In Praise of Uncertainty: A Response to Professor Allen

Stephan Landsman

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Professor Ronald Allen and his colleagues have provided us, in a separate article, with fascinating data derived from nineteenth-century American court decisions regarding noneconomic damages.1 Inspired by these data and their interest in epistemology, they raise, in their present piece, some challenging questions about the awarding of noneconomic damages in tort cases. Their central contention is that such damages are not based on facts that are "analytically or empirically verifiable"2 and therefore offend the Due Process Clause.

Allen notes at the outset that neither he nor his colleagues are tort scholars.3 This gap in their backgrounds is significant because, as they note, "[t]he life of the law truly has been experience rather than logic, and a long-standing practice can compromise the most rigorous analytical implications."4 To overcome that difficulty, Allen turned to the historical data—the behavior of American courts in the nineteenth century—to see how judges managed the awarding of noneconomic damages. I believe they looked at the wrong place (America) and the wrong time (the nineteenth century) in their effort to understand the tort "experience."

The distinguished tort scholar Robert Rabin, writing in the Eleventh Annual Clifford Symposium entitled Who Feels Their Pain? The Challenge of Noneconomic Damages in Civil Litigation,5 reminds us that noneconomic damages have been with us for a very long time, and that common-law courts have been the architects of both the

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3. Id. at 1249.
4. Id. at 1251 (citing O.W. HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881)).
causes of action and processes relied upon to award them.\textsuperscript{6} By the fourteenth century, English courts had recognized the tort of assault and awarded damages for the psychic disruption that it causes.\textsuperscript{7} It has generally been agreed that the twin purposes of such awards are to recompense for the disturbance caused by the defendant’s act and to address actions that risk causing “breaches of the peace.”\textsuperscript{8} Once the elements of the tort have been proven, it is up to the factfinder to determine how much is needed to compensate for the injury, restore the peace, and deter future assaults. This process has been utilized for the last seven centuries. Although the monetary amount of damages for an assault has never been viewed as “analytically or empirically verifiable,” judges and lawyers alike have recognized the propriety of such awards.

Precisely the same story may be told about the tort of false imprisonment. Here, again, psychic disruption is the harm for which an award is made, and no “analytically or empirically verifiable” monetary figure is sought or required. Since the fourteenth century, judges and lawyers have recognized the propriety of such awards and have relied upon jury decisions to fix the proper figure.\textsuperscript{9}

Although they are of more recent vintage, the defamation torts of libel and slander are also long-established. Slander’s place in the common-law courts was recognized no later than the sixteenth century, with libel following perhaps a century behind.\textsuperscript{10} The defamation torts address reputational harm rather than mental tranquility; again, there is no precise monetary predicate for the award of damages for either the specialized category of slander per se or libel.\textsuperscript{11} In fact, defamation damages are divided into two categories: general and special. As to the former, “no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages... and the jury is permitted, without other evidence, to estimate their amount.”\textsuperscript{12}

In these long-lived torts, there is no factual price tag to guide the factfinder when fixing damages. Each serves an important set of so-

\textsuperscript{8} \textit{W. Page Keeton et al., Prosser and Keeton on the Law of Torts} § 10, at 43 (5th ed. 1984).
\textsuperscript{9} \textit{Id.} § 11, at 47 n.2.
\textsuperscript{10} \textit{Id.} § 111, at 772.
\textsuperscript{11} \textit{Id.} § 112.
\textsuperscript{12} \textit{Id.} § 112, at 788 (citations omitted).
cial goals through the recognition of the tort and the award of damages that reflect a social evaluation of the gravity of the offense and harm caused. None has been the subject of a concerted challenge on the basis that the award is not premised on a particular piece of factual proof. When the negligence tort was fashioned in the nineteenth century, a similar approach to noneconomic damages was employed. It relied on the historical power of common-law courts to award damages for noneconomic harm and thereby advance a number of objectives unattainable by an exclusive reliance on economic damages. The pain and suffering component, like the damages components of assault, false imprisonment, and defamation, is fundamental to the tort. Judge Richard Posner's famous opinion in *Kwasny v. United States* makes the point best:

> 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 tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.

Lest it be thought that awards for intangible injuries are an antiquated notion, it should be remarked that the awarding of such damages has been embraced in recently developed torts, reaffirming the common-law conviction that such awards are essential to legal policy and consonant with the processes of tort law. The intentional infliction of emotional distress tort, recognized by the *Restatement (Second) of Torts* in 1948, provides a convenient example. The same is true of a number of the privacy torts that have arisen in response to Justice Louis Brandeis and Professor Samuel Warren's celebrated article of 1890. Most recently, the courts have followed the same path in developing the negligent infliction of emotional distress tort.

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15. 823 F.2d 194, 197 (7th Cir. 1987) (cited in *Marc A. Franklin et al., Tort Law and Alternatives* 710 (8th ed. 2006)).
16. *See Rabin, supra* note 6, at 369.
17. *See Keeton et al., supra* note 8, § 117.
19. *See Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994)* (noting that the negligent infliction of emotional distress tort identifies a kindred but distinct form of harm and that nearly all the states have recognized it).
Allen and his co-authors insist that proof of a monetary price tag is essential before noneconomic damages can be awarded. This requirement runs counter to the development of doctrine and practice in torts. It would interfere with the goals and operation of a substantial number of torts. It mistakes the caution of nineteenth-century courts, renowned for their desire to control jury activity, with the broader consensus displayed in the historical development of the tort. Professor Paul Guyer, a friend and distinguished philosopher, once suggested to me that an excessive infatuation with logic can be like "cutting one's throat with Occam's razor." Here, I think, Allen and his colleagues have mistakenly brought its blade to bear on tort, heedless of history and the needs of society.

It appears that Allen and his colleagues believe that certainty of proof regarding the size of monetary loss is essential. Their faith in certainty has a nineteenth-century air to it. Their approach fails to take into account the uncertainties woven into the fabric of the world around us. Albert Einstein taught us that the precision of the Newtonian universe was illusory; his principle of relativity forced us to recognize that frame of reference is critical and protean. Werner Heisenberg, through his uncertainty principle, called attention to the inherent limitations of our ability to measure. Kurt Gödel demonstrated the necessary incompleteness of any formal logical system. When faced with these insights, the great jurist and torts scholar Justice Benjamin Cardozo had this to say: "As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable."

We live in a world where a great deal cannot be reduced to the certainty of explicit proof. Early on, the tort system turned to the jury mechanism to address the challenge of uncertainty. It is not that the jury is perfect—no human system of measurement can be—but rather that it speaks with the authority of our polity. When there is a paucity of proof, as in the cases of the tort damages, then the jury is our designated decisionmaker. It can make mistakes and is sometimes in need

of correction, but under our constitutional scheme its assessment of damages deserves great deference.\textsuperscript{25}

Common-law judges and lawyers have concluded that, if tort law is to get its job done, some level of uncertainty is unavoidable. Perhaps the most convenient example of this practical compromise, apart from the damages context, can be found in the adoption of comparative rather than contributory negligence.\textsuperscript{26} Over the course of the twentieth century, courts across the United States have replaced the harsh contributory negligence doctrine (pursuant to which any percentage of plaintiff's negligence would bar all recovery) with an apportionment of fault that allows partial recovery. There is no "analytically or empirically verifiable" basis for the percentages of fault assigned by the factfinder pursuant to the rule of comparative negligence—a problem that was acknowledged from the outset of the doctrine's development.\textsuperscript{27} Yet courts forged ahead and made the change.\textsuperscript{28} Certainty had to yield to fairness.

Despite Allen's stimulating analysis, tort law must live with uncertainty if it is to accomplish its goals. This is nothing new to the world of torts. It is the way the common-law courts have worked for centuries to address the very real harms done by some members of our society to others.

\textsuperscript{26} See Landsman, \textit{supra} note 20, at 605–10.
\textsuperscript{27} See \textit{Keeton et al.}, \textit{supra} note 8, \$ 67, at 470.
\textsuperscript{28} See Landsman, \textit{supra} note 20, at 610.