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Joseph Sanders

University of Houston Law Center

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Reforming General Damages: A Good Tort Reform

Joseph Sanders*

I. INTRODUCTION

In some conflicts, capturing a phrase is half the battle. Proponents of affirmative action won a significant victory when they changed the discussion from one of *quotas* to one of *diversity*. Similarly, those who sought to achieve some retrenchment in tort law gained a substantial advantage when they commandeered the term “tort reform” to describe their undertaking and then persuaded most American state legislatures to enact provisions favorable to their position. Needless to say, those who oppose their agenda do not agree that most of what has occurred is reform in a positive sense. Hence, the title of this symposium—Genuine Tort Reform. What, however, counts as “genuine”? “Genuine” itself conveys the implicit message that what has previously gone under the banner of tort reform is not genuine. If so, what is it? Fake? Counterfeit? No, I prefer a simpler idea. I would like to talk about *good* tort reform, or at least *better* tort reform, the opposite of which is simply bad or worse tort reform.

In this paper, I sketch out what I believe good reform would look like and then discuss one frequently suggested reform that I believe meets this definition—limitations on general damages variability.¹ In Part II, I review tort reform over the last two

* A.A. White Professor of Law, University of Houston Law Center.

1. There are three basic categories of damages: nominal, compensatory, and punitive. Within the compensatory category, damages are generally divided into two groups, special and general. “Special damages” is a term meant to convey all damages on which we can, at least in theory, put a price. Special damages, or “specials,” are also called “economic damages.” They

decades and how this compares to other “reforms” of the tort system over the last century or so. In Part III, I offer my criteria for determining if a reform is better or worse. Part IV presents the research evidence on general damages variability. Part V reviews the possible solutions to this problem: doing nothing, imposing caps, abolishing general damages altogether, and the use of greater jury guidance and/or greater post verdict review to reduce variability in general damage awards. I conclude with a discussion of why the latter alternative counts as good tort reform.

II. TORT REFORM IN CONTEXT

A. Changes in Tort Law over the Last Century or So

Although “tort reform” as a social movement is a recent phenomenon, it is hardly the first, and certainly will not be the last round of changes in tort law. Historically, because torts has been the last bastion of the common law, most changes have occurred as a result of judicial opinion rather than legislative enactment. The movement toward strict liability in products law in the mid-twentieth century and then the slow retreat back to a negligence-like standard for most types of products defects occurred largely through the mechanism of judicial opinions.² The changes in products liability law over this period is but one facet of a more general “plaintiff-oriented expansion” of tort law in the 1950s and 1960s and at least a partial retrenchment later in the

include such things as hospital bills, lost wages, rehabilitation expenses, etc. “General damages” is a term meant to convey other types of damages that do not constitute real expenses the plaintiff has incurred or is anticipated to incur in the future. They are often called “noneconomic damages.” Typically, these damages include pain and suffering, some aspects of loss of consortium, loss of enjoyment of life, etc. In this paper, I will use the terms “noneconomic damages,” “general damages,” and “pain and suffering damages” interchangeably, although in other contexts one might wish to acknowledge that pain and suffering damages are only a subset of noneconomic and general damages.

2. David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955 (2007). Owen also discusses even earlier “reforms” whereby products cases were taken out of the tort system through the rubric of the privity rule and then brought back in by the rule’s evisceration at the hands of Judge Cardozo in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

century.³

The primacy of court-led change does not mean that the legislative-led changes of the “tort reform” movement are anything new. An early example of legislative change is the adoption of the wrongful death statutes.⁴ Two more recent examples of legislative change are the largely successful effort to remove workplace injuries from the tort regime⁵ and the largely unsuccessful effort to create a no-fault system to handle automobile accident cases.⁶ Likewise, the movement in the 1970s from contributory negligence to comparative fault was most frequently undertaken by way of statute,⁷ although it also occurred by way of judicial opinion.⁸ Numerous jurisdictions have also passed legislation in the area of medical malpractice⁹ and products liability.¹⁰ It is within this context that we should assess the tort reform movement.

B. Tort Reform Movement of the Last Thirty Years.

Although it is impossible to establish a firm date for the beginning of what is now commonly called “tort reform,” most scholars would agree that the first sustained “round” of tort reform legislation occurred in the 1970s in response to the first

3. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 46 (2001); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437 (2006); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605 (1992); Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465 (2007) [hereinafter Sebok, *Dispatches*]. For an interesting article relating this history to the role of blame in tort law, see Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003) [hereinafter Sebok, *The Fall and Rise*].

4. Wrongful death statutes altered the judge-made common law rule that one’s cause of action died with oneself.

5. See Donald G. Gifford, *The Death of Causation: Mass Products Torts’ Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943 (2006).

6. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004); Sebok, *The Fall and Rise*, *supra* note 3, at 1046.

7. See, e.g., WIS. STAT. ANN. § 895.045 (West 2007).

8. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (en banc).

9. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. ch. 74. (2000).

10. See, e.g., *id.* ch. 82. These numerous legislative encroachments have steadily eroded tort law’s status as the last great bastion of the common law.

medical malpractice insurance crisis.¹¹ This legislation was followed by a second insurance hard market in the 1980s which precipitated a second round of legislation.¹² By the end of the second round, the basic content of these reforms was in place. The components are so well known that a mere listing will suffice: completion of the movement to comparative fault; prohibiting ad damnum clauses; requiring some form of alternative dispute resolution process; limits on contingent fees; periodic payment provisions; new restrictions on governmental liability and the re-emergence of limits on charitable organization liability; changing the collateral source rule; limitations on joint and several liability; new rules concerning punitive damages;¹³ and caps on compensatory damages (usually limited to general damages).¹⁴

The 1980s were not the end of the process.¹⁵ Initially, many states took tentative steps directed solely at medical malpractice. Over time, the states have fleshed out their statutes by adding additional components to their list¹⁶ and have caused many of the

11. See PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* (1985); Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 *LAW & CONTEMP. PROBS.* 5 (1986); G. Edward White, *Tort Reform in the Twentieth Century: A Historical Perspective*, 32 *VILL. L. REV.* 1265 (1987).

12. Allen Redlich, *Ending the Never-Ending Medical Malpractice Crisis*, 38 *ME. L. REV.* 283 (1986). The relationship between the tort system and hard insurance markets has been hotly contested over the years. See DANZON, *supra* note 11; Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 *EMORY L.J.* 1263 (2004); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521 (1987); Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 *HOUS. L. REV.* 207 (1990); Peter H. Schuck, *Mapping the Debate on Jury Reform*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 306 (Robert E. Litan ed., 1990).

13. These include caps, higher burdens of proof (clear and convincing), and higher standards of culpable behavior (malice).

14. To this list we might add the judicially inspired movement toward heightened admissibility standards for expert witnesses that commonly goes by the name "the Daubert revolution." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

15. A third hard insurance market near the turn of the century led to another burst of legislative activity. See Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 *DEPAUL L. REV.* 393 (2005); Jeffrey W. Stempel, *Not-So-Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform*, 4 *NEV. L.J.* 337 (2004).

16. For example, many states now have "John Doe" provisions that permit defendants to join unknown individuals as third parties. Jurors may

provisions to apply to all tort cases.

The great majority of these efforts has been enacted at the behest of defense interests and is designed to create a more favorable tort system from its point of view.¹⁷ These efforts have been opposed by plaintiff interests who, when they have lost in the legislature, have turned to the courts in a frequently successful effort to have some or all of the statutes declared unconstitutional under the relevant state constitution.¹⁸

The tort reform movement of the last thirty years is inextricably wrapped up in interest-group politics and much of the rhetoric that surrounds the process must be understood in that context.¹⁹ The claimed benefits and harms of reform are often exaggerated and it is impossible to argue persuasively that all of the legislation is well thought through or that all the criticisms are cogent. For example, if the object of most tort reform legislation is to reduce the cost of malpractice insurance, considerable research indicates that tort suits are far from being the most important cause of hard insurance markets.²⁰

Some may be tempted to say that the whole tort reform enterprise is a mistake and that we would be better off without this legislation. A more reasoned approach would assess each change in turn. From this perspective, the changes may be more or less reasonable. At one extreme is the movement to comparative responsibility. Few would argue that this was unwise. Although most statutes abolishing the contributory negligence rule preceded tort reform, they are a precipitating

assign a percentage of responsibility to these unknown individuals, although clearly there is little or no chance the plaintiff can ever collect a judgment against them. Indeed, the party may have immunity. See FLA. STAT. ANN. § 768.81 (West 2008).

17. There are other pockets of legislation during this period that are not generally included under the rubric of tort reform, most notably legislation facilitating state lawsuits against tobacco companies in the 1990s. See FAIGMAN ET AL., 3 MODERN SCIENTIFIC EVIDENCE ch. 27 (2006-2007 ed.).

18. See, e.g., *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (striking down a statute placing a cap on noneconomic damages in medical malpractice actions). But see *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

19. Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest - It's Even More True Now*, 51 N.Y.L. SCH. L. REV. 285, 288 (2006-2007); Sebok, *Dispatches*, *supra* note 3.

20. Baker, *supra* note 15.

cause of many later changes.

Changes in the joint and several liability rules, changes which are usually associated with the tort reform movement, are a case in point.²¹ The moral force of joint and several liability is very strong in a contributory negligence legal system where, by definition, every prevailing plaintiff is not legally responsible. Once we move to comparative fault the plaintiff may be legally responsible, and some defendants may be adjudged to be far less responsible for an injury than the plaintiff. In this context, the moral force of the joint and several liability rule is largely absent.²² This does not mean that every alternative rule is equally good. Some alternatives, such as the complete abolition of joint and several liability in all situations, may be worse than other alternatives such as a reallocation of liability based on percentage of fault when one defendant is in fact judgment proof.²³

Other reforms such as limitations on contingent fees and changes in the collateral source rule seem to be motivated at least in part by a less legitimate desire to discourage lawsuits by making them less attractive to plaintiffs and their attorneys.²⁴

21. Under joint and several liability a prevailing plaintiff may recover the entire judgment from any liable defendant, whose remedy in turn is to seek contribution from other responsible defendants. When a defendant is not jointly and severally liable – or as is sometimes said, is only severally liable – the plaintiff may only recover the percentage of the judgment assigned to that defendant and must collect separately from each defendant to obtain the entire judgment. When the joint and several liability rule is in place, the risk that some defendants may be judgment proof falls on co-defendants. In the absence of the rule, the risk falls on the plaintiff.

22. See *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987). Plaintiff adjudged to be 14% responsible for her injury was allowed to recover the rest of her damages against a defendant assigned 1% of the responsibility for the accident. This result was subsequently superseded by statute. See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

23. For a summary of the many variations states have adopted, see *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* §§ 1-26 (2000).

24. This is not to say there are no principled arguments for these changes. For example, individuals who support a change in the collateral source rule, under which funds from a collateral source (usually an insurance policy) are not deducted from a plaintiff's award, may do so because they believe the primary goal of tort law is compensation and there is no reason to provide redundant recoveries for the same injury. On the other hand, those who think that deterrence is a primary goal may believe that the traditional rule maximized the internalization of costs to those who cause them. I find

Insofar as this is the case, the changes are hard to justify.

Then there are the reforms that address general damages. As I argue below, there is a real problem with general damages variability. Some argue that caps on general damages are a solution to this variability. However, as I argue in Part V, this solution is open to several criticisms. Caps do not directly address the problem of variability and, insofar as the size of pain and suffering awards are a function of the size of the special damage awards, the practical consequence of caps is systematically to disadvantage the most seriously injured plaintiffs.²⁵

III. LOOKING TO THE FUTURE: GOOD TORT REFORM

Many who oppose what has been done in the name of tort reform may believe that good tort reform would return to the status quo before the laws were passed. There are some provisions for which this seems to be a proper course. I do not intend to address this option. Instead, I would rather look forward to new changes. What new tort reform efforts are worth undertaking? What does good reform look like? From my point of view, a good reform has several attributes.

First, it must be doable. This practical consideration forecloses a number of possible changes. For example, in the aftermath of the United States Supreme Court rulings in *Gore*, *State Farm*, and *Williams*²⁶ it seems futile to propose a return to the law of punitive damages that existed prior to its constitutionalization. Similarly, with the rewriting of the Federal Rules of Evidence to reflect the Supreme Court's holding in *Daubert* and its progeny,²⁷ changing admissibility rules at the federal level (and at many state levels for that matter) is unlikely.²⁸ As these examples suggest, a wholesale repeal of "tort

myself on the side of the latter group, but I can see the point of the opposing point of view.

25. See Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 430 (2006).

26. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

27. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

28. To this list of improbable changes one might add returning to products liability law as it was envisioned under RESTATEMENT (SECOND) OF TORTS § 402A and returning to complete joint and several liability for all

reform" legislation is not in the offing.

Second, a good reform addresses an aspect of the current tort regime that most would agree produces unjust outcomes. The legal system as a whole would be better off were this change to be made.

Third, good reforms are those that enjoy some support from all relevant constituencies, perhaps because most agree they address an occurrence of injustice.²⁹ Good reforms may be fundamental or modest.³⁰ An example of a fundamental change is the movement to workers compensation at the beginning of the last century. Most would agree that it addressed a problem of frequent injustice in work related injury cases. The change occurred primarily because industry and labor reached an agreement about the nature of the reform.³¹ Similar fundamental changes in medical malpractice or automobile accident law may or may not be good policy, but achieving them will require the emergence of a similar consensus, a consensus that in the present climate seems quite unlikely.³²

negligent defendants.

29. A reform is not bad solely because it favors plaintiff or defense interests, but this does not make it good either. My point is only that those reforms that can find some support from all relevant interests are better.

30. Some may argue that the very fact that a reform does not fundamentally alter the existing tort system itself counts as a plus. If this is a criterion, and it is not clear to me that it should be, this counts in favor of the defense-oriented tort reform of the last few decades. By and large, it has not attempted to make fundamental doctrinal changes nor has it seriously pursued efforts to remove whole types of injuries from the tort system.

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

32. For glimpses of what a no-fault medical malpractice regime might look like, see PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1626 (2002); David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 AM. J.L. & MED. 225, 228 (2001); Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993). A small step in this direction has occurred in the area of vaccinations. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. §§ 300aa-1 to -33 (2000). Under the statute, one may opt out and sue in tort. (However, this election is final and if one loses the tort claim one cannot then request compensation under the act). See Shackil v. Lederle Labs., 561 A.2d. 511 (N.J. 1989). For a review of other no fault plans over the recent decades, see Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703-13 (2005).

We might, however, agree upon more modest endeavors, ones that do not fundamentally alter the existing regime. My candidate for such a reform is in the area of general damages.

IV. GENERAL DAMAGES VARIABILITY

General damages are a central component of the American tort system.³³ They are notoriously uncertain.³⁴ This uncertainty produces inconsistency. Evidence that jurors reach inconsistent results on general damages comes from a substantial body of research.³⁵

Several themes dominate this research. First, the severity of the injury suffered by the plaintiff is a reasonably good predictor of the level of all damages, including general damages. For example, Bovbjerg and colleagues analyzed jury awards in Florida and Kansas City from the mid-1970s to the mid-1980s and found that injury severity (as measured on a nine-point ordinal scale)

33. Best estimates are that general damages make up approximately 50% of total damage awards across at least some types of tort cases. Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 L. & CONTEMP. PROBS. 57 (1986); Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 296 (1998); W. Kip Viscusi, *Pain and Suffering in Products Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203 (1988).

34. I am far from the first person to make this point. See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 924-27 (1989); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 768-69 (1995); Shari Seidman Diamond et al., *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 313-17 (1998); Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303, 307-11 (1989); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997, 997-99 (1990); Sugarman, *supra* note 25; Viscusi, *supra* note 33.

35. The following discussion borrows from Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*, 55 DEPAUL L. REV. 489 (2006).

was the best predictor of overall damage awards.³⁶ This variable, when combined with other objective variables available to the authors, explained approximately 60% of the variation in total awards and a somewhat smaller percentage of noneconomic awards.³⁷

However, within each category of injury, pain and suffering damages exhibited considerable variance. For example, for the category "permanent significant," category six on the nine point scale, a category that includes injuries such as deafness, loss of a limb, one eye, kidney, or lung, the mean pain and suffering award was \$386,000 (in 1987 dollars). The award at the 25th percentile

36. The scale is the product of the National Association of Insurance Commissioners. Here are the nine categories:

Severity of Injury	Examples
1. Emotional only	Fright, no physical damage.
2. Temporary insignificant	Lacerations, contusions, minor scars, rash. No delay.
3. Temporary minor	Infections, misset fracture, fall in hospital. Recovery delayed.
4. Temporary major	Burns, surgical material left, drug side-effect, brain damage. Recovery delayed.
5. Permanent minor	Loss of fingers, loss or damage to organs. Include non-disabling injuries.
6. Permanent significant	Deafness, loss of limb, loss of eye, loss of one kidney or lung.
7. Permanent major	Paraplegia, blindness, loss of two limbs, brain damage.
8. Permanent Grave	Quadriplegia, severe brain damage, lifelong care or fatal prognosis.
9. Death	

Obviously, these are very crude categories. *THE NAT'L ASS'N OF INS. COMM'RS, MALPRACTICE CLAIMS: FINAL COMPILATION* 48-66 (M. Sowka ed., 1980).

37. Bovbjerg et al., *supra* note 34, at 923, 941 n.156 (1989). Other variables included plaintiff age, type of defendant (government, non-government), type of case (e.g., products liability), whether the case involved a loss of consortium claim, and jurisdiction.

was \$9,000 while the award at the 75th percentile was \$598,000.³⁸ Other studies have produced similar results.³⁹ For example, Sugarman reports that in twelve quadriplegia cases decided a few years on either side of the year 2000, pain and suffering awards ranged from one dollar to six million dollars.⁴⁰

In one study, Leebron examined jury and trial judge awards for pain and suffering in cases where the plaintiff died prior to trial.⁴¹ He reviewed 256 reported appellate opinions where general damages were awarded, admittedly a very selective sample. For each case, he had information on how long an individual lived after the injury. Except for very short survival times (less than half a minute) and relatively longer times (over a week) duration is not significantly related to the size of the award.⁴² Within duration intervals there is a substantial variation in awards. For example, in a particularly useful analysis, he compares awards for drowning victims who, as a group, suffer a similar fate for a similar duration of time. Awards in these cases varied from zero to over \$137,000, with the average being \$32,000 and a standard deviation of \$36,000 (in 1987 dollars). After appellate review, the awards ranged from \$4,300 to \$52,800.⁴³

Substantial variance is also observed in experimental studies. Wissler et al. gave mock jurors scenarios and asked them to assign general damages.⁴⁴ They found substantial vertical equity in the

38. *Id.* at 937.

39. See MARK A. PETERSON, COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY (1984); Sloan & Hsieh, *supra* note 34; Viscusi, *supra* note 33; Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181 (1997).

40. Sugarman, *supra* note 25, at 414.

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

42. *Id.* at 294.

43. *Id.* at 297. For other research that has found considerable "horizontal" variance, see AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 56-57 (1985); Sloan & Hsieh, *supra* note 34, at 1026 ("In several respects, payment patterns appear to be inequitable horizontally, but each finding has a possible contrary explanation."); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 781 (1992).

44. Roselle L. Wissler et al., *Decisionmaking About General Damages: A*

sense that people who were perceived to have suffered more serious injuries received larger awards on average than people who were perceived to have suffered lesser injuries.⁴⁵ However, they too observed substantial variance in awards within each scenario.⁴⁶

Research that compares juries to other potential fact finders such as arbitrators, finds that their median and mean awards are comparable.⁴⁷ However, jurors exhibit more variance. The study by Wissler et al. compares juror awards with those of judges and lawyers. Respondents were given short vignettes and asked to assess the severity of the victim's injuries. They were then asked to assess damages. All groups were similar in their severity assessment. However, jurors were less able than the other groups to translate this assessment into a dollar amount of actual damage awards. In the authors' final regression models, they were able to explain 58% of the variance in defense attorney awards, 48% for plaintiff attorneys, 42% for judges, but only 28% for jurors.⁴⁸ The authors note that these "patterns of predictability and intra-injury variability in awards are not surprising, given that jurors have essentially no experience assigning a dollar value to injuries while the other groups do."⁴⁹

Most explanations of the variability we observe in general damage awards place particular emphasis on how anchoring effects influence decision making.⁵⁰ Whenever people are asked to

Comparison of Jurors, Judges, and Lawyers, 98 MICH. L. REV. 751 (1999).

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

46. Wissler et al., *supra* note 44, at 794. See also Diamond et al., *supra* note 34, at 306-11.

47. 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, 893 (1993).

48. Wissler et al., *supra* note 44, at 794.

49. *Id.*

50. Anchoring is not the only variable affecting general damage awards. For example, Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995) have a useful discussion on how the way in which the general damages issue is put to the jury (framing effects) alters judgments. Asking the jury to "make the plaintiff whole" is one such frame, which is different from a "selling price" frame that asks the jury to imagine how much the plaintiff would have to be paid to subject himself to the injury in the first place. *Id.* at 1342. Plaintiff

make numerical estimates, initial values tend to “anchor” their final estimate by changing the standard of reference that they use when making their numerical judgment.⁵¹ Anchoring effects occur even when individuals conclude that the anchor contains no useful information.⁵²

It may be that unwarranted variance is less than these studies suggest, either because the variance witnessed is really an artifact of the crude measures of damages used in the research, or because there are other, legitimate considerations that are causing jurors to award substantially different sums for what appear to be similar injuries. Both points have some merit. The measures of the severity of injury are crude and it may be that other, subjective variables shape individual judgments. It seems quite unlikely, however, that all the differences we observe can be explained in this way. When researchers permit respondents to make finer judgments of severity, as occurred in the Wissler et al. study we still see substantial differences in awards.⁵³ Moreover, the differences revealed in the studies are often large and it is difficult to imagine a set of subjective factors that would explain such large differences in pain and suffering awards.

The conclusion that the uncertainty in general damage awards produces a potential problem of individual unfairness

and defendant culpability also affect the size of noneconomic awards. See Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990); Cather et al., *supra* note 45.

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

52. Beginning with the Chicago Jury Project in the 1950s, legal scholars have observed anchoring effects in jury judgments on damages and have been able to produce these effects in the laboratory. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 756 (1959) (reporting that interviews conducted with jurors revealed that plaintiffs' damage requests anchored juror damage determinations in six of seven cases); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 525-28, 532-33 (1996); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1009-10, 1016 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 495 (1989); Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 390-94 (1990).

53. Wissler et al., *supra* note 44.

seems to me to be inescapable. Equally situated individuals may experience substantially different outcomes. If fairness and justice require that we treat like cases alike and different cases differently, such variability in general damages undermines these values. One federal circuit judge expressed the problem this way:

At bottom, we are left with the following abstract observation. When a tortfeasor wrongfully causes a plaintiff to suffer pain from a seriously broken leg and a jury awards the plaintiff \$50,000 for pain and suffering, can it be said that the award was against the facts, that it was inappropriate, or that it was in any way illegal or wrong? And when another jury returns an award for the same pain and suffering in an amount of \$350,000, could any rational analysis lead to the conclusion that the second jury acted against the facts, acted inappropriately, or reached an illegal or wrong verdict? Yet one verdict is seven times the other, and the irrationality of the awards is made manifest.⁵⁴

V. SOLUTIONS

If variance is a problem with general damages, how might we respond? Four possibilities come to mind. First, for those who think there is no problem or that any cure would be worse than the disease, the proper course of action is to do nothing. Second, is the most widely adopted solution to date: imposing some form of caps on general damages. Third, there is the radical solution of abolishing general damages completely. The fourth is to adopt some method to limit variability in general damages. I discuss each of these in turn.

A. Do nothing

One might argue that even if the differences we observe are real, this is not a problem, or at least it is a necessary evil. Variance is an unavoidable fact of life in a system that prides itself on individualized justice. Insofar as one adopts this position, there is no problem to be addressed. Perhaps this argument

54. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1417 (2004).

resonates with parts of the bar. Based on the limited data we do have from mass tort situations, I believe that this is a point of view held by a very small minority of the population at large.⁵⁵

B. Caps

1. Defense Interest in Caps

Because there is no market for pain and suffering, even after an accident has occurred it is difficult to estimate general damages in an individual case.⁵⁶ This uncertainty may alter settlement strategies for the risk averse who wish to avoid outcomes at the tail of the damages distribution, e.g., very low or very high awards.⁵⁷

55. For a discussion of compensation under the 9/11 fund, see Stephan Landsman, *A Chance To Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393 (2003). Landsman notes that concern for horizontal equity was strongest with respect to noneconomic losses:

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

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

56. There is uncertainty with respect to special damages as well. For example, it is difficult to calculate accurately the cost of long term health care for seriously injured individuals, especially when there are different levels of care accompanied by different price tags. See *McDonald v. United States*, 555 F. Supp. 935 (M.D. Pa. 1983). Estimating earnings capacity can also be a difficult task. By and large, however, there are markets for these damages and these markets provide some anchoring. See Anthony J. Sebok, *Translating the Immeasurable Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 390 (2006).

57. It is not clear how damages uncertainty affects settlement rates. Theoretically, greater uncertainty may increase the likelihood of settlement because it increases the range of outcomes preferable to litigation. On the other hand, this uncertainty may cause the parties to so wildly disagree about the value of a case that they do not perceive there to be a set of outcomes superior to litigation for both parties. This latter risk is diminished insofar as attorneys use services such as that provided by Jury Verdict

Given this situation, plaintiffs as a group must be concerned about the low end of general damage distributions. Even when plaintiffs are awarded an amount that fully covers their economic damages, a pain and suffering award of zero will leave them with far less than full compensation after they pay their attorney. Stated this way, however, the problem rarely finds its way into the law reviews or the public discourse about what is wrong with tort law. The plaintiff personal injury bar does not complain about low general damage awards per se.⁵⁸

Defendants, however, are not bashful when it comes to complaining about the high end of the general damages distribution. From one perspective, this concern is surprising. Other things being equal, one would expect that risk aversion is a

Research that provide case evaluations to attorneys. The attorney inputs information about a case and JVR software provides a estimate of the value of a claim. See Sebok, *supra* note 56. Note that these values are derived from past jury awards. This is the very information that many of the proposals I discuss below wish to give to the jury.

Even if damages uncertainty were shown to increase settlements, this may not be an altogether good thing. Professor Kritzer reports the results of an experiment in which twenty pairs of lawyers who practiced in the Des Moines, Iowa area were given the same information about a single case and asked to retire and negotiate a settlement in private before reassembling to discuss their settlement. The low settlement figure was \$15,000 and the high figure was \$95,000 with other settlements scattered randomly between the high and low values. Herbert Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 817 (1998). For some other theoretical discussions of the settlement process, see Joseph A. Grundfest, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 683 (2006).

58. As we shall see, however, the plaintiffs bar does complain that caps may produce lower general damage and this in turn may cause lawyers to refuse to take a case at all. Caps are far from the only factor that may affect a willingness to take a case. Of equal if not greater importance are the limits of an insurance policy. It is relatively rare for plaintiffs to recover sums greater than insurance policy limits if those sums must come from the personal assets of the plaintiff. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001); Kathryn Zeiler et al., *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990-2003*, J. LEGAL STUD. S9 (2007) (reporting data from closed claims in Texas that indicate physicians carry much less insurance than is conventionally believed, that policy limits often act as effective caps on recovery, and that personal contributions by physicians to close claims are rare).

more serious problem for plaintiffs than for defendants. Many defendants are insurance companies who handle numerous similar cases. It is easier to estimate general damages in a group of cases than in any individual case. Thus, repeat players such as insurance companies have an advantage over one-shot players because across their portfolio of cases they are able to estimate average payouts, and a higher than expected payout in one case will be offset by a lower than expected payout in another case.⁵⁹

Why, then, do defendants care? Part of the answer is that not all defendants are repeat players in this sense. They do not hold a portfolio of independent accidents about which they can say that over the long run general damage awards will balance out. Many are one-shot or nearly one-shot players. Even when a given defendant faces numerous claims from the same incident, e.g., the same defective drug, these cases are not independent of each other in the same way that the individual automobile accident cases in State Farm's portfolio are independent. The resolution of one case or a few cases may set the standard for the resolution of future cases.⁶⁰

Moreover, defense interests may be concerned about a separate aspect of general damages: their overall growth. There is some evidence to suggest that they do have something to worry about. Hard numbers are difficult to come by, but it is probably the case that over the last half-century general damages have increased faster than inflation and economic growth. As Sebok says, "certain noneconomic damages have been around for a long time, and when we compare their change over time, we see—to put it bluntly—that pain is worth more now than it was forty years ago."⁶¹ Perhaps because of these dual concerns—variability

59. The classic paper on this point is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974-1975).

60. For a discussion of this process in the context of the Dalkon Shield litigation, see RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

61. Sebok, *supra* note 56, at 385. General damage awards in the United States are much more generous than in Europe. For example, Sugarman presents evidence that the median pain and suffering award for the loss of a leg in the United States is approximately eighteen times greater than in Europe. Even larger ratios exist for blindness (fifty-two times larger) and quadriplegia (twenty-seven times larger). Sugarman, *supra* note 25, at 418

and growth in the average award size—defense interests have strongly supported caps as a way to control general damages. Certainly, a central part of their argument for caps has been that they would control the cost of insurance, especially medical malpractice insurance by holding down damage awards. Defense interests have been fairly successful in getting caps: caps are the most widespread response to uncertainty in general damage awards.

Damage caps were first introduced as a part of the initial rounds of tort reform following the hard medical malpractice insurance markets in the 1970s and 1980s.⁶² By the late 1980s approximately half of the states had placed caps on noneconomic damages, a percentage that may have grown slightly in recent years.⁶³ Relatively few commentators have supported caps.⁶⁴ The law review literature is now replete with articles criticizing caps and proposing alternatives.

tbl.14. These ratios are somewhat inflated by the fact that when Sugarman did his analysis the exchange rate was much more favorable toward the dollar. See also Sebok, *supra* note 56, at 392.

62. The call for caps is nothing new. See William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 32 (1954-1955). For a very useful discussion of early academic concern with pain and suffering awards, see Philip L Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 CAP. U. L. REV. 545 (2006).

63. An exact count of states with caps is hard to come by, in part, because state supreme courts have struck down caps in a number of states. For various counts, see Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 412, app. 1 (2005) (Twenty-nine states, with an appendix that lists the relevant statutes); Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 DEPAUL L. REV. 293, 306 n.60 (2007) (Twenty-five states). Ronen Avraham has a dataset of tort law reforms from 1980 to 2005 on his law school home page. See Northwestern University, Ronen Avraham, <http://www.law.northwestern.edu/faculty/profiles/RonenAvraham> (last visited July 2, 2008). It is particularly useful if one wants to know the specific years reforms were enacted, repealed, or overturned by courts. Hoffman reports that since 2000 legislatures in eight states (Florida, Georgia, Mississippi, Nevada, Ohio, Oklahoma, Texas, and West Virginia) have passed legislation imposing some form of caps. Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 264 (2006-2007). The caps ranged from a low of \$150,000 to a high of \$1,000,000.

64. An exception is WEILER, *supra* note 32, at 58-59.

2. The Effect of Caps on Litigation Rates and Size of Awards

Many of these articles argue that if the primary criterion upon which to assess caps is whether they control insurance rates in malpractice cases, there is limited evidence that they achieve this result. Other factors have a much larger impact on the cost of medical malpractice insurance.⁶⁵ Frequently, these articles propose alternative reforms that may have a greater effect on insurance premiums. They include: regulation of insurance rates;⁶⁶ creation of a national data base of medical errors designed to weed out “bad” doctors;⁶⁷ requiring plaintiffs to present a “certificate of merit” from a qualified physician before filing a suit;⁶⁸ using court appointed experts to establish the standard of care;⁶⁹ creating specialized medical courts;⁷⁰ and the implementation of a system of “voluntary caps.”⁷¹

Of course, the “if” in the preceding paragraph is questionable. Although increases in malpractice insurance premiums have very often been the catalyst for rounds of tort reform, it seems to me that this is not the most important criterion by which tort reform should be judged.⁷² A more central set of questions is what effect increases in malpractice insurance rates have on litigation rates and recoveries, and, beyond that, what effect they have on the practice of medicine and on overall injury rates.⁷³

65. For a useful discussion, see Baker, *supra* note 15.

66. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119 (2006).

67. *Id.*

68. Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 VAND. L. REV. 1457 (2006).

69. *Id.*

70. Amanda R. Lang, *A New Approach to Tort Reform: An Argument for the Establishment of Specialized Medical Courts*, 39 GA. L. REV. 293 (2004-2005).

71. Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703 (2005).

72. I do not mean to argue for or against the proposition that controlling insurance rates was the “true” motivation of tort reformers. My point is only that regardless of motivations, caps are best judged by other criteria.

73. Very little work has been undertaken to assess whether reforms impact injury rates. *But see* Paul H. Rubin, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221 (2007) (reporting research indicating that

A substantial amount of research has been undertaken to measure the effect of pain and suffering caps on settlement practices, overall litigation rates, frequency of statutory reductions, and average award size. Most of the research is directed at malpractice cases, but some addresses a wider swath of tort law.

Experimental evidence (i.e., subjects presented with a set of materials and asked to bargain to a settlement) indicates that the existence of caps does have a marginally significant effect on the likelihood of avoiding trial. This effect is achieved primarily because a cap reduces uncertainty about the trial outcome, increasing the chance that there is a contract zone, which in turn increases the likelihood that opposing subjects will find agreements that both sides prefer to a trial.⁷⁴

noneconomic damage caps, a higher evidence standard for punitive damages, product liability reform, and prejudgment interest reform are associated with fewer accidental deaths, while reforms to the collateral source rule are associated with increased deaths between 1981 and 2000). The best discussion of the relationship between tort reform and defensive medicine is to be found in TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* ch. 6 (2005). He makes the important point that one of the worst ways to measure the extent of defensive medicine is to do so by way of opinion surveys of doctors who have an incentive to exaggerate the extent to which they engage in this practice. Better research looks either at hospital records or clinical scenarios. The results of studies based on those methods lead to the conclusion that differences in malpractice risk may have a modest effect on the practice of defensive medicine but other factors such as the growth of managed care tend to neutralize this effect. *Id.* at 126, 134.

74. The experimenters also note that subjects come to the bargain with self-serving biases, causing plaintiffs to predict higher trial outcomes than defendants. "These biases impede the ability of subjects to reach voluntary settlements. Beyond the invariable uncertainty reduction that accompanies a cap, our regression results identify another mechanism through which caps affect the settlement rate--caps diminish the self-serving biases present in negotiating pairs." Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 367-68 (1999). For discussion on the effect of punitive damage caps, see also Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999); Edith Greene et al., *The Effects of Limiting Punitive Damage Awards*, 25 LAW & HUM. BEHAV. 217, 229 (2001). The finding concerning the likelihood of going to trial is consistent with a study by Browne and Puelz that found caps on noneconomic damages reduce the likelihood of filing suit and the size of noneconomic damage recoveries in automobile accident cases. Mark J. Browne & Robert Puelz, *The Effect of Legal Rules on the Value of Economic and Non-Economic Damages and the Decision to File*, 18 J. RISK &

Much of the research on actual case outcomes is summarized by Avraham.⁷⁵ Of all the various components of tort reform, caps on damages have the greatest effect. Caps are found to reduce the number of lawsuits filed, the magnitude of awards, and insurance costs.⁷⁶ Avraham's own work covers the period from 1991 to 1998.⁷⁷ He presents state level and individual level data. At the state level (i.e., comparing awards in states with caps to those in states without caps), caps reduce the number of cases by 10 to 13% and reduce total payments by 15 to 20%.⁷⁸ At the individual case level, the effects are much larger. His data show that caps on noneconomic damages reduce average awards by 65 to 70%.⁷⁹ Avraham believes that these results are biased and that the real effect is smaller.⁸⁰ If so, his findings may be closer to those from earlier research that also looked at individual level data.

Hyman et al.⁸¹ report similar results for medical malpractice cases in Texas.⁸² Using a simulation method on the Texas Closed Claims Database data from 1988 to 2004 they estimate that the 2003 cap on non-economic damages affected 47% of the jury verdicts. It reduced the mean award by 73% and the median award by 33%. The cap reduced what they term the mean "allowed verdict—that is the allowable portion of the jury verdict plus interest—by 37% and the median "allowed verdict" by 36%.⁸³ The cap also affects 18% of settled cases and reduces the

UNCERTAINTY 189 (1999).

75. Ronen Avraham, *An Empirical Study of the Impact of Tort Reform on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. s183 (2007).

76. *Id.* It is a separate question as to whether savings in insurance costs are passed on to customers in the form of lower premiums.

77. His data come from the National Practitioner Data Bank, published by the United States Department of Health and Human Services. By statute, since 1990 all medical malpractice payments are to be reported to the Department within thirty days. *Id.*

78. *Id.*

79. *Id.* The large effect is compatible with the finding that more than 30% of the cases in Avraham's data base had awards greater than \$250,000, the cap that exists in many states. *Id.* at 26.

80. *Id.* at 28.

81. David A. Hyman et al., *Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. LEGAL ANALYSIS (forthcoming 2008), available at <http://ssrn.com/abstract=995649>.

82. The Texas noneconomic damage cap applies only to medical malpractice cases. See TEX. CIV. PRAC. & REM. CODE ANN. ch. 74.

83. Hyman et al., *supra* note 81, at 2.

aggregate payout in these cases by 18%.⁸⁴

Sloan et al. report that all caps reduced payments by 38% and caps on noneconomic damages reduced payments by 31%.⁸⁵ Yoon concludes that from 1987 to 1999, damage awards in Alabama decreased by roughly \$20,000 after caps were imposed and then increased by roughly \$40,000 when the caps were lifted.⁸⁶

Pace et al.⁸⁷ provide a valuable look at caps on jury verdicts in California.⁸⁸ Forty-five percent of the 257 trials they studied had at least one award that exceeded the California \$250,000 cap.⁸⁹ As a result of the cap, total payment by defendants (economic and noneconomic damages combined) was reduced by 30%.⁹⁰ In the capped cases, the median reduction of the award was \$366,000.⁹¹

3. How Caps Are Related to Injury Severity, Gender and Age on Awards.

Because economic damages and noneconomic damages are

84. *Id.*

85. Frank A. Sloan et al., *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis*, 14 J. HEALTH POL. POL'Y & L. 663, 678 (1989).

86. Albert Yoon, *Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South*, 3 AM. L. & ECON. REV. 199, 203 (2001). See also W. Kip Viscusi et al., *Damage Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. RISK & INS. 23 (2005).

87. NICHOLAS M. PACE ET AL., *CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA* (2004).

88. Note that these data are at the trial level whereas Avraham's data include thousands of reported cases, the vast majority of which did not go to trial. Part of the problem with getting a fuller understanding of the effects of tort reform measures is the fact that research is often focused on different parts of the disputing pyramid. See Sanders & Joyce, *supra* note 12, at 235; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?*, 140 U. PA. L. REV. 1147, 1184 (1992). As an aside, only 22% of the medical malpractice trials in the Pace et al. study resulted in a plaintiff verdict. This low percentage is consistent with other data. See Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1459-60 (2007); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1125-27 (2006).

89. PACE ET AL., *supra* note 87, at 22.

90. *Id.* at 21.

91. *Id.* at 22 tbl.3.2. The effect was larger in cases that involved death. *Id.*

positively correlated, we should anticipate that caps are more likely to affect those with more serious injuries. Nearly all the research reviewed above confirms this belief. For example, in the Pace et al. study, cases involving more seriously injured plaintiffs were more likely to be capped than those involving less serious injuries, although caps affect cases at many levels. Sixty-five percent of the verdicts involving brain damages were capped while 27% of the cases involving an injury to a foot or an ankle were capped.⁹²

Finley discusses a separate effect of caps—they lead to gender differences.⁹³ Finley analyzed medical malpractice cases appearing in jury verdict reporters in California between 1992 and 2002. Part of her analysis looked at 131 “gender neutral” injuries to adults, these are injuries that could happen to anyone regardless of gender. The mean total award for women in this group of cases was \$1,227,000, comprised of a mean economic award of \$269,000 and a mean noneconomic award of \$959,000. Thus, the noneconomic damages constituted approximately 78% of the total award. For men, the equivalent numbers are: total award, \$2,342,000; economic damages, \$1,216,000; noneconomic damages, \$1,126,000. Noneconomic damages comprised only 45% of their award. Because noneconomic damages were a larger percentage of awards to women, cap reductions result in a larger reduction in overall awards. For women, the cap on noneconomic damages reduced tort recoveries by 48.4%. The cap on noneconomic loss damages reduced men’s tort recoveries by 40%.⁹⁴

The Pace study uncovered gender difference of a similar nature. Forty-four percent of the awards to males in their study exceeded the cap while 39% of the awards to women did so. The median reduction for men was \$460,000 and for women \$260,000. However, consistent with Finley, they found the median change in total award in capped cases was 25% for males and 34% for females.⁹⁵

Finley also notes that women may suffer injuries unique to their gender, such as impaired fertility or pregnancy loss, that

92. *Id.* at 28 tbl.3.8.

93. *See* Finley, *supra* note 12, at 1267.

94. *Id.* at 1285. Finley observed a similar pattern in wrongful death cases. *Id.* at 1290-91.

95. PACE ET AL., *supra* note 87, at 33 tbl.3.12.

may result in relatively lower economic damages; thus, caps on noneconomic damages will take an even larger percentage of the total recovery.⁹⁶

Finley's article includes a discussion of recoveries by the elderly⁹⁷ and infants, but does not break down the data by other age categories. Pace et al. do include such a breakdown. 71% of the cases involving children under the age of one were capped, 67% of the awards to plaintiffs sixty-five and older exceeded the caps, but only 2% of the cases involving plaintiffs between the ages of forty-two and sixty-four were capped.⁹⁸ The strikingly low percentage of capped noneconomic damages for middle aged people is not the result of a small number of people in the study. There were a total of sixty-one cases involving plaintiffs in this age group. This extreme result may be an aberration of this dataset, but there do seem to be age related differences in the size of pain and suffering awards. Bovbjerg et al. report data from another study that found plaintiffs between the ages fifty-one and sixty-four were awarded higher levels of noneconomic compensation than those between thirty-five and fifty.⁹⁹ Absent detailed information about each case, it is impossible to know whether these age differences reflect: (a) differences in the severity of injury; or (b) jury perceptions that given the same injury, people of different ages experience more or less pain and suffering simply because of their age.

Whether the gender and age differences observed in these studies constitute discrimination (and, if so, in what direction) depends on one's point of view.¹⁰⁰ Finley adopts the position that because women generally recover smaller awards for economic damages (due perhaps to smaller recoveries for wage loss) we should measure the discriminatory effect of caps by looking at the

96. See Finley, *supra* note 12, at 1266.

97. For elderly plaintiffs, the gender situation was reversed. Caps produced an average 42.5% reduction in recoverable damages for men and an average 31.7% reduction in recoverable damages for women. See *id.* at 1288-89. Overall, the total reduction for older plaintiffs was somewhat lower (34.6%) than for the total population of all plaintiffs. *Id.* at 1287.

98. PACE ET AL., *supra* note 87, at 31 tbl.3.11.

99. Bovbjerg et al., *supra* note 34, at 944 tbl.5 (1989).

100. I am unaware of any experimental research that specifically studies whether juries award more or less noneconomic damages for the same injury simply because of the plaintiff's gender or age.

reduction in total awards. If, however, one looks solely at the effect of caps on noneconomic damages, her data (and that of Pace) indicate that male awards take a larger percentage hit. Regardless of the spin one puts on these data, they reflect the inherent inequality of an individualized damages system that is intended to compensate fully plaintiffs for their economic damages and, insofar as money can do so, to put them back into the position they enjoyed prior to their injury. This means that those with more, e.g., better jobs, longer life expectancy, etc., are entitled to larger damages for the same injury and that death often produces far smaller economic losses than severe injury.¹⁰¹ Should these inequalities be made up for in the size of noneconomic awards? Tort theory says no, but Professor Finley seems to say that at least to some extent it should.

4. Caps and the Willingness to Take a Case

Setting aside the question of fairness, the relationship between economic and noneconomic damages brings us to a second question. When a meritorious case involves relatively small economic damages, do caps cause plaintiff attorneys to refuse to take cases that they would take in the absence of caps? Finley speculates that disparities in the ratio of economic to noneconomic damages will cause lawyers to refuse to take cases of female plaintiffs at a disproportionate rate.¹⁰² Michael Rustad provides more insight on this issue in his study of nursing home cases. Because many nursing home abuse cases involve relatively low economic losses, they are an area where reductions in noneconomic damages may lead to a substantial reduction in total award.¹⁰³

Rustad argues that damage caps in Texas have caused this type of litigation to become so undesirable that plaintiff lawyers will no longer take most nursing home cases on a contingency fee

101. For example, in the Finley study, the average economic damage award for the death of an infant was \$32,000 while the average award for seriously injured infants was \$7,426,000. See Finley, *supra* note 12, at 1292-93.

102. *Id.* at 1313.

103. Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 *ELDER L.J.* 331 (2006).

basis.¹⁰⁴ The evidence for this is based on interviews with trial lawyers who say that they are leaving this area of practice.¹⁰⁵ Daniels & Martin report similar statements by other Texas trial lawyers who argue that tort reform has caused them to move their practice away from personal injury cases, especially from malpractice cases.¹⁰⁶ Although Rustad and Daniels & Martin focus their attention on Texas, it is not clear that the situation there is any different than that which prevails in other states with similar caps. Rustad, for example, quotes one California attorney who was of the opinion that California's cap makes "most nursing home cases 'zero damages' cases because the cost of litigation exceeds the potential value of the award."¹⁰⁷

Unfortunately, all of these studies rely heavily on attorney self-reports to measure the effect of noneconomic caps on the viability of cases. Studies based on this type of data have the same inherent limitations as do studies relying on physician self-reports to assess whether the tort system causes doctors to practice defensive medicine. Both doctors and plaintiff lawyers have an incentive to exaggerate the bad effects of what are to them undesirable laws. Perhaps a better estimate of the effect of caps comes from studies such as Avraham's, discussed above, which report that caps lead to approximately a 10% decline in cases in states where they exist. Unfortunately, this research cannot tell us how much of this reduction is the result of attorney unwillingness to take cases they otherwise would have taken in the absence of caps. A full analysis of this question requires a more fine grained analysis than we have to date.¹⁰⁸

5. Summary

How might we sum up caps? They are the most effective of all

104. *Id.* at 374.

105. *Id.* at 375-76.

106. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 668 (2006). See also Daniels & Martin, *supra* note 19, at 312-16. The Texas cap only applies to medical malpractice cases.

107. Rustad, *supra* note 103, at 371.

108. If we assume the decision to take a case is based on a rational cost-benefit analysis, even cases with small noneconomic awards would be worth taking if the estimated cost of litigating the case is substantially below the cap.

tort reform measures if by effective we mean that they have a measurable impact on the tort system. Although their impact on insurance rates is minor, they have a much greater effect on the number of suits and the size of awards. Caps may increase the probability of settlement by reducing uncertainty, however, they are most likely to do this in cases where noneconomic damages are potentially large. Studies of actual jury outcomes confirm that the impact of caps is visited most on the more seriously injured plaintiffs, whose noneconomic awards are most likely to be above the caps. Historically, studies have found that this group of plaintiffs tends to be the most undercompensated even without caps.¹⁰⁹ There is some evidence that caps limit the willingness of plaintiff attorneys to take certain types of cases, especially those where the potential economic damages are low.

Finally, and most important, whatever aggregate effects caps may have, they do nothing to resolve the problem that similarly situated plaintiffs may receive widely varying recoveries. Moreover, caps may create the opposite injustice of compelling people in very different circumstances to accept exactly the same noneconomic damage award. What alternatives might we consider?

C. Abolishing Noneconomic Damages Entirely

The most radical solution to the problems posed by the indeterminacy of noneconomic damages is simply to abolish them. Over the years, some scholars have called for the complete abolition of general damages.¹¹⁰ From one perspective, these calls are easily dismissed. For one thing, they violate one of my principles for better tort reform, that it must be doable. Unless this change is accompanied by other fundamental changes in the way we deal with injury in our society, abolishing general damages does not seem to be within the realm of possibility.¹¹¹

109. Saks, *supra* note 88, at 1216-23. See also Luke Ledbetter, "It's the [Tort System], Stupid": Consumer Deductibles: How to More Equitably Distribute the Risks of Medical Malpractice and Adequately Compensate Victims Without Statutory Damage Caps, 6 APPALACHIAN J.L. 51, 62-68 (2006).

110. See, e.g., Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 476 (1959).

111. The sorts of changes I have in mind here are a decision to go

Nevertheless, a brief discussion of these proposals is worthwhile because it reinforces the point that the present system is seriously flawed and that caps on damages alone cannot repair these flaws.

The two most recent calls for abolishing general damages are by Richard Abel¹¹² and Joseph King.¹¹³ Each makes the same set of criticisms about general damages. The relationship between general damages and the overarching goals of tort law (compensation, deterrence, and corrective justice) is tenuous.¹¹⁴ Justifications, such as they are, are often based on practical considerations such as the frequent observation that pain and suffering damages provide a fund of money with which to pay the plaintiff's lawyer's contingency fee without depriving the plaintiff of funds sufficient to actually pay medical bills or replace lost earnings.¹¹⁵ Moreover, awarding money for pain and suffering leaves the legal system open to the criticism that it is monetizing something upon which a dollar value cannot be placed, thus violating our well-founded sense of incommensurability.¹¹⁶

If there is one thing that ties these critiques together, however, it is the sense that the combination of incommensurability, incalculability due to the absence of a market against which to judge appropriateness,¹¹⁷ and the absence of any meaningful guidance to jurors when they are asked to decide cases,¹¹⁸ results in unprincipled differences in outcome.¹¹⁹ This

exclusively to a no-fault automobile insurance plan or a full blown national health care system.

112. Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006).

113. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 S.M.U. L. REV. 163 (2004).

114. *Id.* at 164. See also Chase, *supra* note 34, at 764-65.

115. 2 DAN B. DOBBS, *LAW OF REMEDIES* 399 (2d ed. 1993); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 801 (1995).

116. King, *supra* note 113, at 171; Abel, *supra* note 112, at 270. See also Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659 (2003).

117. King, *supra* note 113, at 175; Chase, *supra* note 34, at 765; Levin, *supra* note 34, at 308.

118. King, *supra* note 113, at 175. King quotes Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 PSYCHOL. PUB. POL'Y & L. 712, 736 (2000), for the proposition that instructions from the

fundamental problem with noneconomic damages is left relatively untouched by damage caps.

D. Limiting Variance in Awards

1. Schedules and Scenarios

There is a better alternative: take steps designed to limit the variance in awards. In an earlier article, I reviewed a number of these proposals.¹²⁰ Most fall into two basic types.

One type of proposal places greater responsibility on trial judges to monitor and adjust awards.¹²¹ A 1987 ABA Commission

court on how to assess general damages are “breathhtakingly unhelpful” in achieving greater predictability of noneconomic awards. See Chase, *supra* note 34, at 768-69 for examples of typical instructions.

119. The issue of unprincipled differences between awards is different from the issue of whether any award is principled. When two similar people suffer the same physical injury and are awarded very different amounts in general damages, there are no commonly agreed upon criteria by which we could say that one amount is correct and the other amount is incorrect. To take but one recent example, in *Philip Morris Inc. v. French*, 897 So. 2d 480 (Fla. Dist. Ct. App. 2004), *rev. denied*, 918 So. 2d 292 (Fla. 2005) the plaintiff, TWA flight attendant Lynn French, sued several tobacco companies for her sinusitis allegedly caused by breathing second hand smoke on the job. The jury found for the plaintiff and awarded her a total of \$2 million for past pain and suffering and \$3.5 million for future pain and suffering. The trial judge granted the defendant’s motion for a remittitur and reduced the award to \$500,000. Similar outcomes in other cases are reported in WEILER, *supra* note 32, at 55 n.39. In one case, a jury award of \$25 million for the distress of a mother who saw her children killed in a traffic accident was reduced to \$2.5 million. In each of these cases it is impossible to say that one result is correct and the other is error or that there is some third amount that is superior to both of these amounts.

120. Sanders, *supra* note 35.

121. Today, tools such as additur and remittitur are rarely used to accomplish this objective, and when they are used their application does not appear to be much more principled than the jury judgments they are altering. Apparently, only New York has a statute directing the appellate division to “determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.” N.Y. C.P.L.R. 5501(c) (McKinney 1995). This rule replaced the older, common law “shock the conscience” standard that still exists in many states. In determining if awards “deviate materially,” New York courts look to awards approved in similar cases. See Eva Madison, *The Supreme Court Sets New Standards of Review for Excessive Verdicts in Federal Court* in Gasperini v. Center for Humanities, Inc., 50 ARK. L. REV. 591, 595 (1997); Charles D. Cole, Jr., *Charging the Jury on Damages in Personal-Injury Cases: How New York Can*

report on tort damages recommended measures along these lines.¹²² It found that there should be greater use of additur and remittitur by trial and appellate courts to set aside pain and suffering verdicts that are “clearly disproportionate to community expectations.”¹²³ A fleshed out version of this approach can be found in Baldus et al.¹²⁴ They propose that judges compare a

Benefit from the English Practice, 31 SYRACUSE J. INT’L L. & COM. 1 (2004). At least one federal circuit has moved in the New York direction. The Fifth Circuit has occasionally applied the maximum recovery rule to create judicially a cap on general damages. Some opinions have used the rule to cap non-pecuniary damages at 133% of the highest previous recovery in similar cases. *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990). See also, *Lejeune v. Transocean Offshore Deepwater Drilling Inc.*, 247 F. App’x 572 (5th Cir. 2007); *Lebron v. United States*, 279 F.3d 321, 328 (5th Cir. 2002). For a discussion of the rule, see Lawrence James Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429 (2003).

Recently, Judge Posner applied a similar rule in a Seventh Circuit opinion. In *Arpin v. United States*, the court vacated and remanded an award for loss of consortium awarded by the trial judge after a bench trial. Nos. 07-1079, 07-1106, 2008 WL 927686, at *8 (7th Cir. Apr. 8, 2008). The trial court’s justification for a \$7 million loss of consortium award for a wife and four adult children was that “it is difficult to put a value on something that is priceless. Mrs. Arpin is far more dependent on her husband than are her children. Her children have suffered the loss of a father that is great and the devastation to this family is immeasurable.” *Id.* at *6. The Seventh Circuit concluded that this explanation was insufficient to satisfy Fed. R. Civ. P. 52(a) requiring the judge to explain the grounds of his decision. The court said:

One cannot but sympathize with the inability of the district judge in this case to say more than he did in justification of the damages that he assessed for lost of consortium. But the figures were plucked out of the air, and that procedure cannot be squared with the duty of reasoned, articulate adjudication imposed by Rule 52(a).

Id.

The court recommended to the trial judge that he examine the average ratio of consortium damages to economic damages in wrongful-death cases in which the award of such damages was affirmed on appeal and then adjust the award upward or downward on the basis of case-specific factors such as the age of children, whether they are minors and the closeness of the relationship between the decedent and this family. *Id.* at *6-7.

122. ABA, Report of the Action Commission to Improve the Tort Liability System 10-15 (1987).

123. *Id.* at 13.

124. David Baldus et al., *Improving Judicial Oversight of Jury Damage Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995).

given case to a group of cases in which the plaintiff suffered similar injuries. The injuries in each of the comparison cases would be ranked on a five point scale from much less to much more severe. The actual awards in each of the comparison cases would then be adjusted to reflect the award that would have been returned if the level of harm in the comparison case had been the same as that in the case under review. At this point the court can compare the award in the case at hand to the "adjusted" awards in other cases. Finally, under the Baldus proposal the court would establish a range of reasonableness and verdicts would be affirmed only if they were no more than 10% higher than the highest adjusted award.¹²⁵

The second type of proposal is designed to influence jury decisions in the first instance. These proposals in turn may be divided into those that would restrict juries to a range of general damage amounts and those that only wish to give juries guidance without any real constraint on their ultimate decision. In their seminal article on general damages, Bovbjerg et al. propose alternatives that range from more to less restrictive.¹²⁶ Their most restrictive proposal would create a matrix of values that awards a fixed sum of general damages based on the severity of the injury, the body part affected, and the age of the injured party. The values would be based on past jury findings in each cell, aggregated across all case types: medical malpractice, products liability, and so on.¹²⁷ The fact finder would have no discretion as to the size of an award once they placed the plaintiff into an appropriate age and injury category.¹²⁸ A modification of this

125. *Id.* at 1143-53. The paper does not discuss awards that are too low, but presumably awards that were more than 10% below the lowest award could be adjusted upward.

126. *Id.* at 34.

127. In fact, case type influences noneconomic awards. Awards are higher in malpractice cases and lower in automobile accident cases. *Id.* at 943 n.163. This, of course, is another source of horizontal inequality in the award of noneconomic damages.

128. Bovbjerg et al., *supra* note 34, at 946. Similar, fixed amount proposals have been advanced by other scholars. See, e.g., Patricia M. Danzon, *Medical Malpractice Liability, in LIABILITY: PERSPECTIVES AND POLICY* 101, 122-23 (Robert E. Litan & Clifford Winston eds., 1988); Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 210-11 (1958) (suggesting that general damages should be capped at 50% of the plaintiff's proven medical, nursing, and hospital bills); Ronald J. Allen et al., *An*

alternative would be to give the jury an upper and lower boundary that reflects the nature of the plaintiff's injury. The jury would be told that its award must fall within this range.¹²⁹

A similar proposal is advanced by Paul Weiler in his important book, *Medical Malpractice on Trial*. Professor Weiler would support either a sum certain schedule of damages based on the nature of the plaintiff's injury, or a schedule that allows some discretion on the part of the jury to deal with "idiosyncratic cases."¹³⁰

Bovbjerg et al. also discuss less restrictive proposals. For example, they offer an alternative whereby juries would be given a number of standardized injury scenarios with noneconomic damages dollar values associated with each scenario. The scenarios are designed to give juries potential anchors that reflect the "going rate" for different injuries. The values associated with the scenarios would not be binding.¹³¹

Versions of the scenario alternative have been proposed by several other scholars. Professor Chase would provide jurors with a chart summarizing similar awards in cases of similarly situated plaintiffs.¹³² Wissler et al. would support plans that "pool jury awards made for similar cases and present these cases and their award distributions to juries for guidance in reaching their general damages awards."¹³³ Diamond et al. prefer a plan that would allow attorneys, with some judicial oversight, to present to the jury a set of pain and suffering awards that other juries made

External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation, 56 DEPAUL L. REV. 1249, 1275 (2007) (supporting legislative schedules). Other countries have adopted similar scales. See Sugarman, *supra* note 25 for a discussion of a provision in New South Wales, Australia.

129. Bovbjerg et al., *supra* note 34, at 959.

130. WEILER, *supra* note 32, at 58-61.

131. Bovbjerg et al., *supra* note 34, at 955.

132. Chase, *supra* note 34, at 775-76. Professor Chase cites the ALI Reporters' Study, *Enterprise Liability for Personal Injury* 199-230 (1991) for similar positions. It recommends the development of guidelines that give juries inflation-adjusted damage amounts attached to a number of disability profiles that vary in terms of severity. Chase notes that the discussion of the guidelines indicates that the members of the ALI study were not of one mind as to how binding the guidelines should be on the jury. See also Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 198 (2002).

133. Wissler et al., *supra* note 44, at 817.

in similar cases.¹³⁴ They envision a procedure similar to the use of “comparables” in property tax appeals.

A few commentators add an additional component. They would eliminate all compensatory damages if the plaintiff’s injury did not meet some minimal threshold of seriousness—if, for example, it involved temporary pain and suffering.¹³⁵ These proposals are premised on the finding that such claims are often overcompensated, in part, because of their nuisance value.¹³⁶

All of the scenario proposals begin with the assumption that the most important variable to consider in assessing general damages is the nature of the injury suffered by the plaintiff. Many also have an age of plaintiff component. For example, Bovbjerg et al.’s proposal calls for constructing hypothetical scenarios that include information on injury severity, victim age and/or life expectancy, the extent of pain endured, the extent of an inability to engage in normal activities, and the duration of each factor.¹³⁷ The proposed scenarios would not allow for variance on some other dimensions that might be relevant to some jurors. For example, a survey might reveal that most prospective jurors believe that, other things being equal, a mother suffers greater emotional distress from the loss of an infant child than a father, but there is no provision in the Bovbjerg et al. proposal or any other proposal of which I am aware to explicitly introduce gender into any of the scenarios. As the Bovbjerg et al. proposal should make clear, the construction of scenarios or categories is a complex matter. Setting aside the question of what variables should and should not be included, the scenarios must be detailed

134. Diamond et al., *supra* note 34, at 321-22.

135. WEILER, *supra* note 32, at 60; ALI Reporters’ Study, *supra* note 132, at 230/

136. WEILER, *supra* note 32, at 60. For an interesting discussion of nuisance value cases, see Randy J Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

137. Bovbjerg et al., *supra* note 34, at 954. The authors suggest that the scenarios should describe the circumstances of the injury but should not include any information on responsibility or causation. *Id.* Obviously, the authors are worried that jurors will allow the level of defendant culpability to influence the size of general damage awards, something which formal tort rules forbid, but something that seems to happen with a fair degree of frequency in actual cases. See Horowitz & Bordens, *supra* note 50; Sharkey, *supra* note 63.

enough to be useful, but without features that make the case unusual.

My personal preference is for relatively hard schedules that provide for a range of awards for each category with, perhaps, some provision to deal with extraordinary cases in much the same way that sentencing guidelines may be violated under special circumstances. However, I am not wed to any particular plan and although each may have its problems I believe all of the suggestions are superior to the status quo. One should not make the best the enemy of the good.

2. Objections to Schedules and Scenarios

Each proposal reviewed here has the benefit that it takes seriously the argument that current arrangements create too much horizontal inequity and it attempts to narrow the range of general damage awards for similarly situated plaintiffs.¹³⁸ For me, this benefit outweighs a number of potential criticisms of these proposals. It is important, however to review possible objections to schedules or scenarios.

First, there is the concern about cost. Depending on which alternative one employs, there will be the cost of starting up the system. With respect to the scenario alternatives, there is the cost of establishing which scenarios to use and how to present them to the jury. Overall, however, the costs of these proposals seem to be small, mostly incurred as start-up costs to get the new regime in place. As an offset, presumably the total time required for counsel to argue about general damages would be reduced, resulting in somewhat shorter trials. The post-verdict adjustment alternatives may lead to increased costs due to appeals of jury damage awards. As a counterweight to these costs, if, as some have argued, schedules and/or scenarios increase the probability of a settlement or of settlement at an earlier point in the lawsuit, this may reduce overall average litigation costs. In sum, cost is not a fatal objection.

138. Even the least restrictive of these proposals should narrow variance to some extent. In one study, Diamond et al. manipulated anchor points. One-fourth of their jurors heard plaintiff ask for \$250,000. This produced significantly lower awards than those arrived at by jurors who were left totally on their own. Diamond et al., *supra* note 34, at 319. They report that James Zuehl achieved similar results in an unpublished study. *Id.*

Second, there is the concern that these proposals would invade the province of the jury. Here we face a tradeoff. The proposals that are likely to have the greatest impact in reducing horizontal inequity are the ones that most clearly limit jury discretion, and those that leave the most discretion in the hands of jurors are likely to leave the most residual inequities. Individual states must seek the balance that they find most comfortable. This does not mean that no plan is acceptable. In my judgment, proposals that do no more than anchor jurors by informing them of average awards in previous similar cases do not undermine jury judgments any more than knowledge of previous awards undermines a judge's decision in a bench trial.

Third, some lawyers may object to schedules or scenarios because they diminish the advocacy skills of the best trial lawyers. For these skills to have a maximum impact, they require a system where rhetorical ability can significantly alter outcomes. In a system where damages are largely determined by a set of fixed rules, such skills can have little play.¹³⁹ For highly skilled elite trial lawyers, schedules and similar devices diminish an important aspect of what sets them apart from other personal injury lawyers. This point is captured in Thomas Galligan's compelling review of the virtues of the common law tort action and its incompatibility with damage schedules.¹⁴⁰ In ordinary litigation:

The specific story dominates the stage. The law's generalized standards accommodate the details of the case. Broad standards invite particularistic, event specific versions of what happened. The detailed story matters more than it might in a legal landscape of detailed, particularistic rules. When the story matters, the individuals matter. The litigants and those whom they call as witnesses become actors in a play, a play

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

140. Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 172 (1996). Most people who have spent time with plaintiff personal injury lawyers are struck by their defense of traditional common law adversarial processes. See Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481 (1992).

about what happened, and each of the characters matters [sic].

Turning to general damages, we see perhaps the most dramatic example of tailoring damage awards to the needs of the particular plaintiff. Juries rendering awards for mental anguish, pain and suffering, and loss of enjoyment of life focus not on the average person but once again, on the particular plaintiff Fact finders consider the pain the particular plaintiff suffered, the mental anguish this plaintiff has suffered, and the loss of enjoyment of life this plaintiff has suffered. The jury focuses in on the particular plaintiff involved in the particular case. It should be noted that recent proposals to provide jurors with guidelines or schedules for general damages are inconsistent with traditional rules concerning general damages. The proposals would abstract away from the particular plaintiff.¹⁴¹

Galligan is correct. Schedules are likely to diminish those lawyer skills that maximize the award of an individual client. But by definition this is a game everyone cannot win. Not every award can be high, and in my opinion, diminution in the importance of advocacy skills is a reasonable price to pay for less variance in awards.

Fourth, there is the question of bargaining strength. One advantage of uncapped noneconomic damages is that in serious cases it creates a more symmetrical bargaining space. When defendants face an unknown upper bound on damages, they may apply a “danger value” to a case; that is a premium in excess of the expected value to eliminate exposure to a potentially severe jury verdict when a case presents a potential for a low frequency, high severity payout.¹⁴² For defense insurance companies, one advantage of caps on damages is that they restrict the danger

141. Galligan, *supra* note 140, at 140, 172.

142. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 199 (1970). For two useful articles on the effect of uncertainty, see Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 219 (2007); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 683 (2006).

value of cases. Caps cause bargaining spaces to become asymmetrical because in this situation only plaintiffs must bargain under the handicap of serious risk aversion.

This asymmetry is a reason to oppose caps on damages, but is not a reason to oppose schedules or scenarios per se. Most schedules would presumably affect cases that have no danger value for defendants. Only the more severely injured plaintiffs present this problem for most insured defendants. Were schedules and scenarios to operate only on the high side, this might be a reason to oppose them for the most seriously injured plaintiffs. However, one should keep in mind that the schedules and scenarios have a risk-reducing effect for the plaintiff as well. Plaintiffs would have less reason to fear the very small general damage awards that may occur in the absence of these devices. In sum, schedules result in a more symmetrical bargaining space by reducing the danger value of a case for plaintiffs and defendants alike.

A final plaintiff objection might be that adopting a version of these proposals would result in the worst of both worlds: schedules plus caps. This is a reasonable concern. Low caps and schedules do present an asymmetry problem in addition to the problems caps may pose for lawyer compensation within a contingent fee system.¹⁴³ To this, I do not have a complete answer. It seems very unlikely that defense interests would willingly abandon the hard-won caps in exchange for schedules, unless the schedules were quite rigid, as they are in Bovjberg et al.'s first proposal or the post verdict adjustment proposal of Baldus et al. Nevertheless, a bargain might be struck that trades some type of schedules for an increase in caps. Moreover scenarios or schedules might be proposed in jurisdictions that do not now have caps.

VI. CONCLUSION

In this paper I have argued that one good tort reform would be to adopt some version of the various proposals designed to

143. In this paper, I do not address the question of whether it would be better to replace contingent fees with some form of a loser pay system. For one proposal along these lines, see King, *supra* note 113 (calling for the abolition of general damages).

restrict the range of general damage awards for people who are similarly situated. Given my criteria of what constitutes good tort reform, I believe these proposals qualify for that label. First, I think they are doable. At the very least, other states could adopt the New York rule concerning post verdict adjustments of general damages. Other changes could be done by the legislature, but I believe many of these proposals could be implemented by the courts alone. The biggest obstacle to introducing some of these changes is not that they are radical or difficult to implement, but that none of the actors in the system, judges, defense lawyers, and plaintiff lawyers have an interest in pushing them. Even if this has been the case in the past,¹⁴⁴ it does not have to remain the case in the future. I take heart from efforts to permit jurors greater privileges, such as taking notes, asking questions, and even engaging in pre-deliberation discussions of the case. Proposals along these lines languished for years, but in recent times a number of jurisdictions have moved to implement some or all of these good reforms.¹⁴⁵

Second, this reform addresses an aspect of the current system that most would agree produces unjust outcomes. We in the legal community may sometimes lose sight of this fact because we have rationalized variation in general damages as not being that bad, or as somehow explainable if only we knew all the considerations that went into each separate jury decision. Ask the citizenry at large, however, whether differences of an order of magnitude are acceptable, and the answer is almost certainly no. The recent experience with the 9/11 fund is a cogent reminder that unwarranted variance in general damages is perceived to be unjust.

Third, I believe these reforms can garner some support from relevant constituencies, or at the very least they would not engender immediate opposition and implacable hostility from the judiciary, the plaintiff bar, or the defense bar. On this point,

144. See Sanders, *supra* note 35, at 507-14.

145. Randall T. Shepard, *Jury Trials Aren't What They Used To Be*, 38 IND. L. REV. 859, 864 (2005); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 151-62 (1996). See also Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006); Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REF. 349 (1999).

unfortunately, I could be wrong. The tort wars have produced such a hostile environment that some proposals seem to create opposition simply because someone on the other side first suggested them. I expect that some who oppose the proposals put forth in this paper will conclude that I must be in the opposite camp (whichever camp that happens to be). But this observation leads me to one final point about why constraining general damages in the ways proposed here is a good idea. Surely the adoption of some version of this proposal will not bring peace in our time. It might, however, be a moment of detente and act as a small step toward de-politicizing the battle over torts. On that score as well, this reform counts as a good one.