELFARE* 17, 19 (Peter H. Schuck ed., 1991), which stresses that "[Social] change has always been a driving force in tort law . . . . Today, as in the past, new social conditions demand new legal solutions. Tort law, with great creativity and mixed success, struggle to devise them." See also Croley & Hanson, *supra* note 6, at 1908 (referring extensively to VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 3 (1994), and stating that "Zelizer's account thus provides one strong piece of evidence that whether quantifying life and limb is socially acceptable depends upon the context in which it is done and, more specifically, that what many may resist in the insurance context, they may praise in the tort context.").

However, the goal of this article is neither to elaborate on the theory that damages for intangible loss are a social response, nor to analyze different normative or efficiency theories in favor or contrary to compensation for intangible loss.<sup>17</sup> The challenge is to provide decision-makers with the necessary expertise in addition to that which the American judicial system is already able to provide.<sup>18</sup> At the end of this comparison, better use of information in awarding non-pecuniary damages for personal injury will emerge as a proposal for the United States. The suggestions will not attempt to reduce the role of juries in civil trials, but will build upon their expertise. Paradoxical as it may seem, standardization is a formidable tool for maintaining jury power when reference can be made to previous judicial assessment of non-economic damages.<sup>19</sup>

## 2. Intangible Loss and Personal Injury: The Trend.

Having stated the goals of this article, there is a need to clarify the first claim: the expanding trend<sup>20</sup> of non-economic damages in personal injury has both modified the conceptual underpinnings of these titles of damages and has increasingly focused on protecting health and bodily integrity.

Almost one hundred years ago, a prominent scholar alleged that social judgment (mostly compensation concerns) and economic rationales (mostly deterrence concerns) dictate the safeguarding of protected interests.<sup>21</sup> The more a society de-

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17. For a recent account of those theoretical frameworks in the United States see Ronen Avraham, *Pain-and-Suffering Damages in Tort Law: Revisiting the Theoretical Framework and the Empirical Data* (Feb. 2003) (unpublished Mich. Law & Econ. Research Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=382120](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=382120) (providing abstract) (complete text on file with author).

18. Such expertise given from the outset may help the review of decisions by trial judges or on appeal, but this is a sort of side benefit of the article, not its principal goal.

19. In other terms, this is not a quest for substituting judges and juries with an administrative body of experts. See Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2137-38 (1998) ("[A]n administrative or legislative body might create a kind of 'pain and suffering grid,' 'libel grid,' or 'sexual harassment grid,' combining the basic elements of disparate cases into presumptive appropriate awards. A judge would produce a dollar award by seeing where the case at hand fits in the grid and perhaps by making adjustments if the details of the case strongly call for them.") (citations omitted).

20. The idea of expansive and restrictive jurisdictions appeared in MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 684 (3th ed. 1983). The evolution of tort law and the movements for its alternatives, as well, can be traced to expansive and restrictive trends in jurisdictions related to social evolution. For an analytical account, see Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 15-23 (1988).

21. As one author states it, "A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law." PROSSER AND KEETON ON TORTS 57 n.22 (W. Page Keeton ed., 5th ed. 1984) (quoting THOMAS ATKINS STREET, *FOUNDATIONS OF LEGAL LIABILITY* 460, 470 (1906)). For a review of literature claiming tort damages' main goal is deterrence, and not compensation, see Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135 (2003); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585 (2003).

velops (in economic terms), the greater the amount of resources it spends in recognition of “new” interests and the greater the demand for legal recognition will be. In a way, individual interests compete to move away from an unprotected area towards the protected legal arena in light of the growth in the welfare and judicial sophistication of the society. Before achieving protection, infringements of these interests are randomly distributed (e.g., non-pecuniary losses are “ills of life, of which every man ought to take his share”)<sup>22</sup> and are sunk costs, haphazardly spread.<sup>23</sup> With the expansion of the resources and tools available to a society, these individual interests emerge in the judicial arena seeking legal protection. It is a long-lasting process, with many different steps leading eventually to subsequent clarification points. At these stages, useless and burdensome residues of chaotic growth are removed to adapt these new interests to the legal framework efficiently, reshaping the original understanding to the point that the recognized interests are well protected and at a lower cost.<sup>24</sup>

The level and kind of protection (e.g., damages granted and their extent) are mirror images of the wealth and social milieu of the nation and of its needs. In this respect, national tort systems switched the compensatory focus from the wrongdoer to the injured,<sup>25</sup> moving the primary value of the individual’s protection from the periphery to the center of the tort system.<sup>26</sup> This was, and largely is, the new social and individual perspective involving personal injury damages.<sup>27</sup> Moreover, this change did not need affirmation through heated political debate.<sup>28</sup> It only required time and incremental steps in the tort system. Generally, the evolution of damages for non-pecuniary loss fits this framework precisely. The idea of expand-

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22. *Theobald v. Railway Passengers Assurance Co.*, (1862) 26 Eng. L. 8 Eq. R. 438.

23. See *infra* Part II.

24. See *infra* Part III, A 3-4; see also Sugarman, *supra* note 3, at 2409 (“In 1900, misfortune was a more accepted part of life. Today, people are more willing to blame others for their injuries and go to court to obtain redress.”).

25. For a fruitful discussion about “the milieu in which automobile no-fault and workers’ compensation legislation were enacted,” see ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* 288 (1990), who finds that “a serious challenge to the foundations of the tort system was mounted only when a more comprehensive ideology of victims’ rights achieved center stage.”

26. A quite orthodox reading perceives this pro-plaintiff trend as a quest for a “good Samaritan” system, always ready to grant compensation. This expression is borrowed from ROSCOE POUND, *NEW PATHS OF THE LAW* 27-30 (1950), who used it in a very critical way against the (then) new trend toward socialization of risks. The same kind of critiques are to be found in several western countries. For commentary on France, see RENE SAVATIER, *LES METAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT CIVIL D’AUJOURD’HUI* 255-56 (2d ed. 1952).

27. On the punitive function in tort law, see generally David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373 (1994). For historical perspective, compare W. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970), with Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AM J. COMP. L. 69, 83 (1973), who argues that there is not enough evidence of a switch from punishment to compensation in the law of torts.

28. The shift from the periphery to the center may be expressed by the move from the protection of non-economic interests via the protection of economic ones (e.g. individual well-being protected indirectly by way of redressing lost earnings related to personal injuries) to a more direct protection with the increased compensation of non pecuniary damages related to damages to health.

ing legal rights in growing societies sheds light on the puzzle of non-pecuniary damages, at least in cases of personal injury, and it adds explicatory coherence to their continuing history.<sup>29</sup> The variation both in awards and in types of interests protected by non-pecuniary damages also reflects the different levels of national richness.

The expansive trend we are tracing has been a selective one; indeed, we discover titles of non-pecuniary damages in our legal systems, which are chiefly directed towards protecting paramount values such as individual psychophysical integrity.<sup>30</sup> Today, societies protect health and bodily integrity as such, regardless of one's ability when healthy. It is natural for a society, in which the primary demands of survival are usually more than satisfied, to deem one's bodily integrity worthy of protection, without needing to justify it with reference to lost earnings or out-of-pocket expenses.<sup>31</sup> Both pain and suffering and loss of enjoyment of life have always been strictly related to a personal injury; but loss of enjoyment of life can also be related to a loss of a faculty or a medical condition. It was not a caprice of the Parliaments if, at the end of the nineteenth century, statutes began to protect workers, solely and exclusively, for physical impairment that had reduced their capacity to work.<sup>32</sup> In an earlier historical stage, most countries enacted statutes to protect only the physical capacity of soldiers. At that time, economic development barely allowed the protection of the productive capacity and the ability to serve as a soldier. Resources were available only for these primary exigencies, and the answer the legal systems gave was acceptable both economically and socially.<sup>33</sup>

Undoubtedly, the frontiers of production and consumption in our societies have moved upwards. Consequently, there has been an expansion in demand for the protection of health, bodily integrity, and freedom, as paramount instrumental values for personal enjoyment, as well as economic production. At the turn of the last century, while revising English law for non-economic damages, the Law Reform Commission concluded that "Abolition of [non-economic damages] may be

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29. It has already been argued that individuals lack the ability to make informed decisions with respect to pain and suffering, and several supply side market failures prevented non-economic damages from emerging in real markets. See Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91 (1993); Croley & Hanson, *supra* note 6.

30. For extensive data about the European experience, see generally DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, *supra* note 7.

31. Indeed, in RESTATEMENT (SECOND) OF TORTS: COMPENSATORY DAMAGES FOR NONPECUNIARY HARM § 905 (1979), it is suggested that "[c]ompensatory damages that may be awarded without proof of pecuniary loss include compensation (a) [f]or bodily harm, and (b) [f]or emotional distress." See *infra* Part III.

32. It is worth mentioning that in RESTATEMENT (FIRST) OF TORTS § 1 cmt. e (1934), it is stated that "the entire history of development of tort law shows a continuous tendency to recognize as worthy of legal protection interest which previously were not protected." For further analysis and data, see Frederick J. Holding, *The Challenge of Personal Injuries to Medicine, Law, and Economy*, in DAMAGES FOR PERSONAL INJURIES: A EUROPEAN PERSPECTIVE, *supra* note 11, at 86, 98.

33. It was the birth of the welfare state, but social security, as we know it today, did not exist.

thought to discriminate unfairly against those, such as the unemployed, who do not suffer any, or any substantial, pecuniary loss as a result of personal injury.”<sup>34</sup>

The investigation into the extent of the wealth of our societies is beyond the scope of this article. However, reducing awards for intangible loss, as is often proposed in legal literature because, for instance, it is asserted that consumers do not demand insurance for them, merely eludes the problem of dealing with the alleged increase in these titles of damages.<sup>35</sup> On the contrary, if placed in the context of the growth of society, we can better understand the increasing importance of compensation for non-pecuniary damages and we can manage them effectively. After all, damages for physical impairment related to the ability to work were deemed an illogical request before the end of nineteenth century; but subsequently they became vested rights. In the same way, compensation for intangible loss has extended its reach to protect individual interests, such as health and bodily integrity, from unlawful interference.<sup>36</sup>

Non-economic damages for personal injury appear to be a tentative response to an irrefutable demand by society for compensation for “limitations on the per-

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34. THE LAW COMM’N, DAMAGES FOR PERSONAL INJURY: NON-PECUNIARY LOSS 5 (1999), <http://www.lawcom.gov.uk/docs/lc257.pdf>. This was the perception of “almost all of the accident victims who took part [in the] . . . empirical survey” run by the Commission (97.5% of consulted persons).

35. Often, proposals tend to push the amount for non-pecuniary losses downward. In this sense, see Patricia Danzon, *Medical Malpractice Liability*, in *LIABILITY: PERSPECTIVE AND POLICY* 101, 118-19, 122 (Robert E. Litan & Clifford Winston eds., 1988). Another project based on previous assessment by judges and juries was developed by Levin, *supra* note 8, at 303 (convincingly suggesting the implementation of a flexible system of guidelines). Since the 1950s, several scholars have advocated a reduction of awards. See, e.g., Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 211 (1958) (proposing a 50% limitation of medical and nursing expenses linked to pain and suffering, in change of a drastic reduction of what was one of the greatest obstacle for plaintiff recovery: that is, contributory negligence rules); L. F. Scott, *Damages for Personal Injury*, 8 INDUS. L. REV. 106, 108 (1956) (refusing any attempt to fix an amount: “True compensation can, logically speaking, only be that figure which the plaintiff would have accepted in order to undergo the injury”); William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 31 (1954) (suggesting that the only jury guide-posts in its task of assessing damages for these matters are common sense and sound judgment). Other scholars have suggested the abolition of pain and suffering awards in order to either reduce insurance premiums or to avoid the financial burden stemming from accident compensation being imposed on businesses. See, e.g., LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND THE INSURANCE* 88 (1958); Fleming James, Jr. *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 297 (1958); Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959). Note however, that scholars have found both theoretical and empirical evidence of some degree of willingness to pay for receiving non-economic damages compensation. See Croley & Hanson, *supra* note 6. Most significantly, in 1999, the U.K. Law Commission based its recommendations to increase pain-and-suffering damages upon public perceptions on the proper level of damages. See THE LAW COMM’N, *supra* note 34. As a matter of fact, the Court of Appeals actually followed these recommendations in the leading case of *Heil v. Rankin*, [2001] Q.B. 272 (U.K.). See *infra* Part I.C.2.

36. Tort law as a whole has been understood, to some extent, as having this scope. See Patrick Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1018 (“American tort law is a response to the demand of a society in which there are many grievances not regarded as the responsibility of governments to redress.”).

son's life created by the injury."<sup>37</sup> Comparative research shows that this response leads to a differentiation within the domain of traditional non-pecuniary loss, between loss of enjoyment of life<sup>38</sup> and pain and suffering<sup>39</sup> (to use the language of common law). Pain and suffering and loss of enjoyment of life seek to redress different intangible losses, despite the fact that courts often award them together. A clear distinction between them fosters a profound innovation in the legal system, too often misread or not read at all.<sup>40</sup> It makes a distinction between those entirely subjective non-economic damages for intangible loss and those damages with an "objective"<sup>41</sup> basis for evaluation, due to the existence of an ascertainable medical condition.<sup>42</sup> This bifurcation reflects the choice of protecting health and bodily

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37. *McDougald v. Garber*, 536 N.E.2d 372, 379 (N.Y. 1989) (Titone, J., dissenting) (citing *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980)); see also Carleton R. Cramer, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 972 (1981); Kyle R. Crowe, Note, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275 (1990).

38. For commentary on the problem of awarding damages for loss of enjoyment of life, also known as "hedonic" damages, see, among others, Cramer, *supra* note 37; Stephen J. Fearon, *Hedonic Damages: A Separate Element in Tort Recoveries?*, 56 DEF. COUNS. J. 436 (1989); Eric L. Kritcher, Comment, *Establishing Recovery for Loss of Enjoyment of Life Apart From Conscious Pain and Suffering: McDougald v. Garber*, 62 ST. JOHN'S L. REV. 332 (1988); Paul E. Marth, Comment, *Loss of Enjoyment of Life: Should It Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459 (1975); Ronald J. Mishkin, Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639 (1969); Stanley V. Smith, *Hedonic Damages in Wrongful Death Cases*, A.B.A., Sept. 1988, at 70; Carel J.J.M. Stolker, *The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-Pecuniary Loss*, 39 INT'L & COMP. L.Q. 82 (1990); John A. Williamson, Note, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321 (1987).

39. For further commentary on pain and suffering awards, see Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984); Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 LAW & SOC'Y REV. 537 (1988); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985); Peter N. Kalonizes, Case Notes, *Infant Pain and Suffering: The Valuation Dilemma*, 1 PEPP. L. REV. 102 (1973); Leebron, *supra* note 8; Jeffrey O'Connell & Rita J. Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. LEGAL F. 1; Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974); Margaret A. Somerville, *Pain and Suffering at Interfaces of Medicine and Law*, 36 U. TORONTO L.J. 286 (1986); 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 (1993); Zelermyer, *supra* note 35.

40. Such a distinction in the American tort system has already been acknowledged. See, e.g., Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4TH 293 (1984); Cramer, *supra* note 37, at 972.

41. As already distinguished, "objective" means "existing independently of perception or an individual's conceptions" as opposed to "distorted by emotion or personal bias." See *supra* note 2.

42. As per Lord Justice O'Connor in *Housecroft v. Burnett*, 1 All E.R. 332, 337 (1986), "The human condition is so infinitely variable that it is impossible to set a tariff, but some injuries are more susceptible to some uniformity in compensation than others." See also *infra* Part II.

integrity as a reaffirmed social value, even with our imperfect tools of monetary awards.<sup>43</sup>

### 3. Dealing with Pain and Suffering: A First Note for a Euro-American Debate

Compensation for non-economic damages rests at the center of the debate among scholars in both Europe and America. The theoretical question has often been whether the legal system should compensate for non-economic damages<sup>44</sup> and, if so, how it can be done efficiently. The efficiency argument has led to either the refusal to recognize compensation for non-economic damages<sup>45</sup> as legitimate, or to advocate recognizing it<sup>46</sup> on empirical or theoretical grounds.<sup>47</sup>

Framing the debate on non-economic damages in Europe and the United States is a complex task, because very often, issues perceived as national and paro-

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43. In addition, there is another argument, probably one of the strongest, for the purported increase in the awards for non-pecuniary damages (even advocating a further increase in some instances). In fact, it can be argued that medical science has advanced to such a degree that many people survive accidents when in the 1970s, for example, they would have died. Several of these people live longer than before, as in the case of a spinally-injured patient, whose life expectancy is 25% longer today than it was in the 1970s. There is naturally a collateral argument to be taken into account as well: advances in medical science mean that it is possible to treat many injuries more effectively, so that their consequences are less severe today than in the past. This will clearly modify the correct ordering of injuries on the scale of damages.

44. One of the most crude and classic expositions of a position contrary to non-economic damages in the United States is offered by Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224-25 (1953), who argues that pain and suffering is an injury, but allowing monetary awards as compensation is not defensible because it requires the evaluation of the "imponderable" by a method of "arbitrary indeterminateness."

45. See Jennifer Arlen, *Reconsidering Efficient Tort Rules For Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41 (1990) (suggesting that efficient deterrence does not require compensation for pain and suffering); John E. Calfee & Paul Rubin, *Some Implications of Damages Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371 (1992); Robert Cooter, *Towards Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 392 (1989) (admitting only "pain-and suffering that curtailed earnings"); Priest, *supra* note 10, at 1546-47, 1553 (arguing the efficient consumer rationale to deny pain and suffering compensation); Alan Schwartz, *Proposals for Product Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 362-67 (1988). For further commentary from the perspective of law and economics, see W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 MICH. L. & POL'Y REV. 141, 156 (1996).

46. See WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 186-87 (1987); Samuel A. Rea, Jr., *Non-Pecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35, 39 (1982). On different grounds, see Croley & Hanson, *supra* note 6; Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 60 (1991); and Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 183-84 n.205 (1990), who advocates at least some level of pain and suffering damages is certainly required by the system. For further commentary, see Patricia M. Danzon, *Tort Reform and The Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 533 (1984), who argues in favor of damages for serious pain-and-suffering.

47. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 133-34, 228-31 (1987) (arguing that optimal deterrence demands that enterprises bear the full costs of the injuries they inflict).



chial fill the debate. A good example might be the role of civil juries, unique to the United States, and it is regularly perceived — on both sides of the Atlantic — as such a distinctive feature as to render European and American experiences in awarding non-economic damages incapable of comparison. One should also mention the recurrent argument that European tort systems compensate for far less non-economic damages, not only because they exclude juries in civil trials, but also because most items hidden in American awards for non-pecuniary damages are overtly compensated in European countries, if sometimes outside the litigation system. A non-exhaustive, but illustrative, list might include attorney fees (American rule vs. the “loser pays” rule), welfare state benefits, and health care insurance.<sup>48</sup>

Without challenging these accounts, this article will make the argument that a large and important part of both the American and the European experience remained out of the picture, almost as if by design. In particular, legal literature has insufficiently investigated the richness of experience on each side of the Atlantic. Further, scholars have not framed the issues we labeled as parochial and national insularities in a Euro-American debate on assessment of non-economic damages and its relentless rising trend. Concentrating on the continuous process of awarding non-economic damages for personal injury, American and European systems have tried to cope with the assessment problem. We should try to fill these gaps by searching for potential examples of cross-fertilization that might throw light upon these peculiarities as well.<sup>49</sup> After all, the reasoning behind the attempts in justifying (or refusing) non-economic damages, rests on theoretical assumptions of cross-border validity.

The following sections will show how the evolution of compensation for non-economic damages, accompanying both physical and pure emotional harm in America and Europe, leads to a comprehensive framework for assessing these damages based upon the emerging distinction between those non-pecuniary damages for which an “objective” evaluation basis (existing independently of perception) exists and those for which such an “objective” basis does not exist.

### ***B. The Anglo-American View: Towards More Clarity for Intangible Loss***

Each country has its own history and local constraints in the development of non-economic damages. For instance, statutory limits to recovery of non-economic damages strongly influenced both the Italian<sup>50</sup> and the German<sup>51</sup> experi-

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48. Comandé, *supra* note 11, 142ff.

49. An example of this possible cross fertilization can be found in Richard Lewis, *Methods for Calculating Damages for Loss of Future Earnings*, 2 J. PERS. INJ. 151 (2002); Richard Lewis, Robert McNabb & Victoria Wass, *A New Way to Assess Damages for Loss of Future Earnings*, NEW L.J. 1042 (2002); and Richard Lewis, Robert McNabb & Victoria Wass, *Loss of Earnings Following Personal Injury: Do the Courts Adequately Compensate Injured Parties?*, 113 ECON. J. 568 (2003), where the authors compare North-American and English methods for assessing future loss of earnings and proposing a new model based on the American experience.

50. The Italian civil code literally restricts non-economic damages to instances provided for by the legislature. CODICE CIVILE [C.C.] art. 2059 (“Non-patrimonial damages shall be awarded in cases provided by law.”).

51. Recovery of non-pecuniary loss is generally excluded unless the statute explicitly pro-

ence, while the physical impact requirement has strongly influenced common law systems.<sup>52</sup> The Anglo-American experience shows distinctive features as well. However, we focus first on the United States and the United Kingdom, because they shared the first evolutionary steps. We will identify some overall common trends, despite different conceptions.

Indeed, it is relatively easy to chart the titles of non-pecuniary damages available to a personal injury victim in common law systems.<sup>53</sup> To some extent, the history of non-pecuniary loss recovery revolves around the sole pain and suffering.<sup>54</sup> It is still the main title of damages for intangible loss and it is present in every common law country.<sup>55</sup> All other forms of non-pecuniary damages developed from it, and judges and legislatures have always tried to drive non-pecuniary damages within its compass. Loss of amenity of life and loss of enjoyment of life sprang from pain and suffering, both in the United Kingdom and in the United States respectively. For these reasons, the notion of pain and suffering has changed over time and we can clearly understand it only after recognition of the other main titles of non-pecuniary damages.

Very often, the term of art "pain and suffering" is still used to encompass all damages for intangible loss (a sort of synecdoche under which all non-pecuniary damages are awarded), though its technical meaning has a more restricted connotation.<sup>56</sup> This Part will show, in all the countries surveyed, a trend to clearly identify and distinguish between pain and suffering (as subjectively perceived *pretium doloris*) and loss of enjoyment of life (as an "objective" damage to health and bodily integrity). Therefore, we concentrate on these predominant titles of intangible loss,<sup>57</sup> which have had a different evolution in each common law system.

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vides the contrary. See, e.g., Bürgerliches Gesetzbuch [BGB][Civil Code] Jan. 1, 2002, Reichsgesetzblatt [RGBl] § 253. An example of a code which allows recovery of non-pecuniary loss is Bürgerliches Gesetzbuch [BGB][Civil Code] Jan. 1, 2002, Reichsgesetzblatt [RGBl] § 847, regarding compensation for pain and suffering for bodily harm or impairments of health.

52. Traditionally, this provision required tortfeasor's fault and it did not apply to almost all statutory strict liability regimes. The original version of § 847 has been replaced by § 253 par. 2 which provides that non-pecuniary loss has to be compensated in any case of injury of body, health, freedom and sexual self-determination. For further details, see ULRICH MAGNUS, *LE RECENTI REIFORME DELLA RESPONSABILITÀ CIVILE TEDESCA*, IN *DANNO E RESPONSABILITÀ*, 1269-72 (2002).

53. Both tort law and contract law award damages for non-pecuniary loss. Under tort law this is in fact the rule, but under contract law, the award constitutes an exception. See generally, DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES, DAMAGES FOR PERSONAL INJURY* (2d ed. 1993); HARVEY MCGREGOR, *MCGREGOR ON DAMAGES* § 92.2 (1988).

54. For a general introduction to pain and suffering and its main legal problems, see STUART SPEISER, CHARLES KRAUSE & ALFRED GANS, *THE AMERICAN LAW OF TORTS* 70 (1990). If the damages are predictable, some civil law traditions do acknowledge the possibility of awarding pain and suffering damages. See e.g., CODE CIVIL [C. CIV.] art. 1150 (Fr.); CIVIL CODE OF QUEBEC art. 1607 (1991) (Quebec, Can.).

55. See Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards* (unpublished manuscript, on file with author), available at <http://www.law.berkeley.edu/faculty/sugarman/Depaul%202%20clean.doc>.

56. See *infra* Part I.B.1.

57. Physical inconvenience and discomfort are two other types of non-pecuniary damages.

### 1. Some Historical Hints on Pain and Suffering, its Description, and its Functions

The history of pain and suffering discloses a shift first in its functions and then in the kind of harm it actually redresses. A brief history of it helps to explain how the move from an eminently punitive perspective to a more compensation oriented one could have rested on the same notion of pain and suffering.<sup>58</sup>

Pain and suffering awards started with an obvious punitive intent in the seventh century,<sup>59</sup> as a sort of fine for breach of the King's peace. When juries started to assess it, they were still looking more to place blame than to compensate the actual loss.<sup>60</sup> In the eighteenth century, cases expressly mentioned the physical pain and sorrow of the victim,<sup>61</sup> but it is only in *Scott v. Sheperd*<sup>62</sup> that the expression "pain and suffering" is actually used. Chief Baron Pollock clearly synthesized the common understanding of awards for non-pecuniary damages until the nineteenth century:

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They are more frequently assessed in England under breach of contract (*Hipkiss v. Gaydan*, [1961] C.L.Y. 9042 (U.K.); *Elmcroft Dev. Ltd. v. Tankersley-Sawyer*, (1984) 15 H.L.R. 63 (C.A.) (U.K.)); and only rarely as a different damage for deceit (*Saunders v. Edwards*, [1987] 1 W.L.R. 1116 (C.A.) (Eng.)); false imprisonment (*MCGREGOR*, *supra* note 53); or nuisance (*Bunclark v. Hertfordshire County Council*, (1977) 234 E.G. 381 (Q.B.) (U.K.)). Sometimes they are awarded when the plaintiff shows some physical discomfort without any actual physical manifestation. See JOHN MUNKMAN, *DAMAGES FOR PERSONAL INJURY AND DEATH* 130 (10th ed. 1996). Sometimes they are awarded for discomfort other than physical. See *Piper v. Daybell Court-Copper*, [1969] E.G.D. 535 (Q.B.) (U.K.). The ancient "social discredit" is sometimes given for malicious prosecution and false imprisonment (*Savil v. Roberts*, (1699) 91 Eng. Rep. 14 (K.B.); *Walters v. Alltools*, (1944) 61 T.L.R. 39 (C.A.) (Eng.)), but never for breach of contractual relationships (*Addis v. Gramophone Co.*, [1909] A.C. 488 (U.K.); *Bailey v. Bullock*, [1950] 2 All E. R. 1167 (K.B.) (Eng.)). In the U.K., loss of society and relatives (loss of consortium) was substituted by a fixed amount for bereavement by the Administration of Justice Act of 1982, § 3 (U.K.). In the United States, it is sometimes awarded as an amount distinct from pain and suffering. For a list of minor types of non-pecuniary losses sometimes awarded as part of a larger amount of pain and suffering, see H. STREET, *PRINCIPAL OF LAW OF DAMAGE*, 68-70 (1975).

58. See Jeffrey O'Connell & Keith Carpenter, *Payment for Pain and Suffering Through History*, 50 INS. COUNS. J. 411 (1983). The history began with the English tradition, though it experienced a subsequent split, creating one for the U.S. and one for the U.K. These days, the idea persists of retaining pain and suffering only for intentional wrongdoing or for the most serious cases. See, e.g., Ingber, *supra* note 39, at 809 (proposing full compensation for non-economic damages only in cases of intentional wrongdoing); Warren A. Seavey, *Torts and Atoms*, 46 CAL. L. REV. 3, 11-12 (1958) (proposing that pain and suffering damages be limited to cases involving conscious wrongdoing and wrongful acts).

59. See BENJAMIN THORPE, *ANCIENT LAW AND INSTITUTES OF ENGLAND* 33 (1840).

60. See, e.g., SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW*, 149-60 (2d ed. 1996) (1898); Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003).

61. See *Benson v. Frederick*, (1766) 97 Eng. Rep. 1130 (K.B.); *Beadmore v. Carrington*, (1764) 95 Eng. Rep. 790 (K.B.).

62. (1773) 95 Eng. Rep. 1124 (K.B.). In legal literature, the expression was only used for a few years afterwards. See JOHN WENTWORTH, GEORGE TOWNSEND & JAMES CORNWALL, *A COMPLETE SYSTEM OF PLEADING* 437 (1797-99); JOSEPH CHITTY & THOMAS CHITTY, *A TREATISE ON PLEADING* (1809). The first British case on point seems to be *Pippin v. Sheppard*, (1822) 25 Rev. Rep. 746, 749 (Exch. Div.) (Eng.).

A jury most certainly have a right to give compensation for bodily suffering, unintentionally inflicted. But . . . I never made a claim in respect of it, I look on it, not so much as a mean of compensating the injured person, as of damaging the opposite party. In my personal judgment, it is an unmanly thing to make such a claim. *Such injuries are part of the ills of the life, on which every man ought to take his share.*<sup>63</sup>

In the United States, compensation for pain and suffering has also been awarded since early times.<sup>64</sup> Nevertheless, it is only since the 1820s that we can find frequent records of those awards.<sup>65</sup> The usual rationale was that courts, in awarding damages, should take into consideration the sufferings from pain endured by the plaintiff.<sup>66</sup> Already in the mid-nineteenth century, pain and suffering was a clearly defined category of damages, and its function was compensation oriented. For example, *Morse v. Auburn & Syracuse Railroad*,<sup>67</sup> refused the dominant idea of pain and suffering as a sort of punitive damage for intentional torts.

In fact, pain and suffering gained a larger hold in the legal system when its main function started to shift from a punitive perspective toward a compensatory one.<sup>68</sup> After World War II there was a significant increase in the amount of money awarded,<sup>69</sup> an escalation that occurred in conjunction with the intensification of

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63. *Theobald v. Railway Passengers Assurance Co.*, (1862) 26 Eng. L. 8 Eq. R. 438 (emphasis added).

64. See, e.g., *Coffin v. Coffin*, 4 Mass. 1 (1808).

65. See e.g., *Lisley v. Bushnell*, 15 Conn. 225 (1842); *Worsters v. Proprietors of the Canal Bridge*, 33 Mass. 541 (1835); *Sompson v. Henry*, 28 Mass. 379 (1831); *Reed v. Davis*, 21 Mass. 216 (1826).

66. *Lincoln v. Saratoga & Southern R.R.*, 23 Wend. 425 (Sup. Ct. Judicature N.Y. 1840).

67. 10 Barb. 621, 624-25 (N.Y. App. Div. 1851) (recovering damages for pain and suffering).

68. In the same period, most treatises began to discuss the issue. See, e.g., SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* (3d ed. 1850); ISAAC F. REDFIELD, *A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS* (1858). For a detailed history of pain and suffering, see Jeffrey O'Connell & Theodore M. Bailey, *The History of Pain and Suffering*, in O'Connell & Simon, *supra* note 39, at 83-109.

69. See O'Connell & Carpenter, *supra* note 58 at 413. Indeed, case law analysis confirms this hypothesis. See, e.g., *Loftin v. Wilson*, 667 So. 2d 185 (Fla. 1953) (awarding \$300,000); *Runge v. Everbrite Elec. Signs, Inc.*, as quoted in 22 NACCA L.J. 404 (1958) (awarding \$95,000); *Wolfe v. General Mills, Inc.*, 35 Misc. 2d 996, (N.Y. App. Div. 1962) (awarding \$240,300). This increase was explained as the outcome of the use of demonstrative evidence. See O'Connell & Bailey, *supra* note 68 at 103-04. For demonstrative evidence on pain and suffering, see MELVIN BELLI, *MODERN TRIALS* 1639 (1954); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES, CASES AND MATERIALS* 150 (3d ed. 2002). For a *per diem* evaluation and blackboard argument, see HAROLD LUNTZ, *ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH* 168-72 (1990); C. Hayes Cooney, Note, *Per Diem Evaluation of Pain and Suffering: Its Property in the Courtroom*, 15 VAND. L. REV. 1303 (1962); J. Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 1962 DUKE L.J. 344; and James O. Pearson Jr., *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R. 4TH 940 (1981).

automobile circulation.<sup>70</sup> Moreover, the development of insurance policies for third-party liability contributed to change monetary awards for pain and suffering into compensation, rather than a surrogate for private retaliation.<sup>71</sup>

In summary, in common law systems, damages for pain and suffering evolved from a tool of punishment and reprobation, as stated by Baron Pollock, to a compensatory title of damages, as stressed in *Morse*. This important move occurred almost without an apparent change in the actual notion of pain and suffering.

## 2. The Medical Notion of Pain and Suffering, and its Legal Implications

Pain and suffering is a term of art,<sup>72</sup> used without any distinction between the two component terms, although there are clear differences between them, both historically and medically. Traditional definitions describe the term "pain" as a sudden affliction of the nerves related to a *physical harm* of the person who suffered the injury.<sup>73</sup> The term "suffering", on the other hand, describes an affliction not directly related to a physical harm — it is more an individual emotional response. Consequently, we associate the concept of suffering with the fear felt when the injury occurred<sup>74</sup> and the subsequent anguish<sup>75</sup> or embarrassment and fear for one's health.<sup>76</sup> In summary, we associate the term "suffering" with every kind of mental suffering. However, usually damages can only be awarded for each of these mental disturbances or distress *if the plaintiff shows some verifiable psychiatric symp-*

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70. Some authors suggested this increase was related to the originally primary punitive goal of pain and suffering. See O'Connell & Bailey, *supra* note 68, at 108.

71. See Deborah R. Hensler, *Money Talks: Searching For Justice Through Compensation For Personal Injury and Death*, 53 DEPAUL L. REV. 417, (2003) (revising modern theories on damages compensation). Hensler writes:

'Money talks.' Money is a medium of exchange for labor and products. But it is also a medium for conveying social meaning. Voluntary monetary transfers can demonstrate individuals' acceptance of responsibility for the consequences of wrongdoing, sympathy for those less fortunate than they, solidarity with members of their community who have suffered misfortune, or obligation to family members or others. Socially mandated transfers — in the form of fines, civil damages, alimony, child support, social security payments, or taxes — express group norms. Norms establishing the amount of money that should be paid in these different circumstances also convey meaning about how large an obligation one set of people has to another and about how much recipients deserve from these others. Whenever money changes hands, it carries with it multiple messages about personal and social relationships and about personal and social worth. But these messages are so embedded in the culture that many people rarely stop to consider them.

*Id.* at 451-52.

72. DAVID KEMP & MARGARET KEMP, *THE QUANTUM OF DAMAGES* 1008 (Andrew Ritchie ed., 1991).

73. Such a definition is proposed by CHARLES MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 88 (1935).

74. See *Boston v. Cheasepeake & Ohio Ry. Co.*, 61 N.E.2d 326 (Ind. 1945).

75. See *generally* *DeLoach v. Lanier*, 125 F. Supp. 12 (N.D. Fla. 1954).

76. For a broad definition of the term, including embarrassment and sadness for a physical disfigurement or fear for one's own health, see Administration of Justice Act, 1982, § 1 (U.K.).

toms<sup>77</sup> (e.g., some objectively ascertainable manifestations of an illness).<sup>78</sup> Certainly, emotional distress is also an important non-pecuniary damage and, as we will see, it can be conceptualized better according to the proposed framework.<sup>79</sup>

In short, pain remains inherently a physical sensation due to a corporal harm (a bodily experience), and suffering is mainly an emotional experience *reacting to the physical pain*.<sup>80</sup> A negative physical event is historically the real starting point for any occurrence of pain and suffering. This feature has helped to overcome the inherently contradictory tension between the compensation goal and the discouragement of trivial, or even fraudulent, claims.

Although the fertile ground for damage claims for non-pecuniary loss remained mainly in the sphere of physical injury, the perspective of judges and juries changed dramatically over time.<sup>81</sup> The switch is still going on, and the physical injury requirement that originally helped limit the claims has lost most of its effect due to developments in medicine, psychology and psychiatry.<sup>82</sup> The physical injury requirement, without more, is unable to help limit the claims, because it has become the requirement of a mere (even minimal) physical impact.<sup>83</sup> Nonetheless,

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77. See R. DIAS & B. MARKENSINIS, TORT LAW 413 (1984) (underlining the need of psychiatric symptoms). See generally DOBBS, *supra* note 53; DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (4th ed. 2001).

78. Indeed, the Supreme Court has defined negligent infliction of emotional distress in these terms:

[M]ental or emotional injury apart from the tort law concepts of pain and suffering. Although pain and suffering are mental harms, these terms traditionally have been used to describe sensations stemming directly from a physical injury or condition. [Instead, negligent infliction of emotional distress] is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994) (citations omitted).

79. This comment will discuss damages for emotional distress later because the process of limiting (and thus acknowledging) these damages is better understood once the historical patterns followed by non-economic damages accompanying a physical injury have been illustrated.

80. In this sense, see, for example, Cramer, *supra* note 37, at 972; and Yale David Koskoff, *The Nature of Pain and Suffering*, 13 TRIAL 21, 22 (1977).

81. On the contrary, the physical impact requirement — the need of a physical contact causing the injury to health — has become more controversial in the last decades, revealing itself as a residue of previous attempts to reduce the risk of uncontrollable trivial litigation. For general and preliminary information, see MCGREGOR, *supra* note 53, at 53. See also *Hinze v. Berry*, [1970] 2 Q.B. 40 (U.K.).

82. See, e.g., RON MELZACK & PATRICK WALL, GATE CONTROL THEORY OF PAIN 11 (1968); Ben A. Rich, *A Prescription for the Pain*, 26 WM. MITCHELL L. REV. 1, 18-21 (2000) (revising the distinction between pain and suffering by revision of literature).

83. See, e.g., Cramer, *supra* note 37, at 969-70 (stating that “physical pain is the neurological response to physical damage to the body”); Koskoff, *supra* note 80, at 22; N. Werchick, *Unmeasurable Damages and a Yard Stick*, HASTINGS L.J. 263, 266 (1965) (referring to “a more localized sensation of discomfort, distress, or agony resulting from the stimulation of nerve endings”). However it seems clear that “pain” is still, in a medical sense, a feeling connected to a physical injury. See, e.g., Cramer, *supra* note 37, 969-70; Koskoff, *supra* note 80, at 22. For a scientific point of view, see 1 JOHN J. BONICA, THE MANAGEMENT OF PAIN (2d ed. 1990). Note that these arguments stimulated deep reflections in the 1950s and 1960s among medical doctors

there is still resistance to awarding damages solely for mental suffering.<sup>84</sup> In one way or another, most of the ancient arguments against awarding damages solely for mental suffering persist even now: the fear mainly being that equating the mental suffering from both physical harms and from non-physical harms could widen the field to imaginary claims.<sup>85</sup> In effect, when mental shock manifests itself with some physical symptoms, courts see no problem in redressing the mental suffering<sup>86</sup> endured by the victim.<sup>87</sup>

The technical definition of pain and suffering, shared by all common law systems, better attaches to its most ancient notion in its continuous developing process.<sup>88</sup> This notion can be described in terms of *pretium doloris* (price of suffering)<sup>89</sup> and it expresses the original aim to compensate only pain and sorrow that

and law scholars. See generally GREEN, *supra* note 35, at 88; James, Jr., *supra* note 35, at 297; Plant, *supra* note 35, at 210.

84. See *infra* Part I.B.6-7.

85. See *Victorian Ry. Comm'rs v. Coultas*, [1888] 13 App. Cas. 222, 226 (P.C.) (U.K.) (appeal taken from Vict.). Medical developments and psychologists' theories have made the confines between physical and mental illnesses more diaphanous; moreover, the existence of physical pain without any particular psychical pathological condition may restate the distinction between "pain" and "suffering." For further commentary on this problem, see Somerville, *supra* note 39, at 286-87, who advocates for greater analytical rigor in the use of pain on the one side, and suffering on the other.

86. See *Duvey v. T.K. Maltby Ltd. & Strick Line Ltd.*, [1955] 2 Lloyd's Rep. 645 (Q.B.) (Eng.).

87. Indeed, it is also useful to mention mental distress or mental anguish, nervous shock and neurosis as separate titles of intangible loss not related to a bodily injury. Mental distress (or mental anguish) does not always stem from a physical injury. See MUNKMAN, *supra* note 57, at 121-23. Mental distress can, nevertheless, sustain autonomously an action for damages recovery. Therefore, it is different from mental suffering that cannot sustain an action for damages by itself, as acknowledged by case law. See, e.g., *Lynch v. Knight* [1861] 9 H.L.C. 577 (Eng.) ("The general principle embedded in the common law is that mental suffering caused by grief, fear, anguish and the like is not assessable" or "mental pain or anxiety the law can not value, and does not pretend to redress, when the unlawful act complained of causes that alone."). However, damages have been given "for the mental suffering arising from the apprehension of the consequences of the publication." *Goslin v. Corry*, [1844] 135 Eng. Rep. 143, 147 (C.P.); see also *Ley v. Hamilton*, [1935] 153 L.T. 384, 386 (H.L.) (appeal taken from Eng.) (giving damages "[for] the insult offered or the pain of a false accusation"); *McCarey v. Associated Newspapers*, [1965] 2 Q.B. 86, 104 (U.K.) (giving damages for "injury to the feelings"); *Saunders v. Edwards*, [1987] 1 W.L.R. 1116 (C.A.) (Eng.) (giving damages for deceit); *Millington v. Duffy*, [1984] 17 H.L.R. 232 (C.A.) (giving damages for trespass to property). Damages have also been denied for mere disappointment. See *Hamlin v. Great Northern Ry. Co.*, [1856] 1 H&N 408, 411 (Eng.); MCGREGOR, *supra* note 53, at 53.

88. This understanding of pain and suffering is clearly summarized by 2 AM. L. INST. ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE, 199-200 (1991) ("Pain and suffering is a term that actually covers a number of categories of non-pecuniary loss . . . tangible physiological pain suffered by the victim at the time of injury and during recuperation . . . anguish and terror felt in the fact of impending injury and death, . . . immediate emotional distress and long-term loss of love and companionship resulting from the injury or death of a close family member . . . the enduring loss of enjoyment of life by the accident victim who is denied the pleasures of normal personal and social activities because of his permanent physical impairment.") (emphasis added).

89. See Jean Limpens et al., *Liability for One's Own Act*, in XI INT'L ENCYCLOPEDIA OF

accompanies a *physical injury*,<sup>90</sup> in order to exclude imaginary or fraudulent claims. It also helps to explain why consciousness is an essential requirement for awarding pain and suffering, and why the so-called *unconscious plaintiff* doctrine is the crucial legal issue from which other titles of non-pecuniary damages flowed from pain and suffering.

### 3. The Semantic Bifurcation in Damages for Intangible Loss, and the Unconscious Plaintiff.

In all common law countries, in a claim for pain and suffering, the plaintiff must show both duration and consciousness of the pain and suffering.<sup>91</sup> Consciousness refers to the mental situation of a human being aware of his/her own condition and of the surrounding world. An unconscious person is not aware and does not react to external stimuli.<sup>92</sup> There are several categories of unconscious persons, for example, comatose people<sup>93</sup> and seriously brain-damaged individuals, who are all unconscious of the changes they have suffered due to a personal injury; and, at the extreme of this doctrine, should not recover anything for pain and suffering.<sup>94</sup> In the end, the unconscious plaintiff doctrine apparently leads to the paradoxical result that the "greater the degree of brain injury inflicted by a (negligent) defendant, the smaller the award the plaintiff can recover in general damages."<sup>95</sup> Since 1962, this paradoxical situation has lead the United Kingdom to refuse to reward an unconscious plaintiff with damages for pain and suffering,<sup>96</sup> but to still allow damages for loss of amenity of life.<sup>97</sup>

Legal systems following the Western legal tradition tackle the unconscious plaintiff differently. However, in general we find one of two possible solutions. The first one awards only a symbolic sum or nothing to unconscious plaintiffs.<sup>98</sup> Following an alternative path, some countries, such as the United Kingdom, France, and Italy, have adopted a clear distinction between pain and suffering (as *pretium doloris* that relies only on personal perception) and loss of enjoyment of

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COMPARATIVE LAW, *supra* note 14.

90. See AM. L. INST., *supra* note 88, at 199-200. Each of the components (pain, suffering) of the locution have progressively changed their meaning and now it seems that they include even psychical suffering even not connected with bodily harm. *Id.*

91. See Leebron, *supra* note 8, at 268.

92. MARK MUMENTHALER, *NEUROLOGY* 12-13, 163-64 (2d ed. 1986); FRED PLUM & JEROME B. POSNER, *THE DIAGNOSIS OF STUPOR AND COMA* 19 (3d ed. 1982).

93. Regarding awards for loss of enjoyment of life, two separate and sometimes confusing issues exist. The first is whether such awards should constitute a separate category. The second is whether they should be payable to comatose plaintiffs.

94. See, e.g., Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1593 (1997) (arguing that courts must compensate comatose victims to increase their recovering capacity).

95. *McDougald v. Garber*, 504 N.Y.S.2d 383, 386 (N.Y. 1986).

96. "Because of its nature, sorrow can be compensated only by happiness." *Stolker*, *supra* note 38, at 257.

97. *Wise v. Kay*, [1962] 1 Q.B. 638 (U.K.).

98. Hans Stoll, *Penal Purposes in the Law of Tort*, 18 AM. J. COMP. L. 3, 94 (1970); see also Rogers, *supra* note 7, at 257 (detailing the solution adopted in Belgium and the Netherlands).



life (as a more "objective" title of non-pecuniary damages susceptible of being framed according to the severity of the resulting health and bodily injury). In these legal systems, it is the actual damage to the victim's health that matters and not the victim's own perception of it. Moreover, compensation for loss of amenity of life reaffirms the social value of bodily and health integrity. For instance, in the United Kingdom, damages for loss of amenity of life "are awarded for the fact of deprivation; a substantial loss, whether the plaintiff is aware of it or not."<sup>99</sup>

Notwithstanding the distinction between pain and suffering and loss of amenity of life, the former plays the role of a catch-all category.<sup>100</sup> It is still somewhat prevalent in all common law countries to grant a single award without distinguishing between pain and suffering and loss of amenities of life or loss of enjoyment of life.<sup>101</sup> Hence, it is difficult to parse out the award for the physical injury itself and for the suffering.<sup>102</sup> Therefore, even with a clear distinction between suffering and physical impairment, between subjective and "objective" basis, as we will see, punitive and compensative perspectives might be still unreasonably commingled.

#### 4. Loss of Amenity of Life in the British Commonwealth

The history of loss of amenity of life is a peculiar one. It was first assessed in the United Kingdom and it was not recognized in the United States until more recent times. Since the nineteenth century, it has been clear that "[i]n assessing . . . compensation the jury should take into account . . . the injuries [the] victim sustained in his person, or his physical capacity of enjoying life."<sup>103</sup> In fact, "loss of

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99. *Lim Poh Choo v. Camden & Islington Area Health Auth.*, [1980] A.C. 174, 188 (U.K.). In the 1960s, Judge Morris had already pictured the distinction between the two different titles of damages in his opinion in *H. West & Son Ltd. v. Shepard*, [1964] 2 A.C. 326, 349 (U.K.):

An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of, and will eliminate, those heads or elements of damage that can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the deprivation of the ordinary experience and amenities of life that may be the inevitable result of some physical injury.

However, see the opinion of Lord Pearce in that same decision: "[W]here there is little or no consciousness of deprivation there can be little or no damages." *Id.* at 364-68. In 1972, the Pearson Commission suggested abolishing all damages for the unconscious plaintiff. PEARSON COMM'N, 1 REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY 393 (1978).

100. See, e.g., *Capelouto v. Kaiser Found. Hosp.*, 500 P.2d 880, 883 (Cal. 1972) ("[P]ain and suffering" is a "unitary concept" that "has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal").

101. See *KEMP & KEMP*, *supra* note 72, at 302; see also 3 J. F. CLERK & W. H. LINDSELL, ON TORTS 231 (7th ed. 1982) ("The practice is for judges to make one assessment of damages in respect of pain and suffering and loss of amenities of life."). It is also the same in the United States. See *Cramer*, *supra* note 37, at 984 (stating that separate awards could make non-pecuniary damages more foreseeable).

102. A. I. Ogus, *Damages for Loss of Amenities: For a Foot, a Feeling or a Function?*, 35 MOD. L. REV. 1, 2 (1972).

103. *Fair v. London & North Western Ry.*, [1869] 21 L.T. 326, 327 (D.C.) (Eng.).

amenity" is the name commonly and conveniently (but not very happily) given to the non-economic consequences of the destruction or diminution, permanent or temporary, of a faculty, which deprives the injured person of the ability to participate in normal activities, and thus, to enjoy life to the fullest and to take full advantage of the opportunities that it otherwise might offer.<sup>104</sup> Very often, loss of faculty<sup>105</sup> and loss of enjoyment of life<sup>106</sup> are alternative phrases for this expression in the United Kingdom. In particular loss of faculty makes it clear that loss of amenity of life is strictly related to damage to one's health.

An opinion, in a well-known Australian case, clearly illustrates the view widely adopted in the British Commonwealth:

Loss of amenities . . . is not a loss of something in the same sense of loss of a possession of an earning capacity is. A man who loses a limb, his eyesight, or his mind, does not lose a thing that is his, as his ox or his ass or his motor car is his, but something that is part of himself, something that goes to make up his personality.<sup>107</sup>

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104. *Teubner v. Humble*, (1963) 108 C.L.R. 491 (Austl.). For further commentary, see LUNTZ, *supra* note 69, at 172.

105. See CLERK & LINDSELL, *supra* note 101, at 23; W. SALMOND & R. HEUSTON, *LAW OF TORTS* 642 (1996).

106. MUNKMAN, *supra* note 57, at 126; STREET, *supra* note 57, at 62.

107. This clear discussion comes from an Australian decision. See *Skelton v. Collins*, (1966) 115 C.L.R. 94, 130 (Austl.). The opinion continues:

Money may be a compensation for him if having it can give him pleasure or satisfaction. If his expected years of life have been made less, money may enable him to cram more into the time that remains. . . . But the money is not then a recompense for a loss of something having a money value.

*Id.* at 131. See generally Harvey McGregor, *Compensation Versus Punishment in Damages Awards*, 28 MOD. L. REV. 629, 649-53 (1965); SALMOND & HEUSTON, *supra* note 105, at 643. The *Skelton v. Collins* case partially reflects the so-called functional approach as it was adopted in 1978 by the Supreme Court of Canada in three decisions, widely referred to as "the trilogy." See *Arnold v. Teno*, [1978] 83 D.L.R.3d 609; *Thornton v. Bd. of Sch. Trustees of Sch. Dist. No. 57*, [1978] 83 D.L.R.3d 480; *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 83 D.L.R.3d 452. In one of the "trilogy" cases, the Court explained that this approach provides a rationale as to why money is considered compensation for non-pecuniary losses: "Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way." *Andrews*, 83 D.L.R.3d at 454. For general information on the Canadian experience of personal injury damages, see A. Bisset & A. Johnson, *Damages for Personal Injuries — The Supreme Court Speaks*, 25 MCGILL L.J. 316 (1978); B. Feldthusen & J. McNair, *General Damages in Personal Injury Suits: The Supreme Court Trilogy*, 28 U. TORONTO L.J. 381 (1978); M. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987); S. M. Waddams, *Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?*, 63 CANADIAN L. REV., 734 (1985). See also R. Devlin, *Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, in CONTRIBUTIONS TO INSURANCE ECONOMICS (Georges Dionne ed., 1992); Marc Gaudry, *The Effects on Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act*, in REPORT OF THE INQUIRY INTO MOTOR VEHICLE ACCIDENT COMPENSATION IN ONTARIO 1-28 (1988).

The functional approach is rather opposed to the diminution of value approach adopted by

Under U.K. law, when the victim is unconscious there will only be an award for loss of amenity of life and nothing for pain and suffering.<sup>108</sup> Even a permanent state of euphoria due to a brain injury receives compensation.<sup>109</sup> The focus is on the relevance of the injury to health, objectively ascertainable because it amounts to an illness medical expertise can categorize apart from individual perception. In fact, the main question regarding loss of amenity of life is whether we should evaluate it subjectively or objectively.<sup>110</sup> A shift from the former approach to the latter happened in England in 1937, awarding compensation to the estate of a deceased victim.<sup>111</sup> Later, it became clear that U.K. courts assessed the main portion of the damages for non-pecuniary loss as compensation for the loss of the faculty itself;<sup>112</sup> for the damages to health that impairs a life that continues.

### 5. Loss of Enjoyment of Life in the U.S. Experience

There is almost no difference between "loss of enjoyment of life" and "loss of amenity of life," but for the fact that the latter expression is commonly used in the British Commonwealth and the former in the United States to distinguish these terms from pain and suffering.<sup>113</sup> This trend is a logical development of the traditional notion of pain and suffering.<sup>114</sup> Although the distinction between pain and suffering and loss of enjoyment of life is less clear and more questioned among courts and scholars in the United States than in the United Kingdom, it is possible to identify a similar trend to distinguish loss of enjoyment of life as damage to health and bodily integrity in the meaning described above.<sup>115</sup> In the United States,

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all examined countries. In this latter approach, damages are meant to put a value on what the claimant has lost, irrespective of how the sum awarded will be spent. THE LAW COMM'N, *supra* note 34, at 11 (clearly stressing that a truly functional approach is inimical to the "development of a tariff of damages for different injuries, as the level of awards depends on what substitute pleasures are appropriate for particular claimants").

108. *Lim Poh Choo v. Camden & Islington Area Health Auth.*, [1980] A.C. 174, 188 (U.K.) (clearly stating that damages for loss of amenities of life are awarded *for the fact of deprivation, a substantial loss*, whether the plaintiff is aware of it or not). *But see* *Wise v. Kay*, [1962] 1 Q.B. 638 (U.K.); *H. West & Son Ltd. v. Shepard*, [1964] A.C. 326 (U.K.).

109. For a list of English cases, see STREET, *supra* note 57, at 63.

110. Then, the overriding issues were unconsciousness and immediate death. *See generally* John Fleming, *The Pearson Report: Its "Strategy,"* 42 MOD. L. REV. 249 (1979) (analyzing the main policy concerns and proposal of the Pearson Commission).

111. *Rose v. Ford*, [1937] A.C. 826 (U.K.).

112. *H. West & Son Ltd.*, [1964] A.C. 326.

113. Although various other terms, such as "right to live as a whole man" or "inconvenience," have been used to describe much the same element of damages.

114. As a more detailed analysis could confirm, pain and suffering has historically compensated only pain and sorrow that follows from a *physical injury*. But each of the components (pain and suffering) of the locution have progressively changed their meaning and now it seems that they include even psychological suffering not connected with biological damage. However, note that the physical impact/injury requirement is still in the focus of the debate. For a detailed history of pain and suffering, see O'Connell & Bailey, *supra* note 68.

115. Because compensation for suffering can be awarded to third persons not directly physically injured in a given accident, the distinction between pain and suffering and loss of enjoyment of life will be decisive in restoring clarity to the non-pecuniary losses category and its adjudication. *See Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for*

one can distinguish three main understandings of non-pecuniary damages in this regard. Some jurisdictions deny any autonomy to loss of enjoyment of life as a title of damages. On the contrary, it is relevant in a large number of jurisdictions today, but often as a parameter for awarding damages for pain and suffering. For a third position, in a growing number of jurisdictions, loss of enjoyment of life is a form of damages clearly distinct from both loss of earning capacity and pain and suffering.<sup>116</sup>

From a technical standpoint, most of the cases regarding loss of enjoyment of life turn upon arguments about jury instructions. More particularly, the issue is whether it is permissible to instruct a jury on loss of enjoyment of life, and, if so, how this is to be done. In fact, several jurisdictions either accept or request evidence on loss of enjoyment of life, even if they do not award a separate amount for it. The reason is often to justify, on appeal, the amount awarded.<sup>117</sup> The dominant interpretations on this issue take into account loss of enjoyment of life in assessing damages, by either considering it as a factor in a pain and suffering award or as a singular form of damages clearly distinct from pain and suffering. Both sets of jurisdictions instruct juries accordingly.

#### *a. Loss of Enjoyment of Life as a Factor to Assess Pain and Suffering*

The best way to sketch this developing trend in those jurisdictions in which loss of enjoyment of life is only a factor of pain and suffering is to illustrate some leading cases.<sup>118</sup> For instance, in *Grunenthal v. Long Island Railway Co.* the court instructed the jury on the necessity of considering all the effects of the injury on the “normal pursuit and pleasure of life, in assessing pain and suffering.”<sup>119</sup> On the other hand, in *Huff v. Tracy*<sup>120</sup> the court justified its denial of a separate jury instruction on loss of enjoyment of life to avoid the risk of a double recovery, *because pain and suffering already includes loss of enjoyment of life as a component*.<sup>121</sup> In *Willinger v. Mercy Catholic Medical Center* the argument used to refuse damages for loss of enjoyment of life was the requirement of consciousness. The court stated that awarding non-pecuniary damages to an unconscious plaintiff goes against “the compensatory objective of awarding damages to tort victims.”<sup>122</sup>

Sometimes, courts award loss of enjoyment of life together with pain and suf-

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*Bodily Injury*, *supra* note 40, at 293.

116. *Id.* at 294.

117. *McAlister v. Carl*, 197 A.2d 140 (Md. 1964).

118. For background information, see *Marth*, *supra* note 38, at 459; *Mishkin*, *supra* note 38, at 639; *Peck*, *supra* note 39, at 1355.

119. 388 F.2d 480, 484 (N.Y. 1968).

120. 129 Cal. Rptr. 551 (Cal. Ct. App. 1976).

121. This seems to be the reading of the California case offered by *Cramer*, *supra* note 37 (reporting *Huff v. Tracy* as one of the cases that accepts a bifurcation in the non-pecuniary losses).

122. 393 A.2d 1188, 1191 (Pa. 1978) (stating that compensation for the loss of life's amenities is recoverable only if the victim survives the accident giving rise to the cause of action). In this case, the issue on appeal was whether or not there was a right to give instructions to the jury regarding loss of enjoyment of life. *See id.*; *see also Loss of Enjoyment of Life as a Distinct Element or Factor or Awarding Damages for Bodily Injury*, *supra* note 40, at 302.

fering and physical disability.<sup>123</sup> In the landmark case *Flannery v. United States*, the court noted that the evaluation of loss of enjoyment of life, even as a pain and suffering component, should be “objective,” otherwise in some extreme cases there could be serious problems.<sup>124</sup> Where courts would rely on a victim’s own sense of deprivation there could be almost no non-pecuniary damages when the injured party is a child, or a “sad” person who almost does not know anything about the “pleasures of life.” On the other hand, in some States, such as Utah, loss of enjoyment of life is strictly considered a component of mental suffering only.<sup>125</sup>

Courts in Texas provide representative examples of the continuous metamorphosis of loss of enjoyment of life.<sup>126</sup> In 1901, the Court of Civil Appeals of Texas acknowledged, “[t]he matter, though pleaded, is too vague to furnish any information upon a definite subject upon which damages would arise or be allowed.” Hence, the court did not award anything for “loss of capacity for the enjoyment of pleasure of life.”<sup>127</sup> Almost sixty years later, in *Missouri Pacific Railroad Co. v. Handley*, the same court justified its high assessment for pain and suffering because of the difficulty to continue living a life without the median fingers of one hand.<sup>128</sup> This meant that even under the rubric of pain and suffering, Texas took into account bodily integrity as a relevant individual interest protected by the law, when it was not speculative (i.e., objectively discernible in terms of illness or disability).<sup>129</sup>

The cases reported reveal that in several jurisdictions courts are confident that non-pecuniary damages, as a whole, take into account the interest protected by loss of enjoyment of life (health and bodily integrity as an instrumental tool and a value as such); but, due to the lack of a clear distinction, there is still a significant fear of duplicate damages. It is still the old and wise argument based on the suspicion of double recovery or trivial claims that accompanies the entire history of pain and suffering.<sup>130</sup> These cited cases also express the need/search for objective parameters of evaluation, as opposed to the unreliability of the victims’<sup>131</sup> own apprecia-

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123. At times those awards are quite big, as in a West Virginia case in which \$1,300,000 was awarded for loss of enjoyment of life, \$364,000 for past and future medical expense or nursing, and \$535,855 for loss of wages to a semi-comatose plaintiff, unaware of his situation. *Flannery v. United States*, 297 S.E.2d 433, 435 (W. Va. 1982).

124. *Id.* at 438.

125. See *Judd v. Rowley's Cherry Hill Orchards Inc.*, 611 P.2d 1216 (Utah 1980) (stating that loss of enjoyment of life overlaps with damages for pain and suffering).

126. See generally *Loss of Enjoyment of life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, *supra* note 40, at 294.

127. *Locke v. Int'l & Great Northern Ry. Co.*, 60 S.W.2d 314, 316 (Tex. Civ. App. 1901).

128. *Mo. Pac. R.R. v. Handley*, 341 S.W.2d 203 (Tex. Civ. App. 1960).

129. However, in a recent N.Y. case, loss of enjoyment of life was not considered a separate element of damages deserving a distinct award, but only a factor in assessing damages for conscious pain and suffering, thereby requiring a demonstration that plaintiffs have suffered some physical injury or pain. *Golden v. Manhasset Condo.*, 770 N.Y.S.2d 55 (N.Y. App. Div. 2003).

130. But see discussion *infra* Parts I.6-7 (stating with some certainty that a well-defined line between pain-and-suffering and loss of enjoyment of life can entirely avoid the problem of trivial or even fraudulent claims).

131. See *Collins Dictionary*, *supra* note 2 (defining “objective”).

tion of the loss incurred.<sup>132</sup> In the next section, we find an attempt to solve this problem in the other trend mentioned in American case law that we are analyzing: the recognition of the loss of enjoyment of life as a separate source of damages.

### *b. Loss of Enjoyment of Life as a Separate Element of Damages*

A more recent trend has developed in some American jurisdictions:<sup>133</sup> this trend recognizes loss of enjoyment of life as a remedy for bodily injury, leaving the task of redressing anguish and mental suffering to a more limited notion of pain and suffering. This trend started in the 1960s. Serious bodily injuries were the driving force for a different perspective on awarding damages for non-pecuniary loss, implying that the less clear allegations of loss of enjoyment of life were concealed in awards for pain and suffering.<sup>134</sup>

Indeed, loss of enjoyment of life was the point of distinction between a mainly punitive perspective and a more compensatory one. The former perspective reflects individual mental consequences and social disapproval for the wrong

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132. See *infra* Part III.

133. See, e.g., *Lousteau v. K-Mart Corp.*, 871 So. 2d 618 (La. Ct. App. 2004) (arguing loss of enjoyment of life is a separate element of general damages which must be determined by the trial judge and which is not necessarily included in an award for general pain and suffering); *Blocker v. Rapides Reg'l Med. Ctr.*, 862 So. 2d 1220 (La. Ct. App. 2003); *Hebert v. Old Republic Ins. Co.*, 807 So. 2d 1114 (La. Ct. App. 2002); *Brown v. Glaxo, Inc.*, 790 So. 2d 35 (La. Ct. App. 2001). But see *Golden v. Manhasset Condo.*, 770 N.Y.S.2d 55 (N.Y. App. Div. 2003) (arguing it is only a factor to be considered by the jury in assessing damages for conscious pain and suffering).

134. In a 1965 case, a court recognized loss of enjoyment of life as a separate element of personal injury damages to compensate for the loss of the normal pursuit and pleasures of life. *Culley v. Pa. R.R. Co.*, 244 F. Supp. 710 (D. Md. 1965). Four years later, another court stated that under Michigan law there was no differentiation of loss of enjoyment of life and pain and suffering. *Pierce v. N.Y. Cent. R.R. Co.*, 409 F.2d 1392 (6th Cir. 1969). On the contrary, the *Pierce* court said that a clear distinction would facilitate every check upon the fairness of the amount awarded. *Id.* In reaching its decision, the Sixth Circuit recognized the distinction between loss of enjoyment of life and pain and suffering to be lawful. *Id.* However, it was unwilling to allow a distinct instruction to the jury, fearing that the speculative character of that form of damages would excessively influence the jury. *Id.* However, another court restated the speculative argument that:

The rule against recovery of 'speculative damages' is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent . . . [t]hat is, if it is uncertain whether the defendant caused the damages, or whether the damages proved flowed from his act, there may be no recovery of such uncertain damages; whereas, uncertainty which affects merely the measure or extent of injury suffered does not bar a recovery.

*Sherrod v. Berry*, 629 F. Supp. 159, 164 (N.D. Ill. 1985). See also DOBBS, *supra* note 53, § 3.2-3.4; FOWLER V. HARPER, FLEMING JAMES, JR., OSCAR S. GRAY, THE LAW OF TORTS § 25.3. (1986). The Minnesota Supreme Court took a completely different perspective. In 1978, it decided that a jury could consider loss of enjoyment of life in awarding damages. *Amunti v. Payette*, 268 N.W.2d 52 (Minn. 1978). A year later, the Nebraska Supreme Court stated that it was not normally proper for a jury to have a separate instruction for pain and suffering and loss of enjoyment of life. *Swiler v. Baker's Super Market Inc.*, 277 N.W. 2d 697 (Neb. 1979). Nevertheless, when loss of enjoyment of life was the consequence of a serious personal injury and there was enough evidence of it, courts should admit distinct instructions. *Id.*

complained of, while the latter indicates a clear protection of individual health and bodily integrity from third-party interference. Loss of enjoyment of life reveals its conceptual autonomy in the United States, even if its redress is often still offered by the traditional title of pain and suffering. Indeed, complete acknowledgement of this bifurcation was not so far away. In 1980, the U.S. Court of Appeals for the Sixth Circuit conceived loss of enjoyment of life as entirely independent from pain and suffering, denying any risk of duplicate recovery in cases of personal injury.<sup>135</sup> The court defined the nature and goal of compensating the loss, explaining that pain and suffering compensates physical and mental discomfort for the injury while loss of enjoyment of life compensates the victim "for the limitations of person's life created by the injury."<sup>136</sup>

Thus, it is possible to divide the reported cases into two main sets. Before the 1960s, loss of enjoyment of life, whether recognized distinctly or not, was mainly a factor in the assessment of pain and suffering.<sup>137</sup> Since then, loss of enjoyment of life was more often awarded independently from pain and suffering, becoming a central element of damages, moving from the periphery of tort law.<sup>138</sup> However, as we have seen, courts have already recognized loss of enjoyment of life as a proper title of damages and the real change could be in awarding it to unconscious or dead plaintiffs. Still, these changes contributed to fundamental alterations. Further, the trend of making a distinction between pain and suffering and loss of enjoyment of life is increasing, judging from the reported cases. An open and complete recognition of these differences would clarify the state of the law in the United States, contributing to a reduction in uncertainty and deflation in the overall debate on non-economic damages. In addition, it would ease the trade-off between the need for an equitable evaluation of the damages and the countervailing need to frame more objective evaluation criteria to make the loss predictable in insurance terms.<sup>139</sup>

## **6. Loss of Enjoyment of Life: A Notion Toward Compensating Damages to Health and Bodily Integrity**

Today, loss of enjoyment of life could be defined as a material modification of the capacity to enjoy life, as clearly distinguished from the capacity to work and from the suffering related to the injury. All of the precluded activities are not prof-

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135. *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980).

136. *Id.* at 824; *see also* *Mariner v. Marsden*, 610 P.2d 6 (Wyo. 1980) (finding that loss of enjoyment of life is a compensable damage and a fact finder may either make a separate award for loss of enjoyment of life or take into consideration the loss of enjoyment of life in arriving at the total general damages).

137. *See* *Burke v. United States*, 605 F. Supp. 981 (D. Md. 1985).

138. *See* *Cramer*, *supra* note 37, at 966 (reporting that almost a half of the states in the U.S. have acknowledged this metamorphosis). However, as we saw before, loss of enjoyment of life was recognized before and the real change could be its award to unconscious or dead plaintiffs. *See generally* *Fearon*, *supra* note 38, at 436-37.

139. The chronic lack of information does not affect insurance companies directly because they should have some actuarial data to set the premiums. However, the poor information courts have (*e.g.* juries always assess non-pecuniary damages for their first time), produces uncertainty and affects both insurance companies' data and incentive litigation.

itable ones in the sense that they do not allow money earning as such and are wealth neutral.<sup>140</sup> The impaired activities are all expressions of one's individual personality and pursuits; these impairments are "limitations on the person's life created by the injury."<sup>141</sup>

Loss of enjoyment of life distinguishes itself today both from the loss of earning capacity, as well as from pain and suffering. It is a new title of damages that has sprung from pain and suffering, the historical type of reparable losses that comprehended all non-economic damages.<sup>142</sup> In the past, society could only devote resources to ensure survival, and damages for loss of earning capacity and out-of-pocket expenses conformed accordingly.<sup>143</sup> There was also a time in which a moral sense of judgment and desire for deterrence forced the compensation of some irreparable losses.<sup>144</sup> Non-pecuniary loss assessment in the form of pain and suffering expressed only societal blame for wrongful acts. Today, health and bodily integrity have become central issues and primary interests worth compensation and protection for their own sake, regardless of their utility to produce wealth or their national protection.<sup>145</sup> In the United States, compensation for health and bodily integrity use the vehicle of damages for loss of enjoyment of life.

This is not just a semantic bifurcation of non-economic loss.<sup>146</sup> Pain and suffering and loss of enjoyment of life seek to redress different losses, despite the fact they are often lumped together. The method of proving them is also different. To establish loss of enjoyment of life, it is sufficient to demonstrate the victim's previous way of life and how the injury impaired it; that is, the degree of the health impairment. This way, damages for loss of enjoyment of life correspond to the extent of the injury to individual health more objectively. The proof for pain and suffering is theoretically more difficult because the plaintiff must show a physical in-

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140. See Croley & Hanson, *supra* note 6, at 1778-79 (discussing that non-pecuniary losses are wealth-neutral in the sense that they do not have an impact on wealth such as requiring an elevator in the house after injury).

141. Cramer, *supra* note 37, at 972.

142. DOBBS, *supra* note 53, § 8.1; RESTATEMENT (SECOND) OF TORTS § 924 (1977).

143. RABIN, *supra* note 25, at 34 (stressing the need of a historically contextual perspective on personal injury and more generally on tort law).

144. See, e.g., Richard Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 99-100 (1986) ("At the same time that tort law affects the allocation of resources . . . it also reinforces the system of symbols by which the allocation is justified."). Perhaps a significant role in moving forward the boundaries of compensation was performed by the rules of negligence. After all, a fault-based system is better able to justify an award that reflects society's dislike or moral blame thorough an award otherwise not measurable in money. See also Leebron, *supra* note 8 (arguing that deterrence is a better justification than compensation for non-pecuniary losses).

145. See Stephen R. Perry, *Tort Law*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 57 (Dennis Patterson ed., 1995) (arguing health is at the hearth of protected interests in legal systems).

146. Crowe, *supra* note 37, at 1275 (using the expression "semantic bifurcation" and elaborating on the idea it is possible to distinguish subjective and objective components in non-pecuniary damages).



jury, the suffering endured and the emotional responses to it<sup>147</sup> — a basket of extremely subjective evaluations for the jury.<sup>148</sup>

Nevertheless, this is not entirely the actual situation because comprehensive awards for non-pecuniary damages are still common, and several jurisdictions do not expressly recognize loss of enjoyment of life as a separate element.<sup>149</sup> However, loss of enjoyment of life is developing rapidly as a different kind of remunerable loss from pain and suffering aimed at compensating health and bodily integrity as such. As we have seen, historical rationales strictly link physical injury to all non-economic damages. The reference to compensation for non-economic damages accompanying pure emotional harm further elucidates these rationales.

### **7. From Physical Impact to Bystander Recovery: Accounts of Non-Pecuniary Damages Accompanying Physical and Pure Emotional Harm**

The evolution from the original unique title of non-economic damages (pain and suffering) has led to a progressive fragmentation of the category into several types; mainly to add loss of enjoyment of life to pain and suffering or to alter the meaning of the latter to encompass the former. It appears also that health and bodily integrity have become an interest deserving non-economic damage compensation, realized through damages for loss of enjoyment of life. This article previously described this evolution in damages for non-pecuniary loss accompanying physical harm. These losses have a quite different history than pure emotional distress claims, which the common law recognized only later and in circumstances that are more limited.<sup>150</sup> For instance, nobody doubts that embarrassment for disfigurement has received compensation since ancient times. In contrast, it has been very questionable whether, for example, bystanders can recover non-pecuniary damages.<sup>151</sup> Indeed, it is inherently more difficult to evaluate how a person witnessing an accident can suffer damage to his/her own health. The ancient dictum “mental pain or anxiety the law cannot value, and does not pretend to redress,

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147. See Cramer, *supra* note 37, at 979.

148. However, proof is usually given by testimony, frequently that of relatives; furthermore, expert testimony is not necessary and usually it only serves to prove the reality of pain and suffering. See *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 752 (9th Cir. 1980); *Curnow v. W. View Park Co.*, 220 F. Supp. 367, 369 (W.D. Pa. 1963). Note, yet, that all non-pecuniary damages are general damages and it is not necessary to prove the exact amount of them; it is enough just to demonstrate their existence. See generally *RESTATEMENT (SECOND) OF TORTS*, § 905 (1977).

149. See Fearon, *supra* note 38, at 429.

150. For a description of the *prima facie* elements of negligent infliction of emotional distress and a discussion of its status, see Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: “Outrage”*, 38 A.L.R. 4TH 998 (1985); Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist*, 33 ST. MARY’S L.J. 455 (2002); and Barry J. Koopman, Note, *A Rule of Which Procrustes Would be Proud: An Analysis of the Physical Injury Requirement in Negligent Infliction of Emotional Distress Claims Under Iowa Law*, 51 *DRAKE L. REV.* 361 (2003).

151. See, e.g., David J. Leibson, *Recovery of Damage for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163 (1977); Pamela Cogan Thigpen, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hosps.*, 13 PAC. L.J. 179 (1981) (stressing the growth in the number of such claims).

when the unlawful act complained of causes that alone" still appears to command.<sup>152</sup> Nevertheless, the titles of non-pecuniary damages accompanying both physical harm and pure emotional distress are theoretically the same.

Emotional distress is by definition a psychologically caused damage. It usually consists of psychological disturbances, often accompanied or followed by physical ones, the material cause of which is not an immediate physical injury. It is beyond the scope of this article to discuss whether the legal system should redress intangible loss accompanying pure emotional harm. Nor is the aim of this section to discuss whether pure emotional distress is a proper basis for a claim. Rather, its purpose is to connect the problems already solved in redressing non-pecuniary loss accompanying physical harm to the limits historically imposed on emotional distress, in order to identify a possible comprehensive framework for awarding damages for intangible loss, regardless of the physical or emotional event that gave rise to them.

This article discussed earlier how questions surrounding the notion of pain and suffering and the attempt to anchor mental suffering to objective evidence (usually a physical harm or an ascertainable illness) contributed to create "pain and suffering" as a term of art. Intangible loss caused by pure emotional distress rests on emotional harm in which the dividing line between mere mental suffering and ascertainable illnesses tends to be even more diaphanous. Quite often, issues of causation and policy are commingled in deciding whether to award damages for emotional distress.<sup>153</sup> However, several arguments on the proper grounds for the claim are, surprisingly, connected to the notion — and proof — of the non-economic damages to be awarded. Further, the main policy argument used to refuse payment for non-pecuniary damages accompanying both physical and emotional harm is the prevention of trivial or fraudulent claims.<sup>154</sup> Sometimes, fear of excessive burdens posed by civil liability allies itself with this policy consideration<sup>155</sup> or with the obvious uncertainty of evaluation. In reality, the sole rationale

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152. *Lynch v. Knight*, (1861) 11 Eng. Rep. 854 (K.B.). 'A different story seems to be applicable for intentional infliction of emotional distress. The court's reluctance to recognize a legally protectable independent interest in emotional distress had to do with presumed difficulties of proof and valuation and a fear of fraudulent claims and a flood of litigation. Today, however, a majority of jurisdictions acknowledge the existence of an independent tort of intentional infliction of emotional distress, and few refuse it expressly. See *Modern Status of Intentional Infliction of Mental Distress As Independent Tort: "Outrage"*, *supra* note 150.

153. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984); DAN B. DOBBS, THE LAW OF TORTS § 229 (2000).

154. This is an old argument (*Spade v. Lunn & Boston R.R. Co.*, 47 N.E. 88, 89 (Mass. 1897)), though it was sometimes criticized (*Dillon v. Legg*, 441 P.2d 912, 917-18 (Cal. 1968)). In fact, the original rationale for denying recovery for such losses relied mostly on the risk of speculative or fraudulent claims: it is the "flood of litigation" argument. *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896).

155. See, e.g., Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J., 1237, 1244 (1971); see also RESTATEMENT (SECOND) OF TORTS § 313, cmt. d, § 436 cmts. f-h (1965) (applying to negligent infliction of emotional distress, and noting that actions causing unintentional emotional distress are not actionable unless the actor should have realized his or her conduct involved an unreasonable risk of causing the distress).

for this denial was either fear of an unlimited liability burden for defendants and society as a whole, or the burden of administering such uncertain claims. It is a policy argument, and courts treated it accordingly. Therefore, the debate was mainly about causation. This was true to an even greater extent in the awarding of non-pecuniary damages accompanying pure emotional harm. Consequently, courts created several doctrines, attempting to provide reliable guidance for solving the dilemma between either denying compensation altogether or assuming the risk of fraudulent and trivial claims in cases of emotional distress.<sup>156</sup>

The first legal doctrine elaborated with this end in view was the so-called "physical impact" rule. At the end of the nineteenth century, the legal principle was that the law does not compensate nervous shock without physical harm.<sup>157</sup> The argument was approximately this: emotional distress without physical harm was too remote a consequence; it would only increase the litigation rate.<sup>158</sup> Hence, easily verifiable proof of physical impact became the key to the trial, offering a rule of thumb. Today the lack of a logical ground for the theory is easy to perceive, once we either reflect on the fact that psychiatry is still unable to say how much of a disease is due to organic modification, or consider such expressions as "to die of fright" and "to go mad with pain," which express a possible reality that might happen and which medicine can prove.

The physical impact theory, although it was losing much of its grip in view of the alleged goal of screening claims, ruled for a long time. In fact, "impact has been found to mean any physical contact, however slight."<sup>159</sup> Moreover, medical

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156. The point is clearly expressed by Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493 (2001), who stated that "[t]he history of emotional distress represents an ongoing attempt by courts to balance the conflicting goals of full compensation and precluding fraudulent or *de minimis* claims — with the balance shifting ever more towards compensation."

157. See *Victorian Ry. Comm'rs. v. Coultas*, [1888] 13 A.C. 222 (P.C.) (appeal taken from Vict.) (U.K.); *Mitchell*, 45 N.E. 354; *Ward v. W. Jersey & Seashore R.R. Co.*, 47 A. 561, 561 (N.J. 1900) (holding that emotional harm without physical injury was not a basis for fear damages).

158. Note, however, that the argument applies only for negligent infliction of emotional distress. In fact, there are no doubts for non-pecuniary loss awards in case of intentional infliction of emotional distress. See RESTATEMENT (SECOND) OF TORTS § 46 (1965). In this case intent performs as a proxy for legal causation.

159. KEETON ET AL., *supra* note 153, § 54. The policy concerns underlying this kind of damages are also clearly recognized in *George v. Jordan Marsh Co.*, 268 N.E.2d 915, 918 (Mass. 1971), where the court stated:

The right to recover for these items of damages [emotional distress that results in physical harm] should not be denied just because they do not fit in any of the exiting niches in the ancient walls surrounding the law of torts. If the current needs of society require and justify so doing, the walls may be extended and additional niches built to accomplish justice.

The court also quotes *Spade*, 47 N.E. 88, and its policy reasons (noting that recognizing them would open a wide door to unjust claims and the extreme difficulty to administer such tort rules). See generally R. EPSTEIN, CHARLES O. GREGORY & HARRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 1039 (8th ed. 1990) (distinguishing between remoteness and fear of excessive litigation as a distinct early argument to deny recovery). In the U.K., both remoteness and floodgate arguments were refused. *Dulieu v. White & Sons*, [1901] 2 K.B. 669 (U.K.) (refusing

development eased proving impact, whatever it could be, and it became an anachronistic requirement, easy to manipulate.<sup>160</sup> In 1921, Goodrich realistically said: "the magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery."<sup>161</sup> The fiction of treating intangible loss accompanying pure emotional distress as if it was accompanying a physical harm is rather clear, and it finds a reasonable explanation, though not a justification, in the historical evolution of non-economic damages.

Since the 1960s, American courts have started to depart from this theory; ceasing to look for a physical impact, they instead searched for the danger of physical impact.<sup>162</sup> Indeed, the next shift was toward the so-called "zone of danger" rule.<sup>163</sup> Under the zone of danger doctrine,<sup>164</sup> victims who were not directly *physically injured* could seek compensation for their intangible loss. All they needed to prove was that they reasonably feared for their own *bodily integrity*.<sup>165</sup> Implicitly, to be in the zone of danger meant that the damages complained of were foreseeable and plausible because they could have occurred. Indeed, this doctrine gave only a reasonable proxy for non-fraudulent actions and for negligent behavior. The existence of non-pecuniary damages was still closely reliant upon a physical bodily injury, though in an even more fictitious way: the material danger of it. Clearly, this theory too is a mere pretext<sup>166</sup> to filter the number of potential

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the "actual impact" requirement). Note that the improvement in the law was limited to "shock which arises from a reasonable *fear of immediate personal injury to oneself*" (emphasis added); that is, to the "zone of danger" rule. *Id.*

160. Even dust in the eyes (Porter v. Del., Lackawanna & W. R.R Co., 63 A. 860 (N.J. 1906)) or a horse defecating onto plaintiff's lap (Christy Bros. Circus v. Turnage, 144 S.E. 680, 681 (Ga. Ct. App. 1928)) were a sufficient impact to allow compensation. For a critical comment on these evolutions, see Andrew J. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 8 (1976).

161. Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV., 497, 504 (1922). In the mid-eighties, five jurisdictions in the United States were still applying the physical impact doctrine. Glenn M. Troost, *Workers' Compensation and Gradual Stress in the Workplace*, 133 U. PA. L. REV. 847, 858 n.46 (1985).

162. *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), *overruled by* *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). Indeed, before *Dillon*, California allowed recovery only under the zone of danger test. See Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805 (2004) (offering a complete and well-reasoned analysis of the evolution and rationale for negligent infliction of emotional distress).

163. *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) is a recent application of the rule. See also *Tibbetts v. Crossroads, Inc.*, 411 N.W.2d 535, 538 (Minn. Ct. App. 1987) ("A plaintiff may not recover damages for negligent infliction of emotional distress unless the plaintiff shows that the defendant's action resulted in either physical injury or physical danger to the plaintiff.").

164. After courts acknowledged the arbitrariness of the physical impact rule, fear of physical impact to oneself or the zone of danger was enough. See Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV., 477, 478 (1982).

165. At first glance, the argument appears illogical because it assumes that everybody fears only for himself and not for someone else, such as a sibling. See Leibson, *supra* note 151, at 172.

166. This assumption seems to be clearly stated by Kontorovich, *supra* note 156, at 493, who stated that "at each stage of the liability expansion, courts have attempted to limit recovery to categories of cases where the emotional distress seems most likely to be genuine and substantial, such as where the distress flows from a physical injury to a plaintiff." *But see* Julie A. Davies,

claims, despite the famous assertion of Judge Keating that, "[a]ny limitations, if needed, should be developed on a case by case basis, using proximate cause and foreseeability as a means to avoid anomalous results."<sup>167</sup> He added: "The only real requirement . . . which policy and justice dictate, is stringent evidence of causation and of actual injury to deter those who would use sound and just rule as a cover for spurious claims."<sup>168</sup>

The real target of this theoretical construction was the search for a legal device to screen claims, and — once again — it failed to match its objective by merely linking the claim to the fear of bodily injury without framing it in a broader setting. Continuing the historical analysis can help develop a better understanding of the origin and rationale of these doctrines, as well as the reasons for their shortcomings and the possibility of developing a clearer framework.

### 8. Historical Patterns Towards a Framework: From Physical Harm to Recognizable Illness and Disability

As previously discussed, initially damages for pain and suffering — then the only title of intangible loss accompanying physical and mental harm — prevented private retaliation, especially for intentional wrongs. Moreover, the ancient notion of pain and suffering revolved around physical pain. Hence, physical impact was the usual way to cause intangible loss before formally becoming a legal requirement. Pain and suffering was mostly *physical* pain due to a *physical* harm,<sup>169</sup> which of course implies a *physical* impact, and it was also the only non-pecuniary damage for emotional distress. Because the physical origin of the intangible loss was the only reasonable proxy for the cause of action, physical harm was an easy rule of thumb to determine the fraudulence of a claim, as it merely photographed the reality. Later on, loosening its grip and fading into the "zone of danger" doctrine for pure emotional distress claims, the original factual reasons of the doctrine were lost, but the artificiality of the zone of danger doctrine soon became apparent as well.

The landmark case of *Dillon v. Legg* clearly shows the artificiality of the zone of danger, rejecting the rule on appeal.<sup>170</sup> The California Supreme Court elaborated on the original physical injury/impact requirement, looking for justifications of "the rights of the victim and the scope of the defendant's responsibilities."<sup>171</sup> In

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*Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 22-23 (1992) (appreciating the results this doctrine produces).

167. *Tobin v. Grossman*, 249 N.E.2d 419, 425 (N.Y. 1969) (Keating, J., dissenting).

168. *Id.*

169. At that time, only few cases alluded to pain other than physical. See, e.g., *Lisley v. Bushnell*, 15 Conn. 225 (1842).

170. 441 P.2d 912 (Cal. 1968) (expressly overruling *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963)).

171. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814, 857 (1990).

*Dillon*, Erin Lee Dillon's mother and sister witnessed her death in a car accident. The trial court gave compensation to the sister for her emotional and physical suffering. However, it dismissed the mother's complaint because, despite proximity to Erin Lee, the accident never threatened the mother's life. In reversing the trial court judgment, the Supreme Court of California challenged all of the arguments for the zone of danger rule, marking it as an "artificial abstraction which bar[s] recovery, contrary to the general rules."<sup>172</sup> Then the court tried to enumerate new guidelines, such as the need for a close relationship between direct victim and bystander and psychological proximity to the place of the accident<sup>173</sup> to make more plausible the causal connection between the alleged health injury and the accident involving the third-party. Ten years later, an independent cause of action for negligent infliction of serious emotional distress was recognized. In *Molien v. Kaiser Foundation Hospitals*, the Supreme Court of California said: "The attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme."<sup>174</sup>

Again, in this decision the important issue for us it is not whether a viable cause of action exists in any American jurisdiction, but the actual notion of damages for intangible loss the court uses. The reported opinion in *Molien* recalls a clear recognition that humans have a physical and a psychological component, both of which contribute to one's health. However, it also acknowledges that, because health integrity (both physical and psychological) is the interest protected by some non-pecuniary damages for intangible loss in personal injury, it does not make a difference if the harm is inflicted by a physical or an emotional injury. Damage to health caused only through a physical harm or only through a psychical wrongdoing share a common feature: both are damages to one's health that deeply alters a victim's life. Having acknowledged these evolutions, it is possible to signal how a coherent screening test for intangible loss, accompanying both physical harms and pure emotional ones — when the latter are recognized by law — is the presence of a pathology: an illness or disability that a medical doctor can ascertain according to scientific knowledge. Furthermore, as we will see, according to the

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172. *Dillon*, 441 P.2d at 925.

173. For a critical list and analysis of these guidelines, see, for example, Rosalee A. Miller, *Bystander Recovery for Negligent Infliction of Emotional Distress in Iowa: Implementing an Optimal Balance*, 67 IOWA L. REV. 333 (1982), where the author compares several cases; and Pamela Cogan Thigpen, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Found. Hosps.*, 13 PAC. L.J. 179 (1981). Note also that this comment does not deal with the interplay between risk perception and fear. For general information on this subject, see Guzelean, *supra* note 3, where the author debates the latest developments in federal courts and offers a reconstruction of the restrictions imposed by American law to emotional harms.

174. 616 P.2d 813, 821 (Cal. 1980); see *Thing v. La Chusa*, 771 P.2d 814, 819-30 (Cal. 1989) (providing a modern reading of the impact/injury requirement that sets bright line rules and acknowledges the problems of the test devised in *Dillon*); Michael Jay Gorbach, *Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-Line Stance of Elden and Thing Obsolete?*, 54 HASTINGS L.J. 273 (2002) (providing general information on the legislative response to cases dealing with emotional distress).

European experiences this selecting criterion helps to assess damages for loss of enjoyment of life (or compensates damage to health and bodily injury, as we would prefer to call it).

Thus, historical reasons explain the evolution of the titles of damages for intangible loss accompanying both physical and pure emotional harm. Both physical injury and reasonable fear for physical injury were initially trustworthy proxies to check the validity of a claim and reliable tools to set guidelines for the evaluation of each claim, but they are not any more.<sup>175</sup> In addition, these historical rationales reinforce the continuous expansion of damages for intangible loss, with the aim of offering compensation for damage to health and bodily integrity.

Furthermore, this historical path leads to envisaging a more efficient and coherent screening test than the current one for intangible loss relying on the presence of an ascertainable medical condition. Of course, this test requires a clear distinction between pain and suffering, defined as *pretium doloris*, and loss of enjoyment of life, conceived as attempting to compensate damage to health and bodily injury. Under the suggested framework either direct victims of a physical injury — e.g., a person run over by a car — and those claiming intangible loss accompanying pure emotional distress — e.g., a mother witnessing the accident from the safety of a balcony — have to prove that the alleged wrong actually caused the illness complained of and the extent of health damages they suffered. In providing the correct evidence, both victims could recover loss of enjoyment of life (compensation for damage to health and bodily injury) and, to a different extent, pain and suffering. What is important to evaluate is the impairment of health suffered, and not whether it accompanies a physical or purely emotional harm.<sup>176</sup>

### ***C. The European Views of the Cathedral: Experimental Circulation of Awarding Approaches***

American case law shows some hesitancy to openly acknowledge health and bodily integrity as a deserving interest. A trend in this direction is entirely clear, but it is not uniform yet among American jurisdictions. It would be better to opt entirely for a plain distinction between pain and suffering (with the sole meaning to redress mental-moral suffering) and loss of enjoyment of life (an attempt to take

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175. W. Horton Rogers, *England*, in *DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE*, *supra* note 7, at 57 (“[W]here there is no physical injury the claimant must establish that his loss falls within the principles governing psychiatric trauma or, as we have traditionally said, ‘nervous shock.’ . . . The claimant must have suffered a recognizable psychiatric illness.”); *see also infra* Part II.A.3.

176. The theoretical equivalence between physical and emotionally caused harms appear to be stressed with transparent clarity by Judge Mosk, stating:

In the light of contemporary knowledge we conclude that emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress; the refusal to recognize a cause of action for negligently inflicted injury in the absence of some physical consequence is therefore an anachronism. We further conclude that it is no less regressive to deny recovery for loss of consortium simply because the plaintiff's spouse has suffered a disabling but non-physical injury.

*Molien*, 616 P.2d at 814.

care of health and bodily integrity as such, whether it accompanies a physical injury or purely emotional harm), as often happens in Europe. This move could help to set clear guidelines in their evaluation.

Such a clear distinction is enforced in the United States, although it is not universally acknowledged. Comparison with European experiences, where the distinction operates more clearly, will show: (1) the benefits of this different reading of non-pecuniary damages; and (2) its applicability to American jurisdictions in order to provide guidelines for the judicial decision-making process.<sup>177</sup> Indeed, it is worth following the venerable idea that when the movement of the law is not straight and its “direction not always visible,” all that “can be done is to point out a tendency and to justify it.”<sup>178</sup>

### 1. The Distinctions Among the European Models; Their Convergent Paths to Judicial Scheduling

So far, we have used the traditional common law language and its conventional distinction within the category of non-pecuniary damages, between loss of enjoyment of life (or loss of amenity as it is called in the United Kingdom) and pain and suffering. However, when shifting to international scenarios this language may be misleading in non-common law jurisdictions. In dealing with personal injury damages outside the common law world, we should not surrender to a babel of languages and different notions across and within legal experiences. Apparently, these notions are very diverse. Even if they come from the same inspiring principles in terms of legal protection, their disparate significance could arouse confusion in different cases and contexts of accidents. It may be the case of the meaning given to expressions like *smartengeld*, pain and suffering, *préjudice corporel*, *préjudice d'agrément*, *daño corporal*, *daño moral*, *danno alla salute*, *Schmerzensgeld*, *danno morale*.<sup>179</sup>

As seen with respect to common law experiences, tort systems have eventually acknowledged various titles of non-pecuniary damages. In addition, as the previous sections show, the kinds of losses compensated under titles of damages, such as pain and suffering or loss of enjoyment of life, have dramatically changed, revealing a need for different parameters or new categories. Referring back to our very first assumption, we argued that the changes in and the enlarged awards for

177. Again, the idea here is to offer some reliable guidelines. This comment suggests that reliable guidelines are the other side of the problem, which is nicely pointed out by Lord Pearce in *H. West & Son Ltd. v. Shepard*, [1964] A.C. 326, 368-69 (H.L.) (U.K.), who stated “[i]t would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award.” However, this “safe passport” exists only if there is not a bright line between “objectively” ascertainable non-economic damages, and those that are not. For instance, in the U.K. in the 1970s, a sharp trend towards the use of standardized awards was discernable. See R. F. V. HEUSTON, *SALMOND ON THE LAW OF TORTS* 592 (16th ed. 1973).

178. OLIVER WENDELL HOLMES, *THE COMMON LAW* 77 (1881).

179. For information on several European Community member States, see generally Rogers, *supra* note 7, at 245-96; Bernard A. Koch & Helmut Koziol, *Comparative Analysis, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE* 407, 419-34 (Bernard A. Koch & Helmut Koziol eds., 2003); and Comandé, *supra* note 11, at 17-45.



non-pecuniary loss correspond to substantial social modifications in Western societies. Those modifications happened through profound transformations of the tort system or, stated otherwise, by using the tort system to match the demand for protection of individual interests. Those transformations have enhanced the fulfillment of fundamental social values deeply rooted in the Western legal tradition and in the modern Western constitutions. Indeed, in light of the results of an international working group, it is possible to find shared trends and values within the European legal orders,<sup>180</sup> even using the broad definition of non-economic damages adopted at the beginning of this article.<sup>181</sup> Protection of human dignity and health, granted by European Union Member States' constitutions and embedded in international agreements and treaties, calls for the respect of an equal treatment principle as well.<sup>182</sup> They impose considerations of the same injuries and facts, but call for the different treatment of dissimilar ones. Otherwise stated, these principles impose the avoidance of unjustified variations within levels of injury seriousness (principle of horizontal justice) and differentiation according to injury seriousness and duration (principle of vertical justice).

Indeed, in Europe, it is undeniable that the health protection principle is a shared fundamental value, which, as an offspring of the preservation of human dignity,<sup>183</sup> finds its first common application in terms of a compensatory protection for damages sustained by victims.<sup>184</sup> It finds its explicit or implicit articulation in European constitutions and receives a similar specification in the health protection principle, both as a general interest and as an individual right.<sup>185</sup> Still, we need to identify non-economic damages worthy of compensation in cases of psychophysical integrity impairment and to draw guidelines for their compensation. Besides, it is not possible to make any clear differentiation between psychological and physical health, both under legal technical and medical scientific profiles.<sup>186</sup> For these reasons as well, several European countries found it useful to distinguish — at least *de facto* — between damage to health and bodily integrity and mere psychological alterations or subjective predispositions. As evidenced before, the ascertainable medical condition — documented illnesses and disabilities — objectively

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180. See the results in Francesco D. Busnelli, *Prospettive Europee di Razionalizzazione del Risarcimento del Danno Non Economico*, DANNO E RESPONSABILITÀ, Jan. 2001, at 5-11.

181. See *supra* note 7 and accompanying text.

182. See Busnelli, *supra* note 180, at 5-11.

183. See Busnelli, *supra* note 180, at 6-8.

184. See Suzanne Galand Carval, *France*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, *supra* note 7, at 87 (“[I]n personal injury cases, . . . it is widely felt — among both judges and scholars — that damages for non-pecuniary loss perform the fundamental function of expressing the society's acknowledgement of what is currently called the ‘eminent dignity of the human being’ (*l'éminente dignité de la personne humaine*). And indeed, it has been a decisive step to admit that the loss suffered by the victim of a personal injury is not limited to the negative consequences of the accident on his working capacity.”).

185. See, e.g., COSTITUZIONE [COST.] art. 32 (Italy).

186. See, e.g., Constitution of the World Health Organization, pmbl., July 22, 1946, 2 OFFICIAL RECORDS OF THE WORLD HEALTH ORGANIZATION 100 (“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”); see also *supra* Part I.B.6-7.

appreciable by medical experts and judges, characterizes the former and better identifies with the harms to health, however caused. Mere psychological alterations, not amounting to an ascertainable condition, cannot be appreciated according to objective parameters and would encompass transient sufferings such as anger or temporary stress.

In several European jurisdictions, medical evidence plays a key role in distinguishing damages for intangible loss. Indeed, all European awarding systems count on one form or another of medical description or evidence for non-economic damages that would be pigeonholed as compensation for damage to health and bodily injury, regardless of the actual words used to describe them.<sup>187</sup> This role of medical evaluation has proved critical in the presentation of an "objective" and uniform estimation of non-economic damages to psychophysical integrity.

On these grounds, many European legal orders have adopted monetary *barème* (standardization using scheduling) based upon age and confirmed permanent disability, or other economic values deriving from case law.<sup>188</sup> These systems rely upon the differentiation shown in non-pecuniary damages (objective vs subjective assessment). As discussed *herein*, these are good examples of how the distinction between damages to health and pure pain and suffering eases the standardization process, which lays down the basic parameters needed to guarantee the respect of the paramount equality principle in all legal systems.

## 2. The United Kingdom as a Paradigmatic Evolution of Awarding Damages for Intangible Loss

Assessment of damages for non-pecuniary loss under English law experienced a drastic change since the Court of Appeal decided to carefully monitor awards after World War II and began to set standards, crafting brackets of values on review of trial courts awards. Most likely, the policy for this innovation rests on ease of calculation, consistency across cases, and predictability (to promote settlements and maintain insurability).<sup>189</sup> A prominent English scholar has put it in a

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187. See generally, Rogers, *supra* note 7, at 268-75 (stressing the different systemic impact of medical evidence in several European Countries).

188. See *infra* Part I.C.2.

189. See, e.g., Ward v. James, [1966] 1 Q.B. 273, 299-300 (U.K.). The background idea in this assessment evolution is clearly summarized in Wright v. British Rys. Bd., [1983] 2 A.C. 773, 784-85 (H.L.) (U.K.), where the court stated:

[I]t is an important function of the Court of Appeal to lay down guidelines both as to the quantum of damages appropriate to compensate for various types of commonly occurring injuries and as to the rates of 'interest' . . . [S]uch guidelines . . . should be simple and easy to apply though broad enough to permit allowances to be made for special features of individual cases which make the deprivation caused to the particular plaintiff by the non-economic loss greater or less than in the general run of cases involving injuries of the same kind. Guidelines laid down by an appellate court are addressed directly to judges who try personal injuries actions; but confidence that trial judges will apply them means that all those who are engaged in settling out of court the many thousands of claims that never reach the stage of litigation at all or, if they do, do not proceed as far as trial will know very broadly speaking what the claim is likely to be worth . . . A guideline as to quantum of conventional damages or conventional interest thereon is not

plain and straight forward way: "[I]f we cannot say what a leg or an arm is worth, we can at least say that a leg today is worth the same as a leg tomorrow and we can also say that an arm must be worth more than a hand."<sup>190</sup> Lord Diplock clarified the point, saying:

Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor . . . the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases.'<sup>191</sup>

On these ideals, the British experience has developed, in the course of half of a century, an approach to assess pain and suffering and loss of amenity of life.<sup>192</sup> As anticipated, very often courts award a single lump sum in respect of these titles

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a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change . . . . But though guidelines should be altered if circumstances relevant to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial . . . . As regards assessment of damages for non-economic loss in personal injury cases, the Court of Appeals creates the guidelines as to the appropriate conventional figure by increasing or reducing awards of damages made by judges for various common kind of injuries. Thus so called 'brackets' are established, broad enough to make allowance for circumstances which make the deprivation suffered by the individual . . . greater or less than in the general run of cases, yet clear enough to reduce unpredictability of what is likely to be the most important factor in settlement of claims. 'Brackets' may call for alteration not only to take account of inflation, for which they ought automatically to be raised, but also, it may be to take account of advances in medical science which may make particular kinds of injuries less disabling or advances in medical knowledge which may disclose hitherto unsuspected long term effects.

See also MUNKMAN, *supra* note 57, at 186-93.

190. P. S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 189, 216 (2d ed. 1975), stating:

Although the courts have now definitely committed themselves to the 'tariff' approach, it is clear that many judges have had misgivings about the selection of particular arbitrary figures for particular disabilities. The main reason for this is that the fixing of arbitrary figures is, in the English legal system, generally seen as a legislative and not a judicial act. The drawing of arbitrary lines is not, on the whole, a common law process.

191. *Wright*, [1983] 2 A.C. at 777; see also *Rushton v. Nat'l Coal Bd.* [1953] 1 Q.B. 495, 502 (U.K.), stating:

The only way . . . in which one can achieve anything approaching a uniform standard is by considering cases which have come before the courts in the pasts and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.

192. See Rogers, *supra* note 175, at 66 (discussing standardization in personal injury compensation); W. V. Horton Rogers, *Compensation for Personal Injury in England, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE*, *supra* note 179, at 76-91 (providing a case as an example of the monetary assessment of pain and suffering and loss of amenity of life). See generally THE LAW COMM'N, *supra* note 34.

of damage.<sup>193</sup> Trial judges and the Court of Appeal look at a sort of scale describing the severity of injury and offering a bracket of sample awards from precedents on quantum. Since 1992, the Judicial Studies Board,<sup>194</sup> an independent body set up in 1979, periodically publishes versions of these guidelines, updated to take into account both inflation and new increasing/decreasing trends.<sup>195</sup> Before, only private collections containing disability descriptions and previous awards were available.<sup>196</sup>

This system has brought about a great deal of standardization, because it led to a sort of table based on the relative seriousness of different injuries. The large collection of cases that has piled up over the years makes possible “quite precise answers and in any case will give at least a starting point for reasoned argument.”<sup>197</sup> Note, however, that even where injuries are comparatively uniform and produce very similar physical effect (e.g., loss of an arm) the guidelines are neither a fixed tariff nor binding. Decision-makers will regard the effect on the actual claimant. The focus is on the injury and the age of the victim, though decisions rarely mention age expressly.

The British system is in slow but relentless evolution. After a consultation paper in 1996, the English Law Reform Commission issued a report in 1999 urging the “Court of Appeal and/or the House of Lords, using their existing powers to lay

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193. Other common law countries such as Australia have that instead of making a global award of damages, as a jury would, trial judges should itemise the particular heads of loss and, at least provisionally, assign to each head the amount to be awarded as a component of the final judgment”. See Harold Luntz, *Turning Points in the Law of Torts in the Last 30 Years*, Address Before the National Conference of the Australian Insurance Law Association (Aug. 14, 2003), in 15 *INS. L. J.* 1, 1-23, (2003), available at <http://ssrn.com/abstract=482162>.

194. The Civil and Family Committee of the Judicial Studies Board is in charge of the guidelines. See generally Judicial Studies Board, <http://www.jsboard.co.uk> (last visited Nov. 23, 2005). It is presently chaired by an Appeal judge and is composed of two High Court Judges, two Circuit Judges, three District Judges, two scholars, one solicitor, one barrister, and a representative of the Ministry of Justice. See generally *id.* For the guidelines, see JUDICIAL STUDIES BOARD, *GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES* (6th ed. 2002). These Guidelines are not in themselves law, since the Judicial Studies Board has no legislative power but the Guidelines should be regarded with the respect accorded to the writings of any specialist legal author. See *Arafa v Potter* [1994] P.I.Q.R. 73, 79. Note also that the Master of the Rolls, Lord Woolf, in his foreword to the third edition of the JSB *Guidelines* noted that they are “the most reliable tool, which up to now has been made available to courts up and down the land as to what is the correct range of damages for common classes of injuries.” JUDICIAL STUDIES BOARD, *GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES* (3d ed. 1996).

195. To the best of my knowledge, a reducing trend has never appeared in awards for non-economic damages.

196. There are several British sources describing both injuries and awards. See, e.g., JUDICIAL STUDIES BOARD (6th ed.), *supra* note 194 (using an eight category classification based on type and location of injury, with subcategories for more specific parts of the body); DAVID A. KEMP ET AL., *THE QUANTUM OF DAMAGES IN PERSONAL INJURY AND FATAL ACCIDENT CLAIMS* (4th ed. 2000) (using a thirteen category classification system based on both the area and severity of the injury, with subcategories for more specific parts of the body); MUNKMAN, *supra* note 57 (18-category classification system based on both the area and severity of the injury, with subcategories for specific parts of the body and more specific types of injuries).

197. See Rogers, *supra* note 7.

down guidelines as to quantum in the course of personal injury litigation" to adopt recommendations for increasing non-pecuniary loss awards.<sup>198</sup> The Court of Appeal, in an unusual five-judge decision, finally followed the Law Commission's recommendations and incremented the non-economic damage amounts awarded for the most serious injuries.<sup>199</sup> The evolution of the English system required some necessary components. Some of them are clearly present in the United States. Obviously, one example is the considerable body of case law in which facts and reasons for the decision are expressed in a quite detailed way.<sup>200</sup> Other components require a policy decision by the judicial system. This is a case of a conscious attempt to improve control of non-economic damages by a centralized Court of Appeal, while offering more guidance from the outset to the decision-maker, be it a judge or a jury. Moreover, as put by a prominent scholar, the information made available should be "easily accessible both at a 'simple' and a 'complex' level."<sup>201</sup>

However, a note or comment comparing English and American experience would emphasize that, contrary to the United States, the English system does not usually use juries in civil trials. Notwithstanding this, in our opinion, there would be no difference if knowledge of the permissible ranges for different injury types were provided to judges or juries.<sup>202</sup> Actually, the possible cross-fertilization between judges and juries is clearly stressed in the United Kingdom. For instance, Lord Clyde, in *Currie v. Kilmarnock and Loudoun District Council*, emphasized:

In a system in which damages may be assessed in different cases either by a jury or by a judge it is essential, not only for the profession, but also for the court both in the making of awards and in the consideration of awards which have been made, for there to be available a convenient record of awards by juries as well as by judges.<sup>203</sup>

Moreover, some authorities suggest that judges should take account of jury awards in their own assessments of damages.<sup>204</sup> A second obvious comment is that English judges itemize their verdicts while American juries do not always do so. However, this is a tradition courts can easily overcome, as has happened in Great

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198. THE LAW COMM'N, *supra* note 34, at 7.

199. *Heil v. Rankin*, [2000] 3 All E.R. 138 (C.A.) (Eng.); see Richard Lewis, *Increasing the Price of Pain: Damages, the Law Commission and Heil v Rankin*, 64 MOD. L. REV., 100 (2001) (providing general information about this decision and its implication in the U.K. legal system).

200. See also *infra* Part III.B.3.

201. Rogers, *supra* note 7, at 276. An example of simplicity is offered by the Judicial Board's Guidelines, which are revised and republished at least biennially. See *supra* note 194. But see KEMP & KEMP, *supra* note 72 (providing an example of complexity).

202. The concept is clearly expressed by Sir Thomas Bingham who stated that "[a]ny legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury. No other result can be accepted as just." *John v. MGN Ltd.*, (1995) Eng. Rep. 586, 611 (C.A.) (Eng.).

203. THE LAW COMM'N, *supra* note 34, at 64.

204. Jury trials for personal injury are still available in Scotland.

Britain without statutory intervention, and has already been overcome by some American jurisdictions.<sup>205</sup>

### 3. The German Approach and Its Similarities with the United Kingdom

The awarding model for non-pecuniary damages accompanying damage to health and bodily integrity in Germany is similar to the British practice. In effect, German practitioners and courts constantly refer to private compilations offering a description of the case and of non-economic damages awarded.

Reforms that have recently taken effect, provide that non-pecuniary loss has to be compensated in any case of injury of body, health, freedom, and sexual self-determination.<sup>206</sup> However, German practice had previously developed a sort of indicative scheduling system to assess non-pecuniary damages for harm to health and bodily integrity: namely to award *Schmerzensgeld*. Trial courts enjoy great discretion in awarding compensation. Their assessment can be reviewed on appeal only to check whether the outer limits of a reasonable award in like cases have been respected and whether all relevant circumstances of the case in question and the rules of logic or science have been regarded.<sup>207</sup> Guidance has been available since the late 1950s in the form of privately elaborated tables reporting the sums and circumstances of decided cases (so-called *Schmerzensgeldtabellen*) for both trial court and appellate judges.<sup>208</sup>

The wide use and relevance of these private compilations have in some way exercised control over judicial discretion, by providing reasoned patterns for standardization without reducing the decisiveness of the individual circumstances of each case. These *Schmerzensgeldtabellen*, as demanded by the German rules of civil procedure, describe the injury suffered by the victim and the amounts awarded according to claimant's request.

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205. See *infra* Part III.B.3. See also James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 179-80 (1991), stating:

Our presumptive scheduling approach also, to a limited extent, resembles the British model, except that we propose more systematic use of information by juries as well as judges. The British apparently view their approach as taking judicial notice of prior valuations rather than as binding judicial precedent. Our proposal calls for similarly non-binding information, but its intent is to create a presumptive benchmark. In this regard, our approach is more analogous to the federal criminal sentencing guideline, which also provide a presumptive schedule of punishment from which judges can only deviate by reference to factors not included in the calculus used by the scheduling ranges.

206. Bürgerliches Gesetzbuch [BGB][Civil Code] Jan. 1, 2002, Reichsgesetzblatt [RGBI] § 253, ¶ 2.

207. See, e.g., Ulrich Magnus, *Schadenersatz für Körperverletzung in Deutschland*, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE, *supra* note 179, at 148-76.

208. There are several publications available on the market. See, e.g., SUSANNE HACKS, AMELI RING & PETER BÖHM, *SCHMERZENSGELDBETRÄGE* (2004); LOTHAR JAEGER & JAN LUCKEY, *SCHMERZENSGELD* (2003); WALTER HAMPFING & ÄRZTLICHE FEHLER, *SCHMERZENSGELDTABELLEN* (1989).

#### 4. The French Original Experience of Judicial Scoring and Scheduling

Several other European jurisdictions show a tendency to use "objective" parameters to evaluate non-economic damages for health impairments linked to personal injuries.<sup>209</sup> Medical scientists mainly offer those parameters, which courts use together with monetary scheduling often elaborated on by themselves or by scholars relying upon previous decisions. In any event, the role of medical experts is crucial in several, if not all, European jurisdictions where courts usually appoint their own impartial experts.

In France,<sup>210</sup> *préjudice physiologique (ou déficit physiologique ou déficit fonctionnel)* is the title that best expresses the notion of non-economic damages for health and bodily harm. It encompasses non-economic damages for the permanent reduction suffered by the victim, regarding physical, psychological or intellectual functions. The medical expert (*médecin expert*) has a fundamental role in awarding *le préjudice physiologique*,<sup>211</sup> because they describe and quantify it in percentage points (*le taux de l'incapacité permanente partielle*) by way of authoritative disability scorings, such as the "*Barème indicatif des déficits fonctionnels séquelaires en droit commun*." This list of medical scoring points sets a rate for disabilities, by recommending either a specific rate or a scale of rates for each of them. Rates are expressed in percentage points and different chapters are devoted to different disabilities. These medical scorings tables are neither compulsory nor official, although both the *Cour de Cassation* and the Ministry of Justice have acknowledged them as a useful tool for uniform decision-making. Their authority stems from widely recognized merit in the scientific arena.<sup>212</sup>

Courts usually appoint a medical expert (as usually happens in Italy as well) and the expert assigns a percentage value to plaintiff's disability according to the evaluation provided by her/him and by each litigant's medical expert. After this

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209. In order to foster standardization, objective parameters, such as medical expertise are important in Spain; also, over the last decade, Spanish scholars have begun to develop an autonomous category of personal injury for non-economic damages (*daño corporal*). See generally Miquel Martín-Casals, Jordi Ribot & Josep Solé, *Non-Pecuniary Loss Under Spanish Law*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, *supra* note 7, at 192. In Austria, in cases of bodily injury (defined as any negative effect on bodily or spiritual health and integrity) objective clues for the difficult assessment of immaterial loss justify the award of non-damages. See, e.g., E. Karner & H. Koziol, *Austria*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, *supra* note 7, at 4.

210. For information on the French experience of awarding damages for personal injuries, see Christophe Radé & Laurent Bloch, *La Réparation du Dommage Corporel en France*, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE, *supra* note 179, at 101-04.

211. See S. Galand-Carval, *France*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, *supra* note 7, at 90. Galand-Carval also argues that along with objective parameters, medical experts have an important role in measuring the so-called "personal temporary incapacity" (*l'incapacité traumatique temporaire à caractère personnel*). *Id.* at 89.

212. *Id.* at 90 (quoting C. Rousseau that "one of the conditions for a fair compensation for the victims' losses is that the criteria of their medical assessment be the same in Dunkerque, Menton, Charleville and Bayonne." *Commentaires sur le Barème "droit commun" dit du Concours médical*, in GAZETTE DU PALAIS (1994)).

decision, courts only need to multiply the given percentage, decided in reliance on medical testimony, by the monetary value currently assigned by the court for claimants in similar circumstances. The monetary value assigned by the court decreases with age and increases with the disability rate. "*Le calcul au point*" (calculation by percentage points) is the name commonly given to this second step of the assessment; and it is determined by multiplying the victim's disability rate expressed in percentage points by the corresponding monetary value. In other words, in a two by two matrix, at the intersection of each age and disability percentage, the court finds a monetary value to multiply for the actual disability percentage it has assigned to the plaintiff in its fact-finder capacity.<sup>213</sup> The system was first developed to assess the victim's future loss of earnings, but later the methodology of the "*calcul au point*" was extended to non-economic damages as well.

It is important to stress that medical scoring and monetary scheduling were developed independently of each other. Medical scientists developed the former at a different time to propose uniform descriptions of health impairments. Courts developed monetary values to introduce some consistency in the assessment of damages. In a way, given the absence of external limitations (e.g., legislative tariffs) the French Courts attach great importance to their previous awards and, averaging these values, obtained their first monetary assessment for the *calcul au point*. Periodically, courts update the monetary value of the *calcul au point* to reflect both inflation and different perceptions of the complained non-pecuniary loss.<sup>214</sup> Data is collected on a local basis and each court of appeal keeps an updated local schedule. Of course, this decentralized information elaboration process may appear more costly than a centralized one. Still, it makes it easier to keep evaluation reasonably uniform, but nevertheless close to the local public perception. A specific statute dealing with traffic accidents (the so-called "*loi Badinter*" of 1985) required the periodic publication of all awards, judicial and by way of settlement, in personal injury cases.<sup>215</sup>

Finally, the two sets of tables (the medical scoring ones and the monetary scheduling ones) are neither rigidly binding for judges nor compulsory; indeed they *must* not be so, according to the French *Cour de Cassation*.<sup>216</sup> They only offer a uniform starting point for fulfilling the principle of full compensation based on individualized assessment of the personal, individual, and concrete situation of the victim.

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213. See *supra* Part I.C.5-6.

214. See. Galand-Carval, *supra* note 211, at 101. Note also that damages for disfigurement and physical pain are assessed according to schedules calculated by reference to previous awards, and judges indicate the lowest, largest and dominant awards of the past year for each of the several scale degrees.

215. Article 26 of this statute provides: "Sous le contrôle de l'autorité publique, une publication périodique rend compte des indemnités fixées par les jugements et les transactions." Law No. 85-677 of July 5, 1985, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 6, 1985.

216. Cass. 2e civ., Feb. 1, 1995, Bull. civ. II, No. 42.



### 5. The Italian Synthesis, and the Role of Medical Scoring in Europe

The *calcul au point* has a corresponding, but more highly developed counterpart in Italy, which is used for awarding damages for the impairment of physical and psychical health (so-called *danno alla salute* or *danno biologico*). Indeed, Italy deals with non-economic damages for personal injury by way of awarding damages for "*danno alla salute*" as an independent, indispensable title of non-economic damages. This is distinguishable from pain and suffering, which is only "awarded in cases provided by law."<sup>217</sup> Damages for *danno alla salute* have a compensatory goal and, considering the constitutional protection devoted to fundamental individual rights, health "cannot suffer limits to the compensation for damage done to it."<sup>218</sup> However, until the acknowledgement of this title of non-economic damages by courts in the early 1980s, loss of earnings was the parameter for awarding personal injury damages.

Within the old framework, personal injury damages included only the economic loss to the injured coming from a diminution of his/her ability to work. All the remaining losses were "ills of life" (to use Baron Pollock's expression). Clearly, this interpretation was not satisfactory, especially in light of the 1948 Italian Constitution holding health as a paramount value and a collective interest.<sup>219</sup> Hence, trial courts in Pisa and Genoa followed a constitutional approach to personal injury damages, by establishing that everyone is entitled to health and by reshaping the category of damages for non-pecuniary loss through the creation of *danno alla salute*. Since the 1980s, both the Italian Supreme Court (*Corte di Cassazione*) and the Constitutional Court (*Corte Costituzionale*) have upheld these creative case law trends, holding that courts are bound by the principle that damages caused by the infringement of the right to health must be compensated. Compensation should ensue, even though damage to health and bodily integrity neither reduced the ability to generate earnings nor caused pain and suffering (as *pretium doloris*).<sup>220</sup> Therefore, Italian case law has developed a distinction in the non-

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217. Recently the Italian Corte di Cassazione and the Corte Costituzionale revisited the provision of art. 2059, reading it in a broader way in order to give non-economic damages in cases of serious injury to fundamental rights. See Cass., sez. III, 31 may 2003, n.8827-28, in *DANNO E RESPONSABILITÀ*, Aug.-Sept. 2003, at 816 (with commentary by Francesco D. Busnelli, *Chiaroscuri d'estate. La Corte di Cassazione e il danno alla persona*, at 826; Giulio Ponzanelli, *Ricomposizione dell'universo non patrimoniale: le scelte della Corte di Cassazione*, at 829; Antonino Procida Mirabelli Di Lauro, *L'art. 2059 c.c. Va in Paradiso*, at 831). For further commentary on this evolution of Italian case law, see generally IL "NUOVO" DANNO NON PATRIMONIALE (Giulio Ponzanelli ed., 2004); I DANNI NON PATRIMONIALI (Emanuela Navarretta ed., 2004); IL NUOVO DANNO NON PATRIMONIALE (M. Bona & P. G. Monateri eds., 2004).

218. Corte cost., 14 July 1986, n.184, Foro It. 1986, I, 2053 (with commentary by Giulio Ponzanelli, *La Corte Costituzionale, il Danno Non Patrimoniale e il Danno Alla Salute*).

219. COSTITUZIONE [COST.] art. 32 (Italy).

220. See Cass., 6 June 1981, n.3675, in *LA VALUTAZIONE DEL DANNO ALLA SALUTE* 398 (M. Bargagna & F. D. Busnelli eds., 1995). In this work, most of the leading decisions on personal injury damages can be found as an appendix, in addition to other materials and commentary from members of the Research Group on *Danno Alla Salute* of Pisa under the auspices of the Italian National Research Council. See also RAPPORTO SULLO STATO DELLA GIURISPRUDENZA IN MATERIA DI DANNO ALLA SALUTE (M. Bargagna & F. D. Busnelli, eds., 1996) (analyzing over

pecuniary damage category most comprehensively, by establishing an independent category of damages to the person ("*danno alla salute*"), which has gained a primary and crucial role in personal injury. In fact, the Constitutional Court<sup>221</sup> soon stated *danno alla salute* is "a first, essential, priority compensation that conditions every other one."<sup>222</sup> This new title of damages absorbed various other titles for non-pecuniary damages, bringing disparate case law under a unified theory.

The Italian Supreme Court identified the need for an equitable evaluation that must be coherent with the kind of loss involved<sup>223</sup> for this fundamental title of damages. This quest for coherence led to the search for a formula that had a double means of assessing damages, which would primarily base uniformity on a medical evaluation of the psychophysical disability and on the possibility of extrapolating homogeneous monetary guidelines from prior awards. In practical terms, a medical evaluation gauges permanent disability, through assigning to it a percentage according to specific scientific parameters commonly available in reputed scientific and practitioners' publications. Following this expert medical evaluation, which yields a verifiable medical condition element, judges assign a monetary value to the percentage point and multiply it by the number ascertained, which represents the victim's disability. In addition, the system safeguards that the judgment is equitable, because it is for the court to define the monetary value of each point according to previous awards,<sup>224</sup> and it is also for the court to ascertain the disability and its correspondence to a severity percentage, according to the medical evidence given by expert medical witnesses.<sup>225</sup> Finally, the court adapts the scheduled result obtained for the case under consideration by multiplying the selected monetary point value by the ascertained percentage.<sup>226</sup>

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1,000 decisions) [hereinafter RAPPORTO].

221. See, e.g., Corte cost., 14 July 1986, n.184, Foro It. I 1986, 2053 (arguing that lost earnings and out of pocket expenses may not accrue in an actual case, but *danno alla salute* must always be compensated). The Corte Costituzionale (Constitutional Court) also fostered the extension from tort liability to work related injuries of the "constitutional principle of full and not limitable compensation of *danno alla salute*." Corte cost., 27 Dec. 1991, n.485, in RESPONSABILITÀ CIVILE E PREVIDENZA 58 (1992) (with commentary by Emanitela Navarretta, *Capacità lavorativa generica, danno alla salute e nuovi rapporti tra responsabilità civile ed assicurazione sociale (In margine a Corte Costituzionale 485/1991)*). For more details on *danno alla salute* in work and traffic related accidents, see DIANORA POLETTI, *DANNI ALLA PERSONA NEGLI ACCIDENTI DA LAVORO E DA AUTOMOBILE* (1996).

222. Corte cost., 14 July 1986, n.184, Foro It. I 1986, 2053 (with commentary by Giulio Ponzanelli, *La Corte Costituzionale, il Danno Non Patrimoniale e il Danno Alla Salute*).

223. Cass., civ. sez., 13 Jan. 1993, n.357, in IL CORRIERE GIURIDICO 303 (1993) (with commentary by V. Carbone, *I Contrasti Giurisprudenziali sui Criteri di Liquidazione*).

224. In comparison with the U.S. system, the idea of supplying information about ranges of evaluations to the juries without binding them to these past evaluations is generally stated by Schuck, *supra* note 5, at 326.

225. In American scholarship more than seventy years ago, H. F. Goodrich sought guidance by medical doctors in this evaluation, since law "has already recognized the possession of a pleasant mental state as a subject for protection." Goodrich, *supra* note 161, at 513.

226. Cass., sez. III, 14 Apr. 1995, n.4255, in 60 RESPONSABILITÀ CIVILE E PREVIDENZA 519 (1995) (with commentary by G. Ponzanelli, *La Corte di Cassazione ed il criterio equitativo nella valutazione del danno alla salute*, confirming the criteria summarized in the text and referring to them as "the results reached by the most sagacious courts of merits").

Indeed, the Italian Constitutional Court expressly fostered: "a criterion fulfilling both the need for basic monetary uniformity and [the need] for elasticity and flexibility to adjust awards to reflect the actual effects of the ascertained disablement on activities of daily life."<sup>227</sup> These are also goals shared by the other European systems mentioned; and thus, an agenda for standardizing non-economic damages accompanying personal injury in all systems, including the United States, may be established.

Furthermore, as in France, each court can develop local tables of monetary values and use them together with medical scorings (called *barème*, after the French legal usage), widely accepted by medical scientists. Of course, in both countries, the standardizing process applies only to non-economic damages (*danno alla salute* and *préjudice physiologique*) for which medical expertise can clearly offer an "objective" basis for evaluation, in the form of evidence of a medical condition.<sup>228</sup>

Finally, it is also worth remembering that the use of monetary tables or medical *barème* is not compulsory in either France or Italy. They are followed because of their scientific authority and/or because they constitute shared information among the players in the personal injury compensation arena. Last but not least, it should be noted that the Italian Court of Appeals and the Italian Supreme Court will not question the amount of damages awarded by trial courts if the criteria used for calculation and the *ratio decidendi* are consistent. Therefore, when the reasoning of judges is logically consistent and coherent with the evidence, a Court of Appeal would not question the amount or the criterion adopted for awarding personal injury damages.<sup>229</sup>

## 6. Exemplifying the Disability Schedule and Value Table Judicial Scheduling

We could call the Franco-Italian approach to awarding objective non-economic damages the "disability schedule and value table" judicial scheduling. Tribunals and experts have worked out orientation tables over the last thirty years or so. It has been a long process of judicial creation. This process makes these non-pecuniary damages easy to ascertain and assess "objectively," because:

1. It finds its primary ground for uniformity in medical-legal evaluations of psycho-physical disabilities, which gives objective uniformity and measurability in the sense stressed from the outset;
2. It offers the possibility of establishing homogeneous grounds for evaluation of damages caused by the ascertained disabilities from past case law on the merits; and
3. The system safeguards the equitable power of each judge to adjust this objective measurement to the peculiarities of the case.

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227. Corte cost., 14 July 1986, n.184, Foro It. 1986, I, 2067.

228. Still, in France courts assess *dommage moral* (moral suffering) based on a scale of seriousness in seven degrees. See Goodrich, *supra* note 161.

229. As a side note, it is also important to stress that both the theoretical evolutions and awarding methods were case law developments within the civil law system.

In order to clarify their actual operation, it is useful to describe a representative scheduling table for monetary values, using the Italian experience as an example.

As previously mentioned, the court assesses the percentage of the invalidity suffered by the plaintiff on the basis of the evidence presented in the case, in order to establish a monetary value corresponding to this disability, bearing in mind the age of the victim, as set out in the following table of examples. At this point, the judge multiplies the monetary value, identified by the personal injury percentage points allocated, and if necessary in the judge's opinion, the judge will adjust the uniform result according to the individual circumstances of the victim. For example, the value in the table is € 2.784.66 for each damage percentage point for a twenty-year-old with an ascertained health and bodily injury of 42%.<sup>230</sup>

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230. RAPPORTO, *supra* note 220, at 216 (showing values as an example of the criteria for construing a sample table).

Sample Monetary Values Schedule.<sup>231</sup>

INCAPACITY

	0	1	2	3	4	5	6	7	8	9
1%	643,55	641,93	639,01	636,04	632,93	629,79	626,53	623,19	619,77	616,26
2%	720,57	718,76	715,48	712,16	708,69	705,16	701,51	697,77	693,94	690,02
3%	808,63	806,60	802,93	799,20	795,30	791,34	787,25	783,05	778,75	774,34
4%	909,50	907,22	903,09	898,89	894,51	890,06	885,45	880,73	875,90	870,94
5%	1.025,27	1.022,70	1.018,04	1.013,31	1.008,36	1.003,35	998,16	992,84	987,39	981,80
6%	1.158,38	1.155,48	1.150,21	1.144,87	1.139,28	1.133,61	1.127,75	1.121,74	1.115,58	1.109,27
7%	1.311,73	1.308,44	1.302,48	1.296,43	1.290,10	1.283,68	1.277,04	1.270,24	1.263,26	1.256,11
8%	1.488,73	1.485,00	1.478,23	1.471,36	1.464,18	1.456,90	1.449,36	1.441,64	1.433,72	1.425,61
9%	1.693,44	1.689,19	1.681,49	1.673,68	1.665,51	1.657,23	1.648,65	1.639,87	1.630,86	1.621,64
10%	1.930,64	1.925,80	1.917,02	1.908,11	1.898,80	1.889,36	1.879,58	1.869,56	1.859,30	1.848,78
11%	1.959,11	1.954,21	1.945,29	1.936,26	1.926,81	1.917,22	1.907,30	1.897,14	1.886,72	1.876,05
12%	1.988,07	1.983,09	1.974,05	1.964,88	1.955,29	1.945,56	1.935,50	1.925,18	1.914,61	1.903,78
13%	2.017,52	2.012,46	2.003,29	1.993,98	1.984,25	1.974,38	1.964,16	1.953,70	1.942,97	1.931,98
14%	2.047,46	2.042,34	2.033,02	2.023,58	2.013,70	2.003,69	1.993,32	1.982,69	1.971,81	1.960,65
15%	2.077,92	2.072,71	2.063,26	2.053,68	2.043,65	2.033,49	2.022,97	2.012,19	2.001,14	1.989,81
16%	2.108,89	2.103,61	2.094,01	2.084,28	2.074,11	2.063,80	2.053,12	2.042,18	2.030,96	2.019,47
17%	2.140,39	2.135,03	2.125,29	2.115,42	2.105,09	2.094,62	2.083,78	2.072,68	2.061,30	2.049,64
18%	2.172,42	2.166,98	2.157,10	2.147,08	2.136,60	2.125,97	2.114,97	2.103,70	2.092,15	2.080,31
19%	2.205,00	2.199,48	2.189,45	2.179,28	2.168,64	2.157,86	2.146,69	2.135,25	2.123,53	2.111,51
20%	2.238,14	2.232,53	2.222,35	2.212,03	2.201,23	2.190,29	2.178,95	2.167,34	2.155,44	2.143,24
21%	2.271,85	2.266,16	2.255,82	2.245,34	2.234,38	2.223,27	2.211,77	2.199,98	2.187,90	2.175,52
22%	2.306,13	2.300,35	2.289,86	2.279,22	2.268,10	2.256,82	2.245,14	2.233,18	2.220,92	2.208,35
23%	2.341,00	2.335,14	2.324,49	2.313,69	2.302,40	2.290,95	2.279,09	2.266,95	2.254,50	2.241,74
24%	2.376,48	2.370,52	2.359,71	2.348,75	2.337,29	2.325,66	2.313,63	2.301,30	2.288,66	2.275,71
25%	2.412,56	2.406,51	2.395,54	2.384,41	2.372,77	2.360,97	2.348,76	2.336,24	2.323,41	2.310,27
26%	2.449,26	2.443,13	2.431,99	2.420,69	2.408,87	2.396,89	2.384,49	2.371,78	2.358,76	2.345,41
27%	2.486,60	2.480,37	2.469,06	2.457,59	2.445,60	2.433,44	2.420,84	2.407,94	2.394,72	2.381,17
28%	2.524,59	2.518,26	2.506,78	2.495,13	2.482,96	2.470,61	2.457,83	2.444,73	2.431,30	2.417,55
29%	2.563,23	2.556,81	2.545,15	2.533,33	2.520,97	2.508,43	2.495,45	2.482,15	2.468,52	2.454,55
30%	2.602,55	2.596,03	2.584,19	2.572,19	2.559,63	2.546,90	2.533,72	2.520,22	2.506,38	2.492,20
31%	2.642,55	2.635,93	2.623,91	2.611,72	2.598,97	2.586,05	2.572,67	2.558,95	2.544,90	2.530,50
32%	2.683,24	2.676,52	2.664,32	2.651,94	2.639,00	2.625,87	2.612,29	2.598,36	2.584,10	2.569,48
33%	2.724,65	2.717,82	2.705,43	2.692,86	2.679,72	2.666,39	2.652,60	2.638,46	2.623,97	2.609,13
34%	2.766,78	2.759,85	2.747,26	2.734,50	2.721,15	2.707,62	2.693,61	2.679,25	2.664,54	2.649,47
35%	2.809,65	2.802,61	2.789,82	2.776,86	2.763,31	2.749,57	2.735,34	2.720,76	2.705,82	2.690,52
36%	2.853,26	2.846,11	2.833,13	2.819,97	2.806,21	2.792,25	2.777,81	2.763,00	2.747,83	2.732,28
37%	2.897,64	2.890,38	2.877,20	2.863,84	2.849,86	2.835,69	2.821,01	2.805,98	2.790,57	2.774,78
38%	2.942,81	2.935,43	2.922,05	2.908,47	2.894,28	2.879,88	2.864,98	2.849,71	2.834,07	2.818,03
39%	2.988,76	2.981,28	2.967,68	2.953,89	2.939,48	2.924,86	2.909,73	2.894,22	2.878,33	2.862,04
40%	3.035,53	3.027,93	3.014,12	3.000,12	2.985,48	2.970,63	2.955,26	2.939,51	2.923,37	2.906,83
41%	3.083,13	3.075,40	3.061,38	3.047,15	3.032,28	3.017,20	3.001,59	2.985,59	2.969,20	2.952,40
42%	3.131,56	3.123,72	3.109,47	3.095,03	3.079,92	3.064,60	3.048,75	3.032,50	3.015,85	2.998,78

AGE

231. RAPPORTO, *supra* note 220, at 216 (showing the above table).

10	11	12	13	14	15	16	17	18	19	20
612,67	608,98	605,21	601,38	597,42	593,40	589,33	585,16	580,97	576,64	572,26
685,99	681,87	677,64	673,36	668,92	664,42	659,86	655,19	650,51	645,66	640,75
769,83	765,20	760,46	755,65	750,67	745,63	740,51	735,26	730,01	724,57	719,05
865,86	860,66	855,33	849,92	844,32	838,64	832,88	826,99	821,07	814,95	808,75
976,07	970,21	964,20	958,10	951,79	945,39	938,90	932,25	925,58	918,68	911,70
1.102,80	1.096,17	1.089,38	1.082,49	1.075,36	1.068,13	1.060,79	1.053,28	1.045,75	1.037,96	1.030,06
1.248,79	1.241,28	1.233,59	1.225,79	1.217,72	1.209,53	1.201,22	1.192,72	1.184,19	1.175,36	1.166,42
1.417,30	1.408,78	1.400,05	1.391,20	1.382,03	1.372,74	1.363,32	1.353,66	1.343,98	1.333,97	1.323,82
1.612,18	1.602,49	1.592,56	1.582,49	1.572,07	1.561,49	1.550,77	1.539,79	1.528,78	1.517,39	1.505,85
1.838,00	1.826,95	1.815,63	1.804,15	1.792,27	1.780,21	1.767,99	1.755,47	1.742,92	1.729,93	1.716,77
1.865,11	1.853,90	1.842,41	1.830,76	1.818,70	1.806,47	1.794,07	1.781,37	1.768,63	1.755,45	1.742,09
1.892,68	1.881,30	1.869,64	1.857,82	1.845,58	1.833,17	1.820,59	1.807,70	1.794,77	1.781,39	1.767,84
1.920,71	1.909,17	1.897,34	1.885,34	1.872,92	1.860,32	1.847,55	1.834,47	1.821,35	1.807,78	1.794,03
1.949,22	1.937,51	1.925,50	1.913,32	1.900,72	1.887,94	1.874,98	1.861,70	1.848,39	1.834,61	1.820,66
1.978,21	1.966,32	1.954,14	1.941,78	1.928,99	1.916,02	1.902,86	1.889,39	1.875,88	1.861,90	1.847,74
2.007,70	1.995,63	1.983,27	1.970,72	1.957,74	1.944,58	1.931,23	1.917,55	1.903,84	1.889,65	1.875,28
2.037,68	2.025,44	2.012,89	2.000,16	1.986,98	1.973,62	1.960,07	1.946,19	1.932,28	1.917,88	1.903,29
2.068,18	2.055,75	2.043,01	2.030,09	2.016,72	2.003,16	1.989,41	1.975,32	1.961,20	1.946,58	1.931,77
2.099,20	2.086,58	2.073,65	2.060,54	2.046,97	2.033,20	2.019,24	2.004,95	1.990,61	1.975,77	1.960,74
2.130,75	2.117,94	2.104,82	2.091,51	2.077,73	2.063,76	2.049,59	2.035,08	2.020,52	2.005,47	1.990,21
2.162,84	2.149,84	2.136,52	2.123,01	2.109,02	2.094,84	2.080,46	2.065,73	2.050,95	2.035,67	2.020,18
2.195,47	2.182,28	2.168,76	2.155,04	2.140,85	2.126,45	2.111,85	2.096,90	2.081,90	2.066,39	2.050,67
2.228,67	2.215,28	2.201,55	2.187,63	2.173,22	2.158,60	2.143,79	2.128,61	2.113,38	2.097,64	2.081,68
2.262,44	2.248,85	2.234,91	2.220,78	2.206,15	2.191,31	2.176,27	2.160,86	2.145,41	2.129,42	2.113,22
2.296,80	2.282,99	2.268,85	2.254,50	2.239,65	2.224,58	2.209,31	2.193,67	2.177,98	2.161,75	2.145,31
2.331,74	2.317,73	2.303,36	2.288,80	2.273,72	2.258,43	2.242,93	2.227,05	2.211,12	2.194,64	2.177,95
2.367,29	2.353,06	2.338,48	2.323,69	2.308,39	2.292,86	2.277,12	2.261,00	2.244,83	2.228,10	2.211,15
2.403,45	2.389,01	2.374,20	2.359,19	2.343,65	2.327,89	2.311,91	2.295,54	2.279,12	2.262,14	2.244,93
2.440,24	2.425,58	2.410,55	2.395,30	2.379,52	2.363,52	2.347,29	2.330,68	2.314,01	2.296,76	2.279,29
2.477,67	2.462,78	2.447,52	2.432,04	2.416,02	2.399,77	2.383,30	2.366,42	2.349,50	2.331,99	2.314,25
2.515,75	2.500,63	2.485,14	2.469,42	2.453,15	2.436,66	2.419,93	2.402,79	2.385,61	2.367,83	2.349,82
2.554,49	2.539,14	2.523,41	2.507,45	2.490,93	2.474,18	2.457,19	2.439,80	2.422,35	2.404,30	2.386,01
2.593,91	2.578,32	2.562,35	2.546,14	2.529,37	2.512,36	2.495,11	2.477,45	2.459,73	2.441,40	2.422,83
2.634,02	2.618,19	2.601,97	2.585,51	2.568,48	2.551,21	2.533,69	2.515,75	2.497,76	2.479,15	2.460,29
2.674,83	2.658,75	2.642,28	2.625,57	2.608,27	2.590,73	2.572,95	2.554,73	2.536,46	2.517,56	2.498,41
2.716,35	2.700,03	2.683,30	2.666,33	2.648,77	2.630,95	2.612,89	2.594,39	2.575,84	2.556,64	2.537,19
2.758,61	2.742,03	2.725,04	2.707,80	2.689,97	2.671,88	2.653,53	2.634,74	2.615,90	2.596,41	2.576,66
2.801,60	2.784,76	2.767,51	2.750,01	2.731,89	2.713,52	2.694,89	2.675,81	2.656,67	2.636,88	2.616,82
2.845,35	2.828,25	2.810,73	2.792,95	2.774,56	2.755,90	2.736,98	2.717,60	2.698,16	2.678,06	2.657,68
2.889,88	2.872,51	2.854,71	2.836,66	2.817,97	2.799,02	2.779,80	2.760,12	2.740,38	2.719,96	2.699,27
2.935,19	2.917,55	2.899,47	2.881,13	2.862,15	2.842,91	2.823,39	2.803,40	2.783,35	2.762,61	2.741,59
2.981,30	2.963,38	2.945,02	2.926,40	2.907,12	2.887,57	2.867,74	2.847,44	2.827,08	2.806,01	2.784,66

## II. LEARNING THE COMPARATIVE LESSONS

### *A. Paths Toward a Better Use of Information in Awarding Intangible Damages in Personal Injury*

Part I set the debate on non-economic damages in a comparative framework, stressing the need for more Euro-American comparison. It also demonstrated a significant trend, both in the United States and Europe, to distinguish non-economic damages for intangible losses that have an “objective” basis for assessment, due to the existence of an injury to health ascertainable by medical evidence. This comparison anticipated that there are gains in acknowledging this different framework and behaving accordingly. This Part will highlight these benefits and illustrate some examples for utilizing them. Drawing on these examples, Part III will demonstrate how the United States could obtain these benefits as well, without triggering constitutional concerns or statutory intervention.

#### **1. Towards Effective Compensation for Damage to Health and Bodily Injury: A Synthesis**

Surprisingly enough, the results reached by the approaches of Italy, France, and the United Kingdom are actually similar. Under English common law, the basis for the assessment of damages for non-pecuniary loss rests on collections of leading cases on quantum<sup>232</sup> which set out the sum of money awarded and a description of the medically ascertainable condition suffered. This approach is similar to the German one, even though Germany is a civil law country, because private editors publish similar compilations of previous cases.<sup>233</sup>

The two patterns emerging from the reported European experiences have been rightly called the “disability schedule and value table” model and the “precedent model.”<sup>234</sup> They can hybridize with one another, resulting in reciprocal benefit.<sup>235</sup>

Nevertheless, the starting point *looks* different. The French or Italian lawyer, having obtained medical evidence which places the injury at the relevant level of disability in terms of points, then turns to the relevant ‘value’ table to convert that into a sum of money. The English lawyer,

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232. See *supra* Part I.C.2.

233. See *supra* Part I.C.3. Of course, this system requires a large set of case law that contains extensive descriptions of the facts, and it could only then be applied within the legal orders where court decisions are not limited to recitals.

234. See Rogers, *supra* note 7, at 274.

235. See Giovanni Comandé, *Danno biologico: si al modello anglo-tedesco per superare le incongruenze del sistema*, GUIDA AL DIRITTO, June 12, 2004, at 11 (proposing for the Italian system to adopt a descriptive system, such as the one in the U.K., for the most serious injuries falling above a severity score of 70%); see also LA VALUTAZIONE DELLE MACROPERMANENTI: PROFILI PRATICI E DI COMPARAZIONE (Giovanni Comandé & Ranieri Domenici eds.) ETS, 2005.

having obtained evidence on the nature and effects of the injury, then tends to regard it in 'descriptive' terms and goes to the standard sources of specialist material reporting court awards, to look for something similar.<sup>236</sup>

Both prototypes present strengths. To operate either method requires different sets of information and probably a different attitude of mind. The disability schedule and value table approach is probably the easiest to put in place, because it can build on existing accepted medical scoring systems and mathematical formulas,<sup>237</sup> and it is much more accurate with reference to age. It is simpler and easier to implement, especially where a complete set of former decisions is not readily available. Yet, it is likely to trigger competing expert views on the accuracy of the scoring and the proper part of the matrix to which the actual disability should be allocated.<sup>238</sup> Of course, a requirement that the court be bound by expert evidence would resolve the problem, but that implies statutory reform.<sup>239</sup> One main difference in the descriptive Anglo-German model is that it requires a more complex set of information, which nonetheless seems to have developed in both a common law country, such as the United Kingdom, and in a civil law system, such as Germany. Moreover, American scholars have already investigated the methodology for gathering and using such data in courts.<sup>240</sup>

As mentioned previously, the pre-requisite for making these methods universal is the ability to distinguish from among non-economic damages or damages for which an objective criterion for selecting and assessing damages is possible, and those for which it is not possible. Indeed, through medical expertise, we can objectively ascertain and score non-economic damages for bodily and health impairment. In Europe, the innovative approaches to awards rely on the ability of the medical sciences to evaluate health impairments objectively, in light of scoring percentages (e.g., France or Italy)<sup>241</sup> or as revealed by descriptive tables (as in Germany or the United Kingdom).<sup>242</sup> The history of damages for intangible loss in

236. See Rogers, *supra* note 7, at 274-75.

237. See *infra* Part III.

238. See *supra* Part I.C.4-6.

239. We exclude from the outset this solution for the United States in order to avoid some complex constitutional issues.

240. See generally David Baldus, John C. MacQueen, M.D. & George Woodworth, 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 (1995) (suggesting: (1) the use of a comparative review methodology; (2) a more systematic and fully explained comparative review and case reporting practices; (3) the use of rudimentary quantitative methods; and (4) an enhancement of existing databases and long term development of state-wide databases); Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering", 83 NW. U. L. REV. 908 (1989) (discussing various advantages and concerns of scheduling damages).

241. See *supra* Part I.C.3-6. A complex scoring system was also adopted in Spain for traffic accidents. See generally Casals et al., *supra* note 209, at 209-12.

242. See *supra* Part I.C. Moreover, the Charter of Fundamental Rights of the European Union now strongly supports health, although this document only has political value only. See Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.



the Anglo-American world proves that the United States can follow a similar pattern.<sup>243</sup> Furthermore, the European legal systems and the arguments we set out in this Part reveal that if information is collected and shared and a theoretical starting point for the evaluation of courts is chosen, non-economic damages may become reasonable and predictable,<sup>244</sup> and what is more, they become easily insurable.<sup>245</sup>

Under this perspective, judicial awards rendered in the past are an efficient substitute both for an *ex ante* hypothetical evaluation and for an *ex post* analysis, which have usually mislead<sup>246</sup> potential victims' own evaluations before the accidents and actual victims' after they have occurred.<sup>247</sup> This is true when courts are provided with "objective" parameters and information.<sup>248</sup> The solution suggested by our comparative analysis consists of an *ex ante* macro evaluation of the expected payments (damages) and an *ex post* case-by-case award (micro-valuation).<sup>249</sup> The macro-evaluation ideally results from the bulk of the single mi-

243. See *infra* Part II.

244. At least this is true if referred to each case under judgment. See generally Leebron, *supra* note 8. It is suggested that we view juries as a survey mechanism and "if a survey is the best available pricing mechanism, the jury seems well suited to this task. As part of its task of determining liability, the jury is in a position to gather facts at least with respect to a specific case." *Id.* at 318.

245. Comandé, *supra* note 11, 269-78 (arguing this point more extensively).

246. See generally Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995) (arguing that there is likely to be a substantial disparity between the willingness-to-pay and the willingness-to-accept measures of damages used to compute compensation awards). However, perceptions differ. One interesting study summarizes several surveys in the United States and the United Kingdom on the willingness to pay for non-economic damages. See generally Avraham, *supra* note 17; see also Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 757 (1999) ("If art can acquire a market value, in principle, so can the loss of sight. The problem is that people do not normally buy and sell the sorts of sensory, motor, cognitive, and other capacities that are injured in accidents. The result is that to compensate for noneconomic losses, the law must turn to an alternative source of values, namely the social judgment of the community, typically supplied by juries.").

247. Giovanni Comandé, *Towards a Better Use of Information in Personal Injury Damages*, in LIBER AMICORUM PIERRE WIDMER 49, 58-61 (H. Koziol & J. Spier eds., 2003) (arguing this point more extensively).

248. See Croley & Hanson, *supra* note 6, at 1898 ("Solving the problem posed by the high costs of many *ex ante* calculations of numerous expected losses, the civil jury, already mobilized to determine causation and violation of the applicable liability standard, is well positioned to perform *ex post* calculations of one actual loss. Thus, the individual consumer need never perform the innumerable *ex ante* calculations involving the probabilities of various possible losses, their severity, and their insurance consequences."); see also Geistfeld, *supra* note 11, at 773, 804 (generally discussing variability of assessment of damages and arguing methods that "enable jurors to determine pain-and-suffering damages in a manner that is consistent with the case law.").

249. An *ex ante* perspective refers to valuation before the experience of pain and suffering. In contrast, an *ex post* perspective refers to valuation after the experience. Still, even the perception of victims may underestimate enduring pain and suffering if the U.K. Law Commission found:

[D]amages for non-pecuniary loss in respect of serious personal injury are too low for two reasons: first they provide further evidence that those damages are not generally perceived to be commensurate with the claimant's losses; secondly, they suggest that the

cro-evaluations. In turn, these rely on the macro-evaluation as a guideline for awarding damages.<sup>250</sup> When accidents have occurred, courts can base their opinions on the evidence shown at trial, and insurance companies can gather information to spread the risk efficiently.<sup>251</sup> Litigants — both victims and wrongdoers — can exploit the system even more efficiently and at the least cost.<sup>252</sup>

An awarding method, which transforms *ex ante* non-measurable, non-pecuniary costs to expected costs, captures the solutions adopted to fine-tune judicial assessment in Europe. These models circulated in Europe, as both the Anglo-German and the Franco-Italian approaches show, nurture standardization and a more efficient use of resources for compensation, which derive from a better use of information. Possibly, they may lead to a universal model for standardizing (at least some) non-economic damages in a way that grants both predictability of awards and flexibility for a case-by-case approach, as the jury system requires in the United States.<sup>253</sup> In this respect, this article argues that a settled legal framework and a standardization process with proper information could help to produce, in the United States as well in other countries, homogeneous and consistent assessments of non-economic damages, objectively ascertainable in light of the seriousness of the injury to health.<sup>254</sup> Moreover, these methods do not automatically produce a binding scheduled assessment of damages. Again, European experience shows that individualized determination is not inherently in conflict with the search for clear guidelines, if the decision-maker can coherently justify departing from the guidelines.<sup>255</sup> Such a method can actually coexist with a set of uniform

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ongoing non-pecuniary effects of many injuries are far greater than anticipated by victim at the time that they receive their compensation. If victims tend to under-estimate the future effects of their injuries on their lives, it seems very likely that judges, entirely understandably, do so too, which would inevitably lead to lower awards than a fuller appreciation of the future would have elicited.

THE LAW COMM'N, *supra* note 34.

250. *But see* *Jettre v. Healy*, 60 N.W.2d 541, 546 (Iowa 1953) ("We have carefully examined the case cited by counsel, but comparison of verdicts is not a satisfactory method of determining the reasonableness of an award in a particular case.").

251. This comment claims it is untrue that insurers have no interest and incentive to find actuarial data on damages for non-pecuniary losses. However, this argument would require a more extensive discussion.

252. *See infra* Part II.A.4.

253. As this comment aims to demonstrate, several European countries show that it is possible to set up a system which is both predictable and flexible. This practice relies upon a standardization process capable of taking account of individual cases by shifting information from the pre-accident to the post-accident scenario. Indeed, non-pecuniary compensation management is often a problem of scarce and unbalanced information among the players of the compensation/deterrence game of tort law (judge, victim, defendant, and insurers). *See Geistfeld, supra* note 11, at 797-800 (demonstrating that taking into account deterrence, a rational consumer will always require at least some pain and suffering protection).

254. *See* Schuck, *supra* note 5, at 308-12.

255. *See* Blumstein et al., *supra* note 205, at 179 ("An unexplained outlier should constitute a *prima facie* case for either remittitur or additur by the trial judge or an appellate holding of inadequacy or excessiveness of the judgment.").

standards,<sup>256</sup> helping to change the system from one which allows windfalls<sup>257</sup> for small injuries to one that truly recompenses for serious permanent impairments.<sup>258</sup>

Indeed, there are large potential benefits for improving the American system by adopting one of these ways. Nevertheless, we do not expressly advocate the adoption of either the so-called "disability schedule and value table" approach or the Anglo-German "precedent" approach.<sup>259</sup> However, Part III of this article analyzes the possible circulation of the European models described above in the United States, and proposes, by way of example, a scheme as to how a normalized values schedule could be developed, to which medically recognized scoring systems and monetary indicative values relate.

## 2. The Models at Work, Their Applicability and Potential for Self-Implementation

There are systems which exist and combine reasonable predictability with the tailored assessment of damages. At the risk of oversimplifying, European courts often tackle the problem of uncertainty and justice (both vertical and horizontal) either using leading cases on *quantum* or building upon scientific tables. These are the converging models: (1) the "disability schedule and value table" judicial scheduling of France and Italy; and (2) the "descriptive" one of the United Kingdom and Germany. These systems give full information about past evaluations not only to the litigating parties, but also to courts. They also grant a wide range of discretion to judges (and juries where, as in Scotland, they still have a role in civil trials)<sup>260</sup> in awarding damages and consequently in sending messages to consumers and manufacturers.

As previously mentioned, in France and Italy medical experts score the level of physical impairment (both transient and permanent) the victim has suffered, while orientation tables schedule monetary values. By integrating the two evaluations, *whoever* has the task of estimating damages for health impairment has an objective uniform basis upon which to do so. In the United Kingdom and Germany, collections of leading cases on *quantum*<sup>261</sup> are a substitute for tables of monetary

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256. *Contra id.* at 174. However, these authors pledge that one of the weakest pointpoints of the tort system for non-pecuniary losses consists in the "lack of information provided to juries." *Id.* at 175.

257. See JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN 8-9 (1979).

258. Despite general vertical equity, plaintiffs with small losses tend to be over-compensated and those with large losses tend to be under-compensated. A. Conrad, *Testimony Before the New York Joint Legislative Committee on Insurance Rates Regulations*, U. Mich. L. Quadr. Notes, 14, 15 (1970) (stating that "[I]f there is one thing which [all] surveys have shown conclusively, it is that the tort system overpays the small claimants who need it least and underpays the large claimants who need it most").

259. Similar conclusions were reached by the European Tort Law Group in devising the Principles of European Tort Law. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF TORT LAW, art. 10:301 (2005), available at <http://www egtl.org/Principles/index.htm>.

260. Civil juries, where they still exist, always assess damages for the first time, hence they inherently lack this information.

261. Collections of leading cases on quantum in Germany are offered to the public in form

value in suggesting to the court the ranges of amounts for non-economic damages supported by medical evidence. Having this information, courts can then adapt the framework to the case before the court by choosing a value and increasing or decreasing the recommended amount according to the particular facts. In each system cited, every departure from the given range requires rational justification, by distinguishing the case in hand with a view towards affirmation, should it later be appealed or reviewed.<sup>262</sup> In other words, courts are not strictly bound by their past decisions, but past judgments can be used as a preliminary informative framework, saving the costs of accumulating the same information every time.

Because of this foundation, standardizing processes work properly in European legal systems, where they take slightly different forms, in accordance with to the existing set of legal institutions, rules, and traditions from which their evolutionary path originates.<sup>263</sup> The amounts recovered in past cases are the outcome of previous experiences in evaluation, and the collection of these awards in some manageable form has proved extremely useful.<sup>264</sup> All of these patterns of relying upon shared information (either in form of synergy between disability scoring and schedules of monetary values or through precedential decisions) have led to more certainty in predicting the possible award.

Statutory intervention is not needed to implement these innovations, nor to supply information, even in the United States. For instance, in jurisdictions with civil juries, the legal artifice of special verdicts could be required to supply the jurisdictions with such a range of values. Judges could shape the specific question in a form that asks the jury to determine where in the offered range a plaintiff's injury fits.<sup>265</sup> In this way, all players have all of the information needed for a decision and the decision itself would still be on a case-by-case basis.<sup>266</sup> Once parties began to argue their case on previous monetary evaluations and widely accepted scoring systems, a market for databases providing such information would quickly develop. All lawyers would need these databases and they would ask for these databases to be implemented. Private parties would then develop the information tools.

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of descriptive *Schmerzensgeld-Tabellen*. See *supra* note 208.

262. Similar standards do exist in the United States. See, e.g., *Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 198 (4th Cir. 1997), stating:

In determining on remand whether the jury's verdict was rendered in accordance with South Carolina law, the district court should look to South Carolina cases to determine the range of damages in cases analogous to the one at hand . . . . If the court believes a departure from the range is justified, it should provide the reasoning behind its view. If the court determines that there are no other comparable cases under South Carolina law, it should explain this determination as well. Such a decision in the district court will reduce the risk of caprice in large jury awards and will assure a reviewing court that the trial court exercised its considered discretion under the applicable state law.

263. A good example of a path dependency can be the style of decision-writing needed to develop an award system based on leading cases on quantum.

264. In the U.K., multiple publications are used to collect data on past recoveries. See KEMP & KEMP, *supra* note 72; MUNKMAN, *supra* note 57.

265. See, e.g., Stephen A. Salzberg, *Improving the Quality of Jury Decisionmaking, in* VERDICT, *supra* note 5, at 341, 349-71.

266. Another manageable vehicle for supplying information could be jury instructions.

Moreover, decision-makers, called upon to justify an award which diverges from the precedent on quantum, would not be able to abuse their discretion, even if they were so inclined. While guidelines would not be binding for juries, because a review process is already in force (e.g., *additur* and *remittitur*, judgment *non-obstante-verdicto*),<sup>267</sup> the jury itself would *de facto* arrive at a possible divergent evaluation on the evidence presented, without the need to justify the award explicitly.<sup>268</sup> Attorneys would not likely appeal a decision that was actually based on clear evidence and obviously well founded. Even if the jury does not have to justify its decision, it will still be based on the evidence presented and an attorney or a judge will still have to decide whether the verdict is or is not consistent. In summary, greater and better information would start a virtuous circle in which all of the players (e.g., litigants, attorneys, judges, juries, and insurance companies) would behave at the same time as controller and controlled. On the contrary, continuing to withhold such information from some players resembles an argument that ignorance is better than information.<sup>269</sup>

European countries have chosen to share judicial evaluations to serve justice and efficiency, without sacrificing the former to the latter, and the United States could do likewise.

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267. The literature on *additur/remittitur* review in personal injury cases is quite extensive. For preliminary information, see Baldus et al., *supra* note 240, at 1109 (proposing a method for *additur/remittitur* review involving comparison of awards in similar cases); and Francis X. Busch, *Remittitur and Additur in Personal Injury and Wrongful Death Cases*, 12 DEF. L.J. 521, 526 (1963) (arguing there is no suitable "rule of measurement" for pain and suffering that would permit the conduct of an effective review). See also Comment, *Appellate Remittitur*, 33 MO. L. REV. 637 (1968); Leo Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942); Note, *Constitutional Law - Right to Jury Trial - Judicial Use of Additurs in Correcting Insufficient Damage Verdicts*, 21 VA. L. REV. 666 (1935); Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934); Fleming James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQ. L. REV. 143 (1963); Richard Kinder, Comment, *Statutory Authorization of Additur and Remittitur*, 43 MISS. L.J. 107 (1972); Christian J. Mixter, Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150; Thomas R. Newman, *Damages: A Call for Meaningful Precedents*, 3 PACE L. REV. 605 (1983); Michael A. Newsome, Comment, *Additur and Remittitur in Federal and State Courts: An Anomaly?*, 3 CUMB. L. REV. 150 (1972); Note, *Remittitur of Jury Verdicts in Iowa*, 48 IOWA L. REV. 649 (1963); Comment, *Remittitur Practice in Alabama*, 34 ALA. L. REV. 275 (1983); Irene D. Sann, *Remittitur (and Additur) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157 (1987); Irene D. Sann, Note, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976); Eric Schnapper, *Judges Against Juries - Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 320-24, 327-36, 340-47, 353-57 (1989); William H. Wagner, Note, *Procedures to Lessen Remittitur's Intrusion on the Seventh Amendment Right to Jury Trial*, 1979 WASH. U. L.Q. 639.

268. *Additur* and *remittitur* are based on the evidence of the case at trial.

269. The intrinsic worth of providing information to judges and juries can scarcely be questioned. See Baldus et al., *supra* note 240, at 1186 ("There is no justification in principle for denying jury access to comparative awards information. Indeed, such a practice could increase the consistency of awards and reduce the need for judicial oversight.").

### 3. Predictability and Less Arbitrary Choices: The Reasonable Justice of Judges and Juries as "Markets"

This article's analysis has shown that there are both historical-social justifications and some logical-economical grounds for non-economic damage compensation in the case of ascertainable injuries wrongfully caused. Moreover, it has provided some additional reasoning as to why the tort system has, in fact, become the best alternative for protecting individual interests in health.<sup>270</sup> The alternative route of using insurance might not have been practicable,<sup>271</sup> because it would have had to overcome asymmetries of information and contracting costs.<sup>272</sup> The granting of non-pecuniary damages for serious harm to health is not a low-damage-level context, which is why it is not worthwhile to make *ex ante* contractual provision or agree to an *ex-post* general liability rule.<sup>273</sup> On the contrary, while this article acknowledges that some losses correspond to interests which deserve both legal recognition and protection, society must decide who should bear the losses and how these losses should be redressed.

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270. See Croley & Hanson, *supra* note 6, at 1896-1917 (reaching similar conclusions). But see Priest, *supra* note 10, at 1536 (reading the absence of a first party insurance market for non-pecuniary loss as evidence that society does not want them compensated).

271. Indeed, history and accidents have brought about liability rules and the consequent development of a third party insurance market and any attempt to force other tools (namely first party insurance) into the picture should face this fact: third party insurance following liability rules dominates the market for non-pecuniary losses, attracting any willingness to buy insurance there might be in society. Arguments such as social norms preventing people from buying first party insurance for pain and suffering and the existence of liability rules as a rational reason for not buying first party insurance are made by Bovbjerg et al., *supra* note 240, at 933. On the contrary, several scholars advocated the substitution of tort law with first party insurance. See, e.g., PATRICK ATIYAH, *PERSONAL INJURIES IN THE TWENTY-FIRST CENTURY: THINKING THE UNTHINKABLE, IN WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY* 1, 33-46 (Peter Birks ed., 1996); Priest, *supra* note 10, at 1550-63; see also John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement* 114 HARV. L. REV. 690 (2001) (offering a complete account of the so called first party insurance movement).

272. This issue has sparked a fierce debate amongst scholars. For further debate on product liability, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case For Enterprise Liability*, 91 MICH. L. REV. 683 (1993); Croley & Hanson, *supra* note 46, at 1; Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification For Enterprise Liability*, 76 CORNELL L. REV. 129 (1990); and George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237 (1992). Margaret Jane Radin gives a different reading in *Compensation and Commensurability*, 43 DUKE L.J. 56, 70 (1993), and argues that any *ex ante* purchase of first party insurance is precluded by incommensurability more than by irrationality; individuals would signal the incommensurability between non-economic damages and money. Note also that the existence of compensation for non-pecuniary losses under tort law may to some extent prevent first party insurance for non-economic damages. See Bovbjerg et al., *supra* note 240, at 933 ("Informed consumers know that pain and suffering is compensable in tort cases; they are already covered when someone else is to blame for their injury. Given that they thus have a limited need for such coverage, its absence is not proof of its lack of value.").

273. Nevertheless, because of the lack of information in the pre-accident context, people are less willing to contract even in a high-damage-level context. This explains why there is not a wide first party insurance market for non-economic damages.

In some sense, health integrity is under the shadow of an inalienability rule<sup>274</sup> because no amount of money can buy good health or life. Nevertheless, life exposes everyone to certain degrees of risk of damages to one's health. In this contract-forbidden scenario, the entitlement is already allocated<sup>275</sup> and liability rules must protect the individual's interest in avoiding un-redressed damage to health. Tort law provides compensation when contracts are forbidden as well (i.e., entitlements are inalienable) but, despite the inalienability rule, rights are shifted (i.e., infringed) and a price for the damaged inalienable entitlement ought to be found.<sup>276</sup> The protection of liability rules usually relies on market values to assess the importance of the suffered loss and the correct level of damages.

However, in the case of non-pecuniary loss, there is no clear rule setting the right amount of damages, because, by definition, a market does not exist.<sup>277</sup> Nevertheless, this article argues that markets are ideal forums for sending messages to individuals and in reaching stipulated evaluations.<sup>278</sup> Indeed, a market is nothing

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274. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

275. The notion of corrective justice is implicitly evoked. It focuses on the individual and requires adequate compensation from the wrongdoer. It assumes that persons have a pre-existing entitlement to, for instance, bodily integrity, and that when that entitlement is violated, morality requires that the claimant be restored as close as possible to his or her pre-wrong position. See generally Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15-27 (1995).

276. Health is protected to some extent by inalienability rules, but since some accidents do occur, even if not preventable, liability rules have entered into the picture to protect such interests.

277. See Levin, *supra* note 8, at 308.

278. That is socially agreed upon. See *id.* at 272 ("[The tort system] prices goods for which there is, and in many cases, is permitted, no market. In other words, the tort system acts as a kind of 'shadow pricing' mechanism, determining the cost of certain inputs (injuries), so that correct cost/benefit decisions may be made both by the relevant enterprise and the consumer."). Full compensation for non-pecuniary losses remains a myth. See Ingber, *supra* note 39, at 775. See also Wells v. Wells, [1998] 3 W.L.R. 329, 361 (H.L.) (appeal taken from Eng.) (opinion of Lord Clyde), stating:

In respect of pain and suffering money can only be a conventional medium of compensation and the assessment of it to cover the past and the future must necessarily be imprecise and open to differences of view. But the accumulation of precedent and experience and the careful analysis of the nature and effects of particular injuries can go a long way towards establishing levels of award which may be generally recognized and accepted as reasonable in particular circumstances. If necessary those levels may be open to adjustment or even correction from time to time by those courts which are best qualified to review what must in essence be a factual assessment of the kind sometimes referred to as a jury question.

In 1999, the U.K. Law Reform Commission, in suggesting an increase for non-economic damages for serious personal injuries was needed, noted that:

It is plain that responsibility for making that value judgment must be given to someone. In our view whoever bears the responsibility for setting levels of damages for non-pecuniary loss in personal injury cases, should fix conventional levels which to some extent conform with general perceptions of the sums of money that are commensurate with the different non-pecuniary losses suffered. Otherwise the tort system will not, in practice, be a system of corrective justice, since damages awarded will not generally be

more than the sum of subjective evaluations which we deem as a whole, an average objective indicator or a best-informed result. Conversely, non-pecuniary damages do not comfort<sup>279</sup> the average victim, but they affect the individual one because they do not redress imaginary losses but actual losses. On one hand, a pure market evaluation in the case of non-pecuniary damages can even understate a person's evaluation of their own impaired health.<sup>280</sup> On the other, a market can fail "when it too clearly prices that to which we would like to ascribe infinite value."<sup>281</sup>

The problem is still more complicated because none of the possible suppliers of a subjective evaluation can be fully trusted. There are strong incentives for the wrongdoer to underestimate the loss and for the victim to overestimate the loss.<sup>282</sup> The impasse seems to be complete;<sup>283</sup> but in fact it is not, because in a way, courts function by being in both the wrongdoer's and the victim's shoes at the same time. As one author has rightly posited, "[t]he problem . . . is determining the 'correct' or 'efficient' price."<sup>284</sup> In some way, non-pecuniary damages awarded by judges and juries<sup>285</sup> tend to turn the subjective evaluations of the parties into a superior "objective" evaluation, tempering the countervailing evaluations made by the parties and covering the gap of information between pre-accident and post-accident worlds.<sup>286</sup> In other words, the court arena works as a place in which individual choices and evaluations meet each other in an adversarial manner.

In this descriptive market-simulation, the countervailing signals flowing from the players do not automatically create a value for the intangible loss at hand. The court itself establishes the value, as a social arbiter. From this point of view, the

accepted as restoring a victim's losses. This approach is reflected in the case-law, which requires that the fairness and reasonableness of damages for non-pecuniary loss be assessed in the context of the social, economic and industrial conditions prevailing at the time.

THE LAW COMM'N, *supra* note 34, at 32-33.

279. Indeed, society and tort law do not care about the average, but rather, the actual injured person.

280. See Croley & Hanson, *supra* note 6, at 1849.

281. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 49 (1978). This argument, however seems to be more meaningful concerning a first party insurance market. See Croley & Hanson, *supra* note 6, at 1875-76.

282. This is a sort of *ex post* moral hazard in the form of exaggerated damages claims.

283. As stated previously in this comment, first party insurance markets cannot be relied upon. Hence, it is excluded from the range of possibilities.

284. See Leebron, *supra* note 8, at 272.

285. For the moment, this comment will not distinguish between judges and juries in the assessment of non-pecuniary damages.

286. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92 (1991). Easterbrook and Fischel stated it in a different context:

Court systems have a comparative advantage in supplying answers to questions that do not occur in time to be resolved *ex ante*. Common law systems need not answer questions unless they occur. This is an economizing device. The accumulation of cases dealing with unusual problems then supplies a level of detail that is costly to duplicate through private bargaining. To put it differently, 'contractual' terms of many kinds of problems turn out to be public goods!

(quoted in Croley & Hanson, *supra* note 6, at 1897).



awards granted are in a sense arbitrary, because unambiguous criteria to evaluate non-pecuniary damages do not exist<sup>287</sup> and there are no criteria to compare the value of one body part with another. "There is simply no equation between paralyzed limbs and/or injured brain and dollars."<sup>288</sup> However, a fifteen percent reduction of flexibility of an arm is a fifteen percent reduction for every human being, and when an accident has occurred, juries and judges can form their opinion based on evidence and previous decisions in similar cases. This is an excellent starting point to serve both vertical and horizontal justice.

Because no party seems to have better information or information that is acceptable to the other parties concerned, this article assumes that, on average, there is no overestimation or underestimation and courts are assessing non-pecuniary damages quite well. If non-pecuniary damages assessed in tort perform as an *ex post* contract, in which the content of the agreement is written by the court, we should focus on the criteria needed to write the payment clause of this "unsought contract."<sup>289</sup> From this perspective, the tort system compels a contract when one party does not want to contract at all.<sup>290</sup> The real nature of tort law becomes apparent: it has substituted contract as the source of the obligation,<sup>291</sup> overcoming information costs when a contract is unfeasible.<sup>292</sup> Finally, tort law deals with losses sustained by the victims and addresses them on an individual basis, reflecting the subjective evaluation of the parties in conflict on a case-by-case basis.

Thus, historical, economical, and socio-political arguments suggest that once forced by reality to choose an evaluation, we have sufficient reasons to choose the less "arbitrary" action of the courts and accept clear distinctions in the category of non-pecuniary damages where an objectively ascertained medical condition can offer a simple dividing line. The recent European experience could be the prologue for other legal systems. After all, it is self-evident that a reliable degree of certainty regarding appropriate recovery is necessary in order to calculate insurance premiums. In addition, the higher this degree of predictability is, the more predictable the risk and the more efficiently it will be administered.<sup>293</sup> Indeed, at an organizational level, there is no reason not to choose the judicial system as the main actor. After all, if the marketplace is a bad forum to set a monetary value for non-pecuniary loss, the court may well be a proper place in which to do so.<sup>294</sup>

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287. See ATIYAH, *supra* note 190, at 213 ("All such damage awards could be multiplied or divided by two overnight and they would be as defensible or indefensible as they are today.").

288. Cecil A. Wright et al., CANADIAN TORT LAW CASES, NOTES AND MATERIALS 1431 (1985).

289. Calabresi & Melamed, *supra* note 274, at 1107. In other words, this comment adopts this line of reasoning that when transaction costs are high "an argument can readily be made for moving from a property rule to a liability rule." *Id.* This *ex post* approach can overcome high transaction costs as information costs.

290. Indeed, at least injurers would prefer a no-liability rule.

291. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

292. See Croley & Hanson, *supra* note 6, at 1900.

293. The goal of making non-pecuniary damages more predictable is certainly not a new one. See, e.g., Bovbjerg et al., *supra* note 240, at 924-27; see also Schuck, *supra* note 5, at 306-40 (proposing methods to give guidance to the jurors).

294. According to Leeborn,

Furthermore, because of the very nature of damages for intangible loss, we should maintain an individual approach as much as possible. Intangible losses differ from person to person, and the value of the tort system lies in the prospect of confronting each individual case.<sup>295</sup> Moreover, at a pragmatic level, changing the case-by-case approach would require a radical reform of the system, most likely engendering strong political opposition and triggering constitutional concerns.<sup>296</sup> On the contrary, the simple improvement of reducing asymmetric information and sharing a common intellectual framework for non-pecuniary damages would meet less opposition and would not need statutory intervention. Of course, a counter-argument could be that the judicial system itself works arbitrarily to some extent. Still, court assessment, if taken as an implicit market evaluation for “objective” non-pecuniary damages, could be a good substitute for a market.<sup>297</sup> Finally, an important point is that the “arbitrary” system and its arbiters (judges and juries) are already in charge of the awarding process and, as the European experience shows, the system works fairly well.<sup>298</sup>

#### 4. The Impact of Standardization on Settlements and Litigation: A Sample

European experiences offer clear guidelines and place full reliance on the decisions of the courts.<sup>299</sup> For instance, in the United States, the idea of providing

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If we explicitly adopt a survey theory, rather than an exclusive fact-finding theory, of jury assessment of non-pecuniary damages, a different vision of the proper role of judge and jury in this task emerges. While judges, and in particular, appellate judges, are not in a better position to determine price *de novo*, they are in a better position to aggregate, in a way the market does for market traded goods, the preferences expressed by individuals.

Leebron, *supra* note 8, at 319. However, it is well worth ascertaining whether or not this statement could be applicable at the individual case level as well. The most important concern at this level is obviously to give equal treatment for reasonably similar cases and dissimilar treatment for different ones (horizontal and vertical equity). The issue for the actual plaintiff and defendant is whether it is possible to reconcile *ex ante* predictability with a case-by-case approach.

295. For a clear statement of this concept, see Peter H. Schuck, *Scheduled Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Sloan*, 8 YALE J. ON REG. 213, 215 (1991) (“Individualized jury determinations of damages promote the law’s most noble ambition — to vindicate individual rights by producing exquisitely individualized contextualized judgments tailored to the unique circumstances of each individual rather than mass produced according to crude functional categories created to serve social needs.”).

296. See *infra* Part IV. For an analysis of the political dimension of tort law evolution either by judges or legislators (and scholars), see generally Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 (2002).

297. For the concept of implicit market evaluation, see Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1030-34 (1994).

298. According to one commentator, “If a survey is the best available pricing mechanism, the jury seems to be well suited to this task. As part of its task of determining liability, the jury is in a position to gather facts at least with respect to a specific case.” Leebron, *supra* note 8, at 318; see also Croley & Hanson, *supra* note 6, at 1837-41 (arguing that jury behavior can be read as evidence of consumer demand for insurance against pain and suffering).

299. It is suggested in this comment that the example of the level of settlements can apply to the litigation process as well.

information to jurors about previous awards has been suggested on many other occasions.<sup>300</sup> American lawyers may still regard this last suggestion as complete nonsense, because they frequently put most of the blame for the explosion in non-pecuniary damages on the judicial system (mainly on the civil juries). However, to understand fully what the potential impact of these suggestions could be, and before analyzing their feasibility in the United States, it might be worthwhile to make a simple but illustrative comparison between tort litigation and a (normal form) game, where the hypothetical plaintiff and the hypothetical defendant are players.<sup>301</sup>

Indeed, scholars — at least experts in law and economics — seem to agree that if parties are likely to behave strategically they will reach an efficient result. Moreover, they agree that we can overcome strategic behavior “by giving an absolute entitlement to the victim and setting liability equal to damages.”<sup>302</sup> Therefore, we only need to know actual damages to let the system work efficiently. Yet, calculating the actual amount of damages is the problem *par excellence* in every non-pecuniary loss assessment.

To fully illustrate the positive effects of the framework to be grasped by a rather formalized comparative analysis, we will make some assumptions:

- a) Both parties (wrongdoer and victim) are rational and informed (both of them share the following assumptions).
- b) The likely outcome of an out-of-court settlement would be — e.g., \$10,000.
- c) The cost of litigation for each party is — e.g., \$2,000.
- d) Courts in a similar disputed case would award — e.g., \$10,000.
- e) However, when parties are unwilling to settle for a reasonable amount —

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300. See, e.g., 2 A.L.I. 220-27, 230 (Paul C. Wieler 1991) (stating that the development of “meaningful guidelines based on a scale of inflation-adjusted damage amounts attached to a number of disability profiles that range in severity from the relatively moderate to the gravest injuries,” and suggesting a threshold of seriousness before making an award); Kenneth S. Abraham, Robert L. Rabin & Paul C. Weiler, *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 343 (1993) (suggesting that by implementing their proposed inflation adjusted monetary scale for granting pain and suffering damages, with such damages awarded pursuant to a scale according to which “the amount to be awarded for lesser injuries would be prorated downward from the figure that was fixed for the most severe injuries,” and “eventually the scale would terminate at the legal floor for any pain and suffering damages,” and “severity would be defined not just with reference to the nature of the injury . . . but also the age of the victim”); see also Baldus et al., *supra* note 240, at 1109; Blumstein et al., *supra* note 205, at 171; Bovbjerg et al., *supra* note 240, at 908; Leebron, *supra* note 8, at 322-23; Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237.

301. Of course, this comment does not claim to formally apply game theory in all its nuances. The explanation is only a descriptive feature for the argument that settling the framework and sharing this information may force effective results in the tort system. Normal form game (or strategic form game) consists of three elements: (1) the players (victim and wrongdoer in our example); (2) the strategies available to the players (here: settle or litigate); (3) the payoff received for each combination of the strategies. See generally DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 6-30 (1994).

302. See M.A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 24 (2d ed. 1989).

i.e., what is close to court's own usual evaluation, judges would increase or reduce the regular amount (\$10,000) by \$1,000 against the party refusing the settlement.<sup>303</sup>

Under this scenario, both parties' dominant strategy<sup>304</sup> is to settle the case. Based on the starting point of a reliable prior court decision, they behave accordingly, using the same set of beliefs and information.<sup>305</sup> In fact, regardless of the other player's decision, each one is better off settling. Because the most efficient result for each one, as shown in *Table 1*, is to settle the case and save the costs of litigation (*Scenario 1*).

Scenario 1	Victim settles	Victim litigates
Wrongdoer settles	W)- \$10	W) - \$11
	V)+ \$10	V) + \$7
Wrongdoerlitigates	W)- \$13	W) - \$ 12
	V) +\$9	V) + \$ 8

Now, let's suspend the assumption that the parties share full information under (a) above.<sup>306</sup> Further, they do not know how a court would adjudicate at trial, or, in other words, this outcome is not predictable as shown in (d) above. Also, the parties likely have quite different estimations of the loss — e.g., the defendant's expected result (subjective estimate of the loss) is \$10,000 and the victim's is \$20,000. They each see that the settlement point is no lower and no higher than halfway between their evaluation — e.g., \$15,000.

The rules used by the courts for assessment are the same as that under *Scenario 1*. Because there is no reliable court evaluation in *Scenario 2*, assumption (e) does not apply. Both the defendants' (and his insurer) and the plaintiffs' payoff matrix now look rather different from before because they have divergent evaluations of the possible verdict. As shown in *Scenario 2*, from *their point of view*,

303. I am indebted to Miss Orme (an English lawyer living in Italy) who pointed out: that the 'payment-in' system under the English civil procedure rules counters this unwillingness to settle perfectly: D, on the advice of his lawyers, pays into court a certain sum, which is judged to be extremely close to the anticipated award in damages. The 'payment in', as it is usually called, remains a secret from the assessing judge. If the adjudicated award 'beats' the payment in, all is well, and P gets his costs. If the award is lower than the payment in, even by a penny, D gets all the costs of the trial from the date of the payment in, which, as it usually includes the lawyer's brief-fee for appearing in court, can be huge. The advantages of making an early payment-in are, therefore, obvious.

304. BAIRD ET AL., *supra* note 301, at 306 (defining dominant strategy as "[a] strategy that is the a best choice "for a player in a game for every possible choice by the other player").

305. *But see* Schuck, *supra* note 295, at 218 (noting that the use of earlier awards may "impound and then compound what they themselves characterize as distortions of the past, thereby projecting those distortions into the future").

306. This is arguably a fair assumption.

now both the victim and the defendant have an "iterated dominance"<sup>307</sup> to litigate the case. They no longer reach the efficient result of a settlement.

Scenario 2	Victim settles	Victim litigates
Wrongdoer settles	W) - \$15 V) +\$15	W) - \$12 V) + \$18
Wrongdoer litigates	W) - \$12 V) + \$ 18	W) - \$ 12 V) + \$ 18

The essential point in showing a different result under the second scenario is that neither party knows the possible outcome of the case in the courtroom, nor is the court itself familiar with preceding outcomes. Once we eliminate both of the following assumptions: (1) that the court's assessment is equal to the actual value of the injury sustained; and (2) that full/reliable information about prior court decisions is being offered to the players, the parties no longer reach an efficient result. Due to the lack of information, both the parties forfeit something and society, as whole, wastes resources.

The deficiency of shared information is mainly due to the parties' lack of a common starting point in the settlement process. On the contrary, if we let them share the same information and act upon it accordingly, then in their own interest, they will reach an efficient result. It is not even essential that the shared information (i.e., the amount of non-economic damages awarded in court) is the "correct" evaluation of non-pecuniary damages. The shared information works as a transcendental illusion, making it possible to reach an efficient result<sup>308</sup> even if we assume it is not the most correct evaluation. How plausible the assumption is — that court evaluation is equal to what actual damages may be (i.e., how far from reality is our transcendental illusion) — is a question without an answer. Nevertheless, theoretically it is no more, but also no less, plausible than an assumption that either the victim or the defendant is right — i.e., no more but no less than any other "arbitrary" assumption. The only thing known is that these losses need to be redressed in the best way, without wasting resources, and to do so requires setting liability equal to actual damages.<sup>309</sup>

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307. Iterated dominance is a solution concept based on the idea that a player will adopt strictly *dominant* strategies and refuse strictly *dominated* strategies, and that player believes that the other player would behave the same way. BAIRD ET AL., *supra* note 301, at 309.

308. It is a transcendental illusion we need: e.g., as shaving after a warm shower. The image goes as follows. After a warm shower, our mirror is misted and we dry only a small portion of it (say one tenth the size of our face). We will shave looking at our image in that undersized portion of the mirror and behave as if it were the true size of our face. We know it is not, but by behaving as if it were, we can shave "efficiently."

309. When we assume that non-pecuniary loss damages are excessive because of the lack of willingness to buy first party insurance we implicitly assume that damages are greater than actual damages and that this will lead to inefficient allocations. See POLINSKY, *supra* note 302, at 20 (analyzing this concept with respect to the strategic behaviors of the parties).

The vicious circle of asymmetric (or even absent) information has to be broken at some point, to give socially efficient dominant strategies to the players in the game of tort law. Once it is realized that correct evaluations of non-pecuniary damages are available, only one of the estimations can be selected as the right one. As explained above, neither the wrongdoer nor the victim can be fully trusted. Hence, it seems reasonable to choose valuation by the courts as the socially accepted "correct" valuation and behave consequently: spread information conceding that assessments made in the courtroom are, on average, proper ones.<sup>310</sup> By assumption, it cannot be known whether the chosen evaluation is more accurate than the ones proposed by the litigants, but it is, at least, less arbitrary because it takes them into account. All that needs to be done is to make the estimation of the court equal to damages, to provide this information to all parties, and to allow guidelines for the decision-maker. In a formalized way, this is what non-economic damages awarding systems have done in the United Kingdom, Italy, and France.

### ***B. An Experimental Proposal for America: The Normalized Values Schedule***

Another possible problem presented by the European approaches is that they still show horizontal disparity when comparing assessment in different districts of court of appeal. In principle, this disparity could be perceived as reflecting different local social perceptions of the proper value of a specific intangible loss, be it evaluated according to the "disability schedule and value table" approach or according to the "descriptive" approach. Nevertheless, there is at least one way of developing better horizontal equality without forgoing these differences if, as the American jury system seems to do, it is assumed they are worth being conserved.

A research experiment was carried out some years ago that might illustrate this point and offer valuable suggestions for the United States. After a period of "anarchical" jurisprudence when each judge was the arbiter who stated his/her own equitable criterion for assessing non-economic damages in respect of the Italian non-pecuniary damages known as "*danno alla salute*," a research project run under the auspices of the Italian National Research Council ("CNR") developed a proposal for a National Orientation Schedule of monetary values ("NOS") built upon a Normalized Values Schedule ("NVS").<sup>311</sup> Both schedules were developed

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310. When parties of a settlement process share enough information and expect similar results in court, their settlement should be reached at low transaction and administrative costs. See Kathryn E. Spier, *A Note on the Divergence Between the Private and the Social Motive to Settle Under a Negligence Rule*, 26 J. LEGAL STUD. 613, 616-20 (1997) (arguing also that more increased litigation would be proper for deterrence goals). But see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 (1997). See generally Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements at Trials*, 8 INT'L. REV. L. & ECON. 109 (1988).

311. In Italian, it is called "Tabellazione Indicativa Nazionale-TIN". The results of the research are published in the collective work of RAPPORTO SULLO STATO DELLA GIURISPRUDENZA IN TEMA DI DANNO ALLA SALUTE (Marino Bargagna & Francesco D. Busnelli eds., 1996). On this research and on the model developed, see G. Turchetti, *Gli sviluppi dello studio sulla determinazione del valore monetario base del punto di invalidità*, in RAPPORTO, supra note 220, at 171; Giovanni Comandé, *La sperimentazione di una Tabella Indicativa Nazionale tra esigenze di prevedibilità ex ante del danno e di liquidazione equitativa ex post*, in

on the basis of relevant data derived from cases decided all over the country. This approach has shown its suitability to provide uniform nation-wide common ground for monetary assessments of *danno alla salute*, leading to more vertical and horizontal justice without imposing uniform awards.<sup>312</sup>

This article draws on that experience for at least two reasons. Certainly this article does not propose the acceptance of monetary values (NOS) emerging from an Italian study to award damages for loss of enjoyment of life in United States. Nevertheless, some features of the construction and operation of the model proposed can shed light on possible evolutionary paths for the United States. The idea to develop an NVS that gives a higher degree of vertical and horizontal equality is a step that courts in each U.S. jurisdiction could accept without any deep or questioned change. In addition, the way the overall system has developed might reveal instructive patterns for the U.S. judicial system and for further scholarly research.

### **1. The Background Idea and Goals of the NVS and its Experimental Ancestor, the NOS**

The central pivot upon which the aforementioned research project turned was the idea that "real," concrete, economic parameters can never be achieved for health, because it is an irreplaceable attribute which cannot be substituted with a sum of money. Nonetheless, repugnant though such a concept is, this substitution must be made in order to compensate the victim.<sup>313</sup> The research project sprang from the need to arrive at a definitive settlement of the issue of compensation for personal injury arising from civil liability, without sacrificing the tailoring of *ex post* damages to the needs of (accurate) *ex ante* predictability of compensation awards. With this in mind, the parameters used in developing the NOS and the NVS were defined using judgment awards from case law. This process revealed many efforts to reconcile two apparently opposing principles within the compensation goal, namely basic uniformity of awards and the necessity for equitable adjustment to the specific features of the case at hand. These attempts indicated widespread difficulty in the courts about the issue of effective quantification of awards for personal injury.

From this viewpoint, recent case-law developments in Italy have clearly demonstrated two useful indications for reducing the friction between these diametrically opposed needs. The first one identifies, in the scheduling tables of usual valuations produced by each court, an extremely useful scheme for ensuring rec-

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RAPPORTO, *supra* note 220, at 201ff. Part II.B draws upon this experimental research which was carried out and from the publications a colleague (with economic expertise) and myself produced.

312. The NOS was already welcomed by several courts and it might become an interesting reference point for the legislature when it decides to answer the increased call for a statute regulating *danno alla salute* (or "biologico"). Orientation tables such as the NOS described above are developed taking into account life expectancy according to the age of the victim. Very rarely actual life expectancy for the victim in each case is investigated. Clearly enough it is not the best solution, but it seems to work well. However, a common table for all tribunals would be welcome.

313. Cass., sez. III, 14 apr. 1995, n.4255, in 60 RESPONSABILITÀ CIVILE E PREVIDENZA 519 (1995).

ognizably predictable margins of awards for damages, while at the same time providing a uniform basis for the awarding of compensation for personal injury. The second indication concerns the structure of the scheduling tables adopted. The tables developed by case law are completely consistent; this is one of the most obvious differentiations as far as award values are concerned, namely between disabilities assessed at less than ten percent and moderate or serious disabilities, indicating a movement towards a more equal distribution of resources and an effective case-by-case evaluation of the disability.

From these starting-points, the objective was to develop a valid methodology of general application from observations conducted nation-wide, in order to tackle problems of vertical and horizontal justice, leaving aside the monetary value assigned to each percentage point of permanent disability.

## 2. The Methodology to Set up the NOS and the NVS

As mentioned above, in Italy non-economic damages for intangible loss known as *danno alla salute* are awarded using the scoring and scheduling value approach. In order to overcome disparities between jurisdictions and to increase vertical justice, the research project experimented by using a proposal for a monetary NOS that implements an NVS.<sup>314</sup>

The construction of the NVS developed by the Pisa Personal Injury study group in 1995-1996 was based on the identification of the following principles gathered from case law:

1. The value of the point is an increasing function of the percentage of disability;
2. The value of the point is a decreasing function of the age of the victim;
3. The effect of disability on the life of the victim *progresses more than proportionally* with respect to the percentage increase allocated to permanent impairment (not only in absolute but also in relative terms: for example, if the increase in value in the passage from percentage point X% to the next (X+1)% is equal to Y%, then in the passage from (X+1)% to (X+2)%, the value must be higher than Y%); and
4. The reference point for utilizing the table (point unit) has been conventionally established on the basis of a 20-year-old victim and a harm of 10%.

All the above mentioned rules of construction are based on agreed medico-legal scientific evidence,<sup>315</sup> and they guided the first attempts at experimental data elaboration to be operated by individual courts.

The NVS is the outcome of the mathematical elaboration and rigorous application of the criteria mentioned, in addition to other indications from the medico-legal disciplines deriving from observation and analysis of the trends of Italian case law. In fact, the procedure adopted was to collect significant examples of ju-

314. See Turchetti, *supra* note 311, at 180-188; Comandé, *supra* note 311, at 203-05.

315. See A. Bassi Luciani, *Le piccole permanenti*, in RAPPORTO, *supra* note 220, at 119-32 (arguing on empirical data that there is a disproportion in evaluations related to small injuries as opposed to more serious ones).



dicial awards and store the data; the belief was that the set of case law based assessments obtained from analysis of the judgments logged could express a *socially accepted evaluation* for personal injury in tort, freed from the particular viewpoint of the individual adjudicating body, and thus, capable of producing the basic average monetary value. All things considered, refining abnormal assessment data and allocating it to one single basket of values can even theoretically express the result of a weighted socially accepted evaluation which, while not purporting to express certainties, can furnish indications that are not arbitrary.

In this way, a large number of case law judgments, which awarded compensation for personal injury according to the method indicated in Part (I)(C) of this article were collected on a random basis. In the sample judgments analyzed, personal injury damages were awarded by the court on the basis of medical scoring systems scientifically approved and applied at trial by medical experts; these systems assigned a percentage point for the permanent disability of the victim and multiplied this numerical value by the unitary monetary value for each point which the court, in its discretion, considered just and equitable to assign to the case at hand. At this stage, the courts were only just beginning to demonstrate the direction they were taking by the use of tables, such as the one illustrated (*see supra* Part (I)(C)(6)), and to establish the practice of using uniformly-based monetary values.

The judicial data collected served both to draw up the NVS and the NOS disability points. The largest number of judgments available came within the broad class of eleven to thirty years of age (1 - 15%). In drawing up the Table, account was taken of the Mortality Tables reference to men and women, as published in the Italian National Statistics Institute's yearly statistics.<sup>316</sup>

Because it uses a binary table, the Table of Monetary Values is the same in every way as the representation of the monetary values corresponding to the age-percentage of permanent disability and illustrated in Part (I)(C)(6). The Normalized Values Schedule of invalidity points is presented in the same way, but it corresponds to normalized values, rather than to effective monetary values. Normalized values are indicators that are consistent with the rules for constructing the table. The operative monetary table is obtained by multiplying the basic monetary value, which each court or jury believes to be representative of the socially accepted valuation of the intangible loss corresponding to an ascertainable injury to health, by the corresponding normalized value.

Due to the characteristics of less serious permanent disability in comparison to more serious disability (conventionally above 10%), it was thought advisable to differentiate between these two types of disability in a way that takes the differences between them into account, for example, the greater potential of the former for full post-injury recovery.

The operation was completed by identifying two similar curves, one in the 1-10% range, and the other in the 10% - 70/80% range. In order to determine the values of  $\beta_0$ ,  $\beta_1$ ,  $\beta_2$  of the exponential function used ( $f(x) = e^{\beta_0 + \beta_1 x + \beta_2 x^2}$ ) in working out the system in the application illustrated here, the following limits were es-

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316. In the original study, the Mortality tables referring to year 1990 were used. See Italian National Statistics Institute, <http://www.istat.it> (last visited Nov. 23, 2005).

tablished and supported by the analysis of case law samples that were collected and expert evaluations from medico-legal science:

a. In both the 1-10% range and the 10–80% range, a corresponding growth rate in the value of the point equal to 1:3 was established, on the basis of the early indications of tables developed from case law;

b. In the 1-10% range, the value of the point increases from 1/3 to 0.6 in the passage from a 1% degree of disability to one of 6%. Among other things, this pattern allows a function for less serious permanent disability to be identified, which, starting with relatively limited values for the first 2-4%, increases steadily on reaching 5% disability. In this way, a distribution of award values is achieved which compensates in particular the more disabling injuries as compared to those of a lesser impact, frequently involving full post-injury recovery; and

c. In the 10-80% range, the value of the point increases by 1 to 1.7, in passing from a 10% degree of disability to one of 45%.<sup>317</sup>

Using these limits enabled the disability points in the NVS to be defined. It further reflected the basic rules outlined previously: (1) the seriousness of an injury is a decreasing function of age (set out in the mortality tables); and (2) the effect of the disability on the life of the injured person increases to a greater extent when the percentage attributed to the harm endured similar increases.

The translation from the Normalized Values Schedule to the NOS Monetary Value Table for the disability point is made simply by multiplying the normalized value of the relevant point for each age/degree of disability combination by the *basic monetary award* extrapolated from the case law data. In early experimental efforts, this value corresponded to a twenty-year-old man with a ten percent disability — i.e., the so called “reference victim” at the central point of the broad class (11-30 years of age; 1-15%) in which a high percentage of the judgments collected at that time fell.<sup>318</sup> The monetary value was determined by calculating the average weighted value of the damages awarded for injuries falling within the broad class, having removed abnormal cases.<sup>319</sup>

The method described allows for the evolution of case law, and takes into account the general perception of the proper amount of recovery that the type of injury merits, as well as the inflationary trend. All that is required, is to check periodically whether the base reference value is up to date. If this has to be altered — either increased or decreased — a new table of monetary values is obtained by multiplying the normalized value of the point relevant to each age/degree of inva-

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317. These formula have been elaborated within the research group by Professor Giuseppe Turchetti. See Turchetti, *supra* note 311, at 180-82.

318. The research is ongoing and periodically the Research Group publishes the results of its studies. See generally *Osservatorio della giurisprudenza in tema di danno alla persona in responsabilità civile*, in *DANNO E RESPONSABILITÀ*, 1999, 121 (M. Bargagna & F.D. Busnelli eds.).

319. In the latest data elaboration carried out by the CNR Research Group of Pisa, the basic monetary value (for a man aged twenty with a 10% disability) which has a basis of reference in national case-law, was equivalent to €1.716,77 (value pro-rated to March 2002 according to ISTAT's April 2002 coefficients).

lidity combination with the re-rated base value applicable to the twenty-year-old with a ten percent disability.

### 3. Operating with NOS and NVS

Because it has not submitted to monetary figures, the NVS does not suffer any limitations on time or space. It enables compensation amounts founded upon different point values that are calculated on the basis of varying economic and political conditions in each national system, and without leading to iniquitous results. Providing *rates of increase of the point's normalized values* — determined on the basis of a mathematical calculation — the NVS is able to assure similar treatment for all victims, while leaving out any difference in the monetary value attributed to the point.

The principles proposed, which the NVS arose out of, allow the requirement of uniformity in the base monetary value for damages awards to be safeguarded, without reducing individualization in an unacceptable way.<sup>320</sup> Once normalized values have been translated into monetary values, the NOS allows margins of predictability which are indispensable for ensuring the system's stability. It further guarantees improved vertical justice (among lesser and greater injuries) and horizontal justice (among similar personal injuries), and avoids turning the personal injury victim into a faceless number. The forecasting of uniform base monetary parameters in the NOS offers predictable values which are easily adaptable to the case at hand, thereby delivering better horizontal justice. Obviously, all of the monetary values in the elaboration were indicative and susceptible to equitable adjustment, according to the specific case before the court. Thus, the indispensable margin of discretion for the adjudicating body was retained, given that a flexible instrument for valuation should not be turned into a perilous vehicle for making the assessment of personal injury awards standardized and sclerotic. In fact, other happenings may contribute to the equitable adjustment of the pre-selected value for the specific case before the court. For example, the occurrence of disabilities of a different nature, affecting the aesthetic aspect or disabilities which impede more specific functions; or the effect of the injury on someone with a pre-existing condition versus a person in good health.

Two criteria for adapting the uniform base value to the circumstances of the case at hand have, therefore, been internalized in an objective way and they contribute to the determination of the value in the NVS: the seriousness of the injury expressed in percentage terms and the achievement of a monetary value in the light of life-expectancy statistics corresponding to the victim's age. On the other hand, the NOS only gives indications on damages awards that can be personalized, with increases and decreases in the quantum already obtained by combining permanent disability and age in the table. In other words, there are two possible steps in making the awards personalized: (1) an objective personalization resulting from the combination of age and disability in the schedule; and (2) the case specific personalization according to the facts of the case. The method allows different injuries to

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320. As illustrated *supra* in Part I.C.5-6.

be treated coherently in different ways and similar ones to be treated in similar ways, despite their individual and unique aspects.

#### 4. What Can the American System Learn?

Clearly, what is being put forward for the United States is neither the wholesale adoption of the NOS, nor its method of construction. The Italian experience with the NOS is, however, significant to the evolution of an American model because it emphasizes a real possibility of evolution which has not been forced by legislative action,<sup>321</sup> but rather by the synergy of the stakeholders in the judicial arena. The case law material used was both the product of first-hand unbiased research by the study group, and was not supplied by interested parties such as judges, insurers, and lawyers. The inter-disciplinary development of the model was carried out entirely in an academic environment and was spontaneously adopted by the courts, meeting approval because of its basis in the scientific method. In addition, leaving monetary values aside, the development or adoption of the NVS guarantees full parity of treatment (horizontal and vertical) between victims of injury, quite apart from any pre-selected monetary value. Therefore, its adoption is fully compatible with the continued use of a diversified assessment among the various States in North America, and even within each State. The NVS could in fact be developed and used to bring within equal horizontal and vertical parameters the socially accepted assessments arrived at by jurors in local communities, who would assign the unitary base value and adjust the result to the actual case before the court. In this way, a step-by-step procedure would be established, and would ensure that the principle of vertical and horizontal equality is fully respected without compelling the jury (or the trial judge) to choose between fixed monetary values.

Overall, a comparison sends several messages:

1. The increasing significance of non-economic damages in personal injury litigation is not a uniquely American feature, nor it is without a social and economic foundation.
2. All surveyed countries have struggled with similar problems, mainly in assessing non-pecuniary damages and in filtering claims for damages that are either frivolous or difficult to prove.
3. A fruitful option for both filtering claims and improving the process of assessment is to distinguish, in the field of personal injury, damages for non-economic loss that have an “objective”<sup>322</sup> uniform basis for evaluation (i.e, a disability or illness ascertainable by medical science), and those that do not have such a basis.

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321. In fact, the proposed criteria were later adopted by the Italian legislature in drawing up scheduling tables for minor traffic accident injuries. See art. 138 of Decreto legislativo 7 of sept. 2005, n.209.

322. See Collins Dictionary, *supra* note 2 (defining “objective”).

4. Relying on this framework, European legal systems, in both the civil and the common law traditions, have experienced a remarkable evolution in their assessment processes.

5. These innovations were achieved through the judicial system without triggering statutory intervention.

6. Most patterns followed by the European systems could find a place in America, at least with the development of a Normalized Values Schedule.

The comparison also indicates that American courts could potentially implement several of the possible alternative approaches which are emerging, without creating too many problems. This article refers to these different evolutionary patterns as "judicial scheduling," in order to contrast them with other proposals that have been put forward in the United States. The aim of Part III is to argue that the United States could use judicial scheduling, namely Normalized Values Schedules, and to anticipate possible criticisms of such use.

### III. FRAMING U.S. JUDICIAL GUIDELINES FOR NON-ECONOMIC DAMAGES IN THE EURO-AMERICAN DEBATE

Because non-economic damages do exist and have gained a role in tort law,<sup>323</sup> this article deals with their assessment. As argued previously, there are very good reasons why these damages appeared under the umbrella of tort law and to explain their peculiar development in several legal systems.<sup>324</sup> This article now will address whether the "comparative lessons" sketched above would fit into the evolutionary patterns illustrated, patterns which the United States is already following. To do so requires tackling the American debate in the context this article has framed. This article will also consider both the debate about which institution is better suited to award these damages and how such an institution should go about

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323. See Bovbjerg et al., *supra* note 240, at 935 ("From a legal perspective, intangible damages have clearly won a place in legal theory and practice. Modern jurisprudence has generally expanded the recovery for non-economic damages in tort.") (footnote omitted). See also Croley & Hanson, *supra* note 6, at 1908-09, stating:

The practice of quantifying even the most painful types of pain and suffering in dollar terms for the purpose of tort compensation has survived, indeed perhaps flourished, to the present. Economic compensation for non economic losses is now a common aspect of the modern tort regime. Yet, there is seemingly no suggestion that such practice violates important social norms. The fact that none of the proposals to eliminate damages for pain and suffering rests on the proposition that quantifying pain and suffering in tort is contrary to social norms suggests that ex post pricing of pain and suffering through the tort system is indeed socially acceptable.

(citations omitted).

324. See *supra* Part I. See also Bovbjerg et al., *supra* note 240, at 933, stating:

[P]otential victims of negligence may feel that, ethically, it is not their responsibility to pay for pain and suffering inflicted upon them by others. All that can be legitimately inferred from the seeming lack of demand for pain and suffering coverage is that people seem willing to assume the risk of such losses where others are not legally responsible. This is not evidence that pain and suffering lack importance in the context of tortious injury.

doing so — e.g., by using schedules,<sup>325</sup> caps,<sup>326</sup> minimum or maximum thresholds,<sup>327</sup> the case-by-case approach, or something else.

In light of the accounts given above, a preliminary and honest answer to both issues may be that the best institution and the best method do not exist. Keeping this in mind, this article might cautiously revise some of the issues debated in American legal literature from the basis of a discourse about them. A final preliminary note is worth stressing. Having argued in support of the existence of non-economic damages, this section is mainly confined to an analysis of American literature<sup>328</sup> containing proposals which are aimed at better management of non-pecuniary loss assessment. This article does not enter the debate as to whether the existence of non-economic damages for personal injury is acceptable,<sup>329</sup> although these issues will inevitably repeatedly reappear.

### ***A. American Debates and the Lack of Monetary Standards for Non-Economic Damages***

One of the main features of American tort law that may have restrained elaborate comparison with the European experience is the persistent role of the jury in civil trials. The right to a trial by jury, protected by both State Constitutions and the U.S. Constitution,<sup>330</sup> has also sparked the hottest criticisms to proposals for giv-

325. See *infra* Parts III.A.2, III.B.

326. According to Schwartz & Lorber, *supra* note 11, 60-61, as of 2002, several states had passed some form of statutory cap on damages for non-pecuniary harm, a reform that has sometimes been struck down on state constitution grounds. See also Elizabeth Stewart Poisson, *Addressing the Impropriety of Statutory Caps on Pain and Suffering Awards in the Medical Liability System*, 82 N.C. L. REV. 759, 779-80 (2004) (discussing caps for non economic damages and concluding that, “[u]ntil judges, legal scholars, and attorneys clarify the proper methods for jurors to use, legislators are in no better position than jurors to decide what constitutes a just pain and suffering award”). She further argues,

[T]he legal community should make substantive and procedural changes to provide jurors with more guidance in determining pain and suffering awards. These solutions involve judges, jurors, attorneys, and legislators in the endeavor of compensating only meritorious claims and legitimately proven injuries with reasonable pain and suffering awards.

*Id.* at 787.

327. See Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 807, 823-25 (1987) (proposing not only a threshold on pain and suffering damages, but also a ceiling to be adjusted regularly for inflation).

328. Of course completeness cannot be claimed, but this comment has tried to present the overall picture of the ongoing debate in the United States. Moreover, the arguments are aimed at managing the existing assessment of non-pecuniary damages.

329. A long list of authors have argued that since a first party insurance market for non-pecuniary losses does not exist, it is unjust and illogical to force people to buy it via the tort system. See HUBER, *supra* note 11, at 3-17 (purporting the system is forcing a “tort tax”); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 228-31, 245-47 (1987); Schwartz, *supra* note 45, at 362-67. Still it could be argued that the actual development of non-pecuniary losses can be read as an expression of willingness to pay, since the legal right to compensation for non-pecuniary losses would have already been overturned by an overwhelming political will or it would have not developed at all.

330. U.S. CONST. amend. VII (“In suits at common law, where the value in controversy

ing instructions to juries in assessing damages.<sup>331</sup> Those criticisms have often harped on the theme of possible unconstitutionality embedded in the proposals which modify the status quo.<sup>332</sup> The status quo, though, is that the American system offers almost no guidance to jurors in awarding non-economic damages.<sup>333</sup> Jurors must convert their impression at trial into a monetary award without the suggestion of a method by which to do so.<sup>334</sup> Jurors can only rely on their common sense and good judgment in determining a fair and appropriate award.<sup>335</sup>

This rather absurd<sup>336</sup> status quo turns assessing non-pecuniary damages into "one of the most difficult decisions . . . facing the jury in a personal injury case."<sup>337</sup> According to some scholars, even jurors have complained about not having received instructions for this difficult task.<sup>338</sup> Meanwhile, judges can use information about decisions by other juries in prior cases to revise jury decision-making.<sup>339</sup>

shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); see *supra* Parts II.A.2-.3 and accompanying footnotes.

331. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 387-88 (1913).

332. See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (stating that the Seventh Amendment provides a right to a jury trial on legal claims and that questions about damages are legal questions). But see *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997) ("If the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role."). The wave of constitutional challenges to tort reform in the twentieth-century is put in historical context by John Fabian Witt, *State Constitutions And American Tort Law: A History* (Mar. 7, 2004) (unpublished Columbia Law Sch. Pub. Law Research Paper No. 04-67), available at <http://ssrn.com/abstract=515662>.

333. See generally Allen J. Hart, Roselle L. Wissler, & Michael J. Saks, *Multidimensional Perceptions of Illness and Injury*, 2 CURRENT RES. SOC. PSYCHOL. 30, 30-37 (1997); Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, PSYCHOL. PUB. POL'Y & LAW 743-68 (2000).

334. See, e.g., ALABAMA PATTERN JURY INSTRUCTIONS, CIVIL § 11.05 (Ala. Pattern Jury Instructions Comm. 2005); ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 20.06 (Civil Pattern Jury Instructions Comm. 2005); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: DAMAGES INSTRUCTION § 2.1 (West 2000); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: COMPENSATORY DAMAGES § 15.2 (West 1999); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 810.30 (Inst. of Gov't 1998); UTAH MODEL JURY INSTRUCTIONS, CIVIL § 27.2 (Utah State Bar 1998); WYOMING CIVIL PATTERN JURY INSTRUCTIONS § 4.02 (Wyoming Bar 2003).

335. See, e.g., HAWAII JURY INSTRUCTIONS, CIVIL §§ 8.5, 8.61 (Hawaii State Judiciary 1999); NEW JERSEY MODEL JURY CHARGES, CIVIL § 6.11F (N.J. Judiciary 1996); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 810.30 (Inst. of Gov't 1998); UTAH MODEL JURY INSTRUCTIONS, CIVIL § 27.2 (Utah State Bar 1998).

336. Wissler et al., *supra* note 246, at 804 (concluding that reduced consistency in jury verdicts is likely attributable to the fact that in assessing the value of a single case, jurors lack the frame of reference created by other cases that is readily available to judges and lawyers).

337. 22 AM. JUR. 2D *Damages* § 260 (1988).

338. See generally Shari S. Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282 (Robert E. Litan ed., 1993).

339. See generally Schuck, *supra* note 5, at 306-40; Michael J. Saks, Lisa A. Hollinger, Roselle L. Wissler, David L. Evans & Allen J. Hart, *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 243-56 (1997).

Indeed, as the European experience suggests,<sup>340</sup> it is the lack of a monetary standard or guidance, and not the different appreciation of the degree of harm associated to an injury<sup>341</sup> that creates inconsistencies. Without guidelines, what appears to one juror a fair and appropriate amount, might seem too high or too low to another juror. According to the European experience, this conclusion is equally applicable to judges if they are prevented from having and using information on previous awards.

Obviously, a proposed solution to this situation is to give such guidance in assessing damages, by signaling required or recommended upper and lower limits for the type of injury being evaluated, or by providing jurors with injury scenarios and their associated non-economic damages awards.<sup>342</sup> Indeed, some studies show that merely providing jurors with proper information about previous pertinent awards for injuries similar to those under discussion reduced the variability without affecting the size of the award.<sup>343</sup> Therefore, it is quite understandable that a large part of the debate on assessing non-economic damages has dealt extensively with the proper role of juries and the proper ways to improve their operations without triggering constitutional concerns.

### 1. Building on the Existing Literature: Driving the Jury Debate

In the United States, the debate has concentrated on the intellectual and logical foundations and the justifications for non-economic damages, more than on their evaluation.<sup>344</sup> However, the issue of awarding damages for non-pecuniary loss has been on the tort reform agenda for a long time,<sup>345</sup> mainly with the aim of

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340. See *supra* Part I.C.

341. See Roselle L. Wissler, David L. Evans, Allen J. Hart, Marian M. Morry & Michael J. Saks, *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181, 181-205 (1997).

342. Remember that a similar method is used by English courts. For a discussion of the two proposals analyzed in the text, see Bovbjerg et al., *supra* note 240, at 908-76. See also Schuck, *supra* note 5, at 326 (discussing the possibility of advising jurors of the ratio of general to special damages in the comparison of cases or the ratio of compensatory to punitive damages). But see Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 177-78 (1992) (pointing out that evidence of awards made to others with similar injuries "not only is not binding — it is not even admissible")

343. See Saks et al., *supra* note 339, at 243-56; Diamond, *supra* note 338, at 282-305; Baldus et al., *supra* note 240, at 1109; see also Roselle L. Wissler, Patricia F. Kuehn, & Michael J. Saks, *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712, 719-20 (arguing that "the problem of variable general damages awards is due, in part, to the lack of guidelines for converting perceptions of harm into dollar awards, providing jurors with some guidance may reduce the variability;" and further concluding that "giving jurors guidance in the form of information about awards in comparable cases appears to reduce the variability in awards without distorting their value"). But see McCaffery et al., *supra* note 246, at 1342, 1372 (concluding that an instruction telling jurors to consider "how much one would have to be paid to subject herself to an injury in the first place" produces an award twice as large as an instruction telling jurors to make the plaintiff whole).

344. See *supra* Part I.B.

345. See Geistfeld, *supra* note 11, at 776 ("The absence of well-defined standards for determining tort damages for non monetary injuries largely explains why such damages have been



curtailing this title of damages,<sup>346</sup> proposing its abolition,<sup>347</sup> or reducing the role of civil juries in its assessment.<sup>348</sup> Juries themselves are often perceived as the real problem in assessing non-economic damages, even though several studies show such a marked variability between awards by judges and juries does not exist.<sup>349</sup> Several scholars have elaborated suggestions for managing non-pecuniary damages, mainly by giving information to the jury.<sup>350</sup> For instance, an American Bar Association Report suggested "options should be explored to provide more guidance to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case."<sup>351</sup>

The less drastic, and comparatively more recent, approach to non-pecuniary damages is the attempt to grant equal treatment to equally injured victims and to make damages more foreseeable via a scheduled system of payments. Quite a few research proposals rest on some sort of scheduling based on injury severity and prior awards for injuries in each category.<sup>352</sup> Scheduling defines *ex ante* a subset

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and continue to be a focal point in the debate over tort reform.").

346. See, e.g., *supra* Part I.

347. See, e.g., JULES L. COLEMAN, RISKS & WRONGS 420-29 (1992); John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for NonPecuniary Losses*, 21 J. LEGAL STUD. 371 (1992); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 411 (1988) (all proposing to abolish pain and suffering in tort cases).

348. See Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1606-07 (2001) (arguing that in civil cases, juries do not have a legitimate role in protecting a litigant from oppression). Indeed, the role of juries in awarding non-economic damages has been bitterly questioned. See generally Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1224 (1994). See also Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, in REFORMING THE CIVIL JUSTICE SYSTEM 339, 342 (Larry Kramer ed., 1996) (asserting an unexplainable variation among awards for pain and suffering in wrongful death cases); Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1369-70 (1989) (asserting unjustified variation in awards for comparable injuries caused by medical malpractice and other tortious acts).

349. Indeed, most studies comparing judges' and jurors' evaluations did not find significant differences in their decision-making. See Vidmar & Rice, *supra* note 39, at 883-84 (concluding that there are not significant differences in the decision-making processes and outcomes of judges and juries, though the latter could provide more stable outcomes).

350. See Wissler et al., *supra* note 343, at 715 (concluding, on a study of twenty-five jury instructions from several jurisdictions, that "it would not be surprising if awards for an identical injury varied depending on the content of the instructions"); Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 137, 141-46, 149-50 (1990) (discussing three strategies to limit the excess of jury discretion: (a) submission of case profiles with actual awards to juries, (b) establishment of rebuttable limits for prescribed case categories, and (c) "fixed schedule of damages" with jury task limited to classifying cases into the schedule).

351. AM. BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 15 (1987); see also Blumstein et al., *supra* note 205, at 178-79 (proposing that prior damage awards should be given precedented value for future damage awards, awards that are within the middle range of prior awards are given presumptive validity, and awards that differ significantly from prior cases are subject to a "burden of explanation by the jury and heightened review by the court").

352. *But see* Geistfeld, *supra* note 11, at 792 ("If the system has been providing overly arbitrary pain and suffering awards, and if we have no method for determining the appropriate award

of characteristics for the comparison. Generally, these characteristics are injury severity level and the plaintiff's age.<sup>353</sup> According to these schemes, judges might instruct juries to focus on those characteristics before deviating from the given limits. Schedules may prescribe either a fixed amount, a range, or a fixed amount with flexibility.<sup>354</sup> Hence, the main apparatus of a damages schedule explored by U.S. scholars is comprised of: (1) a case classification system or scale that measures the severity of harm suffered; (2) a fact-finding procedure for classifying cases under the scale; and (3) a schedule to translate harm into monetary damages.

For example, Viscusi<sup>355</sup> would offer juries an advisory damages schedule, but would limit its use mainly for deterrence purpose.<sup>356</sup> Frederick S. Levin, as well, proposed binding "guidelines [that] would inform juries of the value for pain and suffering assigned by a large number of juries to injuries similar to those before the factfinder."<sup>357</sup> Levin's contribution reveals an important intuition — among several others — by drawing attention to a landmark in the study of any standardizing process that aims at reducing uncertainty and inequality *without* curtailing jury discretion or acceptable levels of personalized justice. What Levin stated was that:

Although guidelines based on the decisions of many juries would not replicate a market for pain and suffering, it would have some of the advantages of market pricing because of the greater number of persons participating in the value assessment. The guidelines provide the jury with a benchmark to focus on in determining whether the circumstances of the case before it warrant departure from the standard. Discretion is not taken away from the jury, but the guidelines help the jury exercise its discretion in an informed manner.<sup>358</sup>

The year 1995 marks a milestone in the United States in the debate on non-economic damages, because several important publications on the topic were pre-

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in the first instance, why should we make prior awards the cornerstone of future awards."). A similar alternative to scheduling methodology is called "scaling". In scaling proposals, juries select all the characteristics of the case deemed relevant to make their assessment. See Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1490 (1992). An analysis of alternatives and proposals such as "case scaling" is contained in Baldus et al., *supra* note 240, at 1249-64.

353. See Baldus et al., *supra* note 240, at 1124; see also Schuck, *supra* note 295, at 215-19 (discussing the Blumstein et al. proposal of scheduling models).

354. An example on which they are often modeled is federal sentencing guidelines. See Baldus et al., *supra* note 240, at 1124 (arguing that both scaling and scheduling of damages are a departure from current practice, because jurors currently are not given any external standards or ranges to guide their damage assessments and current practice prohibits the submission to the jury of award amounts in other cases, either actual or hypothetical). Baldus et al., however, fear that "[t]he development of a damages scheduling system with the rigor and precision of the federal sentencing guidelines likely will require substantial conceptual and empirical research with data and measures that are significantly better than those which are presently available." *Id.* at 1126.

355. VISCUSI, *supra* note 10, at 113-16.

356. *Id.* But see Croley & Hanson, *supra* note 6, at 1804-06 (criticizing this proposal).

357. See Levin, *supra* note 8, at 310.

358. *Id.*

sented. These publications mainly dealt with recommending greater information for juries. Several scholars advocated devising information tools for both judges and juries in different ways and even, in some sense, conflicting ways. This article focuses on three articles dealing at different levels with horizontal equality and information providing tools.

For instance, one of the main concerns for Professor Geistfeld<sup>359</sup> was to increase horizontal equality. He argued that the current system “fails to treat similarly situated plaintiffs alike” in awarding pain and suffering damages.<sup>360</sup> While acknowledging that the easiest way to remedy this is to provide the decision-makers with evidence of prior awards, he proposed instead that juries assess damages from an *ex ante* perspective that asks how much a reasonable person would have paid to eliminate the risk that caused the pain and suffering injury.<sup>361</sup> This model, he suggested, would avoid the problems involved in acquiring the data that other proposals for offering information to the jury would require, and the risk of perpetuating vertical and horizontal inequalities which may be endorsed by jury awards.<sup>362</sup> Geistfeld also criticized the need to determine injury categories. Again, while acknowledging that relying on injury categories provides an objective and non-speculative measurement of the non-economic injury suffered by the plaintiff, he contested the idea of a possible objective measurement failing to distinguish objective and subjective non-economic losses. However, denying in principle the possibility of standardizing non-economic damages, Professor Geistfeld seems to go against his own assumption that it is possible to give evidence of the increased risk *ex ante*: the basis of his assessment methodology.<sup>363</sup>

Another contribution published in 1995 proposed “that jurors in all personal injury actions in which non-pecuniary damages are sought be informed of the range of awards made by other juries in the same state for such damages during a contemporaneous time period.”<sup>364</sup> The author, Professor Oscar Chase, suggested that a non-binding chart be used, summarizing the range of awards — low, median,

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359. See Geistfeld, *supra* note 11, at 791-93, 805-07.

360. *Id.* at 791.

361. See *id.* at 805-07. Professor Geistfeld defines “full compensation” “by reference” to an *ex ante* perspective and seeks to ascertain how the plaintiff would have measured the cost of the pain-and-suffering injury when she faced the risk that caused the injury. *Id.* The author called his awarding methodology “*ex ante* full-compensation award.” *Id.* at 779. On the general difference significance of the shift from *ex post* to *ex ante* legal reasoning, see generally Frank. H. Easterbrook, *Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984).

362. See Geistfeld, *supra* note 11, at 792. On horizontal and vertical equality, see Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estate* 89 HARV. L. REV. 833 (1976) (criticizing the distinction between personal injury damages and other forms of permanent impairment causes such as discrimination, racism or technology).

363. Henceforth, his following affirmations seem to be somewhat tautological: “The difficulty of achieving justice in the individual case while introducing uniformity via the use of schedules is illustrated by the federal courts’ implementation of the United States Sentencing Guidelines. That experience indicates that scheduling pain and suffering damages may not be an improvement over the current system.” Geistfeld, *supra* note 11, at 792-93.

364. See Chase, *supra* note 348, at 347 (arguing for a pain and suffering schedule or grid and describing criticism of non-economic damages in tort claims).

and high — made by other juries (after any judicial reduction or reversal) in the same State during a contemporaneous time period for different categories of injury severity.<sup>365</sup> The author used a “widely-accepted nine-point injury severity” scale.<sup>366</sup> Further, the proposed chart, when offered with proper judicial instructions, would permit comparison with similar cases. Special verdicts supported by the chart would be easily upheld. Though not binding, the information was supposed to be used in a reasonable way.

This interesting proposal exposes itself to similar criticisms that were made about Bovbjerg, Sloan, and Blumstein.<sup>367</sup> However, it is important to note the different paths discussed for implementing Chases’s proposed solution. The author called on courts to introduce the novelty, but alternately suggested that attorneys may introduce this information by way of expert testimony,<sup>368</sup> and advocated the use of competing grids to convince the jury (as happened in France and Italy) for evaluating the severity of injury.<sup>369</sup> Despite the fact that the proposed main avenues for innovation in the system are in the judicial arena, Chase preferred to leave the decision to the legislature.<sup>370</sup>

Finally, professors Steven Croley and Jon Hanson did not deal directly with assessment criteria for non-economic damages, but rather challenged the conventional wisdom that tort awards for non-pecuniary loss are undesirable from an insurance standpoint.<sup>371</sup> In addition, they suggested contrary evidence for actual demand of insurance for non-pecuniary loss damages.<sup>372</sup> Indeed, for this very reason it is important to recall Croley and Hanson’s specific contribution; the article offers convincing evidence for the underlying assumption that non-economic damages may, at least to some extent, be an answer to the actual demand to protect body and health integrity. It also forcefully links the evolution of non-economic damages to social evolution and attitudes towards non-economic damages.<sup>373</sup>

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365. This proposal is rather similar to one of those proposed by Bovbjerg et al., *supra* note 240, at 908.

366. The same scale is used by Bovbjerg et al., *supra* note 240, at 920, 940-53.

367. *See infra* Part III.A.2.

368. For a general discussion concerning expert and opinion evidence regarding permanent injury or future pain and suffering, see 31A AM JUR 2D *Expert and Opinion Evidence*, § 271 (2004).

369. Chase acknowledges the problems this option might entail. Chase, *supra* note 348, at 356.

370. Arguably, it could be presumed to be a “more democratic” process.

371. *See* Croley & Hanson, *supra* note 6, at 1791.

372. *See id.* at 1841 (“If, on the other hand, jurors are behaving in accordance with their interests as consumers and with their instructions to be fair to all parties to the action, then jury-awarded pain-and-suffering damages constitute some evidence that consumers do demand insurance for such damages.”).

373. Still, this outcome seems to be an unwitting one.

## 2. The Scheduling and Scaling Debate: Distinguishing Notes

Scheduling has often been proposed as an alternative to “abolishing or arbitrarily limiting non-pecuniary damages.”<sup>374</sup> Indeed, as anticipated, various proposals for the scheduling of non-economic damages have been placed on the table. Those proposed by Bovbjerg, Sloan, and Blumstein are probably among the most often discussed and articulated propositions for guidelines in assessing non-pecuniary damages in the United States.<sup>375</sup> Their models for structuring the calculation of pain and suffering damages rely either on a binding schedule of awards, a set of scenarios, or a system of flexible ranges of monetary awards.<sup>376</sup>

Under the first option, these authors would standardize awards according to a matrix or schedule of dollar values based upon the victim’s age and the severity of the injury (either temporary or permanent).<sup>377</sup> However, due to the reduced number of proposed categories, these are too broad and all-inclusive. Correctly, each resulting cell of their matrix would offer a value for non-economic damages obtained by averaging previous awards for such injuries, but because they propose a binding schedule, juries would not be free to vary the award set out in the cell that they decided was appropriate for the case. This is problematic because it fetters the discretion of juries and such an externally imposed restraint could be easily overcome by juries by way of selecting a cell with a higher value.<sup>378</sup>

Bovbjerg, Sloan, and Blumstein’s small set of paradigmatic injury “scenarios” of hypothetical injuries and their corresponding non-economic awards would serve as non-binding guides to valuations for juries.<sup>379</sup> Though non-binding, in contrast to their other suggestions, again the reduced number of paradigmatic scenarios seem far from being able to capture all of the complexities of non-economic damages.

Their third, but no less important,<sup>380</sup> proposal is “a system of flexible floors and ceilings” of monetary awards, varying both according to the severity of the victim’s injury and his/her age. Under this proposal as well, categories would be constructed from prior award averages, using age and severity of injury.<sup>381</sup>

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374. See Bovbjerg et al., *supra* note 240, at 938 (advocating the improvement of the system for awarding non-economic damages by the introduction of information forcing “devices”). But see Marc Feldman, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980, 1000-08 (1992) (questioning the validity and effectiveness of schedules).

375. See Bovbjerg et al., *supra* note 240, at 938-39 (proposing alternative approaches to perfect the valuation of non-economic damages within the framework of the current liability system).

376. *Id.* (seeming to use the term pain and suffering to encompass all non-economic damages).

377. See Bovbjerg, *supra* note 240, at 939, 941-42. This is the proposal most similar to many developed by the judiciary in Europe.

378. Suspicions of this kind have been induced in Italy after a statute reduced the flexibility (and the amount recoverable) for minor injuries caused by automobile accidents.

379. See Bovbjerg et al., *supra* note 240, at 953-56.

380. *Id.* at 956-60. Bovbjerg et al. consider this third option as inferior to the ones previously discussed. *Id.* at 975.

381. Indeed, these scholars offer a fourth, more complex proposal in a separate article. See

In summary, this group of scholars has suggested developing an evaluation system relying on the victim's age, the seriousness of the injury, and the part of the body affected. The amounts in this schedule would be obtained from past awards, and would be adjusted by using life evaluation studies based on economic theory.<sup>382</sup> This schedule, so plotted, would have offered a value point for each given combination of the named three factors (or a range, in the adjusted version of this proposal) within which the court could have chosen according to the actual facts of the case. For exceptional occurrences, they suggested the institution of an ad hoc post-trial administrative tribunal.<sup>383</sup> Correctly, under this model, there would have been no diminution in the amount awarded, because the compulsory range of evaluation was to be drawn up using past awards.<sup>384</sup>

From this article's analysis,<sup>385</sup> there is no doubt that a clear set of guidelines relying on age and the severity of the injury made available to judges and juries would prove extremely useful, but a compulsory valuation grid seems to be excessively rigid<sup>386</sup> and would lose the flexibility vital for a case-by-case evaluation. Moreover, mandatory scheduling would be difficult to implement, once again leaving any change in the real world to a difficult political and constitutional debate.<sup>387</sup> It also seems that "achieving greater precision across cases, . . . simplifying litigation, and assuring all litigants that their awards are relatively fair compared with other similarly situated" is an insufficient rationale for abandoning fine-tuning and ad hoc decisions.<sup>388</sup> These proposals merely freeze the *status quo ante* in contrast to the preliminary assumption that this status quo is wrong.

These prominent scholars assert the need for a "common law" of damages. They suggest developing a reporting system to record damage awards that would have value as precedent for future awards. Indeed, one of their proposals for the use of prior awards as precedent requires more accountability from juries by offering them "more explicit and objective standards" through a complete recording system of awards both at trial and appeal, but it attributes presumed validity to

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Blumstein et al., *supra* note 205, at 178-79.

382. See Bovbjerg et al., *supra* note 240, at 939.

383. *Id.* at 948.

384. Instead, proposals by other scholars tend to push the amount for non-pecuniary losses downward. See, e.g., Danzon, *supra* note 35, at 101, 118-19, 122; see also Levin, *supra* note 8, at 303 (developing a thesis based on previous assessment by judges and juries).

385. See discussion *supra* Part II.

386. For a commentary defending a flexible system of guidelines, see Levin, *supra* note 8, at 313-28.

387. See Schuck, *supra* note 295, at 213-15 (illustrating the political opposition such a proposal would receive). The possible inefficiencies of an out-of-date scheduling for a deterrence perspective are fully investigated by GUIDO CALABRESI, *THE COST OF ACCIDENTS* 203 (1970). For a description of the political and constitutional conundrum related to tort reform see generally Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231 (2003); Kevin J. Gfell, Note, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions* 37 IND. L. REV. 773 (2004); George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683 (2001); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional* 53 EMORY L.J. 1 (2004).

388. See Bovbjerg et al., *supra* note 240, at 947.

previous middle range awards.<sup>389</sup> Further, at least one of their proposals stated that significant departures from previous awards would require more strict scrutiny, and if juries selected the upper level of previous awards, they would need to justify their choice by identifying the specific factors which precipitated their decision.<sup>390</sup> Obviously, all of these constraints are easy targets for criticism because of the across the board cutting of actual awards and because jury discretion would be unduly fettered. Indeed, though highly debated, these proposals were not implemented. According to their creators, one persuasive explanation of this is the proposals required legislative implementation.<sup>391</sup>

Indeed, all of the American approaches we have so far described require at least special verdicts for non-pecuniary damages and an accurate national reporting system on which a compulsory revision of awards by trial and appellate judges would operate.<sup>392</sup> The body of debate on the assessment of non-economic damages deals more with review of jury awards either by trial judges or by appellate courts. The core of this dispute rests on the comparability of injuries and intangible loss and the proper role of judges in the process.

### 3. The Comparability Debate in the United States: Reviewing Jury Conduct and Its Opponents

It is remarkable to observe that a common law system, that by its very nature is built on incremental judge-made law, seems to be extremely doubtful about allowing the judicial system to evolve by way of the interaction of its various components. This skepticism is emphasized when talking about comparability review, and at times even becomes a hotly debated issue politically. There seems to be a significant trend in legal literature to sustain (and contrast) comparability review for damages accompanying intangible loss.<sup>393</sup> This trend has been depicted as a "comparability review" movement aimed, unwittingly or intentionally, at hampering both plaintiff rights and jury prerogatives.<sup>394</sup> It is important, however, to dis-

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389. *Id.*

390. See Blumstein et al., *supra* note 205, at 179, in which the authors stated, "An unexplained outlier should constitute a prima facie case for either remittitur or additur by the trial judge or an appellate holding of inadequacy or excessiveness of the judgment."

391. See, e.g., Bovbjerg et al., *supra* note 240, at 938.

392. See *id.* at 960, 962.

393. See generally Baldus et al., *supra* note 240, at 1112-67.

394. See JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 270 (2003). She concluded that:

[C]omparability review threatens the traditional system of tort compensation for intangible losses. It drastically reduces the power of juries. It significantly usurps the function of the trial judge both as overseer of the jury and as trier of fact in a bench proceeding. It undercuts the remedial principle that damages must be particularized to the individual plaintiff. It threatens the due process rights of litigants not to be bound by proceedings in which they did not participate. It evades democratic deliberation over contested values, while at the same time it may undermine the substantive tort policies of the states.

*Id.* Lind further added that "[b]ehavioralists want to shift to a system of bureaucratic rationality in order to remove decisions regarding tort compensation from democratic processes." *Id.* at 297; see also JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and De-*

tinguish “intangible loss comparability” from “comparability review” for revising jury decisions. The expression “comparability review movement” indicates an attempt to promote a comparability review of damages for intangible loss at both trial and appellate level.<sup>395</sup> Scholars criticize this trend on the assumption that it will disrupt the American tort system as it stands today, replacing it with an administrative regime similar to workers’ compensation plans.<sup>396</sup> Nowadays, some authors attribute part of the responsibility for this skepticism to behavioral law and economics scholars.<sup>397</sup>

The analysis and the approach sustained in this article cannot claim any relationship with those of behavioral law and economics. It is useful, however, to discuss some arguments against increasing comparability of damages awards for review purposes in order to anticipate possible criticisms of this article’s results. For instance, in addressing an objection that award comparison hampers jury discretion, it is reasonable to ask in reply: why are the judicial control systems of *additur/remittitur*, with the traditional “shock the conscience” standard or revision on appeal, any less invasive of the jury system and its constitutional basis? Likewise, it is quite easy to anticipate and contrast the potential allegations that the methodology proposed by this article strips powers from the jury and undermines jurors’ abilities to give justice and to fulfill the Seventh Amendment of the United States Constitution and the States’ constitutional mandates. Critics assert that the proposed approaches represent an “undue encroachment” on the traditional exercise of jury discretion and on traditional tort law.<sup>398</sup> To the contrary, the policy reasons behind this article’s suggestions aim to empower judges and juries as conscious decision-makers. Of course, this empowerment produces the side effect of also being of assistance on review — which is beneficial. In addition, it limits the possibility of an arbitrary judicial reduction or increase in awards made by juries.

The accusation made, that comparability of awards overlooks the assumption that intangible loss “affects the most unique aspects of our being and cannot in principle be equated from case to case,” is not applicable to our inferences because they are actually based on this very assumption.

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*mocratic Values*, 37 AKRON L. REV. 717, 720-29 (2004) (criticizing the creation of a regime of complex litigation designed to crudely reduce the amount of money paid by repeat defendants, because it causes negative externalities and reduce democracy).

395. See, e.g., Baldus et al., *supra* note 240, at 1125-88 (cautioning about complexities in both designing and applying non-economic damage schedules, and suggesting prototype damage schedules/guidelines to be used in awards review on Additur/Remittitur).

396. See, e.g., Lind, *The End of Trial on Damages?*, *supra* note 394, at 251.

397. *Id.* at 251-52; see also Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002) (generally criticizing the psychological research relied on by legal behavioralists to form their arguments portraying pervasive irrationality). But see Sunstein et al., *supra* note 19, at 2137-38 (claiming that the arguments made for consistency in punitive damages apply equally to intangible losses).

398. See, e.g., Abraham, *supra* note 342, at 173-75, 178, 180 (perceiving damages schedules as a departure from the “traditional conception of the uniqueness of every tort claim” intended to “capture for tort law some of the efficiencies and equities generated by non-tort compensation systems”).



Finally, scheduling — hence, comparability of awards — has been called a thwarting of the individualized assessment of both tort law and the jury system, and therefore has moved towards bureaucratic justice.<sup>399</sup> Criticisms have been made about some of the proposed features of jury assessment, such as the fact that standards are set by external bodies, and that each case is evaluated only on a limited number of distinctive features and by applying an averaging process of previous assessments.<sup>400</sup>

Of course, these critiques do not touch a system that was created mainly by the same evolution of the jury assessment process, but still may have a grip on those such as Bovbjerg, Sloan, and Blumstein. Similarly, the claim that comparability challenges the tort system in an undemocratic way (by means of changing review standards)<sup>401</sup> is inconsistent with the very history of intangible loss compensation in tort, which has never triggered the enactment of legislation but has affected judicial evolution.<sup>402</sup>

Finally, the potential improvements that this article's comparative research has revealed would be implemented solely by the judiciary.<sup>403</sup> After all, judicial scheduling would be automatically guided by previous judge or jury decisions and self-implemented by courts. Moreover, denying information to judges and juries seems inconsistent with the established practice of allowing a reviewing court to consider evidence and information that was not available to the jury in an *additur/remittitur* proceeding. However, the core issue for the different camps in the comparative awards debate is the constitutionality of comparing awards. In fact, the issue triggered is the attempt to revise the right to trial by jury.

#### 4. Comparing Awards and the Constitution(s)

There are at least two main constitutional issues to be dealt with in reference to comparing awards. The first one that was mentioned is the risk about undue restraint of the right to trial by jury. The second one is a possible alteration of the interplay between the Federal and the State levels of government. On the first issue, it is sufficient to recall that the U.S. Supreme Court, although it has not specifically ruled on remitting compensatory damages awards solely for their dissimilarity to awards in other cases, seems ready to approve even this practice.<sup>404</sup> The

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399. See, e.g., Baldus et al., *supra* note 240, at 1124-25 (perceiving damages schedules as a "significant move toward 'bureaucratic justice'"); see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (discussing the concept of bureaucratic justice).

400. See Baldus et al., *supra* note 240, at 1125-26. Of course these censures do not touch a system created by the very same evolution of the jury assessment process that created the censures, but still may have a grip on those such as the Bovbjerg-Sloan-Blumstein.

401. See Lind, *The End of Trial on Damages?*, *supra* note 394, at 254.

402. See *supra*, Part I.B-C.

403. See Bovbjerg et al., *supra* note 240, at 969.

404. See Lind, *The End of Trial on Damages?*, *supra* note 394, at 279-82. Lind argues that when "[r]ead holistically," *BMW of America v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003), "signal the Court's openness to comparative standards as a means to concretize damages for intangibles." *Id.* She also debates the impli-

second issue, which has been linked to intangible loss and the use of comparative review techniques, takes a rather more contorted turn<sup>405</sup> because it triggers the interplay between State and Federal law, on one hand, and a possible pattern for creating cryptically uniform law on the other.

Regarding the possible pattern of creating cryptically uniform law, it is quite easy to imagine that federal courts sitting in diversity would have a tendency to resolve (under State law) the cases before them in a similar way. This would produce *uniform* results in each State's common law and in the outcomes achieved in diversity jurisdiction under other States' common law. Of course, this would further be the case when applying the criteria to revise awards for intangible loss as well, but it is doubtful that the practice could be questioned in any legally meaningful way.<sup>406</sup>

With regard to the second issue — the interplay between State and Federal law — substantive tort law, including non-economic damages, is generally a State issue and *Erie Railroad v. Thompkins*<sup>407</sup> precludes any general federal common law. Yet, the tendency of federal courts to allow comparative review in diversity jurisdiction may alter the interplay between procedural and substantive law, because of the fact that procedural uniformity is a matter of “uniquely federal interest.”<sup>408</sup> Although not contradicting this author's analysis, it is worth noting that a more uniform assessment does not need to be promoted across the States and a more uniform assessment is useful even within a State or even a single jurisdiction or court.

Indeed, we suppose that even scholars in asserting “the need for a ‘common law’ of damages,”<sup>409</sup> were not technically referring to a “general federal common law” in *Erie* terms. They only advocated comparability review: a reporting system to record damage awards that would have precedential value for determining future awards as a way of creating a “common law” of damages.<sup>410</sup> After all, these scholars suggested several ways of dealing with conveying more information and proposed different methods for adopting them at the State level.<sup>411</sup>

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cations of comparing intangible loss awards for the purpose of review in light of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), criticizing the “infiltration of comparability review into diversity actions” as an attack at the core of the federal system. *Id.*; see also Robert L. Rabin, *Federalism and the Tort System*, 50 *RUTGERS L. REV.* 1 (1997) (generally analyzing the interplay between state and federal powers in the tort system).

405. See Lind, *The End of Trial on Damages?*, *supra* note 394, at 268-86 (criticizing this issue). However, the arguments set forth by Lind do not seem so pertinent to comparative assessment at the trial level.

406. Federal circuit courts are split over whether judges should have the power to control a jury's damage award for intangible losses by comparing the award rendered with damages given in other cases. See generally J. Patrick Elsevier, Note, *Out of Line Federal Courts Using Comparability to Review Damage Awards*, 33 *GA. L. REV.* 243, 251-52 (1998).

407. 304 U.S. 64 (1938).

408. See Lind, *The End of Trial on Damages?*, *supra* note 394, 268-70.

409. See Blumstein et al., *supra* note 205, at 172-85.

410. *Id.*

411. *Id.*

Since *additur* is unconstitutional in federal courts,<sup>412</sup> a third constitutional issue arises: the risk of asymmetric results in federal courts. Revising practice would work in only one direction by reducing damages awards that are outside the range of any given sample of cases making up the similarity grouping.<sup>413</sup> However, these censures of comparative review are not relevant to information-forcing tools of judges and juries, such as the ones emerging from this article's analysis because they only aim to improve judicial decision-making. In addition, the American legal system already makes use of comparative analysis of approved awards in similar cases to inform the court concerning the appropriate quantum of damages for *additur/remittitur* practice.<sup>414</sup> As one New York state court opinion summarized:

Where the exercise of discretion is at issue, certain standards of uniformity should be adhered to. This is not to say that the amount of damages awarded or sustained in cases involving similar injuries are in any way binding upon the courts in the exercise of their discretion. However, prior verdicts may guide and enlighten the court and, in a sense, may constrain it.<sup>415</sup>

Yet, another New York state case stressed the value of cumulative expertise of previous decision-making processes and its correct use:

A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded.<sup>416</sup>

After all, a judge may even be required to compare awards in a bench trial<sup>417</sup> and it seems absurd to prevent actual juries from accessing the same information.<sup>418</sup>

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412. See *Dimick v. Schiedt*, 293 U.S. 474 (1935).

413. See Blumstein et al., *supra* note 205, at 178-79 (arguing that the revising practice might only work one way: reducing damages outside a middle range).

414. See *Senko v. Fonda*, 384 N.Y.S.2d 849, 851-52 (N.Y. App. Div. 1976).

415. *Id.* at 851 (citations omitted).

416. See *Fried v. New York*, 170 N.Y.S. 697, 704 (N.Y. App. Div. 1918).

417. See *Jutzi-Johnson v. United States*, 263 F.3d 753 (7th Cir. 2001). As Judge Posner stated in his opinion,

[W]hen the trier of fact is a judge, he should be required as part of his Rule 52(a) obligation to set forth in his opinion the damages awards that he considered comparable. We make such comparisons routinely in reviewing pain and suffering awards as do other courts. It would be a wise practice to follow at the trial level as well.

*Id.* at 759 (citations omitted).

418. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001) (concluding that jurors are not passive recipients of court-

Paradoxical as it may seem, these brief remarks should have made clear that even those who oppose comparability review should not oppose comparability for assessing damages, at least for the same normative reasons they question comparative review. Using the words of an antagonist of comparability review, those reasons are summarized as follows:

Remember also that the trier of fact, be it judge or jury, has the only opportunity to directly witness the testimonial facts that the litigants bring forward. It is at trial, and only at trial, that there is an immediate ability to judge the demeanor, credibility, and competency of witnesses. Second, it is only at trial that the full narrative account of each party's view of events unfolds. This is particularly important for intangible losses, for it is only at trial that the victim can explain the full impact of a wrong on her or his personal identity, or on important goals the victim had been pursuing. Moreover, it bears critically on the question of how nonpecuniary harms are to be rationally evaluated, if they are so personal and unique. This is because the narrative form of proof which is inherent in the testimony of plaintiff and defendant, and their attendant supplementary witnesses, opens a logical space for the process of narrative rationality to take place.<sup>419</sup>

In short, it is this argument that states that there is no actual measure for non-pecuniary losses. While this article agrees with the general character of the statement, it replies with reference to those experiences in which some level of comparison among similar cases has proved useful and effective.<sup>420</sup> Indeed, no two plaintiffs are ever the same and no quantum study or scheduling system can lead one to believe that non-economic damage awards are susceptible to precise estimation.<sup>421</sup> Nevertheless, the richness of each jury analysis should not be dispersed, and ways for making use of it should be found. Comparison sustains methods for introducing a degree of procedural equality and promoting greater uniformity in damages awards for plaintiffs with similar injuries.<sup>422</sup>

### **5. A Brief Note Distinguishing Tort and Alternative Approaches to Intangible Loss**

It is important to clarify from the outset two main points in reference to the interplay between tort and its alternatives in dealing with intangible loss. First, tort law requires full compensation, while tort alternatives, despite their focus on compensation, are an occasion to eliminate non-economic damages. Indeed, workers' compensation and no-fault insurance schemes are the archetype for statutorily

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room communications and the traditional approach of merely forbidding evidence on certain topics is of limited value: jurors are influenced no more than judges by information).

419. See Lind, *The End of Trial on Damages?*, *supra* note 394, at 334.

420. See *supra* Parts I.C., II.

421. Quantum Study, *Louisiana Personal Injury Awards*, 46 LOY. L. REV. 651, 652 (2000).

422. See *infra* Part III.B.4.

limiting non-economic damages recovery in exchange for guaranteed recovery of economic losses.<sup>423</sup> It is not the aim of this article to adopt a similar perspective.

Second, all instances in which European legislators have tried to follow a similar path, unduly restricting non-economic damages under tort law, have triggered strict constitutional scrutiny.<sup>424</sup> In addition, compensation plans share some features used in assessing non-economic damages under European tort law that are possibly useful in the United States as well, but this sharing does not lead to equalizing tort law and compensation schemes on this account either.

Certainly other personal injury compensation systems could be taken into account in two ways when setting tort compensation for non-economic damages, but in both instances only in so far as the two systems are genuinely comparable. First of all, other compensation schemes might be a point of reference for monetary awards, but as already explained this is not the case. The amount of social security benefits or damages for work related injuries should not be influential because they are not designed to achieve corrective justice, and therefore are not fully reparative in the way that tort law, in principle, endeavors to be. Compensation schemes either eliminate payment for non-economic damages or reduce them in a *quid pro quo* exchange.<sup>425</sup>

More convincingly, alternative compensation schemes may be of help in assessing non-economic damages under tort law. They already use scales of injury. The expertise, and of course the shortcomings experienced, should be taken into account in selecting the guiding criteria for assessing injury levels.

Although the assessing models that have emerged in Europe today share some features with workers' compensation schemes, such as the scoring of the severity of injury suffered by the victim,<sup>426</sup> they are not a *quid pro quo*. In other words, guidelines and, broadly speaking, standardizing processes in tort law, for example, are not an exchange for easier and certain compensation. On the contrary, the guidelines developed under European tort systems rationalize the emergence of the increased demand for compensation in cases of damages to health and bodily in-

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423. See Larson's Worker's Compensation Law (MB) § 1 (June 2005). See generally ROBERT E. KEETON, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); 7A AM. JUR. 2D *Automobiles & Highway Traffic* § 357 (2004) (offering a general discussion regarding damages for pain and suffering under no-fault insurance statutes); Francis M. Dougherty, Annotation, *What Constitutes Sufficiently Serious Personal Injury, Disability, Impairment, or the Like to Justify Recovery of Damages Outside of No-Fault Automobile Insurance Coverage*, 33 A.L.R. 4TH 767 (1984); Jeffery F. Ghent, Annotation, *Validity & Construction of "No-Fault" Automobile Insurance Plans*, 42 A.L.R. 3D 229 (1972).

424. See Spain, for instance, where the automobile reform has been challenged as unconstitutional. See Elena V. Domingo, *La Corte Costituzionale spagnola sulle tabelle dei danni alla persona. Nota a C. Cost. 29 giugno 2000, n 81*, DANNO E RESPONSABILITÀ, 2001, at 23-30.

425. A somewhat different story might be told about criminal injury compensation schemes.

426. Indeed other authors in America have already stressed that for determining disability, the experience gained under state welfare programs may be very helpful. See, e.g., Sunstein et al., *supra* note 19, at 2125. In discussing guidelines for punitive damages, Sunstein concluded that, "An even more relevant model can be found in the 'grid' used for social security disability determinations, which uses age, educational attainment, and residual functional capacity to produce standardized judgments about disability." *Id.*

tegrity. Moreover, even the suggested amounts in the monetary guidelines are usually derived from the award histories of courts and are not arbitrarily selected like caps, which have been applied by American States in tort law.<sup>427</sup> In contrast with tort law,<sup>428</sup> the alternatives, such as workers' compensation plans, limit the amounts provided and do not assess them on an individualized computation of the victims' pecuniary and non-pecuniary losses.<sup>429</sup> Still, as shown in Parts I and II above, using the various judicial guidelines adopted in Europe would not take away the traditional tort feature of individualized justice. The next sections of this article clearly exemplify this.

### ***B. Judicial Scheduling for America***

European systems, as they developed over time, have succeeded in rationalizing their award systems for non-economic damages in personal injury without reducing the level of protection given to the victims of accidents. Indeed, they describe ways of determining a starting point, from which, in a coordinated way, all of the players can conduct themselves accordingly. From a theoretical standpoint, it does not need to be claimed that the assumed starting point is less arbitrary than other possible ones.<sup>430</sup> Better information would ease the life of all of the players, breaking out of the vicious circle of alleged unmanageable expansion in awards for intangible loss, turning it into a virtuous one. Consider that victims are interested in knowing how courts have decided similar cases before, and insurance companies and the wrongdoer need to know the levels of expected damages. However, if they cannot rely on court evaluations, the information they rely upon is only one-way (each one has a different estimate and perception of the loss) and there are fewer possibilities for settlement. The solution is the opposite when previous court assessments are made certain and trustworthy. If, and only if, the victim knows the reasonably expected outcome of litigation will he or she be able to evaluate a settlement offer intelligently.<sup>431</sup> Correspondingly, wrongdoers and insurance companies must know the predictable outcome of a lawsuit, and that this information is

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427. Paradoxical as it may seem, caps are no less arbitrary than the "arbitrary" determination of non-pecuniary damages they pretend to substitute. After all, caps are based on the inference that there is no possible measure for non-pecuniary damages. See Abraham, *supra* note 342, at 187-88 (noting that when caps are placed on pain and suffering awards "the unique circumstances of those seriously injured victims whose pain and suffering would [exceed the cap] therefore are ignored"). See *id.* at 190 (noting that individuals whose "claims might lie outside the high end of any particular schedule [of damages] bear the risk that they will be less than 'fully' compensated because their special characteristics are not taken into account;" and further discussing how statutory caps on pain and suffering awards conflict with traditional tort principles).

428. See Abraham, *supra* note 342, at 173 (describing "the right to custom-tailored compensation for the actual loss suffered by the claimant" as a notion that lies at "the core of our traditional conception of a tort claim").

429. See, e.g., ROBERT KEETON ET. AL., TORT AND ACCIDENT LAW: CASES AND MATERIALS 867 (3d ed. 1998) ("In general, worker's compensation aims to provide full recovery of medical and rehabilitation expense, but only limited recovery of wage loss, and no recovery for pain and suffering as such.").

430. See *supra* Part II.A.3-4.

431. As described by ATIYAH, *supra* note 8.

also held by the victim to make it likely they will extend a reasonable offer for settlement. Both parties will, thereby, save the costs of trial by reducing the level of litigation and managing non-pecuniary loss compensation in the best way.<sup>432</sup>

The overall approach garnered from Europe indicates a good level of performance, both in general as well as on a case-by-case basis. Indeed, insurance premiums are fixed using *ex ante* macro-evaluation according to previous average payment (damages) regarding macro-evaluation of aggregate liquidation of non-pecuniary loss per class of injuries. Nevertheless, courts assess damages on an *ex post* case-by-case basis and should continue to do so in the United States as well. If insurers and potential wrongdoers could rely on the prospective awards in courts, their behavior would probably follow accordingly in spreading the risk and setting activity and care levels. If damages recovered are, by assumption, equal to actual damages, the system will work efficiently.<sup>433</sup>

The awarding systems in the European countries which have been examined have succeeded in upholding and guaranteeing the stability of the compensation system. However, to work elsewhere, these European insights require some necessary conditions (not necessarily reforms). Above all, they presuppose a clear bifurcation between non-pecuniary damages that can be ascertained objectively on pathological grounds, and those that cannot. This differentiation, already existing in the United States, has offered a basis for improving both predictability and case-by-case assessment in Europe. Indeed, the traditional common law invitation to the jury to rely on the "enlightened conscience of impartial jurors acting . . . to compensate the plaintiff with fairness to all parties"<sup>434</sup> does not mean reliance on their arbitrary judgment.<sup>435</sup> Jurors need information to "enlighten their conscience" as impartial decision-makers.

The lesson from all of the examples offered by Europe is to neither reduce nor constrain the discretion of the judicial system, but to make it an informed process. Justice differentiates between discretionary and arbitrary or blind decisions, and the less arbitrary choice should be selected.<sup>436</sup> A choice that, by the way, may even be more efficient. The aim of these last sections is not to propose a full change in the American system, but more modestly to test one possible innovation of judicial scheduling in the United States: adopting a Normalized Values Schedule at the

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432. See *supra* Part III.A.4.

433. See POLINSKY, *supra* note 302, at 15-25 (providing a more detailed explanation of this statement in economic terms).

434. See NEW MEXICO SUPREME COURT, UNIFORM JURY INSTRUCTIONS, CIVIL § 18.7 (State of N.M. Sup. Ct. 1980).

435. See Croley & Hanson, *supra* note 6 (explaining the interest of jurors to behave as rational consumers).

436. Legal literature often refers to arbitrariness and excessiveness of awards for pain and suffering and loss of enjoyment. See, e.g., DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 13, 99-101, 106-08, 174-75 (1991); Bovbjerg et al., *supra* note 240, at 919-27, 936-38; Leebron, *supra* note 8, at 256, 288-92, 309-19, 322-25, 349-55; W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 203-08, 214-19 (1988).

court level to increase horizontal and vertical equality without necessarily preventing variability of awards among different jurisdictions.

### 1. Reframing the Results: Basic Elements

The United States could follow either of the two main approaches emerging from the European experience for judicial scheduling, at different levels.<sup>437</sup> Both of these approaches rely on the fact that certain non-economic damages assessed in cases of personal injury present a reliable objective basis for description in medical terms, by way of medical scoring or descriptive tables. Similarly, the historical evolution of non-pecuniary damages in America reveals a pattern of a more convincing, predictable, and equitable assessment, by giving more information to the decision-maker. The path the American experience is following is capable of taking either direction without too much disturbance of settled practices and rules. However, this Part will only explore one simple possibility: let juries and judges be in some way informed of previous verdicts, and let them use an NVS to determine the unitary base value point, either according to previous decisions or by their own valuation.

The creation of guidelines for non-economic damages by the judicial system, such as the NVS, requires defining the categories of injuries, and relying upon objectively assessable factors, such as age and severity of the injury. Beyond their statistical suitability, age and severity of injury are also objective measures easily applied in practice, and medical science has developed internationally reputed scoring systems for assessing them.<sup>438</sup> After all, the Restatement (Second) on Torts: § 905 Compensatory Damages for Non-Pecuniary Harm suggests that “Compensatory damages that may be awarded without proof of pecuniary loss include compensation (a) For bodily harm, and (b) For emotional distress.”<sup>439</sup>

Further, the Comment on (a) describes bodily harm as:

[A]ny impairment of the physical condition of the body, including illness or physical pain. . . . It is not essential to a cause of action that pecuniary loss result. Furthermore, damages can be awarded although there is no impairment of a bodily function and, in some situations, even though the defendant's act is beneficial.<sup>440</sup>

This rule captures the result described in Italy as non-economic damages for *danno alla salute*.

The suggestion of emphasizing the diversity among injuries and providing this information is not a new one. It was proposed after empirical research was done on non-economic damages award procedures<sup>441</sup> for helping jurors to form a

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437. See *supra* Part I.C.

438. See *infra* Part III.B.2.

439. RESTATEMENT (SECOND) OF TORTS § 905 (1979).

440. *Id.* cmt. a.

441. See, e.g., Wissler et al., *supra* note 246, at 817.



reference scale with which to compare the case in their hands.<sup>442</sup> The idea of pooling information on jury awards made for similar injuries and making them available to juries as guidance for reaching their damages awards for intangible loss proved to be rewarding as well in several experiments with juries<sup>443</sup> and judges.<sup>444</sup> Still, some features of an NVS make this article's proposal more effective than previous ones: (1) it does not require statutory intervention; (2) it promotes both vertical and horizontal equality in different ways and at different levels; (3) it offers greater precision and ability to consider the pre-injury state of health, the post-injury recovery possibilities, lifestyle, occupation, and social circumstances; (4) it encapsulates them in an easy schematic way; (5) it can be adopted and adapted by any jurisdiction without necessarily requiring the imposition of monetary scheduling on juries. Finally, note that features (1)-(4) are already factors judges and jurors are required to take into account.<sup>445</sup>

## 2. The Basic Elements at Work in the United States: Severity of Injury, Medical Evaluation and Age as Guidelines

Severity of injury is already a good predictor of the award in legal systems, especially if some medical scoring system expresses it in a way that is scientifically reliable and easily understandable by the decision maker.<sup>446</sup> Section 905 of the Restatement indicates the severity of the injury, its permanence, and the age of the plaintiff (which affects the duration of pain and suffering associated with permanent injuries) as predictors of award size. Studies both on empirical data and mock jurors show that measures of injury type, severity, and permanence are consistently the strongest predictors of awards.<sup>447</sup>

Moreover, in the United States, severity of injury is already a very important ingredient in judicial non-economic damages assessment.<sup>448</sup> According to infor-

442. See Sunstein et al., *supra* note 19, at 2104.

443. See Saks et al., *supra* note 339, at 243.

444. See Baldus et al., *supra* note 240, at 1109.

445. See RESTATEMENT (SECOND) OF TORTS § 905 cmt. i (1979).

446. However, the U.K. Law Reform Commission refused the proposal to give more credit to recognized medical scoring systems to assess the claimant's injury, and then to assign tariff values to the various scores. See THE LAW COMM'N, *supra* note 34, at 98; see also Ellen Smith Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Permanent Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964 (1990) (assessing critically the latent value judgments, validity, and bias in permanent impairment guidelines).

447. See Jane Goodman, Edith Greene & Elizabeth F. Loftus, *Runaway Verdicts or Reasoned Determinations: Mock Juror Strategies in Awarding Damages*, 29 JURIMETRICS 285, 289, 308 (1989) (further arguing that jurors try to make equitable awards, but not necessarily based on legally permissible means of computing damages); Valerie Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 LAW & HUM. BEHAV. 151 (1989); Saks et al., *supra* note 339, at 243; Vidmar & Rice, *supra* note 39, at 896; Wissler et al., *supra* note 361, at 181. Still the same studies found "vertical equity" (high correlations between injury severity and awards) but substantial "horizontal inequity" (considerable variation in the amounts awarded for injuries at the same level of severity).

448. See Wissler et al., *supra* note 343, at 736, stating:

Research has found injury seriousness and duration to account for between half and three fourths of the variation in awards (vertical equity), concern has focused on unex-

mation reported by scholars<sup>449</sup> in several jurisdictions, instructions offered to juries indicate that they should also consider physical or bodily injury in determining general damages.<sup>450</sup> In other jurisdictions, the instructions note that “disability” should be considered in determining damages,<sup>451</sup> while others mention “physical impairment,”<sup>452</sup> “impairment of faculties,”<sup>453</sup> inability of part of the mind or body to function in a normal manner,<sup>454</sup> or loss of the use of a part of the body.<sup>455</sup> Of course, still other jurisdictions’ instructions do not mention this aspect of the injury.

Indeed, sometimes courts already make express reference to a percentage of disability.<sup>456</sup> In addition, some studies have rated the severity of the injuries on

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plained variation within levels of injury seriousness (horizontal inequity) and on other possible errors in the assignment of general damages awards. . . . Providing jurors with information about awards in other, similar cases has been shown to reduce award variability without altering the size of awards.

See also Leebron, *supra* note 8, at 256 (concluding that the variability observed, however, is consistent with the view of the jury as a survey mechanism).

449. See Wissler et al., *supra* note 343, at 715-16.

450. See, e.g., Eleventh Circuit Pattern Jury Instructions, Civil Cases: Damages Instruction § 2.1 (West 2000); Fifth Circuit Pattern Jury Instructions, Civil Cases: Compensatory Damages §§ 15.2, 15.4 (West 1999); Louisiana Civil Law Treatise, Civil Jury Instructions § 18.01 (H. Alston Johnson 2000); New York Pattern Jury Instructions, Civil Cases § 2:280 (West 1998).

451. See, e.g., ALABAMA PATTERN JURY INSTRUCTIONS, CIVIL § 11.04 (Ala. Pattern Jury Instructions Comm. 2005); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: DAMAGES INSTRUCTION § 2.1 (West 2000); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: COMPENSATORY DAMAGES § 15.4 (West 1999); HAWAII JURY INSTRUCTIONS, CIVIL §§ 8.3, 8.60 (Hawaii State Judiciary 1999); ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL § 30.04 (Ill. Sup. Ct. Comm. on Jury Instructions in Civil Cases 1995); LOUISIANA CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 18.01 (H. Alston Johnson 2000); NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 7.2 (West 1997); WASHINGTON PATTERN JURY INSTRUCTIONS, CIVIL § 30.05 (Wash. Sup. Ct. Comm. on Jury Instructions, 5th ed. 1992); WISCONSIN JURY INSTRUCTIONS, CIVIL § 1766 (Wisc. Civil Jury Instructions Comm. 2004); WYOMING CIVIL PATTERN JURY INSTRUCTIONS § 4.01 (Wyoming Bar 2003).

452. See, e.g., ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 20.06 (Civil Pattern Jury Instructions Comm. 2005), available at <http://www.state.ak.us/courts/juryins.htm>; COLORADO JURY INSTRUCTIONS, CIVIL § 6:1 (Colo. Sup. Ct. Comm. on Civil Jury Instructions, 4th ed. 2002); TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS § 7.2 (State Bar of Tx. Pattern Jury Charges Comm. 1998).

453. See, e.g., IDAHO CIVIL JURY INSTRUCTIONS § 910-1 (Idaho Pattern Jury Instruction Comm. 1988).

454. See, e.g., IOWA CIVIL JURY INSTRUCTIONS § 200.10 (Iowa State Bar Ass’n 2005).

455. See, e.g., NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 810.35 (Inst. of Gov’t 1998); see also 1 MELVIN M BELLI, MODERN TRIALS §§ 67.1-67.10 (1954) (A leading plaintiff attorney’s handbook for other practitioners); Williard H. Henson et al., *A Quantum Study of Pain and Suffering Awards for Personal Injuries in the Louisiana Appellate Courts*, 31 LOY. L. REV. 889 (1986) (surveying Louisiana appellate court holdings for pain and suffering awards). Note that in Germany *Schmerzensgeldtabellen* started as private attorneys’ handbooks.

456. Examples of cases referring to percentage of disability assigned to the plaintiff in personal injury cases are easily available by perusing studies on quantum in State and federal courts. See, e.g., *Louisiana Personal Injury Awards*, *supra* note 421, at 651. For further information, see generally the biennial *Survey of Admiralty Personal Injury* of THE MARITIME LAWYER.

scales with six, eight, or nine points.<sup>457</sup> Quite often they use the Severity of Injury Scale developed by the National Association of Insurance Commissioners, which ranges from one (emotional injury only) to nine (death).<sup>458</sup> Clearly such a schedule is far too tight, because each point on such a scale necessarily must capture a range of injuries having different degrees of severity and quality.<sup>459</sup> Another descriptive injury typology, universally available, is the coding format that is used by the medical community to classify injuries as produced by the World Health Organization, known as the International Classification of Diseases (ICD-10).<sup>460</sup> In any event, several scientifically-based and reputed scoring systems are available to (and sometimes used by) courts.

With reference to age as a factor for differentiating awards for non-economic damages, it is again § 905 of the Restatement which stresses its importance.<sup>461</sup> Indeed, there are various reasons for selecting age as a principle variable. One main reason is duration. The younger the victim, the more he or she will cohabit with the intangible loss according to his or her life expectancy.<sup>462</sup> Other considerations suggest taking age into account. For example, the injury may affect child development or the recuperative powers of an older victim. Age is also the most objective factor, and is virtually impossible to cheat or manipulate. In an NVS, for instance, it can statistically reflect some features of the incidence of the intangible loss. Finally, the suggested use of age and severity of injury as the main factors in framing the intangible loss has found empirical support in the European experiences.<sup>463</sup>

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457. See, e.g., Randall Bovbjerg, Frank A. Sloan, Avi Dor, Chee Ruey Hsieh, *Juries and Justice: Are Malpractice and Other Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5 (1991) (discussing a study using a six point scale); PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 74-75 (1985).

458. See Nat'l Ass'n of Ins. Comm'rs (1980) Severity of Injury Scale (ranging from 1 for emotional injury only to 9 for death). See generally Nat'l Ass'n of Ins. Comm'rs, [www.naic.org](http://www.naic.org) (last visited Nov. 23, 2005).

459. See Gary T. Schwartz, *Proposals for Reforming Pain and Suffering Awards*, in *REFORMING THE CIVIL JUSTICE SYSTEM*, 416, 419 (Larry Kramer ed., 1996).

460. WORLD HEALTH ORGANIZATION, *INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND HEALTH RELATED PROBLEMS* chs. XIX-XX (10th rev. 2003), available at <http://www3.who.int/icd/vol1.htm2003/fr-icd.htm> (providing classifications for external source injuries, morbidity, and mortality). This version is the latest in a series that was formalized in 1893 as the Bertillon Classification or International List of Causes of Death. World Health Org., *Int'l Classification of Diseases*, <http://www.who.int/classifications/icd/en/> (last visited Nov. 23, 2005); see, e.g., Rachel Rosser & Paul Kind, *A Scale of Valuations of States of Illness: Is There a Social Consensus?*, 7 INT'L J. EPIDEMIOLOGY 347 (1978) (identifying 29 possible physical states of permanent injury, ranging from healthy to comatose).

461. See RESTATEMENT (SECOND) OF TORTS § 905 cmt. i (1979) (discussing ramifications of the injured's age on the measure of recovery).

462. Of course, reduction of life expectancy due to the harm is another loss, but this comment does not address this type of loss.

463. See *supra* Part I.C and II.A. Moreover, several empirical studies show that severity of injury is a good predictor of the size of a pain and suffering award. See, e.g., Bovbjerg et al., *supra* note 240, at 923 (showing that severity of injury explains about 40% of variation); see also AUDREY CHIN & MARK A. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 56, 57 (1985); Chase, *supra* note 348, at 787; Frank A. Sloan & Chee

Undoubtedly, the NVS requires damages to be itemized in some way. American case law, however, already shows a trend requiring the jury to distinguish the amount of general damages for non-pecuniary harm and the amount of special damages for pecuniary harms.<sup>464</sup> Several States already use itemized verdict forms that require the awards for each title of damages to be indicated separately.<sup>465</sup> This procedure is supposed to be helpful in reviewing awards on appeal, though evidence of its incidence on variability of the awards seems scarce.<sup>466</sup> Still, to work out a monetary schedule to be coupled with a NVS requires the acquisition of a certain amount of data. The next section will test the availability of such a basis.

### 3. Building Database(s), Reporting System(s) and Guidelines

There are at least two possible ways to build a monetary award system that relies on existing substantive law.<sup>467</sup> One possibility is to look backwards and collect information on previous awards. An alternative path would be to start collecting this information going forward. While the first pattern offers an immediate basis; the second lacks an existing starting basis for judicial assessment. In any event, both could be performed on a court-by-court level, a jurisdiction-by-jurisdiction level, or at a level that is more extensive and covers more than one State.<sup>468</sup> None of these alternatives necessarily requires statutory intervention. Each can easily be fostered by courts and private independent research at universities, as the Italian, French, and British experiences demonstrate. All of the players in the personal injury compensation game have an interest in, and should contrib-

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Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation System Fair?*, 24 LAW & SOC'Y REV. 997, 1007-08 (1990); Laura R. Willett, Adam P. Wilczek, Richard Trout & Jeffrey L. Carson, *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 781 (1992).

464. See Baldus et al., *supra* note 240, at 1174.

465. See, e.g., COLORADO JURY INSTRUCTIONS, CIVIL § 6:1A (Colo. Sup. Ct. Comm. on Civil Jury Instructions, 4th ed. 2002); TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS § 7.2 (State Bar of Tx. Pattern Jury Charges Comm. 1998).

466. See Wissler et al., *supra* note 343, at 720.

467. Both patterns would require a protocol to ensure unbiased data and uniformity.

468. Some authors already advocated a comprehensive reporting system to record personal injury damages awards as their core proposal. See Blumstein et al., *supra* note 205, at 180-81, proposing that a reporting system should report and tabulate for each verdict:

(a) nature and extent of injuries; (b) some finding on each element of pecuniary damage that the law recognizes for the case such as past wages, medical, and other losses; the value of future wages, medical, and other losses; assumptions about future inflation of such losses and discount rate chosen to bring future losses to present value; (c) types of noneconomic losses and total dollars allowed for them; and (d) adjustments made for comparative negligence, prior settlements by other defendants, joint and several liability, or other factors. Where awards are judicially altered or upheld on review, the new results should be noted. It would be prudent to include a short qualitative description of each case as well; statistically unusual cases often seem less odd when their context is clearer. . .

(citations omitted). To cover small states lacking either data or resources, Blumstein et al. further proposed to let them use comparable data from other states or to build a national reporting system that would be used by all states. *Id.* at 180. Both alternatives could allow "for reporting data by state, region or locality." *Id.*

ute to, the establishment of an unbiased set of data because it would be helpful not only during litigation but also in preventing litigation by facilitating the estimation of the value of a claim and settlement at the pre-trial stage. The European experiences give us an idea about this pattern.

Perhaps one possible criticism of looking at previous or current awards may reiterate the theme that it is impossible to credibly maintain that previous awards of non-economic damages are correct. But, it is equally impossible to argue they are undoubtedly incorrect. On the one hand, reliance on the basic principles of justice in the American system would give credibility to the jury system.<sup>469</sup> On the other hand, extensive horizontal variability would undermine previous jury awards as a basis for calculation.<sup>470</sup>

Still, we should in some fashion codify the mass of evaluation performed by the jury system and use it meaningfully. It is true that the very lack of guidelines is what triggers the suggestion to improve the system, but the current system is already a basis to build on: a basis that other legal systems show can save resources and is susceptible to improvement.<sup>471</sup> At least, this is the actual way in which, after World War II, several European legal systems refined their mechanisms for awarding non-economic damages.<sup>472</sup> It is important to stress again that it is one thing to hamper the jury decision-making process by imposing rigid schedules or guidelines and another to capitalize continuously on the work of current and past juries by extracting information from their efforts, thereby improving the ability of subsequent juries and judges to act upon them.

All of the European jurisdictions and courts examined have proceeded on a trial and error basis, treating the previous steps as a foundation which can be worked on and improved by smoothing out irregularities and errors.<sup>473</sup> Still, Euro-

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469. After all, several studies conclude juries' vertical variability is no greater than judicial one. See generally Croley & Hanson, *supra* note 6, at 1906-14 (concluding that *ex post* quantification of non-pecuniary losses by the tort system does not seem to violate any of the social norms that are transgressed by the quantification of non-pecuniary losses *ex ante*).

470. But see Sugarman, *supra* note 15, at 594 ("The idiosyncrasies of jury composition combine to hand similar victims altogether dissimilar results.").

471. To use two meaningful formulas: "[T]he use of the aggregate wisdom of past practice is quite reasonable — certainly more so than reinventing dollar values in each case . . . Linkage to past awards, in short, provides a helpful empirical foundation upon which to base — and justify — policy judgment." See Bovbjerg et al., *supra* note 240, at 961.

472. See *supra* Part I.C.

473. Note that the Judicial Studies Board periodically revises its Guidelines. See World Health Org., *supra* note 460. Italian courts periodically revise their tables publicizing their updated versions as well. Law reviews collect updated guidelines and tables and publish them, sometimes with criticisms, finding controversial issues and debating them. See e.g., *Il calcolo del risarcimento a Torino*, in GUIDA AL DIRITTO, June 2005, at 34-37; *Il calcolo del risarcimento a Torino*, in GUIDA AL DIRITTO, June 2005, at 44-73. A subsequent version by the courts may incorporate such commentaries and the dialogue will go on ameliorating the overall result. Medical tables vary as well. See Sunstein et al., *supra* note 19, at 2128, stating:

There is a great deal to be said for the incremental step of civil sentencing, building on current practice and ensuring, in every jurisdiction, a serious oversight role for judges, calling not for individual judicial judgments about individual cases, but for judicial comparisons among various similar cases, so as to ensure against dramatic outliers.

pean experiences have shown that one important feature of relying on previous awards is the availability of proper databases to work from. Of course, it is also debatable whether the actual dimension of databases available to courts, and even the reported cases, are representative of the actual universe of cases and decisions. However, this article has sought to demonstrate both that a coherent principled system is possible and that it does not necessarily replicate any real evaluation.

Even accepting the criticism that the proposed approach may incorporate previous wrong or excessive awards, whatever plausibility these claims might have, the proposed methodology will bring about invaluable stability and predictability to the system, and in the long run any discrepancy would be ironed out. Indeed, databases and reporting systems have developed in Europe in a gradual and independent way by incremental steps.<sup>474</sup> Moreover, the NVS model would not require such a large set of cases, and each court can easily develop its own *basic monetary award* with a quick search of its own records or even let the jury fix it case-by-case.

Last, but not least, building the database would serve the single purpose of setting a preliminary *basic monetary award* to operate in conjunction with the NVS. For instance, juries could even continue to be prevented from having information on previous awards — i.e., the previous basic monetary award — and the use of the NVS would still convey rationality and both horizontal and vertical equality in the awarding system.

Bearing this in mind, the American status can be briefly outlined with reference to existing sources of data. To some extent, the United States is even better positioned than were the original European jurisdictions which were examined. It is true that in the United States officially reported decisions refer almost exclusively to general principles or approaches,<sup>475</sup> and a reduced number of cases are released for publication pursuant to the policy to publish mainly cases with value of precedent. A reversal of this policy would be beneficial, and it might only involve the publication of the needed data (an enhanced statement of facts related to damages and the amounts actually awarded).<sup>476</sup> Further, almost no systematic offi-

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474. Another counterargument is that expanding retrospectively the pool of cases to be compared involves the risk of undercutting the results because of inflation. For instance, taking into consideration previous awards clearly requires all monetary values be adjusted for inflation. However, to remedy this potential shortcoming, it is sufficient to adjust the awards for inflation in the earlier cases, as it is regularly done in the UK and continental Europe. See generally Michael A. Rosenhouse, Annotation, *Effect of Anticipated Inflation on Damages for Future Losses – Modern Cases*, 21 A.L.R. 4TH 21 (1983) (adjustment for cases tried in the U.S.).

475. There are several jury verdict-reporting services, including the NEW YORK STATE JURY VERDICT REVIEW AND ANALYSIS (B. Kessler ed.); LAW REPORTER (Association of Trial Lawyers of America); PERSONAL INJURY VALUATION HANDBOOK (Jury Verdict Research, Inc.). Furthermore, the NEW YORK JURY VERDICT REPORTER is published monthly and collects and reports approximately 90% of all jury verdicts in personal injury cases tried to verdict in the metropolitan New York area and 75% of all such verdicts in the remaining counties of the State. It must be noted that the prime source for the awards reported are documented submissions by attorneys.

476. See William L. Reynolds & William M. Richman, *The Non-Precedential Precedent – Limited Publication and No Citation Rules in the United States Courts of Appeals*, 78 COLUM. L.

cial record is now kept of all of the fact-finders' deliberations or findings to help inform future decisions.

Still, according to information cited in legal literature, ten years ago it was estimated that in several jurisdictions intermediate appellate opinions were published at least at some levels (e.g., Indiana 30%; New Jersey, 25%; Tennessee, 10%), while federal circuit courts of appeal publication rates varied "from 31% in the Eighth Circuit to 82% in the Third Circuit."<sup>477</sup> These levels of publication, which at first sight may appear unpleasantly low, are much higher than the analogous level of publication available from the outset in Europe. In addition, in 1989, scholars who proposed much more articulated reporting systems asserted that the basis for such databanks existed in some jurisdictions.<sup>478</sup> The situation has dramatically improved since then.<sup>479</sup>

Just in browsing the Internet, it becomes apparent that several websites of journals and compilations claim to have thousands of jury verdicts related to non-economic damages.<sup>480</sup> At first glance, every State has at least one (sometimes more than one) private publication covering verdicts for personal injury damages.<sup>481</sup> Of course, this article does not claim that these private compilations are necessarily without bias or complete: it only claims that they exist, unlike the situation in Europe before courts fostered the evolution of their national systems.<sup>482</sup> Stimulated by the result, searches on LexisNexis and Westlaw were run. The outcome was once again surprising; most of the materials on which the European solutions have relentlessly evolved are present and readily available. Most of the needed information is accessible: summary of facts, awards, the age of the victim, specific injury information, and so forth. Often verdicts are already divided by

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REV. 1167, 1188-89 (1978) (summarizing arguments for and against policies limiting publication).

477. Baldus, *supra* note 240, at 1175 n.165 (arguing an opinion publication rate of about 35% to 45% in tort and civil rights cases).

478. See Blumstein et al., *supra* note 205, at 181 n.41, stating:

In April 1989, Tennessee enacted legislation that requires civil clerks and masters to report the following data monthly to the Judicial Council: (1) The number of cases filed claiming money damages for personal injury or death; (2) The number of such cases actually proceeding to trial; and (3) For each such case actually proceeding to trial, the number of cases in which the plaintiff was awarded some money damages for personal injury or death, the amount of the verdict given in a jury case, the amount of judgment in a case without a jury, and any additur or remittitur awarded in the case by the trial judge. TENN. CODE ANN. § 16-21-11 (Supp. 1990). The Tennessee Judicial Council is to develop a reporting form, compile the data, and report on findings annually.

479. See, e.g., PERSONAL INJURY VALUATION HANDBOOK (offering a detailed typology with approximately 100 categories classified by injury type, anatomical location of the injury, cause of injury, premises where the injury occurred, and the age and gender of the injured party); see also Jury Verdict Summaries from the Nat'l Ass'n of State Jury Verdict Publishers, <http://www.juryverdicts.com/> (last visited Nov. 23, 2005); MoreLaw.Com, <http://www.morelaw.com/> (last visited Nov. 23, 2005).

480. See *supra* note 479.

481. See *supra* note 479.

482. See *supra* note 479.

jurisdiction, facilitating the research with enough data to work out, for instance, the basic monetary award to use with a NVS in a specific court.<sup>483</sup>

This means that initial research and publication of data have started and can be implemented more scientifically. What this means again is that private initiative, as in Europe, is already paving the way for more consistent sets of information to be distributed to judges and juries, and not only to lawyers and newspapers as mainly happens now in the United States.<sup>484</sup> The available “raw materials” in the form of reported facts are probably more extensive than the available ones in the United Kingdom, France, Germany, and Italy even today.

As discussed, in Italy the self-imposed judicial guidelines provide a means of comparing the case at hand with those that preceded it.<sup>485</sup> The main attributes of the case are charted on the x and y-axis.<sup>486</sup> Each cell describes the attributes in terms of percentage of permanent disability and unity monetary value.<sup>487</sup> Courts obtain the monetary value in different ways from awards in previous cases.<sup>488</sup> Developing a similar instrument in the United States is feasible, by each court incorporating in its instruction to the jury a NVS. Alternatively, lawyers use an NVS in several jurisdictions, presenting it to the jury and looking at the appropriate matrix, relying on the factors described by medical experts who collocated the plaintiff’s disability into the schedule. For instance, the experts may be asked to place the injured in one widely accepted medical scoring system. After presenting evidence regarding injury severity to the jurors, an attorney (or perhaps an expert witness) should be able to explain to jurors how to compute the compensation award, as it is a reasonable way for jurors to determine these damages based on their assessment of injury severity.

In short, courts can implement a NVS approach to compensation for objective non-economic damages without requiring a change in the current law.<sup>489</sup> Under a NVS, the jury would enjoy a reasonable double discretion. First, it would determine the presumptive award by deciding which matrix cell best describes the plaintiff disability (note that it is the medical experts evidence based on scientific guidelines that supports this choice). Second, jurors can adapt the corresponding monetary value to accord better with the facts of the case, basing their decision on previous awards — suggested by a national or local monetary schedule, if permitted — or selecting a value anew.

NVS and related medical and monetary guidelines focus attention on the facts of each case, warranting individualized treatment, but solving, to a certain extent, the valuation problem due to lack of guidance. Obviously, other evidence brought

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483. See *supra* note 479.

484. See *supra* note 479.

485. See *supra* Part II.B; see also Levin, *supra* note 8, at 318.

486. See *supra* Part I.C.5.

487. See *supra* Part I.C.5.

488. See *supra* Part I.C.

489. See 75A AM. JUR. 2D TRIAL § 554 (1991) (stating that counsel is permitted to suggest to the jurors all reasonable inferences that they may draw from the evidence so long as they understand that the argument of counsel is not evidence).



by the parties, evidence which has not always been included in the data used to determine the guidelines, may supplement the factors reflected in the guidelines.<sup>490</sup> Parties would naturally highlight those factors.<sup>491</sup>

Indeed, as shown by the European experiences, guidelines do not go against personalized justice if they are operated using proper flexibility. Under this article's proposal, the guidelines do not prejudice the jury's independence because it retains all of its autonomy: including the power to depart from a previous award if the facts sustain such a decision.<sup>492</sup> If the guidelines are applied and known in advance by juries, then review standards will be even less discretionary for the appellate courts or the trial judge than the usual *remittitur/additur* standards.<sup>493</sup> Indeed, departures from the norms represented by the schedule may well (and appropriately) attract the attention of the court, but the review cannot avoid taking the legitimate evidenced factors that moved the jury to its verdict into account and to allow them to stand if justified.<sup>494</sup>

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490. See Leebron, *supra* note 8, at 322-23, stating:

An alternative approach would be to allow counsel to present in evidence jury awards in other cases. This approach is attractive because it allows the jury to decide whether factual variations in a case justify a substantially higher or lower award. Thus the relevance of prior awards would not be limited to similar cases. For example, an attorney could present prior awards for the loss of a limb to argue the appropriate amount for an injury to the limb, or even a different injury altogether. But at present every jurisdiction regards it as improper to present or refer to amounts awarded in similar cases, the only question being whether such reference is sufficiently prejudicial to require reversal. The reason for this point of view is once again that each case is different and must stand on its own facts.

491. *Id.*

492. See *Coco v. Winston Industries, Inc.*, 341 So. 2d 332, 335 (La. 1976), stating:

Only after making the finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. It is never appropriate for a Court of Appeal, having found that the trial court has abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence.

(citations omitted); see also *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970) (employing the so-called "maximum recovery" standard). The maximum recovery standard allows the increase or reduction of damages awarded only to the lowest or highest amount that the jury could have properly awarded based on the facts and evidence presented. *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1383 (5th Cir. 1980).

493. See, e.g., Leebron, *supra* note 8, at 323 ("States should require reviewing judges to formulate acceptable ranges for awards, taking into account possible factual variations.").

494. Levin, *supra* note 8, at 322, stating:

Departures from the guidelines are permitted, and even encouraged, under appropriate circumstances. This feedback component of the guidelines is significant in three ways: (1) it assures that each plaintiff is given ample opportunity to receive individualized consideration of his/her case; (2) it provides a check on the "correctness" of newly issued guidelines; and (3) it permits the guidelines to respond quickly to changes in public policy, the cost of living, or the consensus value of an injury.

See Chase, *supra* note 348, at 351 ("Courts confronted with attacks on verdicts, whether on appeal or in post-trial motions, should have more confidence in the jury's result because it will have been based on better information.").

Each court could potentially begin to keep track of all jury verdicts and decisions concerning awards for non-pecuniary damages, and monetary values could be periodically revised to reflect the changes in social perception revealed by documented departures from the guidelines.<sup>495</sup> If each court adopts its own guidelines, the feedback offered by data collection would update the system by closely reflecting jury sentiment on the appropriate award for a particular loss. Alternatively, if more than one court or jurisdiction shared the same monetary guidelines there would be a more widely shared sentiment on the monetary value and larger horizontal equality among American citizens. Of course, it is also arguable whether more reliable awards and more horizontal equality are good *per se*. In any event, the proposed innovation does not impose such a large “common law” on non-pecuniary damages. Indeed, a shared methodology which guarantees that the same medically ascertainable impairment receives the same treatment regardless of the monetary value attached to the normalized value in the NVS would assure more equal treatment without necessarily imposing uniform amounts.

It is self-evident, however, that when the system is in place it will slowly acquire precedential value, taking on “attributes of law.”<sup>496</sup> This status will also make it appropriate for the judiciary to police the self-imposed standard, but this is a further development that courts could and should take over at a later stage, as the Court of Appeal in the United Kingdom and the Supreme Court in Italy eventually did. Even if we do not take the view that consistency is a “first principle of law and morals,”<sup>497</sup> consistency in the law in general, and particularly in the law of damages, has several beneficial instrumental effects — i.e., reducing inefficiency (by reducing over-investment in liability avoidance that results in higher insurance costs)<sup>498</sup> and lottery-like results that are often criticized in non-economic assessment. It may also increase the incentives to settle.<sup>499</sup>

#### 4. A Pattern Acceptable Under Constitutional Review and Policymaking

A concluding question to be addressed asks if judicial scheduling would pass constitutional muster.<sup>500</sup> This article does not pretend to run a complete constitutional analysis of the purported innovations. To a certain extent it does not even

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495. See, e.g., Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 158 (“It is appropriate for the jury to assess the harm allegedly inflicted on the plaintiff in light of the values of the community in which it occurred. Jurors do just that.”).

496. See Levin, *supra* note 8, at 318-19.

497. See John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 60, 82 (1987) (“It is hard to imagine stronger evidence of the system’s tolerance — or even an appetite — for inconsistency.”).

498. See E. Donald Elliott, *Why Punitive Damages Don’t Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057 (1989) (“The central failing of punitive damages that renders them incompatible with modern tort law is unpredictability.”) (emphasis omitted).

499. See Schuck, *supra* note 5, at 316 (suggesting that in certain circumstances uncertainty may increase the likelihood of settlement).

500. See Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Constitutional Principle of Separation of Powers*, 12 RUTGERS L.J. 907, 917 (2001) (criticizing the line of cases striking down tort reform under state constitutions).

need this analysis. This article is only proposing to provide the jury with additional information. In no way does the proposal restrict the jury's power or authority in any respect.<sup>501</sup> Yet, it is prudent to sketch some constitutional issues that might be raised and their likely solution because every innovation concerning tort law is perceived as tort reform and triggers constitutional attention.<sup>502</sup>

More exactly, constitutional concerns usually raised against proposed tort reforms do not appear to be applicable to the improvement that has emerged here, as discussed in Part (III)(A)(4). For instance, NVS does not take away traditional common law prerogatives of plaintiffs without a compensatory *quid pro quo* given in return: it does not unfairly single out a category of defendants for protection to the detriment of "plaintiffs who face corresponding cutbacks in remedies." It also does not "abrogate the sanctity of trial by jury."<sup>503</sup> Judicial scheduling neither caps non-economic damages<sup>504</sup> nor constrains jury discretion. On the contrary, the role of the jury would gain momentum and it would increase its effectiveness in resisting judicial scrutiny because NVS would make any judicial review which attempted to second guess jury findings less arbitrary.<sup>505</sup>

Among the positive features which help to defend judicial scheduling against constitutional challenges is that, by nature, judicial scheduling is neither mandatory nor invasive of the functions of juries and judges. Judicial scheduling shares *features* with other proposals: being "advisory, flexible, and self-correcting."<sup>506</sup> This article's proposals do not treat differently the extreme position of the award system<sup>507</sup> and do not withdraw any privilege or prerogative from litigants or decision-

501. *But see supra* Part III.A.3 (discussing potential arguments against increasing comparability of damages awards for review purposes). In addition, if the suggestions this comment proposes are judicially implemented, there should not be any constitutional concern.

502. *See supra* Part III.A.4 (discussing the constitutional issues related to comparing damage awards — undue restraint of the right to a jury trial, and possible alteration of the interplay between federal and state governments). If, the suggestions this comment proposes were judicially implemented, there should not be any constitutional concern.

503. *See also* Bovbjerg et al., *supra* note 240, at 968.

504. *E.g.*, *Boyd v. Bulala*, 877 F.2d 1191, 1194 (4th Cir. 1989) (rejecting the arguments proposing that damages caps invade jury prerogatives); *Davis v. Omitowoju*, 883 F.2d 1155, 1161 (3d Cir. 1989). Still, under some state constitutions, damages caps have been invalidated. *But see* *Kan. Malpractice Victims Coal. v. Bell*, 757 P.2d 251, 260 (1988) (invalidating damage caps under the state constitution); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 719 (1989) (invalidating damage caps under the state constitution); *Ethridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 535 (1989) (upholding a total damage cap of \$750,000 for malpractice against a jury trial challenge).

505. This is different from just relying on additur/remittitur because intensifying the judicial ability to review jury findings without empowering the jury to sustain its decisions *de facto* transforms the review process into a second guess of the fact finder. *See Chase, supra* note 348, at 351.

506. Blumstein et al., *supra* note 205, at 186.

507. This is contrasted to the actual operation of damages caps. *See Sofie*, 771 P.2d at 721 (stating that imposing statutory caps to adjust the jury's award only "pays lip service to the form of the jury but robs the institution of its function"). Similarly, if the system empowers judges to review jury awards but still restrains juries from the means to sustain their decision-making process, the system would pay only "lip service" to the right to a trial by jury and would implement only second guessing.

makers (judges and jury). In this framework, Judge Posner's opinion in *Jutzi-Johnson v. United States* is useful:

[A] practice of consulting damages awards in comparable cases for purposes of facilitating a more thoughtful, disciplined, and informed award in the particular case [is not] the same thing as a rule limiting awards within a range set by previous cases, one understanding of the state law rule involved in *Gasperini*: an award of damages was not to "deviate materially" from awards that had been made in comparable cases. Nor is it easy to characterize a practice of not consulting comparable awards as a remedial rule, hence 'substantive' in the *Erie* sense, rather than as a rule of evidence; or a practice of such consultation by a reviewing court endeavoring to carry out its duty to prevent abuses of discretion in the award of damages as anything more than a rule of appellate procedure.<sup>508</sup>

Unquestionably, the innovations suggested by this article would result finally in a profound change in the actual picture of non-economic damages assessment, promoting fairness of awards for all claims and confidence in the judicial system; but, this would happen without the need for statutory reform. Far-reaching reform of the assessment procedure for non-pecuniary damages, however, seems unlikely to be passed and upheld in the case of a constitutional challenge. Indeed, this is one more policy reason to prefer the patterns suggested by the comparative research discussed in this article. They permit evolution without challenging the system and triggering constitutional concerns.

Analogously, the policy censures fueled by almost all tort reforms or proposals do not have any role in the judicial scheduling that this article suggested. For instance, there is no discrimination among different areas of tort law;<sup>509</sup> there is no reliance on a specific crisis or criticism of abusing the tort system to trigger changes. More precisely, the proposition usually applied in tort reform is to use pretexts for seeking special-interest legislation such as an alleged insurance crisis. In contrast, an innovative proposition for judicial scheduling stems from the appreciation of the tort system, of judicial performance, and, above all, the increased role of non-economic damages for intangible loss. Indeed, the proposed system continues to rely on juries to classify the level of injury severity in its fact-finding capacity and to select the proper amount of money to award for the injury suffered

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508. *Jutzi-Johnson v. U.S.*, 263 F.3d 753, 760 (7th Cir. 2001).

509. Often reforms targeting a specific area as medical malpractice or product liability have been held unconstitutional because they singled out one area. *E.g.*, *Loyal Amendment Life Ins. Co. v. Mattiace*, 679 So. 2d 229, 246 (Ala. 1996) (declaring caps on jury awards in medical malpractice cases unconstitutional).

by the plaintiff in the case at hand.<sup>510</sup> Thus, for all of the above, the suggested improvements would not appear to suffer from constitutional frailties that have, in some jurisdictions, invalidated tort reforms.

#### IV. SUMMARY CONCLUSIONS AND FURTHER RESEARCH

This analysis confirmed the centrality that non-economic damages have gained in personal injury litigation both in Europe and in the United States. It contributed to connecting damages for intangible loss to evolving social and economic grounds.

Indeed, handling non-economic damages is a shared quandary with a seemingly paradoxical contradictory aim: to assess the invaluable and to filter damages claims which are either frivolous or difficult to prove. In trying to solve this conundrum, the surveyed countries were led by historically similar patterns in order to distinguish in the field of personal injury those non-economic damages with an objective uniform basis for evaluation in a disability or an illness and ascertainable by medical science from non-economic damages that do not have such a basis. This bifurcation proved to be a successful device to both filter claims and to improve the assessing process.

European and American jurisdictions have developed different approaches for helping the judicial process award non-economic damages accompanying intangible loss. European judicial scheduling methods, implemented by national courts without statutory reform, further increased predictability and equality without hampering judicial discretion. Comparative analysis proved that the American judicial system could achieve these or similar innovative assessing approaches without triggering statutory intervention or constitutional concerns.

Indeed, most patterns evolved within the European experiences could find their place in the United States. At a minimum, courts could adopt and adapt a Normalized Values Schedule as Part (III)(B) exemplifies. Indeed, a NVS is not submitted to monetary figures and it is able to assure similar treatment for all victims while leaving out any difference in the monetary value attributed to the point.

Still, this article has not yet developed a comprehensive collection of important data to better develop monetary schedules, nor has it taken a position on selecting one of the available scientific scoring systems in the United States. This last selection process would be an enduring one, sustained by scientific respectability and acceptance of each medical scoring system. The issue of local or national development of monetary scheduling would, however, be linked to concerns about equal treatment. Indeed, European jurisdictions have, in some sense, rooted non-economic damages for intangible loss accompanying personal injury in the funda-

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510. Bovbjerg et al., *supra* note 240, at 969, stating:

In operation, the schedules would directly and immediately achieve their main goal — bringing standards to a previously standardless area of law and consistency to previously inconsistent judicial outcomes. Well-designed scheduling approaches have the potential to improve both equity (fair valuation of each case and consistent valuations across cases) and efficient (enhanced predictability that simplifies proof, facilitates settlements, and each insurance rating).

mental right to health and dignity, while assessment approaches have been tied to the fundamental value of equal protection. Both of these choices will require further research and analysis in the United States,<sup>511</sup> based on different conceptions of the relationship between fundamental rights and private law remedies.

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511. Some of these issues are undergoing further research in the framework of international research run under the auspices of the European Union Commission at nine universities in eight European Union countries. For further commentary, see Marie Curie Actions, Fundamental Rights and Private Law in the European Union, [http://mc-opportunities.cordis.lu/show-PRJ.cfm?obj\\_id=4435](http://mc-opportunities.cordis.lu/show-PRJ.cfm?obj_id=4435) (last visited Nov. 23, 2005); and Diritti & Regole Laboratorio Interdisciplinare, Home Page, <http://www.lider-lab.org> (last visited Nov. 23, 2005).