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PAIN AND SUFFERING AND BEYOND: SOME THOUGHTS ON RECOVERY FOR INTANGIBLE LOSS

Robert L. Rabin*

INTRODUCTION

Fifty years ago, Louis Jaffe, most prominently known for his influential administrative law scholarship, turned his attention to tort—and indeed to an infrequently visited corner of tort scholarship—the law of damages.1 More particularly, Jaffe addressed pain and suffering damages in an article that is still frequently cited as a pivotal analysis of the topic. Jaffe began on a bold note, asking provocatively: "But why should the law measure in monetary terms a loss which has no monetary dimension?"2 Throughout the article, in a similarly skeptical tone, he returned to the theme of "the arbitrary indeterminateness of the evaluation."3 Indeed, it is for this theme, and the consequent conclusion that pain and suffering damages might well be eliminated, that the article is most remembered.

In fact, read closely, Jaffe’s views turn out to be far more equivocal. For every thrust in the direction of eliminating intangible-loss recovery altogether, there is a retreat to the position that compensation for past pain is the principal object of his attack.4 Still, it is possible to trace his restive, begrudging stance on the prospect of awarding damages for intangible loss of any sort to a continuing chorus of skeptics in the ensuing decades of scholarship. The skeptics range from a law and economics scholarship that puzzles over the question of why prospective injury victims should be, in effect, forced to purchase a form of insurance (pain and suffering) that has not been sufficiently valued to

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2. Id. at 222.
3. Id. at 224.
4. Id.
be offered in the market, to a leftist critique that objects to the
commodification of misfortune.5

Indeed, corresponding roughly to the fiftieth anniversary of the
publication of Jaffe’s article, Joseph H. King, Jr. gives it pride of place
in the epigraph to his recent article advocating without qualification
the across-the-board, wholesale elimination of pain and suffering
damages in personal injury cases.6 King argues that from any widely
accepted perspective on the goals of tort law—compensation, deter-
rence, corrective justice and fairness, administrative cost concerns,
and the like—pain and suffering recovery ought to be eliminated and
recovery should be granted exclusively for economic loss suffered as a
consequence of personal injury.7 This wide-ranging attack poses sub-
stantial challenges to the awarding of intangible loss. Among a litany
of criticisms, King’s fundamental concerns are that uncertainty of val-
uation fosters unpredictability of outcomes, hence undercutting opti-
mal deterrence and rational experience-rating—and correspondingly,
uncertainty promotes wide disparity among recoveries, hence violat-
ing fairness notions of like treatment for like cases. These conse-
quences are unavoidable, the argument goes, because of the
incommensurability between psychic harm and pecuniary redress.
Moreover, occasional break-the-bank awards generate insolvency and
inability to compensate more “deserving” claims, and correspondingly
undercut the capacity to distribute losses widely and efficiently through
the pricing mechanism.

Whatever the counterarguments may be, these persistent qualms
about compensating pain and suffering seem, at a minimum, good
grounds for locating pain and suffering more precisely on the spec-
trum of tort claims for redress of intangible loss, and considering
whether the reservations about pain and suffering recovery are con-

5. Compare Alan Schwartz, Proposals for Products Liability Reform: A Theoretical Synthesis,
97 YALE L.J. 353, 362–67 (1988) (providing a law and economics critique), and George L. Priest,
The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J., 1521, 1536 (1987), with Rich-
ard L. Abel, Should Tort Law Protect Property Against Accidental Loss?, 23 SAN DIEGO L. REV.
79, 99–100 (1986) (advancing a critical legal studies perspective). Professor Abel restates his
thesis and broadens the scope of his attack in this volume of the DePaul Law Review. See Rich-
ard Abel, General Damages Are Incoherent, Incalculable, Incommensurable, and Incoherent (But

6. Joseph H. King, Jr., Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law,
57 SMU L. REV. 163 (2004). The epigraph, drawn from Jaffe, is as follows: “We have come to
accept almost without question the monetary evaluation of the immeasurable perturbations of
the spirit. But why should the law measure in monetary terms a loss which has no monetary
dimension?” Id. (citing Jaffe, supra note 1, at 222).

7. King would include economic outlays for pain reduction and would also establish attorney’s
fees as an independent head of damages. See id. at 205–08.
text-bound or have wider applicability. In thinking about pain and suffering from this broader perspective on compensation for intangible loss, I will suggest commonalities that firm up the base for recognizing the legitimacy of pain and suffering recovery. At the same time, however, drawing on the inventory of torts recognizing intangible loss, I will suggest reservations about the "make-whole" principle—the notion that tort compensation has conventionally aspired to restore an injury victim to a pre-injury position.

I begin with some thoughts on context internal to the pain and suffering claim in an accidental harm case. Then, I offer a broader historical overview of intangible loss that leads, in turn, to a look at the present landscape from a wide-angle perspective. Finally, in view of the many byways that intangible loss has taken, I reassess the coherence of a "make-whole" foundation for pain and suffering.

II. A Brief Analytic and Historical Excursion

At the outset, it is interesting to note that most critics of intangible-loss recovery—including both Jaffe and King, a half century apart—focus their attention on pain and suffering recovery without any grounding in context, creating the impression that it is a poor relation (parasitic, some might say) of the robust and well-defined nuclear family of medical expense, lost income, and rehabilitative outlays, all recoverable under the rubric of "pecuniary loss." This is highly problematic both as an analytic and a historical proposition.

A. An Analytic Note

To begin with the analytic, the point is not to question the impressiveness of pain and suffering damages, but rather to remark on the critics' correlative contrast to pecuniary loss. Although the point seems to get lost in the critique of pain and suffering, every tort scholar recog-

8. As this suggests, it is not the purpose of this article to debate the merits of whether pain and suffering damages are excessively unpredictable and incoherent (incommensurable), as some have claimed. But note that when a critic such as King makes these arguments, he assumes that pain and suffering awards are unbounded. There is no necessary basis for this assumption, as I discuss in Part III. See infra notes 64–75 and accompanying text. In addition, while the incommensurability argument is tautologically correct, it is insensitive to the complex pathways by which loss of enjoyment of life and indignity may be ameliorated. The artist who can no longer paint or the athletic individual who can no longer participate in competitive events may not be restored to his or her pre-existing condition by a monetary award, but he or she may be given the opportunity to develop new intellectual enthusiasms, travel possibilities, and spectator satisfactions. See, e.g., Richard N. Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. FLA. L. REV. 477 (1982).

nizes that there is frequently extraordinary uncertainty and imprecision involved in recovery of pecuniary loss in serious injury cases of the sort that generate high intangible-loss awards.

Illustratively, in the landmark California case on noneconomic loss, *Seffert v. Los Angeles Transit Lines*, where plaintiff suffered horrendous, permanently deforming foot injuries that required repeated surgery—and indeed held out the prospect of several future operations and a lifetime of pain—the main contested issue was the amount of pain and suffering damages. What is revealing, however, for our purposes, is that the opinion does not address the imprecision about the plaintiff's future economic loss. The year is 1961, and looking to the future, plaintiff recovers $1,000 (in total) for drugs over an estimated future life expectancy of thirty-four years; $2,000 per year in medical expenses for the next ten years, and $200 per year thereafter. Moreover, if *Seffert* suggests staggering underestimation of the future course of likely medical expenses, virtually every case involving the permanent incapacity or serious diminution in ability of an individual in an early stage of apparently promising professional development involves highly imprecise estimation of future lost earnings.

The short of it is that setting one's sights on the uncertain character of noneconomic loss creates an illusion that is simply inaccurate: that there is a sharp distinction between noneconomic and economic loss on the dimension of precision in valuation. This does not, of course, negate a concern about the amorphous character of pain and suffering recovery. It does, however, put the concept of "making the victim whole"—the oft-rehearsed restorative function of compensatory damages—in a far less fine-tuned perspective that may, in turn, cast a different light on the preoccupation with imprecision in critically assessing the case for recovery of pain and suffering loss.

**B. A Historical Perspective**

No serious tort scholar would claim that compensation for intangible loss was first recognized in cases of recovery for accidentally

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11. *Id.* at 340-44.
12. *Id.*
13. Not necessarily underestimation, of course. More generally, whether over- or underestimated, in an ironic twist on the insurability argument against recovery of noneconomic loss, this element of high-side lost earnings is a strikingly regressive feature of the loss distribution function of tort awards. Low income earners subsidize high income earners through the distributional consequences of tort law "insurance" against wage loss.
caused physical injury—the domicile of pain and suffering recovery. Nonetheless, the most withering critiques of pain and suffering treat it largely in a historical vacuum, almost as though it is an anomalous feature of tort law. Quite the contrary is the case, and a brief exploration of its historical roots is a useful mechanism for reassessing the make-whole principle as the linchpin for compensatory relief.

The reality is that even a cursory examination of the antecedents to recovery for accidental harm—which in itself dates back less than 200 years as an identifiable category of tort liability—reveals a wholesale acceptance of assigning responsibility for tortious misconduct involving solely intangible loss at least as early as medieval times. Many a student of torts is initiated into the historical treatment of the subject by introduction to I. de S. and Wife v. W. de S. In this classic fourteenth century assault case, the defendant works out his frustration at arriving to the plaintiff’s drinking establishment after closing by taking a swing with his hatchet at the wife of the proprietor, putting her in apprehension of injury. Apprehension, but in fact, no contact and no physical injury. And it is that apprehension of unwanted physical contact that is, of course, the gist of the assault tort.

Likewise, in the venerable tort of false imprisonment, the prima facie case is made out by establishing an unjustified constraint on the victim’s freedom of locomotion. Physical injury, let alone pecuniary loss, plays no role in establishing the right to recovery. Notably, in the innovative Gregory and Kalven torts casebook of a generation ago, adopting harm from insult, indignity, and shock as the organizing principle for the second part of the subject, the authors refer to false imprisonment as “another example of a traditional tort of intent which for centuries has served as a means of protecting against subtle indignities and emotional unpleasantness.”

If assault and false imprisonment are perhaps the oldest and most prominent of the judicially accepted intentional torts compensating for free-standing intangible loss, they are by no means isolated exam-

15. See supra note 9 and accompanying text.
17. 1348 Liber Assisarum, folio 99, Placitum 60, microformed on Great Britian Yearbooks, 1307–1587, Fiche 2.
pies. A cuckolded husband might bring an action for criminal conversation against an outsider who had sexual relations with his wife; or more broadly, an outsider might be sued under the banner of alienation of affections for less forceful means of interfering with the marital relationship.\textsuperscript{20} Once again, these torts compensated for the distress-related claims of the wronged party without reference to any out-of-pocket loss as a consequence of the defendant's conduct.

Moreover, if these latter torts based on distress-related claims of interference with family relationships have something of an archaic flavor, the same cannot be said for assault and false imprisonment. Indeed, the latter tort has at least two areas of distinctly contemporary application: actions by aggrieved employees against employers engaged in constraining behavior to interrogate pursuant to suspicions of embezzlement, and even more common, claims by aggrieved shoppers constrained on suspicion of shoplifting.\textsuperscript{21}

Finally, this brief survey of early claims of intangible loss would be incomplete without reference to an area in which intentional wrongdoing was not a prerequisite; indeed, where strict liability was early recognized (viz., the torts of libel and slander), it sought to redress reputational harm.\textsuperscript{22} Here, arcane rules served as a qualifier. Traditionally a common-law slander claim required a showing of special damages—that is, economic loss—unless it fell into one of the designated categories generally accepted as establishing slander per se. Slander per se categories generally accepted as establishing slander per se were based on a standing presumption of grievous harm to reputation: charging plaintiff with a serious crime, injuring plaintiff's business or professional reputation, imputing lack of chastity to a woman, or asserting that plaintiff had a loathsome disease.\textsuperscript{23} But note that these per se categories, obviating the need to show any pecuniary harm, covered a great deal of ground. And in addition, no similar constraint was imposed on libel actions; reputational harm was implied in such cases and required no proof of special damages.\textsuperscript{24}

It may be argued, of course, that all of these torts grew in soil different from pain and suffering for accidental harm. They served differ-

\textsuperscript{20} DOBBS, supra note 18, at 1245–49.
\textsuperscript{22} ROBERT D. SACC, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2–96 (3d ed. 2000).
\textsuperscript{23} Id.
\textsuperscript{24} In some states, however, special damages are required unless the libel is clear on its face (“libel per se”). See id. §§ 2.8.2–2.8.3.
ent functions, and concomitantly, promoted different goals. On its face, this point is uncontestable.

But beneath the surface the picture is more complicated. At the threshold, it is critical to note that the foundational objection to pain and suffering recovery is based on its incommensurability. We cannot repair past pain by provision of money damages, nor is future pain alleviated (other than by economic outlays for drugs and rehabilitation) or loss of enjoyment of life restored.

Concede the point that any restorative effects of monetary damages are in a different currency. But how does this differ from the character of intangible-loss recovery in other domains of tort law? By definition, what is true of pain and suffering has been historically true of intangible-loss awards across the board: A victim is receiving money for a harm that has no precise monetary equivalent.

Perhaps the starkest instance is assault. When the monetary award is handed down, W. de S. is long-gone and the wife of I. de S. is presumably back behind the bar serving drinks, with perhaps some lingering trepidation about ill-mannered patrons. Can her past apprehension of physical injury be erased by a present award of money damages?

Can past distress at confinement (through false imprisonment) be retroactively addressed by a present pecuniary award? Can reputational harm be erased and consequent humiliation and distress retroactively eradicated by wealth-transfer from a defamer (as distinguished from future-oriented repair by the reputation-affirming judgment itself)? On the incommensurability dimension, then, the case against monetary damages seems to spill well beyond the confines of pain and suffering loss into every well-recognized channel of compensatory relief.

But perhaps incommensurability is of lesser consequence in these other domains of tort law because the purposes of assigning liability were unrelated to making an injury victim whole. In other words, the claim would be that the make-whole principle was (and is) foreign to the objectives of these torts. Here, the case is somewhat more complicated. Historical authority suggests that the criminal and civil law remedies for wrongful conduct causing personal harm were closely intertwined in medieval times and hence the punitive function of damages loomed large.25 And, no doubt, even after civil recourse took an

independent pathway it retained a strong admonitory role in intangible harm cases such as assault and false imprisonment.

But one can speculate that from an early point in time, admonition did double duty in both punishing the wrongdoer (specific deterrence, as we would put it today), while also serving as a warning to prospective deviants within the community (general deterrence). In the latter regard, the long-standing recognition of recovery for intangible loss on deterrence grounds has a familiar ring to contemporary ears. By way of illustration, consider a frequently quoted passage from *Kwasny v. United States*,26 in which Judge Richard Posner put the matter succinctly, observing that:

> We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasor and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.27

Substitute “intangible loss” for “pain and suffering” in this passage, and “assault” or “false imprisonment” (or for that matter any of the early-recognized instances of wrongful conduct) for “negligence.” One then has a reading of the purposes of early recognition of nonpecuniary harm entirely consonant with the spirit of modern times.28 Similarly, a reading of the early common-law recognition of responsibility for intangible loss in less instrumental terms—as an authoritative expression of social disapproval of normatively undesirable conduct, or an effort to afford recognition of an inviolable right to be free of invasion of physical security by another—has its counterpart in contemporary justifications for recognizing the intangible aspects of a victim’s physical injury.29

My point is to counter a certain narrowness of vision in regarding pain and suffering outside a historical context—a context that not only afforded broad recognition to intangible loss as a legitimate source of

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26. 823 F.2d 194 (7th Cir. 1987).
27. *Id.* at 197.
civil redress, but almost certainly was impelled to do so for reasons not markedly different from those that serve as the cornerstones for theories of recovery for personal injury in modern accident law. Correspondingly, one would be hard put to claim that the damages recoverable in these intangible-loss cases reflected any intention to make the victim whole, rather than to roughly match the severity of the harm to the character of the misconduct from a bi-party perspective.\textsuperscript{30}

\textbf{C. An Update Note}

There is a certain irony in pain and suffering damages coming under attack in an era when the legitimation of recovery for intangible loss has consistently broken new ground. The twentieth century was in fact a veritable breeding ground for the development of new categories of tort recovery for intangible loss, and there is no sign of retreat as a new century unfolds.

On the eve of the twentieth century, Samuel Warren and Louis Brandeis published their landmark article proposing a new tort based on invasion of privacy.\textsuperscript{31} After a false start in New York, this virtually unprecedented tort concept, based on redress for the indignity and distress associated with offensive public revelations about one’s private life, became widely accepted.\textsuperscript{32} The tort expresses a sensibility that seems distinctly modern. The notion of a protected zone of individual privacy—a right to be let alone—would almost certainly have seemed bizarre even a generation earlier. It required a new perspective on intangible loss, linked to both urbanization and a transformation in the print media, before the privacy tort could achieve recognition.

New perspective or not, the standard arguments against conventional pain and suffering apply here as well: What is the metric for measuring invasion of privacy damages? In what sense is privacy restored by a monetary award—indeed, doesn’t the litigation enterprise simply exacerbate the harm? How are potential defendants to assess

\textsuperscript{30} Moreover, in a sense these early instances recognizing intangible loss stand in bold relief from pain and suffering recovery in modern accident law because they were freestanding in character, in no sense dependent on related physical harm that was well recognized in its own right. This holds true even for loss of consortium recovery, which came to be recognized in tandem with pain and suffering. Loss of consortium, once disentangled from its feudal origin in loss of spousal services, came to stand independently for the loss of the companionship and counsel of the physical injury victim to the consortium claimant. See generally Dobbs, \textit{supra} note 18, at 841–43.


\textsuperscript{32} See, e.g., Dobbs, \textit{supra} note 18, at 1203–08.
the likelihood and magnitude of risk? In fact, the public disclosure of private facts tort has had a checkered career, and recoveries have been few and far between. But for present purposes, that is somewhat beside the point because the often insurmountable barrier to recovery has been the defense of newsworthiness, rather than the refusal to recognize a prima facie harm.

Moreover, a related privacy tort—the intrusion on privacy claim, once again grounded entirely in intangible loss—has been far more successful in recent years. If anything, the intangible harm here is even more subtle and elusive than in the public disclosure cases, and certainly more so than the "suffering" component of a pain and suffering award. By common assent, no publication is required to establish an intrusion tort; rather, the harm resides in the prying, intrusive conduct itself.

Thus, in a recent and widely noted case, Shulman v. Group W Productions, Inc., the California Supreme Court held that plaintiff, a badly injured victim of an auto wreck whose responses and demeanor in a rescue helicopter were recorded without consent for broadcast by the defendant media outlet, established a colorable claim for intrusion on privacy. Newsworthiness was no justification, as the court saw it: "[T]he last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers."

A similar theme of respect for the private aspects of one's life—an effort to distinguish between spheres of public and private behavior—characterizes a range of intrusion cases, from ambush interviews to overzealous paparazzi. Just as in the public disclosure tort, a dam-

34. For an interesting comparative perspective, see James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 YALE L.J. 1151 (2004) (contrasting the American perspective on protecting the media through a newsworthiness defense with the European view—in particular, France and Germany—downplaying the importance of media protection). More generally, Whitman locates the American approach to privacy law as resting on cultural concerns about safeguarding liberty, in contrast to European values based on upholding dignitary concerns.
36. 955 P.2d 469 (Cal. 1998).
37. Id. at 503.
38. See Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); see also Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). Consider also statutory damage actions for intrusion on privacy by technological means, such as wiretaps. 18 U.S.C. § 2511 (2000). In Barinicki v. Vopper, 532 U.S.
age award cannot compensate by erasing past distress, nor does an award monetize in any precise sense the indignity associated with a breach of an individual's zone of privacy. Apart from social welfare aims of promoting deterrence, compensatory damages in these cases once again can best be seen as a rough approximation of an irretrievable, but distinctly nonpecuniary loss.

If the right of privacy signaled a new conceptual departure in the recognition of recovery for intangible harm, twentieth-century tort law was notable as well for the crystallization of new categories of rights within the well-established domains of intentional harm and negligence. The new tort of intentional infliction of emotional distress (IIED), not fully recognized until adoption of Section 46 of the Second Restatement of Torts in 1948, reiterates the theme of compensating for socially unacceptable behavior that falls below the radar screen of criminal sanctions, just as in the case of assault and false imprisonment.39

But IIED, like the right of privacy, manifests a singularly twentieth-century sensibility towards the right to be let alone. At its core, IIED is a dignitary tort—an extension of the notion that psychic autonomy, and not just physical autonomy, warrants legal protection.40 In this sense, IIED ventures a stage beyond the traditional intangible-loss torts of assault and false imprisonment—torts more closely tied to the premise of a zone of physical danger. And from a similar comparative perspective, IIED, as a twentieth-century manifestation of protection against distress, humiliation, and indignity, seems still a further stage beyond the linked aspirations of conventional pain and suffering damages to offer redress for intangible loss accompanying physical injury. At a foundational level, of course, all of these avenues of compensatory relief illustrate a theme that threads its way through this account:

514 (2001), the Supreme Court invalidated the application of the federal statute and its Pennsylvania counterpart in a damages claim against a third party repeater of an intercepted message. Id. at 535. But the Court took pains to indicate the validity of the statute against the interceptor and referred to the intangible-loss privacy claim as an interest of "the highest order." Id. at 527–28.

39. Section 46 was revised in a later version of the Second Restatement which adopted more limiting language. In its present form it reads: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

40. IIED is a particularly interesting tort because it mirrors the evolving social attitudes about the extent to which one is expected to have a thick skin in dealing with the occasional insults and indignities that are a part of everyday life. The baseline has certainly shifted towards greater protection of psychic distress, but not without continuing reservations. Compare Wallace v. Shoreham Hotel, Corp., 49 A.2d 81 (D.C. 1946) (refusing to recognize liability for a public insult in a restaurant), with Wishnatsky v. Huey, 584 N.W.2d 859 (N.D. Ct. App. 1998) (similarly refusing to recognize liability, a half century later, for rudeness in barring entry to a private meeting).
the common law's resistance to pecuniary loss as a threshold for allowing recovery.

Just such a threshold did, however, preclude recovery for negligently inflicted emotional distress (NIED) well into the twentieth century. Here too, the barrier, expressed in the form of the physical impact requirement for recovery of intangible loss, has almost universally fallen. In its place, the courts have fashioned a "zone of danger" limitation—not unlike the prima facie requirement in intentional harm torts of assault and false imprisonment—illustrated by the barrier to NIED recovery being surmounted by "near-miss" cases such as careening automobiles and malfunctioning thrill rides.

In turn, newly arising late twentieth-century social concerns over exposure to toxic substances put substantial stress on the zone of danger limitation. How are the courts to apply such a test to the rising sensitivity over exposure to carcinogenic substances like asbestos, or to perceptions of AIDS exposure? The judicial tendency to sharply circumscribe recovery in such cases—by a literal reading of the zone of danger, or a stringent requirement of probable, imminent physical consequences—cannot be taken as a resurrected denial of the legitimacy of NIED claims; there has been no rollback on the tort. Nor is it based on skepticism about the commensurability of monetary relief—courts now accept as a given that negligently induced fright can translate into monetary awards. Instead, the reluctance to extend NIED into the dynamic field of toxic exposures rests on a perceived "floodgates" concern.

This floodgates objection introduces a novel element into the continuing saga of compensating for intangible accidental harm. By contrast, the concern about the impact of pain and suffering awards is a concern about magnitude, not about floodgates (by definition, claims for pain and suffering are dependent on correlative claims of physical injury). In sum, whatever legitimate unease might exist over cabin-

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41. Dobbs, supra note 18, at 835–39. The impact requirement was tantamount to holding the line on intangible harm recovery in accident cases at conventional pain and suffering, since it required a minimal physical injury as a touchstone to attendant recovery for nonphysical harm.
44. Dobbs, supra note 18, at 845–47.
45. Id. at 835–39.
46. See, e.g., Metro-North, 521 U.S. at 433.
47. Analytically, this distinction also encompasses third party (or bystander) NIED claims and loss of consortium actions, all of which are add-on claims to physical harm litigation (as in the
ing NIED seems to reflect trepidation over unleashing litigation arising out of the fears and insecurities animated by our techno-chemical age, rather than a broader reassessment of the case for acknowledging this doctrinal category of noneconomic loss.

Meanwhile, claims for tort-type intangible loss flow into new channels, cut out of the topsoil of statutory relief. One such channel has been the revitalization of federal civil rights litigation under 42 U.S.C. § 1983, which creates a civil damages remedy for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," against government officials acting under color of state law.48 A single instance will suggest the tenor of these intangible harm claims. In the 1980s, the Chicago police department’s policy of conducting strip searches of female arrestees led to a series of cases in which the policy was found to be a deprivation of rights secured under the Fourth and Fourteenth Amendments, and thus a § 1983 violation.49 The consequent emotional trauma and humiliation arising out of the searches served as the basis for damage awards.50 Some of the cases involved strips and visual inspections without further claims of indignity; others involved "aggravating circumstances" such as physical inspection, taunting, and even recording on camera.51 Just as at common law, Congress set no guidelines for damage assessment in these cases, leaving the courts with open-ended discretion to monetize emotional distress.52

While the roots of these § 1983 actions can be traced to common-law false imprisonment torts, another channel of statutory relief—Title VII claims for sexual harassment in the workplace—can be seen as an outgrowth of the more recent common law development of an
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IIED tort. Here, too, intangible harm—in these cases established by showing conduct "severe or pervasive enough to create an objectively hostile or abusive work environment . . . [that] would be reasonably perceived, and is perceived as hostile or abusive,"—has served as the foundation for a discrete category of statutory tort actions.54

Just as in IIED cases, the courts have struggled with the dividing line between incivility that is "merely offensive" and that which is sufficiently serious to give rise to a claim.55 But again, once the liability threshold is surmounted, the court's discretion to award nonpecuniary damages is unquestioned (and largely unconstrained), and true to the consistent pattern of intangible-loss torts, damage assessment is unbounded by notions of restoring the victim to a preharassment state of emotional equilibrium.

I have undertaken this brief historical excursion in part to document the proposition that pain and suffering recovery stands solidly within a long-standing and dynamic tradition of compensation for intangible loss. But at the same time, this narrative has suggested that compensation has never stood as an end goal in itself of tort law. Viewed through the prism of generic recovery for intangible loss, one finds that compensation has frequently served either an instrumental or an expressive function: a means of promoting deterrence, articulating social norms, or doing corrective justice (or a mix of these goals).

The same can be said for pain and suffering loss in accidental harm cases. Here, too, there is fundamental disagreement among thoughtful tort observers over the goals of the system.56 In addition, there are simply too many gaps in allowing recovery of nonpecuniary loss for compensation to be viewed as an end in itself. For example, accident law generally does not compensate for distress associated with property loss.57 It does not even compensate for economic loss, let alone

53. 42 U.S.C. § 2000e-2(a). It should be noted however, that in most of these cases the defendant is the employer, and thus is vicariously responsible for the intentional misconduct of the coworker who engages in the sexual harassment. See generally GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE (2001).


55. See, e.g., Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995).


57. See, e.g., Erlich v. Menezes, 981 P.2d 978 (Cal. 1999) (refusing to uphold lower court's award of damages where plaintiffs claimed that contractor's negligence in constructing "dream house" caused emotional distress); Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996) (disallowing an NIED claim for destruction of art works). But for a minority view,
noneconomic loss, in most cases of nonfault-based physical injury. And it recognizes a wide array of policy limitations on intangible-loss recovery in fault-based cases, articulated through no-duty and proximate cause rules as well as defenses. Again, these limitations frequently preclude all forms of compensation, not just nonpecuniary loss.

I do not mean to suggest that victim compensation has merely been an afterthought in the evolutionary process of common law and statutory obligations in tort—a process in which recovery for intangible loss has played a central role. But successful implementation of the disparate set of goals referred to in this historical survey has not turned on the capacity to measure on a case-by-case basis the precise dollar equivalents of insult, indignity, or emotional distress.

III. THE MAKE-WHOLE PRINCIPLE REASSESSED

So, where is one to turn for guidance on a conceptual approach to valuation of nonpecuniary loss? Here, the lessons of history are not particularly helpful. Throughout the long development of liability for intentional wrongdoing, culminating in its manifestations on the contemporary scene in IIED and the statutory torts, judges and juries have exercised relatively unlimited discretion in setting awards for intangible loss. The protection of personality torts of defamation and recognizing emotional distress recovery for damage to plaintiff's home, see Rodrigues v. State, 472 P.2d 509 (Haw. 1970).

58. The Restatement Second of Torts does recognize strict liability for "abnormally dangerous products." See RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977). But the category has remained narrow over the years. The more recent developments in the products liability area provide for nonfault liability under far more limited circumstances than was originally thought to be likely; essentially, in cases of manufacturing defects, with some courts extending nonfault to design defect cases as well under the guise of a consumer expectations test (a move disfavored by the Restatement Third of Products Liability). A good summary discussion is in KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 193–201 (2d ed. 2002).


60. The model California jury instruction on emotional distress reads as follows:

No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for emotional distress. Nor is the opinion of any witness required as to the amount of such reasonable compensation. . . . In making an award for emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

CAL. JURY INSTRUCTIONS: CIVIL § 12.88 (8th ed. 1994). An interesting case, illustrating that unconfined discretion may be the norm but is not inevitable, is Levka v. City of Chicago, 748 F.3d 421 (7th Cir. 1984). There the court engaged in a detailed factual comparison of awards for emotional distress in previous strip search cases, pursuant to reversing the trial court award and remanding with instructions to remit by half or order a new trial. Id. at 425–26.
privacy offer no greater guidance; once again, they leave the content of presumed or general damages, when available, at the largely unchecked discretion of the fact-finder.61

In the realm of accident law itself, model jury instructions on compensatory damages offer no clue as to a methodology for calculating pain and suffering awards. Standard jury instructions recite a general exhortation to act reasonably, as in California: "No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense."62 And appellate courts, in exercising a review function, have ordinarily had no more guidance than the common-law dictate to overturn awards only if they "shock the conscience," or some like formulation.63 It is precisely this "open-endedness," of course, that has led legions of torts critics, including those who accept the legitimacy of pain and suffering awards, to decry both the unpredictability and insensitivity to like treatment of like cases inherent in standardless valuations.64

A comprehensive review of the multitude of reform proposals aimed at constraining discretion in awarding pain and suffering damages is far beyond the scope of this article. But a starting point in that direction—consonant with the themes emphasized in this article—is

61. On libel and slander, the California jury instruction provides:

If you find that the defendant defamed plaintiff by a [libel] [slander] and that such [libel] [slander] was a cause of general damages to plaintiff, in determining the amount of such general damage, you should consider but are not limited to the following:

1. The extent of the publicity given by the defendant to the [libel] [slander];
2. Plaintiff's good name, reputation, and the loss thereof;
3. Plaintiff's shame, mortification, injured feelings and mental suffering;
4. Plaintiff's prominence in the community where [he] [she] lives;
5. Plaintiff's professional or business standing in the community where [he] [she] does business.

In determining the amount of plaintiff's damage, the law does not establish any absolute fixed or mathematical rule or standard by which to compute such damage; therefore, you may exercise your discretion but must do so without passion or prejudice for or against either party.


the recognition that fidelity to the goals of tort law, and more particularly to the compensation objectives of accident law, does not require efforts to engage in precisely contoured case-by-case implementation of a make-whole principle.

This was the reservation expressed by one of the leading jurists of his generation, Justice Roger Traynor, dissenting in the Seffert case, discussed earlier in another connection. In response to the majority's opinion upholding a then-substantial pain and suffering award for an admittedly severe foot injury under standardless "shocks the conscience" review, Justice Traynor noted that "[i]t would hardly be possible ever to compensate a person fully for pain and suffering," and proceeded to suggest grounding the assessment in an examination of awards for past injuries to legs and feet. At the time, Traynor's observation appeared to go largely unnoticed, swamped perhaps ironically by a rising tide of attention to expansionary tendencies in liability rules spearheaded by Traynor and his court.

This is not to suggest an inconsistency in Traynor's torts jurisprudence, however. As far back as Escola v. Coca Cola Bottling Co., he articulated an insurance-based perspective that would abandon corrective justice notions of fault in favor of an enterprise liability framework based on internalization and broad distribution of the costs of accidental harm. The implications on the damages side of the ledger—an actuarial perspective, dominated by concerns about predictability in risk assessment—were simply not spelled out. By the 1980s, however, these liability-expanding doctrinal tendencies had largely run their course, replaced by a rising counter-current of criticism aimed at the size of damage awards.

In the ensuing years, tort scholars and reformers have proposed an array of strategies for confining discretion that can roughly be captured under the headings of ceilings, scheduling, and informational approaches. Ceilings, which have proven most appealing to tort

65. Seffert, 364 P.2d at 346.
66. Id. at 345.
69. Id. at 440-41. See also Fleming James, Jr., Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur, 1 DUQ. L. REV. 143 (1963).
reformers in the political arena, address the concern over unpredictable, high-side pain and suffering awards in a system of largely unconfined discretion. But they do so by abandoning the principle of treating like cases in like fashion (especially if the ceiling is low), and correlative, by ignoring the common law tradition in assessing intangible loss, traced in the preceding section, of seeking some rough correspondence among severity of harm, egregiousness of conduct, and size of monetary award.

Scheduling of damage awards, by contrast to ceilings, would create profiles of harm, crystallized into discrete categories of specified awards with upper and lower limits, ranked according to severity of physical injury. Informational strategies would provide data on past awards to a jury (or trial judge) and, to the extent that an informational approach was coupled with a requirement of explaining substantial deviation from the data, would resemble a scheduling scheme. Both scheduling, nascent in Traynor's Seffert dissent, and informational strategies are premised on a graduated approach that is realistic about the limits of precision in monetizing the intangible, and yet designed to recognize the qualitative differences between the psychic impact of a spectrum of injuries ranging from quadriplegia and permanently disfiguring burns to temporarily disabling bone fractures.

This, too, would be outside the common-law tradition of unstructured discretion; indeed, it is more closely akin to the social welfare model reflected in no-fault compensation schemes. In this regard, while scheduling or informational approaches demonstrate a some-


72. See supra notes 16–25 and accompanying text.


74. For purposes of establishing benefit awards for permanent disability, workers' compensation schemes generally utilize a schedule of designated categories of injuries. 4 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 86 (2000). Some of these schemes do allow for specified-sum pain and suffering awards, for example The National Childhood Vaccine Injury Act of 1986, which provides for pain and suffering awards up to a ceiling of $250,000. 42 U.S.C.A. § 300aa-15(a)(4) (West 2003).
what refined sensitivity to severity of harm considerations, they reflect
the influence of the no-fault compensation model in affording relative
indifference to gradations in the character of harm-imposing conduct.
It can be argued, however, that in the realm of accidental harm, where
moral condemnation of accident-generating behavior is muted, this
concession to a degree of routinization is warranted.

Nonetheless, scheduling and informational approaches are subject
to a variety of criticisms on administrative feasibility grounds, most of
which come down to the question of whether it is satisfying and just to
treat the unfortunate Yetta Sefferts of the world in quasi-categorical,
rather than individual, terms.75 There is no definitive response to this
line of objection. As just suggested, our historical tradition, carried
through to the present in contemporary versions of common law and
statutory torts of intent, continues to conceptualize intangible loss
from a bi-party perspective. Even discarding the nonsequitur that this
perspective requires a fine-tuned effort to make the victim whole, it
leaves open the question of whether pain and suffering should remain
squarely within the field of intangible loss, or rather should be harmo-
nized with the norms of enterprise liability.

75. See, e.g., Geistfeld, supra note 64, at 791–92; see also JoEllen Lind, The End of Trial on