Translating the Immeasurable: Thinking about Pain and Suffering Comparatively

Anthony J. Sebok

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol55/iss2/6
TRANSLATING THE IMMEASURABLE: THINKING ABOUT PAIN AND SUFFERING COMPARATIVELY

Anthony J. Sebok*

INTRODUCTION

The Hague Conference’s Draft Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters has been bouncing back and forth between the United States and Europe since 1993, and many in Europe are afraid that it will never be signed. To be sure, some intellectual property issues have recently arisen that make negotiations even more complicated, but I think it is safe to say that one reason for the Convention’s delay and likely future demise is that, at the insistence of the Europeans, it guarantees that no nation will have to enforce damages that are inconsistent with that nation’s “public policies.”¹ The Americans, on the other hand, refuse to agree to any international convention that does not absolutely respect our unique system of damages.²

This dispute may be another iteration of the globalization battle, and European lawyers may want to limit the enforceability of American-style damages out of fear that successful enforcement of large damage awards will encourage Europeans to forum shop in the United States.³ But I believe that we should take the Europeans’ arguments at face value. Lawyers from a wide range of perspectives, as well as academics and public intellectuals, argue that the American

* Centennial Professor of Law, Brooklyn Law School (BLS). Ryan Micallef, BLS Class of 2007, and Ningur Akoglu, BLS Class of 2004, provided invaluable research assistance in the preparation of this article. Completion of this article was made possible by a summer research grant from Brooklyn Law School. Prepared for the Clifford Symposium, “Who Feels Their Pain? The Challenge of Noneconomic Damages in Civil Litigation.”


2. American courts, however, generally decline to execute foreign judgments that contravene domestic public policy. See Hilton v. Guyot, 59 U.S. 113, 163–65 (1895) (discussing the “comity of nations,” a doctrine that established the public policy requirements of enforcing foreign judgments); see also Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440–43 (3d Cir. 1971) (relying on the comity doctrine to find an English judgment enforceable).

approach is inconsistent with the traditions and mores of European societies. These criticisms are, at their core, not too different (in form, if not in substance) from the European rejection of capital punishment. Furthermore, Europeans are more than mildly annoyed by the fact that America seems unwilling to brook compromise when it comes to the enforcement of American jury verdicts overseas.\(^4\)

European disquiet with American damages comes in two flavors. On the one hand, Europeans reject, out of hand, any form of punitive damages. The reason for this rejection is rooted deep in the theoretical structure of civil law.\(^5\) On the other hand, it is clear that there is also a deep distrust of our damages system overall. This second sort of unease is less clearly stated, and many European lawyers would have trouble expressing what, in particular, they find wrong. The general drift of their complaints is manifested in expressions of incredulity and skepticism about the frequency and size of American damage awards. This is based on the impression that civil litigation has become an increasingly important part of American culture, that private litigation settles more questions (especially tort litigation), and that the amounts awarded by juries are far larger than those awarded by European courts.\(^6\)

The European complaint has to meet two burdens if it is to be taken seriously. First, there has to be some reason to believe that it is descriptively true—that on some significant measure, American civil litigation, especially tort litigation, behaves differently than its European counterpart. And second, even if the first claim is true, there has to be some reason why the difference should matter. The mere fact that there may be a difference in the rate of growth of civil litigation (holding GDP and population growth constant) between the two systems does not in itself say anything interesting; the same would be true if it

---

\(^{4}\) In 2003, Bertelsmann successfully argued to the German Constitutional Court that there was a reasonable likelihood that it would be able to prove that allowing service of a class action, which had been filed against it in the Southern District of New York, violated German public policy. The only thing that distinguished this class action from others was the size of the potential award—the plaintiffs were requesting damages of seventeen billion dollars. See Anthony J. Sebok, Why The Latest Chapter In the Napster Saga Raises Issues About U.S./European Judicial Cooperation, Nov. 17, 2003, http://writ.news.findlaw.com/sebok/20031117.html.


were discovered that there was a difference between the total cost of
the two systems (again controlling for population and GDP) or be-
tween the size of awards. After all, there may be perfectly good rea-
sons, endogenous to the United States, for a more costly system or a
system in which the rate of suits filed increased over recent years.7 I
will discuss why I think the Europeans can overcome the first hurdle,
and then briefly discuss the challenges presented by the second
hurdle.

II. THE NATURE AND SOURCES OF THE INCREASE IN
TORT LITIGATION

First, it must be noted that any discussion about civil litigation in
America is treacherous because we have so little solid statistical data.
As Michael Saks famously noted in 1992, we do not know a lot about
the tort system in America.8 Data is collected only sporadically. The
Justice Department and the Rand Corporation do surveys, and almost
every state has a jury verdict reporter. But for all that, there is no
comprehensive, centralized device for collecting data about how often
lawsuits occur, who wins them, and what they get when they win.

Still, there are many partially comprehensive studies available, and
from those we can piece together certain generalizations. One thing
that can probably be said with some certainty is that the civil liability
system’s importance, as measured by its influence on the U.S. econ-
yomy, has grown in the postwar period. One credible study suggests
that the civil liability system was 0.6% of the Gross Domestic Product
(GDP) in 1950 and over two percent of the GDP in 2002.9 We also
know that, in specific areas of tort liability, the rate of claiming and
the amount of money received per claim has increased relative to in-
fation and population growth. Traffic accidents have declined signifi-
cantly since 1950, yet between 1977 and 1987 auto insurance payouts

7. The mere fact that there is an increase in activity in a certain area of the law during a
certain period of time is not a reason to conclude that there is too much litigation in that area of
law. Civil rights litigation certainly increased—measured in terms of absolute number of suits
and size of damage awards—between 1950 and 1975. I assume that no one today would argue
that the mere fact of an increase is prima facie evidence that civil rights litigation was “dysfunc-
tional” or “out of control.”

8. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation

Towers Perrin reported that in 2002 tort costs were 2.2% of the GDP:
increased by 140 percent. Medical malpractice claiming rates have gone up from 4.5 per 100 doctors in 1920 to 17.8 per 100 doctors in 1985. Between 1970 and 1985 the average claim payout in medical malpractice (adjusted for inflation) increased from $37,000 to $110,000. On the other hand, there is some evidence that the rate of increase in the growth of tort liability flattened out by the 1990s. According to the U.S. Department of Justice's Civil Justice Survey, conducted in 1992, 1996, and 2001, the total amount of money paid out in tort judgments barely increased, relative to the growth in the nation's population and economy.

This is just a tiny slice of the numbers out there. One response to these sorts of numbers is to try to explain away the increase in "claiming and paying" by arguing that until we have all the facts (or at least a lot more facts), we should refrain from forming any generalizations. It seems that this skeptical response is often used to imply that because we do not really know whether tort litigation expanded in the twentieth century, it probably did not. This is a debate that I do not want to reprise because I do not see why a defender of the tort system should apologize for the expansion of the tort system.

Table 1: Tort Costs as a Percentage of GDP

<table>
<thead>
<tr>
<th>Year</th>
<th>U.S. Tort Costs ($ billions)</th>
<th>U.S. GDP ($ billions)</th>
<th>Tort Costs as % of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>$ 1.8</td>
<td>$ 294</td>
<td>0.62%</td>
</tr>
<tr>
<td>1960</td>
<td>$ 5.4</td>
<td>$ 526</td>
<td>1.03%</td>
</tr>
<tr>
<td>1970</td>
<td>$ 13.9</td>
<td>$ 1,039</td>
<td>1.34%</td>
</tr>
<tr>
<td>1980</td>
<td>$ 42.7</td>
<td>$ 2,790</td>
<td>1.53%</td>
</tr>
<tr>
<td>1990</td>
<td>$ 130.2</td>
<td>$ 5,803</td>
<td>2.24%</td>
</tr>
<tr>
<td>2000</td>
<td>$ 179.2</td>
<td>$ 9,817</td>
<td>1.83%</td>
</tr>
<tr>
<td>2002</td>
<td>$ 233.2</td>
<td>$ 10,487</td>
<td>2.22%</td>
</tr>
<tr>
<td>2003</td>
<td>$ 245.7</td>
<td>$ 11,004</td>
<td>2.23%</td>
</tr>
</tbody>
</table>


11. Id at 95.
12. Id. According to the U.S. Department of Justice's Civil Justice Survey, the average medical malpractice award in 1992 in the nation's seventy-five largest counties was $1.48 million (the median award was $201,000). CAROL J. DEFRANCES ET AL., U.S. DEPT OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 5 (1995).
I want to proceed under the assumption that the rate and scale of civil litigation have grown faster than the economy or population. Taking this period of unusual growth as a given, I want to ask a different question: how did this increase come about? My working hypothesis is that the increase in the cost of the tort system can probably be best explained by a significant increase in the rate of claiming and the scale of payments for noneconomic damages.

Noneconomic damages might be best understood in contrast with economic damages, which are those expenses that can be traced to a loss with a market value. Medical expenses, lost wages, and lost profits are economic losses. Noneconomic losses, on the other hand, refer to those losses that have no easily calculable market value. This category includes such diverse damages as compensation for physical pain, mental suffering, disfigurement as a harm in itself, loss of bodily function, loss of enjoyment of life, and embarrassment. Noneconomic losses do not include punitive damages, which are not compensatory and hence fall in a separate category entirely. Although the specific components have changed over the years, the concept of noneconomic damages—which I shall refer to under the shorthand “pain and suffering”—has been a part of the common law for a very long time.

Although all three kinds of damages—economic, noneconomic, and punitive—have grown in frequency and scale over the past fifty years, I suspect that the growth in pain and suffering damages is unique. Unlike punitive damages, which have almost certainly grown at an unusually fast rate in scale if not frequency, noneconomic damages affect the civil liability system in a way that punitive damages do not. Punitive damages make up such a small part of the total damages system that even a five-fold increase in the total amounts paid out would still constitute a very small part of the money paid between plaintiffs and defendants. On the other hand, the amount of pain and suffering damages currently paid out is almost at parity with economic damages.\textsuperscript{14} That is to say, fifty percent of all tort damages currently paid are for pain and suffering. This is a significant number. I wish that there were historical studies that could provide a detailed comparison with current figures, but there seem to be none. Nonetheless, my sense is that noneconomic damages were not half of the total tort liability until sometime after 1960, and have gained prominence as the

result of three significant changes in the practice of tort law over the past fifty years.\textsuperscript{15}

Again, it may be the case that noneconomic damages have always comprised at least half of the tort system's compensatory efforts, but I doubt it. And I see no reason why a disproportionate increase in pain and suffering damages compared to economic damages should be seen as prima facie evidence of a problem with the American tort system. Again, without knowing more about why noneconomic damages have risen as quickly as they have, it would be just as presumptuous to take their rapid rise as evidence of dysfunction as it would be to interpret an absolute increase in the scale and frequency of the award of tort damages overall (economic and noneconomic) as prima facie evidence that the civil liability system was dysfunctional.

I can think of three reasons that, singly and in combination with each other, could explain why noneconomic damages have risen faster than economic damages. It is only after we tease out these reasons and look at them in isolation that one can begin to determine whether the degree to which pain and suffering damages have added to the increase in noneconomic damages is a matter of regret.

First, there has been an increase in the set of noneconomic injuries cognizable in tort. As one scholar put it, "[C]ourts during the last twenty-five years have expanded significantly the circumstances in which they will award damages for emotional distress."\textsuperscript{16} Every torts teacher knows about the evolution of the claim for emotional distress without impact. It was a slow march to get from a state of affairs in which no noneconomic damages were possible without physical impact, to one where there is active debate over whether the bystander test might be satisfied by a parent who did not witness her child being injured \textit{in utero} but did witness the consequences of the injury upon the child's birth.\textsuperscript{17} Courts have expanded the right to noneconomic damages through extending the loss of consortium to women, creating a new interest in the "enjoyment of life" (separate from pain and suffering and thus available to the comatose),\textsuperscript{18} and allowing for pain and suffering in bad faith breaches of insurance contracts (creating a claim for noneconomic damages in tort in what was once seen as an area of

\textsuperscript{15} Deborah Hensler, of RAND and Stanford Law School, has confirmed to me in a personal communication that, in her opinion, there are no existing historical comparisons between the rate of growth of economic and noneconomic damages.


\textsuperscript{17} See, e.g., Arche v. United States, 798 P.2d 477, 480–81 (Kan. 1990).

contract law). Thus, we can say that the frequency of noneconomic damages may have increased relative to economic damages because the grounds for claiming have expanded.

Second, there has been an increase, in absolute amounts, of the actual payout per average noneconomic award. This is a difficult claim to prove in any detail because certain grounds for liability for noneconomic awards simply did not exist until recently. But 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 (even adjusted for inflation). Take for example the average award for pain and suffering experienced before death. Adjusted for inflation, the average amount awarded between 1980 and 1987 was $147,000, while the average awarded between 1960 and 1969 was $48,000—an increase of almost 300 percent. Evidence from Patricia Danzon suggests that pain and suffering awards in medical malpractice verdicts have experienced similar increases. Thus, we can say that the scale of noneconomic damages may have increased relative to economic damages because the quantum of compensation for whatever is supposed to be compensated (pain, suffering, embarrassment, etc.) has increased compared to the cost of labor or medical care.

Third, there has probably been an increase, in absolute amounts, in the number of people claiming in tort for noneconomic damages, regardless of whether they are claiming under a new or more traditional cause of action. That is to say, as Rustad and Koenig have pointed out, noneconomic damages seem to have a gendered quality to them. Women’s claims in medical malpractice are two times more likely to produce an award for noneconomic damages than are similar claims by men. As Rustad observed:

The explanation for the disproportionate number of noneconomic damage awards for women lies in the gendered nature of injuries. . . . [N]early nine out of [every] ten victims of sexual abuse by medical providers were female. In most of these sexual abuse cases, the only compensable injury was emotional pain and suffering. . . . [E]lderly women in nursing home cases and housewives in cosmetic

surgery malpractice cases generally receive only noneconomic damages because they have no present or future earnings to lose.\textsuperscript{23}

In the past thirty years more women, minorities, and working-class people have been brought into the tort system through the activities of an innovative plaintiffs' bar and changes in civil procedure. In some cases, as with women, the effect of the change in the mix of plaintiffs in tort litigation would be to clearly shift the balance of damages further to the noneconomic side of the ledger. In the case of the entry of other excluded people, such as male minority or working-class plaintiffs, it is not obvious why their entry into the tort claiming class would necessarily make noneconomic damages rise faster than economic damages. It would explain, however, why tort damages overall have increased more than one might otherwise expect. On the other hand, if, as I suggested earlier, more people were entering the tort claiming class at the same time that the types of tort damages were expanding rapidly in the area of noneconomic damages \textit{and} the price of pain per unit was rising faster than the cost of wages or medical care, then even these additional male plaintiffs would have helped grow noneconomic damages at a rate faster than economic damages. Thus, we can say that the frequency of noneconomic damages may have increased relative to economic damages because the population of claims for noneconomic damages increased compared to the population of claims for the value of lost wages or medical expenses.

\section*{III. An Increase Compared to What?}

One of the most common assumptions made by Americans about the European tort system is that it is less "plaintiff-friendly" because it does not allow as many types of claims for noneconomic damages as the American system (or the common law). For example, \textit{Business Week} recently published a cover story on tort reform that drew a variety of contrasts between the European and American civil liability systems.\textsuperscript{24} The article's premise was that tort law plays a much smaller role in the regulation of corporate misconduct in Europe than in the United States. Some of the reasons the article cited—such as the relatively stronger role played by the regulatory state—are probably correct. But some of the article's assertions repeat common myths about European tort law. The article contrasts the availability of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} Mike France, \textit{How to Fix the Tort System}, \textit{Bus. Wk.}, Mar. 14, 2005, at 70 ("Western Europeans smoke, take Vioxx, and buy Firestone tires, too. But when they get injured, claims are handled far differently.").
\end{itemize}
\end{footnotesize}
"emotional damages" in the United States and Europe by stating that in Europe, "[p]ayments for emotional distress [are] restricted."\(^{25}\) The article further contrasts the way in which damages are awarded by stating that in Europe, "[p]ayment rulings [are] made by administrative judges with fee schedules."\(^{26}\)

As we shall see below, most Western European nations allow the recovery of emotional distress damages, which look very similar to the broad bases of recovery that characterize the American system. Furthermore, although it is certainly true that lay juries are hardly used in any European civil justice system (including the United Kingdom\(^{27}\)), the blanket assertion that judges are guided by schedules in Europe mischaracterizes a much more complex reality. This point will be explored in greater detail below.

**A. The Real World of the Law of European Emotional Distress**

Like the United States, the United Kingdom and the nations of Western Europe have experienced a gradual change in the number of "headings" under which victims of civil harms could bring claims for compensation. While each national legal system followed its own unique path, the general trend since the Second World War has been to liberalize the availability of emotional distress, whether by law reform or through interpretation of existing code provisions. For example, the Italian heading of *danno alla salute*, which roughly corresponds to injuries to the health of the body, was once measured almost entirely by the impairment of the victim's ability to work.\(^{28}\) This resulted in decisions such as one from 1967 that awarded no damages to a severely disabled elderly person because according to the court, "people without any value can exist, as in the case of those who, because of old age, are absolutely not fitted to any earning producing activity."\(^{29}\) According to modern commentary, the decision was probably correct for its time, but would be viewed as "outrageous" by Ital-

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Unlike England, Northern Ireland and Scotland have retained juries in a small number of tort cases. It is also not clear that judges handle issues of damages that differently from juries in the United States. See generally Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751 (1999).


\(^{29}\) Id. at 142 (quoting Tribunale di Firenze from Jan. 6, 1967).
ian lawyers today. Similar changes have occurred in Germany as well.

Familiar theories of liability, which are conventionally viewed as part of the "torts explosion" in the United States, include recovery for pure emotional distress caused by injury to another, pre-impact fear before death, or loss of enjoyment of life. While there may be debate at the margins of these doctrines, the most significant feature of the modern European doctrine is not only that it has changed almost as rapidly as the American doctrine, but that in many ways it is far more pro plaintiff than American law in its characterization of the grounds of recovery for nonpecuniary losses. The "functional" approach to damages for injury to the person, by which damages are awarded to help the victim purchase "substitute sources of satisfaction for those he has lost" is looked upon with increasing suspicion by European courts and scholars. An increasingly more popular alternative is to treat nonpecuniary injuries as injuries to the personality, as in the French or German model. Under this approach, the injury has an objective value for which compensation must be paid, regardless of whether the victim can or would use the money to alleviate past or future suffering.

B. The Real World of Damages Scheduling in Europe

In almost no Western European system does the legislature set damages for pain and suffering. There are a variety of methods that European judges use to determine damages other than the presentation of testimony at trial.

30. See id.
32. See, e.g., Suzanne Garland-Carval, Non-Pecuniary Loss Under French Law, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, supra note 28, at 87, 91 (explaining that relatives may claim "moral suffering").
33. See Busnelli & Comandé, supra note 28, at 143; Magnus & Fedtke, supra note 31, at 114.
34. See Giovanni Comandé, Non-Pecuniary Damages for Personal Injury in Europe and the US: A Proposal for Judicial Scheduling Models (unpublished article, on file with author).
35. W. V. H. Rogers, Non-Pecuniary Loss Under English Law, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, supra note 28, at 54, 59-60.
36. See Garland-Carval, supra note 32, at 95 (on the "objective analysis of dommage moral").
37. Spain sets damages for road accidents by a legislative schedule. Otherwise, "[t]he most common wording used by Spanish Courts in the assessment of damages for non-pecuniary loss is that it has to be done 'according to the circumstances of the case . . . .'" Miguel Martín-Casals et al., Non-Pecuniary Loss Under Spanish Law, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE, supra note 28, at 192, 209.
In England, courts refer to “brackets”—ranges of amounts for different headings of damages. An independent body called the Judicial Studies Board sets these brackets. It is up to the individual trial judge and the courts of appeals to place the victims’ injuries within the range of the appropriate bracket. In Germany, there is no official body setting out brackets or ranges, but private groups such as ADAC, the German equivalent of the American Automobile Association, publish biannual summaries (Tabellen) of a large number of reported personal injury awards in Germany, with brief summaries of the injuries found and damages awarded by the court. Both France and Italy have used two methods to achieve standardization. First, both nations’ courts require parties to present their claims for pain and suffering in terms of a standardized “point system.” The scales used by the parties before the court are based on expert opinions from medical scientists and psychologists and form a standard by which the severity of an impairment can be measured. In addition, in France the monetary value attached to this point system is collected nationally and used by courts to achieve some modicum of national horizontal equity. In Italy the collection of data is done regionally and there is an effort to achieve horizontal equity at the local or regional level.

IV. THE DIFFERENCE BETWEEN AMERICAN AND EUROPEAN SYSTEMS FOR THE COMPENSATION OF PAIN AND SUFFERING: ABSOLUTE DAMAGES

Assuming that the United States has a system of compensation for pain and suffering that is different in some significant way from the European approach, and assuming that the legal doctrines that comprise the two systems allow for roughly similar headings of damages for nonpecuniary loss or emotional distress, what could account for the difference?

One possibility is that the number of persons claiming in European systems is significantly smaller (relative to population and GDP) than in the United States. One might be able to get a rough sense of the difference in rates of suing by looking at the number of tort claims

38. Basil Markesinis et al., Compensation for Personal Injury in English, German and Italian Law 16 (2005).
39. Id.
40. Id.
41. Id. at 17–18 & n.39.
42. See Comandé, supra note 34, at 54–56.
43. Id.
44. Id.
45. Markesinis et al., supra note 38, at 19.
filed per capita in the United States and Europe. If it were the case that there was less tort litigation in Europe than in the United States, this might be a result of a number of factors.

It might be the case that because of a stronger social safety net, injured Europeans have less incentive to sue to recover medical expenses and lost wages, thus reducing the opportunity to sue for other compensable injuries, such as pain and suffering. Furthermore, it might be the case that the "loser-pays" rule, which is dominant in Europe, and the absence of a contingency fee, which does not exist in Europe except to a very minor degree in England, also create disincentives to sue. Finally, it might be the case that there are fewer injuries in Europe, all things considered, leading to a naturally smaller population of victims who could consider suing. These are all factors that need to be addressed, and yet fall outside the scope of this paper.

Another factor that could account for the difference is the size of pain and suffering awards themselves. Even if the right to redress for the invasion of a nonpecuniary interest was roughly the same between the United States and Europe, and even if roughly the same proportion of injured persons sued for their injuries, the systems might look very different—at least in terms of the costs they impose on their societies—if the amount of damages awarded for similar injuries were very different.

To investigate this possibility I attempted a rough comparison between the German awards recorded in the *Tabellen* and American awards obtained from case evaluation software supplied by a private reporting company, Jury Verdict Research (JVR). JVR maintains a database of over 200,000 American tort case outcomes. JVR works with these cases to provide case evaluation services to attorneys. For example, an attorney might use JVR's software to determine the approximate value of a plaintiff's medical malpractice claim against a hospital by entering specific facts of the plaintiff's case into the software. The software then calculates an estimate of the value of that claim based on the type and extent of the injury, information about the plaintiff and defendant, and other factors.

I have also provided a comparison of German awards within the universe of European awards based on a survey conducted by the European Center of Tort and Insurance Law (ECTIL). I call this survey, 46. *Allgemeiner Deutscher Automobil-Club (ADAC), Schmerzensgeld-Beträge* (Susanne Hacks et al. eds, 20th ed. 2001) [hereinafter *Tabellen*] (containing awards granted by German courts between 1988 and 2001).
which was published in 2001, the “Rogers survey.” The statistics provided by the Rogers survey are much rougher than those generated by the Tabellen-JVR analysis. They are provided to illustrate where, in general, Germany falls within the range of European damages for nonpecuniary loss.

The comparison of New York and German damages was made by sampling cases from one volume of the Tabellen. Specifically, the edition used indexed awards by injury type, among other methods. The cases selected from the Tabellen were cases including cervical spine injuries. These cases were selected both because they are numerous and because they are better suited to research into pain and suffering damages than other types of injuries. The Tabellen lists over 420 cervical spine injury cases.

One limitation of using the Tabellen is that while it is quite detailed about the nature and cause of an injury, it does not separate pecuniary from nonpecuniary damages. But because a very large portion of medical expenses are not recovered in tort litigation in Germany (because they are paid by the state), the real risk in using the Tabellen is that other economic losses, especially relating to lost earnings (past and future), will be contained in the damage awards, thus overstating the basis for comparison. Two comments can be made about this. First, because of the availability of unemployment and disability payments from the state, lost earnings do not necessarily comprise a large portion of damage awards for cervical injury in Germany as compared to the amount awarded for pain and suffering (Schmerzensgeld). Second, to the extent that I am wrong about the first point, this would only lead to an understatement of the difference between American and German pain and suffering awards in cervical injuries, and, as we will see below, the difference is significant even if the figures in the Tabellen unrealistically attribute one hundred percent of the damages to pain and suffering.

A sample group of forty-two cases was selected from the Tabellen, with every tenth case chosen to help randomize the sample. For comparison to these German awards, reports were selected from the Westlaw combined database of verdict reports. These cases were limited to reports between 1988 and 2001 (to match the dates of the Tabellen results) and were also limited to New York State (to match, roughly, the number of results in the Tabellen, allowing easier, ran-

47. See Damages for Non-Pecuniary Loss in a Comparative Perspective, supra note 28.
48. See Tabellen, supra note 46.
49. Id.
dom selection). The Westlaw search returned 309 reports. Of these reports, forty-two cases were selected that matched the following criteria: plaintiff verdicts and settlements in which pain and suffering damages were identified specifically. Further, only the pain and suffering portions of the overall awards were used for comparison. This last restriction will have the effect of minimizing the size of New York damages (thus minimizing their ratios to the German damages).

The New York awards were not adjusted for inflation, while the awards in the Tabellen were adjusted. The lack of inflation adjustment here will tend to understate the New York awards. Medians were taken across the forty-two samples; these medians were compared to provide a ratio. The forty-two samples in both sets were divided into quintiles and the medians were taken of each of the quintiles to provide a set of five ratios (the top New York quintile to the top German quintile, and so on).

The numerical comparisons made here are intended to be rough estimates only. There are several known infirmities (and doubtless several others which remain unknown) in the methods used to gather and compare this information. Among these are sample selection difficulties, differing judicial and medical systems across jurisdictions, inflation, and currency conversion. Nonetheless, the comparisons show that American awards are significantly larger than European awards, justifying further investigation using more refined methods.

As the first chart in the Appendix shows, the ratios between the German and American pain and suffering awards are enormous. In the case of back injury, Germans received a median award of approximately €1,175 ($1,382) while JVR reported a median pain and suffering award of €80,750 ($94,447).50

When compared with the cross-national survey of pain and suffering awards presented in the Rogers survey, Germany seems to fall in the middle of the group. Therefore, one could make a very rough guess that the cervical injury ratios between the German cases and the New York cases indicate that, overall, the quantum of money paid for pain and suffering for similar wrongs in Europe and the United States differs by a factor of at least 10:1 if not more (the German-NY ratios ranged between 28:1 to 68:1).

V. CONCLUSION: WHAT DIFFERENCE DOES DIFFERENCE MAKE?

The first reaction one might have to this report is that either American pain and suffering damages are too high or that European pain

---

50. For the raw data and the list of all the selected cases (without narrative detail), see app. II.
and suffering damages are too low. The former position has been embraced, obviously, by those who want to cap pain and suffering damages in the United States. The latter position has been embraced (perhaps less obviously) in Europe. In 1996, for example, the Law Commission in England concluded that "current awards for non-pecuniary loss for serious personal injury were substantially below the level that they should be, in light of prevailing social, economic and industrial conditions." It recommended that the awards be increased by a multiplier of at least 1.5 or 2.0. In 1992 the Austrian government criticized pain and suffering awards as too low and recommended that parliament raise them. German academic commentary, some of which has the same status as a pronouncement from the American Law Institute, has also criticized pain and suffering damages for serious injuries as inadequate.

The differences between systems should not matter, even if they are quite large, unless the two systems are attempting to secure the same thing through compensation for nonpecuniary loss. This is especially true if all the systems adopted the functional approach to compensation for pain and suffering. The cost of living in the various nations under consideration is not so different that the buying power of a dollar or a Euro can explain the sort of differences that were identified above.

In order to determine whether the difference identified is important, therefore, we would need to collect and then compare theories of compensation that justify monetary damages for nonpecuniary harms. As a preliminary matter, three general theories can be identified. The first is the functional approach, discussed briefly in the above text. According to this theory, the point of damages is to replace the loss suffered by the victim, however the loss was occasioned. A key assumption of this theory is that damages for pain and suffering can do the same work as damages for medical expenses or lost wages. The
second is the deterrence approach, specifically the theory of measuring pain and suffering damages proposed by Mark Geistfeld and others.\textsuperscript{57} Under the deterrence approach, the main purpose of securing damages on behalf of a victim is instrumental. The transfer of the damages is not expected to make the victim any worse off than he or she had been before the accident; it is expected to reflect how much the victim, and hence the tortfeasor, would have valued the avoidance of the risk that resulted in the injury.\textsuperscript{58} The third theory, which I have called the objective approach, views the diminution of quality of life as a wrong in itself, which creates an obligation to repair for the tortfeasors. The objective approach rejects the idea that damages can repair certain kinds of hedonic and dignitary losses, and it rejects the view that the only point of assessing damages is to instrumentalize deterrence.\textsuperscript{59}

I suspect that the modern trend in Europe has been towards a blend of the functional and objective approaches, while the modern approach in the United States has been a blend of the functional and deterrence approaches. If I am correct that the best characterization of the modern approach in Europe towards nonpecuniary damages is a blend of the functional and objective approaches, and the trend in the United States has been towards blending the functional and deterrence approaches, then we may be able to explain part of the gap in the amounts awarded for the same injuries between the two systems.

The next generation of comparative scholarship on damages will have to go beyond comparing the amount of damages received on either side of the Atlantic and will have to compare the theories that generate these amounts. This will require a kind of translation that goes beyond interpreting the different words or mechanisms used by private law systems in different countries. It will involve translation across philosophical or conceptual structures. This is a very hard task because it requires a fair bit of conceptual analysis, as William Ewald noted in his famous essay on comparative law, \textit{What Was it Like to Try a Rat}?\textsuperscript{60} It is, however, an important step in the development of a

\textsuperscript{57} See Geistfeld, \textit{supra} note 14. See also Croley & Hanson, \textit{supra} note 14.
\textsuperscript{58} See Geistfeld, \textit{supra} note 14, at 805–07.
theory of comparative damages that will provide lawyers in the United States with the requisite knowledge that will help them understand not only European noneconomic damage awards, but also the noneconomic awards arising in their own jurisdictions.
APPENDIX I

MEDIAN AWARDS BY QUINTILE

<table>
<thead>
<tr>
<th>Quintile</th>
<th>German Awards</th>
<th>New York Awards</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Average</td>
<td>€ 3,777</td>
<td>€ 214,855</td>
<td>56.9</td>
</tr>
<tr>
<td>Overall Median</td>
<td>€ 1,175</td>
<td>€ 80,750</td>
<td>68.7</td>
</tr>
<tr>
<td>1st Quintile Median</td>
<td>€ 350</td>
<td>€ 9,775</td>
<td>27.9</td>
</tr>
<tr>
<td>2nd Quintile Median</td>
<td>€ 750</td>
<td>€ 21,250</td>
<td>28.3</td>
</tr>
<tr>
<td>3rd Quintile Median</td>
<td>€ 1,175</td>
<td>€ 80,750</td>
<td>68.7</td>
</tr>
<tr>
<td>4th Quintile Median</td>
<td>€ 2,125</td>
<td>€ 136,000</td>
<td>64.0</td>
</tr>
<tr>
<td>5th Quintile Median</td>
<td>€ 8,750</td>
<td>€ 550,800</td>
<td>62.9</td>
</tr>
</tbody>
</table>

MEDIAN AWARD RATIOS BY QUINTILE

<table>
<thead>
<tr>
<th>Quintile</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Quintile Median</td>
<td>68.7</td>
</tr>
<tr>
<td>2nd Quintile Median</td>
<td>64.0</td>
</tr>
<tr>
<td>3rd Quintile Median</td>
<td>62.9</td>
</tr>
<tr>
<td>4th Quintile Median</td>
<td>64.0</td>
</tr>
<tr>
<td>5th Quintile Median</td>
<td>62.9</td>
</tr>
</tbody>
</table>
APPENDIX II

AWARDS BY INJURY

Rogers Survey

AWARDS BY NATION
Damage Awards by Nation and Injury

Rogers Survey