

## Introduction: Who Feels Their Pain - The Challenge of Noneconomic Damages in Civil Litigation: Eleventh Annual Clifford Symposium on Tort Law and Social Policy

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## INTRODUCTION

*Stephan Landsman\**

Awarding damages for noneconomic injury, particularly pain-and-suffering damages in tort cases, has become the focus of a heated debate in the United States. The debate pits tort reformers, corporate America, and much of the medical profession against injured individuals, consumer groups, and trial lawyers. Their interchanges have been marked by extremes of rhetoric and a paucity of data. The Eleventh Annual Clifford Symposium seeks to provide some much needed information and analysis regarding this topic by drawing together leading scholars to consider such questions as the legal and social foundations of noneconomic (or general) damages, the fairness of awarding them, areas of law where they are particularly important, and the impact of reform efforts on those seeking such awards.

Do pain-and-suffering damages have a continuing role to play in civil dispute resolution? Are noneconomic damages important to the development of the law? Has reform been sensible and fair? These and a substantial number of other questions are considered in the articles that follow.

The Symposium begins with a sharp attack on general damages by Richard Abel. His title neatly presents his argument: *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*.<sup>1</sup> Mark Geistfeld continues the critical scrutiny of such awards by suggesting that, in light of Supreme Court precedent about punitive damages, pain-and-suffering awards may be vulnerable to due process attack.<sup>2</sup> He goes on, however, to suggest at least one way out of the difficulty he identifies. Robert Rabin picks up on the theme of the debatable legitimacy of awards for pain and suffering, eventually identifying points “that firm up the base for rec-

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1. 55 DEPAUL L. REV. 253 (2006).

2. See Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331 (2006).

ognizing the legitimacy of pain-and-suffering recovery.”<sup>3</sup> He, however, casts doubt on the “make-whole” rationale often relied upon.

In the next two articles, Anthony Sebok<sup>4</sup> and Stephen Sugarman<sup>5</sup> explore other nations’ approaches to the pain-and-suffering question. These pieces provide an important comparative perspective highlighting the divergent doctrinal commitments that produce strikingly different approaches to award making. In his analysis of divergence, Stephen Sugarman suggests that, among other things, the different ways in which lawyers are compensated for their services may play a major role in the variation between American and foreign pain-and-suffering awards. He observes that contingency fee financing has the effect of dramatically reducing American awards and that general damages may be essential to ensure fair compensatory payments. In light of these insights, Sugarman argues that the introduction of caps on noneconomic damage awards without some form of fee shifting is likely to work a considerable injustice on American tort victims.

John Goldberg takes up the point broached by Robert Rabin about whether noneconomic tort damages should be viewed as a mechanism to make victims whole.<sup>6</sup> After a careful examination of doctrinal origins, he argues for “fair compensation” as a more appropriate conceptualization, one that can introduce greater flexibility into our approach to damage awards. Benjamin Zipursky then returns to the question of caps.<sup>7</sup> He builds an intellectual framework for tort theorist engagement in the debate about caps on pain-and-suffering damages that emphasizes a principled protection of rights, defense of systemic integrity, and thoroughgoing scrutiny of the practical implications of change. Reform and our ability to pursue it intelligently is also the subject of Joseph Sanders’s article: *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*.<sup>8</sup> Sanders argues for more serious consideration of proposals likely to produce horizontal equity

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3. See Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006).

4. See Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379 (2006).

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

6. See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006).

7. See Benjamin C. Zipursky, *Coming Down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform*, 55 DEPAUL L. REV. 469 (2006).

8. 55 DEPAUL L. REV. 489 (2006).

in tort damages awards and considers why these proposals have gained so little traction.

Powerful challenges to two very different tort theory shibboleths come next. Margo Schlanger focuses on the shortcomings of “optimal deterrence” as a justification for reform.<sup>9</sup> She explores substitution effects that may lead potential defendants to change their conduct, not to maximize safety, but to take advantage of the ease of proving certain sorts of precautions at trial or because they reduce the possibility of tortious conduct being detected. These reactions suggest how subtly and adversely well-intentioned, theory-based reforms can affect behavior. Then Robert MacCoun brings a skeptical social science perspective to claims that media bias in reporting on tort awards is motivated by sympathy toward large corporations.<sup>10</sup> He argues that various formal features of trials are far more likely than ideological bias to be producing the skewed reports that focus on large awards and give a misleading impression about the operation of the tort system.

The human cost of suffering and making claims about it occupy the attention of the next two symposium contributions, those by Ellen Pryor<sup>11</sup> and Lee Taft.<sup>12</sup> Pryor focuses on the plaintiff’s lawyer. She develops a series of suggestions about how counsel should go about the difficult tasks of dealing with a client who is in pain and about proving that pain without exacerbating it. Lee Taft looks at what another player, the defendant, can do about a victim’s suffering. He is particularly interested in the power of apology but decries the trend to use it as a tactic rather than a sincere acknowledgement of wrongdoing and signal of willingness to make amends. These two articles are augmented by the next paper in the symposium, from Edward Hickling and his colleagues, which assesses the psychological impact of litigation on claimants.<sup>13</sup>

Stephen Daniels and Joanne Martin return us, one last time, to the debate about caps on pain-and-suffering damages.<sup>14</sup> In the context of

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9. See Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517 (2006).

10. See Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539 (2006).

11. See Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff’s Lawyer*, 55 DEPAUL L. REV. 563 (2006).

12. See Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DEPAUL L. REV. 601 (2006).

13. See Edward J. Hickling et al., *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAs*, 55 DEPAUL L. REV. 617 (2006).

14. See 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 (2006).

Texas reform experience, they document the pernicious effect of cap legislation. They find that caps, at least as adopted in Texas, rob victims (especially children, women, and the elderly) of access to counsel and, hence, a day in court, by making their claims financially unattractive to plaintiff-side lawyers. Michael Green rounds out the Symposium with a fascinating paper about the intersection between causation and damages.<sup>15</sup> He suggests that the way we think about damages has serious implications for the resolution of some of tort's most difficult and esoteric problems about duplicate harm and multiple sufficient causes.

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15. See Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671 (2006).