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Some pain and suffering about pain and suffering

"WHAT'S AUGHT BUT AS 'TIS VALUED?"

(SHAKESPEARE, TROILUS AND CRESSIDA, ACT II, SCENE 2, LINE 53.)

There is an ineffable mystery at the heart of American tort law. It is pain and suffering, or noneconomic damages.

As the relevant jury instruction states, these are damages for "physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress" and other types of noneconomic damages. (CACI 3905A.) Courts have noted that, under this rubric, "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." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.)

CACI 3905A states, with commendable candor, that "[n]o fixed standard exists for deciding the amount of . . . noneconomic damages." The jury is instructed to use their "judgment to decide a reasonable amount based on the evidence and [their] common sense." (*Ibid.*) In other words, do your best!

Lawyers who don't practice civil law are often surprised to learn that there are literally no fixed standards or guidelines for how a judge or jury should determine noneconomic damages. Potential jurors in my courtroom have often asked (very fairly, in my opinion) how they're supposed to figure out what a given plaintiff's pain and suffering are worth. How are they supposed to assign dollar values to pain or grief?

Some jurors have asked if they'll be given precedents, examples of what other juries have awarded in similar cases. Some jurors have asked if there are tables or guidelines for appropriate ranges for various injuries. These jurors have been advised, in effect, "No, no such precedent or guidelines will be available. You're on your own." To paraphrase Nietzsche, these jurors look into the void of guidance, and it looks back into them.

As one law review article put it, "[f]or the most part, courts and legal scholars have thrown their hands up and surrendered to the view that the magnitude of human suffering is essentially unknowable in any objective sense. The problem has been left to juries, in the apparent hope that jurors can fill the intellectual void." (Studdert, et al., Rationalizing Noneconomic Damages: A Health-Utilities Approach (Summer 2011) 74 Law and Contemporary Problems 57 [cleaned up].)

The issues that can arise with our system aren't hard to imagine. Twins who are in the exact same health prior to having accidents on the same day, in different parts of L.A., and who sustain identical injuries, have trials on their injury claims in separate courthouses. What are the chances that the awards for their pain and suffering are identical? Essentially zero.

Not so fast! the alert reader might say. The twins aren't identical *people*. They might have different hobbies, different interests, different levels of enjoyment of life! The same injury may be deemed worth more for one twin than the other because that twin can no longer play his favorite sport or instrument anymore. Or perhaps one twin has young children and will miss out on playing with them. Or perhaps one twin is married and his relationship with his spouse will suffer. And so on.

Our current system makes these determinations "inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 491.) "There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm." (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664-1665 [cleaned up].)

Thus, every determination of noneconomic damages is utterly idiosyncratic: it will depend on the quality of the lawyering, the makeup of the jury, how the witnesses present, the judge's rulings, etc. Importantly, unlike other value determinations a jury may have to make, there can be no reference to fair market values, going rates, what's considered reasonable in a given field.

We can have experts come in to give opinions on the value of damage to vehicles, houses, pools, lawns, works of art, etc. But you can't have an expert come in and tell the jury what the going rate is for, say, the pain and suffering associated with a broken leg.

It seems that these types of damages are considered in American law as essentially incommensurable, necessarily idiosyncratic, individual to every given plaintiff. The law appears to assume that there can be no generality about these types of injuries. One person's broken arm will present a completely different situation in terms of pain and suffering from his neighbor's.

This state of things would seem to present some problems, in terms of consistency, predictability, etc. I imagine that the utter nebulousness of the standard may strike fear in the hearts of both plaintiffs and defendants. Any given jury may veer wildly too high or too low. And how are parties supposed to determine what a case is worth and what it should be resolved for?

Counsel have their own heuristics and rules of thumb, but these are based on counsel's own practices and custom: they have no relation to any actual instruction the jury will be given. The jury won't be instructed, for example, to simply multiply the meds by 2.5 or 3.

In other countries

Other jurisdictions have dealt with the inherent subjectivity and unpredictability of noneconomic damages in different ways. In the United Kingdom, a fellow common-law jurisdiction, the government has put into place something called a "Whiplash Compensation Tariff" for common traffic-accident-related injuries. "It is a fixed tariff of compensation for road traffic accident . . . related whiplash injuries lasting up to two years. The tariff consists of an ascending scale of fixed sum payments, with the appropriate tariff figure for any given claim being determined by the prognosis (duration) of the whiplash injury." (UK Ministry of Justice, The whiplash tariff and guidance on minor psychological injuries (2026) < https://www.gov.uk/government/publications/the-whiplash-tariff-and-minor-psychological-injuries/the-whiplash-tariff-and-guidance-on-minor-psychological-injuries> [as of Oct. 2, 2026].)

The UK system sets out a table of ascending compensatory payments based on the prognosis (made by an independent medical expert) for how long a claimant will suffer the effects of a whiplash injury. (*Ibid.*) The table sets out "the total amount of damages for pain and suffering and loss of amenity payable in relation to one or more whiplash injuries taken together . . ." (Legislation.gov.uk, The Whiplash Injury Regulations 2021 (May 31, 2021) <https://www.legislation.gov.uk/ukdsi/2021/9780348220612 >.)

Canada places strict caps on noneconomic damages, which are periodically adjusted for inflation. (Krantz, The Question of the Constitutionality of Non-Economic Damage Caps in Personal Injury Cases in Canada (Winter/Spring 2019) 50 U. MIA Inter-Am. L.Rev. 195, 216-217.) Australia similarly imposes a cap on noneconomic damages, with a system that requires any claimed noneconomic loss to be compared to the most extreme case (i.e., quadriplegia or massive brain injury). (See New South Wales Consolidated Acts, Civil Liability Act 2002 – Sect 16 Determination of damages for non-economic loss, < https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cla2002161/s16.html >, as of [Oct. 2, 2026].)

Turning to civil-law jurisdictions, Italy has put into place a Unified National Table (the *Tabella Unica Nazionale*) for non-economic damages resulting from traffic accidents and other personal injury cases. (Boccadutri, The New National Compensation Table for Non-Economic Damages (April 10, 2025) Legal 500 < https://www.legal500.com/intelligence/italy/litigation-mediation-arbitration/the-new-national-compensation-table-for-non-economic-damages >.) The *Tabella* sets out uniform criteria for calculating compensation in personal injury cases. (*Ibid.*)

A similar approach has been taken in Spain, using a points-based system known as the *Baremo* ("scale" or "schedule"). (Agencia Estatal Boletín Oficial del Estado, Ley 35/2015, de 22 de septiembre, de reforma del Sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulació (Sept. 23, 2015) < https://www.boe.es/eli/es/l/2015/09/22/35 >.) In Spain, the *Baremo* is binding for traffic accidents but serves as a non-binding guideline in other personal-injury cases. (See Gallagher Re, Baremo Guide (Nov. 2023) < https://www.ajg.com/gallagherre/-/media/files/gallagher/gallagherre/news-and-insights/2023/november/baremo-guide.pdf >.) The system assigns points based on objective factors, such as days of hospitalization, etc. (*Ibid.*)

France follows a similar approach, with a system of "medical scoring points for disabilities"; the scoring system is not binding on courts, but is used as a standard point of reference. (Comandé, Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States (2006) 19 Temp.Int'l & Comp. L.J. 241, 286.)

Individual factors

Don't worry! I'm not here to advocate for any immediate change to our current system. I'm just a trial judge in Glendale. But I do think it's worth considering how our system is set up and whether this is a Panglossian best of all possible worlds. It's worthwhile, in my opinion, to consider how other jurisdictions have tackled this problem of the ineffable.

Our current system emphasizes individual, idiosyncratic traits of each plaintiff: their hobbies, their relationships, their personal histories, and so on. One can see, and studies have examined, how this kind of carte blanche to individualize awards may lead some lives (and pain) to be valued more than others, an outcome that would seem to be inevitable in our current system. (See Levin, Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie" (1989) 22 U. Mich. J.L. Reform 303, 321.)

Juries are instructed to put aside considerations of race, religion, gender, socioeconomic condition, etc. (See CACI 100, 113, 117.) But it's not hard to imagine (or point to instances of), say, wealthier plaintiffs who point to rich and full lives of travel, leisure activity, time with extended family, enriching activities, etc., all pressed on the jury to show how much such a plaintiff has "lost" due to an injury caused by the defendant.

We can imagine this in contrast to a poorer defendant, with whom the jury may have a harder time identifying, who lived a relatively bleaker life before the accident. Will the pain and suffering of the poorer defendant be valued less? It doesn't take too much imagination to guess how this plays out with the different values that jurors might assign to the pain and suffering of different members of our society.

In passing, it's worth noting that, in a different context, support for the Federal Sentencing Guidelines originally came from both sides of the aisle, for similar reasons. (See Cabranes & Stith., Fear of Judging (1998) at p. 2 [noting that the Sentencing Reform Act of 1984 was originally introduced by Senator Edward M. Kennedy to achieve "certainty and fairness" in federal sentencing by eliminating "unwarranted [sentencing] disparity" among similar defendants committing similar offenses].)

These other jurisdictions I've mentioned that have implemented a more objective or standardized system for determining noneconomic damages have often cited the need for predictability, which helps parties in resolving disputes

more readily. And one can imagine how such a system might help everyone involved plan and structure their lives. Predictability is, as we all learn in the first year of law school, generally considered a pillar of the "rule of law." (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 [noting that the doctrine of stare decisis "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law"]; What is the Rule of Law, American Bar Association, < https://www.americanbar.org/advocacy/global-programs/who-we-are/rule-law-initiative/what-is-rule-of-law/ > [as of Oct. 2, 2026] ["The rule of law . . . requires that people can expect predictable results from the legal system . . . . Predictable results mean that people who act in the same way can expect the law to treat them in the same way. If similar actions do not produce similar legal outcomes, people cannot use the law to guide their actions, and a 'rule of law' does not exist."].)

Our American legal system is unique in many ways, and that is all to the good. We need not follow precedent from other jurisdictions, but we can potentially glean new ideas and approaches from them. Our current system allows a jury from the relevant community to make a reasonable determination of how much the claimant's pain and suffering are "worth" in that community, under prevailing economic conditions (including rates of inflation), etc.

One might ask, who better to make this determination than a representative group of citizens in the relevant community? Critics of the international approaches sketched above may also fairly note that attempting to reduce the vast kaleidoscope of potential human injuries and harms to three-columned tariff tables is quixotic, and results in reductive and cramped "guidelines."

It may be that our current approach to noneconomic damages is the best system for our society, but it is worth observing that other jurisdictions have taken different paths. Whether we should follow their lead is left to the wisdom of the voters and the legislature.

N.B. I wrote this piece without the assistance of AI. All errors are my own, and human.

Judge Chowdhury is a judge of the Los Angeles Superior Court. He is currently assigned to an Independent Calendar civil courtroom in the Glendale Courthouse. Prior to joining the Superior Court, he practiced civil law and served as a Deputy Federal Public Defender in Los Angeles. He is a graduate of Williams College and Columbia University Law School.