Helping Jurors Determine Pain and Suffering Awards

Oscar G. Chase

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol23/iss4/1

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
HELPING JURORS DETERMINE PAIN AND SUFFERING AWARDS

Oscar G. Chase*

I. INTRODUCTION

The process by which pain and suffering damages are awarded in the United States has been aptly called "procedurally simple but analytically impenetrable." As the same author goes on to say, "[t]he law provides no guidance, in terms of any benchmark, standard figure, or method of analysis, to aid the jury in the process of determining an appropriate award." This state of affairs has prompted the attention of several commentators who have criticized the existing regime and suggested a variety of thoughtful proposals to improve the situation. In addition to describing the problem and some of the sug-

* Professor of Law and Vice Dean, New York University School of Law. I appreciate the valuable research assistance of Gail Balcerzak, John F. Brown, Arlo M. Chase, Kevin L. Mintzer, and Shari L. Rosenblum. I thank the Institute of Judicial Administration and Aetna Life and Casualty for providing financial assistance for this article. A prior version of this Article was presented at the Institute of Judicial Administration's Research Conference on Civil Justice in the 1990s, at New York University School of Law, October, 1993. Helpful comments have been provided by Samuel Estreicher, Mark Geistfeld, James B. Jacobs, Lewis Kornhauser, David W. Leebron, Russel F. Moran, Burt Neuborne, Linda Silberman, and Peter Tillers. All the views expressed in this paper are my own, and I am responsible for any errors it contains.

2. Id.
3. A partial listing includes AMERICAN BAR ASSOC., REPORT OF THE ACTION COM-
gested solutions in the literature, I will present a new proposal. Apart from those who would dispense with non-pecuniary damages entirely, all of the suggestions of which I am aware (including my own) seek to enhance analytic coherence, but do so at the price of procedural simplicity and most would restrict the scope of the jury’s authority. If reform is to be made at all, the question “how?” must be answered by setting procedural loss against analytic gain. The proposal offered here preserves the power of the jury, enhances the jurors’ ability to make an informed decision, and eschews procedural complexity.

II. THE CURRENT REGIME, ITS DEFECTS AND ITS COSTS

Non-pecuniary damages have been criticized for different flaws by different observers. Most basic is the claim that they are without justification and should be abolished. Other opponents of pain and suffering awards would cap them at some maximum dollar level, an argument that has found favor with some state legislatures. These attacks on the substance of pain and suffering law are not the focus of this paper. They should remind us that failure to mediate the deficiencies—the analytic impenetrability—of the current regime may be used by opponents of full tort recoveries as a justification for baby-and-bath water solutions.


A more extensive list is found in David Baldus et al., Preliminary Report, Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms (Pain, Suffering, and Loss of Enjoyment of Life) and Punitive Damages, 80 IOWA L. REV. 825 (forthcoming Oct. 1995).

4. See, e.g., 2 ALI REPORT, supra note 3, at 204-17, 229 (reviewing the arguments for and against pain and suffering damages, and, while finding the case for them “uneasy”, recommending that they be retained).

5. For a discussion of the $250,000 cap adopted in California and the indexed cap in the State of Washington, see id. at 218. The ALI Reporters questioned the use of caps because: (i) unless indexed, they inexorably force a decline in tort recoveries when measured in constant dollars; (ii) they arbitrarily prevent full pain and suffering recoveries by the most severely injured persons while allowing full recovery to others; and (iii) they do not eliminate the large variations in pain and suffering awards that have been the source of much of the criticism of them. Id.

6. The ALI Report provides:
A less fundamental but still trenchant criticism goes to the standardless nature of the jury’s task. Reviewing courts are free (as jurors are not) to use information about prior awards in similar cases, but they too are hampered by lack of information and lack of commonly accepted principle.

An inescapable reality of the pain and suffering conundrum is that tort law requires the monetization of a “product” for which there is no market and therefore no market price. This largely explains the lamented fact that the jurors who must undertake the monetization are given no “absolute” standard by which to do it. There is none to give them. Each juror must create or bring their own standard to the courtroom. Proposals for legislatively enacted mandatory schedules do not solve this problem. Although they might moderate the related problem of variation among awards, they would merely shift the locus of power to do the impossible, that is, find the right level of compensation.

Consider the situation of a juror asked to determine the correct amount of money with which to compensate the plaintiff for the suffering endured at the hands of the defendant. Our juror will have heard the plaintiff’s testimony about the nature and severity of the suffering, perhaps observed something of its source (as, for example, if the plaintiff is paraplegic), heard expert testimony about the severity and likely duration of the pain, perhaps seen a video tape of the plaintiff’s distressful daily regimen, and have been exhorted to be generous by the plaintiff’s lawyer and to be reasonable by the adversary. The typical jury charge on the issue gives no real guidance at

---

We believe that the cap model has far more vices than virtues, and the fact that state legislatures have been so ready to impose such caps should give pause to those who assert that statutory tort reform reflects a fair and balanced appraisal of the interests of both actors and victims.  

Id. at 218.

7. A trial or appellate court may set aside a damage award that is found to be too high or low. See Flemming James, Jr. et al., Civil Procedure § 7.29 (4th ed. 1992).

8. Valuation must depend to some extent on the juror’s economic circumstances and tolerance for pain. I had occasion to conduct a thought experiment on valuing pain and suffering while writing this Article. I became ill with a non-threatening but very discomforting malady. After the third day in what seemed to be endless suffering, I asked myself how much money I would demand for each additional day of the illness, assuming I could make such a demand. I concluded that it would take at least $50,000 per day, but that the amount would escalate as the days wore on. I then asked myself what I would pay to reduce my illness by one day. The figure was closer to $1,000. Finally, I should confess, when I was able to get the prescription drug ordered by my physician, I complained about the price (about $25). How much was my suffering worth? Even I could not give a coherent answer.
all. In New York, the *Pattern Jury Instructions*, although not binding on courts, are commonly used. They prescribe these instructions:

PJI 2:280. Damages—Personal Injury—Injury and Pain and Suffering

If you decide for plaintiff on the question of liability you must include in your verdict an award of money for the injury you find that plaintiff (decedent) suffered and for conscious pain and suffering caused by defendant.

Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

Plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for the injury and for the conscious pain and suffering to date. 9

Another standard source, *Jury Instructions on Damages in Tort Actions*, is also interesting because it seeks to provide more specifics:

6-17. Physical pain and suffering—Past and future.

In assessing damages, if you have occasion to do so, the law allows you to award to plaintiff a sum that will reasonably compensate him/her for any past physical pain, as well as pain that is reasonably certain to be suffered in the future as a result of the defendant’s wrongdoing.

There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can be so described, is your collective enlightened conscience. You should consider all the evidence bearing on the nature of the injuries, the certainty of future pain, the severity and the likely duration thereof.

In this difficult task of putting a money figure on an aspect of injury that does not readily lend itself to an evaluation in terms of money, you should try to be as objective, calm and dispassionate as the situation will permit, and not to be unduly swayed by considerations of sympathy. 10


Other jurisdictions use similar language:

1.3

INTRODUCTION TO DAMAGES
(Personal Injury—No Punitive Damages Sought)

In considering the issue of Plaintiff’s damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff’s damages.
no more and no less.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others.


2.1 PERSONAL INJURY AND PROPERTY DAMAGE CASES
(Bodily Injury, Pain and Suffering, Disability, Disfigurement, Loss of Capacity for the Enjoyment of Life)

Any bodily injury sustained by the Plaintiff and any resulting pain and suffering . . . experienced in the past [or to be experienced in the future]. No evidence of the value of such intangible things as mental or physical pain and suffering has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

Id. at 166 (alteration in original).

15.2 COMPENSATORY DAMAGES

If you find that the defendant is liable to the plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff’s damages . . . . The purpose of compensatory damages is to make the plaintiff whole—that is, to compensate the plaintiff for the damage that the plaintiff has suffered . . . .

. . . .

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence . . . .


15.4 INJURY/PAIN/DISABILITY/DISFIGUREMENT/LOSS OF CAPACITY FOR ENJOYMENT OF LIFE

You may award damages for any bodily injury that the plaintiff sustained and any pain and suffering . . . that the plaintiff experienced in the past [or will experience in the future] as a result of the bodily injury. No evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in the light of the evidence.

Id. at 172 (alteration in original).
In the attempt to give the jury some guidance, the instructions may introduce still greater confusion. What is a “collective enlightened conscience”? How much sympathy does it take to be “unduly swayed”? If there are no “objective guidelines,” how should one proceed? What tools can one use? The open-ended quality of the jurors’ task leads to three sorts of criticism of the process. It introduces unwarranted variations in result and is therefore unpredictable. It allows the jurors to use inappropriate criteria. It diminishes public confidence in the legal system because of the apparently arbitrary nature of the process.

A. Unacceptable Variations in Jury Awards

Both anecdotal and empirical evidence indicates that the disparity between awards for pain and suffering among apparently similar cases defies rational explanation. Bovbjerg, Sloan, and Blumstein compiled a database of 898 cases drawn from jury verdict reports in Florida and Kansas City. They found that the total compensation award varies with severity of injury, but that this factor explained only two-fifths of the magnitude of variation. Their data “reveals that variation in awards is enormous. Within an individual severity level, the highest valuation can be scores of times larger than the lowest.” They find, nonetheless, that “the current system works rationally and fairly in an aggregate sense.” That is, “the fairness between separate categories of injury, is rather good. The main problem is the absence of ‘horizontal’ equity—the extent of variation within a single category.” And, as might be expected, “[t]he distribution of awards for non-economic loss shows even wider dispersion than the distribution for total awards . . . . Thus, awards for pain and suffering and other intangible losses may be unreasonably inconsistent within the relatively discrete and unambiguous categories for injury severity.”

11. Bovbjerg et al., supra note 3, at 921 (table 2).
12. Id. at 921.
13. Id. at 923 (footnote omitted). The “injury severity level” they used for analysis of the data is the nine-point scale “conventionally used for evaluating malpractice insurance cases.” Id. at 920. They found that it is the “best available single predictor of award amount.” Id. This scale was also used to analyze jury verdicts by Stephen Daniels & Joanne Martin, Don’t Kill the Messenger ‘Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990, 16 JUST. SYS. J. 69, 95 (1993).
15. Id.
16. Id. at 936-38.
A similar conclusion was reached by Leebron on the basis of his study of pain and suffering awards in 256 wrongful death cases.\footnote{Leebron, supra note 1, at 324-25.} By limiting his study to death cases he was able to eliminate much of the variation among fact patterns that might explain award variations. He concludes that “[a]s currently applied . . . the jury system, coupled with deferential judicial review, produces an unacceptable degree of variation in the awards.”\footnote{Id. Using the “further rarification” of death by drowning cases, Leebron reports a range of jury verdicts from zero to $137,000; even after appellate review, the range was from $4,360 to $52,800. See id. at 297-98.} A more recent survey of wrongful death awards supports Leebron’s conclusion. Aaron J. Broder reported on the non-pecuniary damage awards reported for victims of the Korean Air Line disaster, finding that the ten awards made by January, 1994, ranged from zero to $1.4 million.\footnote{Aaron J. Broder, Judges, Juries and Verdict Awards, N.Y. L.J., Jan. 3, 1994, at 3, 3. All but one of the awards for non-pecuniary damages were jury verdicts. The one award by a judge was $1 million.} Since all of the decedents died in virtually the same circumstances, the variations can be only be explained by arguably irrelevant factors such as the venue in which tried, the skill of the attorney, or (most probably) the predilection of the trier of the fact in each case.

Variability is a problem primarily because it undermines the legal system’s claim that like cases will be treated alike; the promise of equal justice under law is an important justification for our legal system. Variability is also claimed to create instrumental defects; that is, it makes it harder to settle cases, thus adding unnecessary transaction costs to the tort system,\footnote{There is some controversy whether uncertainty increases or decreases the likelihood of settlement. See Bovbjerg et al., supra note 3, at 926 n.92 (citing and discussing studies). Pendell, speaking from an insurer’s perspective, asserts that “there is little doubt that predictability greatly facilitates settlement by narrowing the gap between plaintiffs’ and defendants’ judgments about their probability of success at trial and the likely size of the award.” Judyth W. Pendell, Enhancing Juror Effectiveness: An Insurer’s Perspective, 52 LAW & CONTEMP. PROBS. 311, 312 (1989).} and delaying payment to needful plaintiffs. Unpredictability also leads to inefficiencies because of over- or under-precautions by affected industries and insurers.\footnote{Bovbjerg et al., supra note 3, at 925.}
B. Jurors' Resort to Inappropriate Criteria

Deprived of any standard but their "collective enlightened conscience," it would be surprising if jurors, consciously or not, did not sometimes employ criteria of decision making that the formal legal system regards as inappropriate. This can be a more serious problem than that of juror whimsy, depending on the criterion applied.

There is disturbing evidence that some jurors have been affected by the race of the litigants. In their study of verdicts in Cook County, Illinois, Chin and Peterson report that "race seemed to have a pervasive influence on the outcomes of civil jury trials." After adjusting for case types, injuries and the characteristics of other parties, black plaintiffs and defendants lost more often than other parties. When black plaintiffs did win, they recovered only seventy-four percent of what other plaintiffs got for the same injury. On the other hand, awards against black defendants were ten percent less than against other defendants.

Other investigators have found that the plaintiff's gender was influential on awards. A study using mock jurors found a propensity to award greater economic damages to female plaintiffs suing for damages due to male wrongful deaths than the reverse. Leebron's data on pain and suffering awards in reported wrongful death cases also indicated that the awards for male victims were less than those for female victims. At a minimum, further investigation of the impact of race and gender is warranted. The evidence we do have only begins to suggest the dimensions of the problem; it also suggests that we are right to worry about the degree our standardless system allows bias to play a role.

The "deep pocket" effect has been another source of concern. Chin and Peterson found that corporations and government agencies were more likely to be found liable than individuals, and that higher

22. See supra note 10 and accompanying text.
24. Id.
25. Id. The authors do not report whether the latter figure was controlled for income levels of the plaintiffs.
26. See supra notes 24-25.
28. Leebron, supra note 1, at 306.
damages were assessed against them. These findings were corroborated in another study using data gathered from twenty-seven states. This need not suggest an anti-institution bias or an exercise in wealth re-distribution. It may be that jurors conclude that corporations have more ability to act rationally than individuals, and so should be held to a higher level of responsibility. But whatever the explanation, it seems that some jurors are bringing an inappropriate element into the damages deliberation.

Media coverage of jury verdicts and of the tort “crisis” may also improperly affect actual jury behavior. One would expect that the media report only exceptional cases. To test this proposition, we surveyed the personal injury awards reported in two New York newspapers over a six year period and compared the verdicts reported to the medians and averages of the actual verdicts during the same period. As predicted, the verdicts reported exceeded the median of actual verdicts geometrically.


30. Brian Ostrom et al., What Are Tort Awards Really Like? The Untold Story from the State Courts, LAW & POL'Y, Jan. 1992, at 77. “The central conclusion to emerge from our model of verdicts in tort cases is that the size of the plaintiff’s award is related most closely to litigant status rather than the type of trial, the areas of tort law, the length of time to disposition, or the locale.” Id. at 93.

31. See infra Tables IA, IB, II.
### TABLE IA

**NY Times Personal Injury Award Reports**

(All awards in millions of dollars)

<table>
<thead>
<tr>
<th>Year</th>
<th>#</th>
<th>Hi</th>
<th>Low</th>
<th>Avg</th>
<th>Med</th>
</tr>
</thead>
<tbody>
<tr>
<td>88</td>
<td>16</td>
<td>25.0</td>
<td>.75</td>
<td>7.6</td>
<td>7.0</td>
</tr>
<tr>
<td>89</td>
<td>16</td>
<td>200.0</td>
<td>.5</td>
<td>20.5</td>
<td>5.5</td>
</tr>
<tr>
<td>90</td>
<td>13</td>
<td>15.1</td>
<td>.15</td>
<td>7.7</td>
<td>7.6</td>
</tr>
<tr>
<td>91</td>
<td>17</td>
<td>30.7</td>
<td>.4</td>
<td>12.8</td>
<td>2.8</td>
</tr>
<tr>
<td>92</td>
<td>19</td>
<td>127.0</td>
<td>.225</td>
<td>15.9</td>
<td>4.3</td>
</tr>
<tr>
<td>93</td>
<td>14</td>
<td>163.9</td>
<td>1.0</td>
<td>25.3</td>
<td>10.1</td>
</tr>
</tbody>
</table>

### TABLE IB

**NY Newsday Personal Injury Award Reports**

(All awards in millions of dollars)

<table>
<thead>
<tr>
<th>Year</th>
<th>#</th>
<th>Hi</th>
<th>Low</th>
<th>Avg</th>
<th>Med</th>
</tr>
</thead>
<tbody>
<tr>
<td>88</td>
<td>11</td>
<td>25.0</td>
<td>.75</td>
<td>6.7</td>
<td>4.75</td>
</tr>
<tr>
<td>89</td>
<td>14</td>
<td>61.6</td>
<td>.02</td>
<td>9.8</td>
<td>4.6</td>
</tr>
<tr>
<td>90</td>
<td>15</td>
<td>76.1</td>
<td>.12</td>
<td>11.5</td>
<td>6.1</td>
</tr>
<tr>
<td>91</td>
<td>22</td>
<td>127.0</td>
<td>.4</td>
<td>9.2</td>
<td>1.5</td>
</tr>
<tr>
<td>92</td>
<td>8</td>
<td>30.0</td>
<td>.5</td>
<td>6.2</td>
<td>2.4</td>
</tr>
<tr>
<td>93</td>
<td>29</td>
<td>163.9</td>
<td>1.0</td>
<td>23.4</td>
<td>5.4</td>
</tr>
</tbody>
</table>

---

32. Tables IA and IB employ the following methodology. If an award was reported in the same paper on more than one occasion, it was included in the data more than once if the reports appeared at least one week apart. This procedure was justified for two reasons. First, within one week, it is likely that a reader would recall an article was referring to an award that had previously been reported, and not a new award. Secondly, higher awards tended to receive attention in a newspaper over the subsequent few days following its announcement. To characterize every newspaper mention within the first week as a separate report would overly emphasize extremely large awards.

Only cases in which a defendant was found liable are included; findings of no liability were not recorded. Two reports are included in which multiple plaintiffs shared one award; the total award was recorded in the Table as one award on the premise that a reader would recall the whole amount, not the average received by many plaintiffs. The two cases were an award of $30,700,000 reported by the New York Times in 1991 and an award of $7,150,000 reported by Newsday in 1988. Asbestos Case Damages, N.Y. Times, Jan. 25, 1991, at D3; Peter Bowles, Ex-Navy Yard Workers Win Suit, NEWSDAY, Dec. 16, 1988, at 31. If a jury award was subsequently reduced by a trial judge or an appellate court, the lower figure reported at the later date was the only number recorded if the reduction was reported by the same newspaper. If the adjustment was not reported in the same paper, the original jury award was recorded. Lastly, only personal injury cases in which pain and suffering damages could have been awarded were included in the study.
### TABLE II

**Personal Injury Verdicts - 1988 - 1992**

(Amounts in actual dollars)

<table>
<thead>
<tr>
<th>Year</th>
<th>Average</th>
<th>Median</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Statewide (New York State)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>$882,940</td>
<td>$200,000</td>
<td>374</td>
</tr>
<tr>
<td>1989</td>
<td>$1,107,381</td>
<td>$200,000</td>
<td>443</td>
</tr>
<tr>
<td>1990</td>
<td>$1,086,383</td>
<td>$227,066</td>
<td>467</td>
</tr>
<tr>
<td>1991</td>
<td>$851,128</td>
<td>$190,000</td>
<td>387</td>
</tr>
<tr>
<td>1992</td>
<td>$964,553</td>
<td>$250,000</td>
<td>417</td>
</tr>
</tbody>
</table>

| **B. Metropolitan New York** |           |          |       |
| 1988   | $867,432  | $248,212 | 306   |
| 1989   | $1,138,104| $250,000 | 335   |
| 1990   | $1,121,312| $263,897 | 332   |
| 1991   | $954,996  | $225,000 | 253   |
| 1992   | $1,034,039| $274,000 | 294   |

| **C. All Other Counties (Upstate)** |           |          |       |
| 1988   | $374,180  | $85,000  | 68    |
| 1989   | $300,378  | $139,338 | 108   |
| 1990   | $858,097  | $150,000 | 135   |
| 1991   | $490,385  | $124,530 | 134   |
| 1992   | $637,546  | $125,000 | 123   |

To the extent that future jurors base their decisions on their knowledge (as gleaned from the media) of past awards, at least two possible problems arise. Jurors may tend to over-compensate because they have an unrealistic sense of the allowable range of recoveries. Alternatively, jurors may under-compensate because of their dislike for the “windfall” aspect of some very large awards.

At least some players in the tort system apparently believe that

---

33. Note on statistical method: Only cases in which plaintiff recovered are included, not defense verdicts. Only personal injury cases are covered, not contract or property damage. Only jury verdicts are included, not Court of Claims and other bench trials. Figures courtesy of *New York Jury Verdict Reporter*.


35. *Id.* at 111-12.

Jurors themselves are affected and influenced by other juries’ decisions in a number of ways. The jurors we interviewed appeared to be quite cognizant of other civil juries, real and apocryphal. Their concerns about deep pockets, the litigation crisis, and the integrity of plaintiffs were implicitly and explicitly linked to the presumed excesses of antecedent juries.

*Id.*
mass media can affect verdicts.\textsuperscript{36} Institutions with major stakes in the outcomes produced by the tort system have used advertising to attempt to influence aggregate jury verdicts by stating the case for moderation.\textsuperscript{37}

In short, jurors bring some information about levels of compensation actually made in tort cases with them when they arrive at the courthouse, but it is not very reliable information. It is wildly inflated.

\textbf{C. Costs to the Justice System}

Standardless pain and suffering verdicts may add to the cost of tort litigation not only by the difficulties they add to the settlement process, but also by protracting deliberation in the cases that are tried. Juries may (this is conjectural) have difficulty agreeing on the right range when there is no guidance, and their unwitting departure from the limits that courts think are appropriate undoubtedly adds to the frequency with which judges must review their verdicts.

Courts performing the reviewing function may at least resort to reported decisions to determine what other courts and jurors have done with like cases. While not all courts engage in such an examination, the practice is well-established in some jurisdictions.\textsuperscript{38} Yet courts that are willing to undertake a comparative review are ill-informed about the vast majority of cases because aggregate trends are not available to them. The cost here is not only the inefficiencies of each court undertaking its own search for relevant data on each review of an award, but the perhaps larger cost of the integrity of the system. After all, it is hard to understand why judicially-arrived pain and suffering awards are more principled than jury verdicts when the process used to reach the decision is also handicapped by ignorance, even if not to the same degree.\textsuperscript{39}

\begin{flushright}
\footnotesize

37. \textit{Id.} (discussing such examples).

38. See Baldus, supra note 3.

39. The problem of incoherent judicial review of jury verdicts is addressed in depth by Baldus, supra note 3. \textit{See also} Schnapper, supra note 3.
\end{flushright}
III. PREVIOUSLY PROPOSED SOLUTIONS

The ABA Action Commission to Improve the Tort Liability System[^40] made three recommendations directed to pain and suffering damages. One, there should be greater use of additur and remittitur by trial and appellate courts to set aside verdicts that are "clearly disproportionate to community expectations," but there should not be ceilings on pain and suffering damages.[^41] Two, there should be one or more "tort award commissions" established to gather and report information that would be useful in "the framing of jury instructions, the exercise of the power of additur and remittitur, and the process of settling cases."[^42] Three, "[o]ptions should be explored to provide more guidance to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case."[^43] No specific method of providing juries with the desired guidance was endorsed, but the Comment states that some members would have the trial judge suggest "a non-binding range of high and low awards."[^44] The Comment also notes that the data gathered by the proposed tort award commission could be useful in developing the guidelines.[^45] As will become apparent, my own proposal attempts to put flesh on the bones of the Commission’s recommendation.

The ALI Reporters’ Study, Enterprise Liability for Personal Injury[^46], also recommends against mandatory ceilings for pain and suffering damages.[^47] It instead suggests adoption of a floor or threshold of serious injury that would have to be met before pain and suffering damages could be obtained.[^48] The Study found that minor injuries tend to be overcompensated, so a floor would eliminate this problem while freeing money for more serious injury victims.[^49] The Study also recommends the development of "[m]eaningful guidelines" to aid juries in assessing pain and suffering damages.[^50] "The guidelines

[^40]: See ABA COMMISSION REPORT, supra note 3, at 13-15.
[^41]: Id. at 13 (Recommendation No. 2).
[^42]: Id. at 14-15 (Recommendation No. 3).
[^43]: Id. at 15 (Recommendation No. 4).
[^44]: Id.
[^45]: Id.
[^46]: ALI REPORT, supra note 3.
[^47]: Id. at 218-20.
[^48]: Id. at 230 (Recommendation 2); see id. at 218-21.
[^49]: Id. at 220-21.
[^50]: Id. at 230 (Recommendation 3), 221-27.
should be based on a scale of inflation-adjusted damage amounts attached to a number of disability profiles that range in severity from the relatively moderate to the gravest injuries.\textsuperscript{51} The discussion of the guidelines indicates that the authors of the study held somewhat differing views about the degree to which the guidelines should be binding on the jury.\textsuperscript{52} The proposal presented below adopts a non-binding approach.

Baldus, MacQueen, and Woodworth focus less on guiding the jury than on rationalizing judicial review of jury verdicts.\textsuperscript{53} They recommend a method of using prior approved awards, inflation and other variables to construct a systematic method of review.\textsuperscript{54} Bovbjerg, Sloan, and Blumstein have proposed four specific methods of controlling jury unpredictability.\textsuperscript{55} One suggestion is the creation of an award matrix, whereby each plaintiff’s injury would be classified by severity level and plaintiff’s age.\textsuperscript{56} Each resulting “cell” of the matrix would be keyed to a value for pain and suffering which would be obtained by averaging previous awards for such injuries.\textsuperscript{57} Juries would be free to determine the cell into which each case fell, but would have to award the exact amount indicated.\textsuperscript{58} A second proposal is the use of standardized injury scenarios with associated dollar values.\textsuperscript{59} The jury would be provided with a few relevant scenarios, instructed to determine which most approximates the plaintiff’s situation and to base their pain and suffering award on it.\textsuperscript{60} Their third alternative is “a set of varying floors and ceilings bounding jury awards at both the high and low ends of valuation.”\textsuperscript{61} The categories would be constructed from prior award averages, using age and severity levels.\textsuperscript{62} In a separate article, the same authors present a fourth alternative in which aggregations of previous awards would also be provided to the jury.\textsuperscript{63} Jurors would have to explain awards that fell

\textsuperscript{51} Id. at 320.
\textsuperscript{52} Id. at 221-29.
\textsuperscript{53} See generally Baldus et al., supra note 3.
\textsuperscript{54} Id.
\textsuperscript{55} See Bovbjerg et al., supra note 3.
\textsuperscript{56} Id. at 939-53.
\textsuperscript{57} Id. at 945.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 953-56.
\textsuperscript{60} Id. at 950.
\textsuperscript{61} Id. at 959; see id. at 959-60.
\textsuperscript{62} Id.
\textsuperscript{63} Blumstein et al., supra note 3, at 172.
in the highest or lowest quartile of the range. Unexplained outliers would be presumed to be improper by reviewing courts.

Common to the four proposals by Bovbjerg, Sloan, and Blumstein is the development of a data bank of prior awards in the jurisdiction.

IV. AN INFORMATION-ORIENTED PROPOSAL

The described proposals differ primarily in the degree of flexibility they preserve for the jury. That presented below is more oriented toward preserving jury autonomy than most of the others. It assumes that by providing jurors with more information about prior awards their verdicts will be more rational and will be seen to be so. Thus, less control of jurors will be required. Some might see this as a first reform—to be followed by more drastic measures if dissatisfaction persists. This proposal takes seriously the invitation of the ABA Commission to explore methods for providing more guidance to jurors.

I propose that jurors in all personal injury actions in which non-pecuniary damages are sought be informed of the range of awards made by other juries in the same state for such damages during a contemporaneous time period. The information would be provided in a chart constructed to allow comparison with roughly similar cases in which plaintiffs' verdicts were recovered. The chart would be described by the court in its charge to the jury, and counsel would be free to comment on it during summation. It would be available to the jury during deliberation, along with appropriate instructions on its purpose and related special verdicts. The jurors would not be bound by the information they receive, but would presumably use it to form a general impression of a "reasonable" award.

More specifically, the chart would grid the median, high, and low sums awarded (after any judicial reduction or reversal) for each of the severity levels on the widely-accepted nine-point injury severity

64. Id. at 179.
65. Id.
66. See Bovbjerg et al., supra note 3, at 960.
67. Of course, the idea of providing information to jurors about previous awards has been suggested by others as well. See, e.g., ABA COMMISSION REPORT, supra note 3, at 15; 2 ALI REPORT, supra note 3, at 230; Lebron, supra note 1, at 322-23. I am grateful to John Evancho and Judyth W. Pendell for directing my attention to this literature and to the concept of the grid or chart as an aid to jurors.
68. The authority responsible for constructing the actual chart and the process to be used are discussed infra notes 69-78.
scale for persons in the plaintiff's age bracket. The jury would be instructed to determine the injury severity level of the most significant injury suffered by the plaintiff due to the culpability of the defendant and to report this as a separate itemized verdict. It would then be asked to determine the award for pain and suffering as a separate item of damages.

A sample chart with model instructions (but without dollar amounts) is presented in Figure 1. Numbers are not included because the damage awards by severity category have not yet been calculated.

69. The scale replicates the nine-point severity of injury scale. See supra note 13.

70. This would aid a reviewing court in determining the jury's reasons for reaching the pain and suffering award and facilitate future statistical evaluation.
**FIGURE 1**

Prior Pain and Suffering Awards in New York State for Persons in the Age Bracket N - N During Years 1989 - 1994, Keyed to Level of Severity of Their Most Significant Injury

<table>
<thead>
<tr>
<th>Injury Severity Level</th>
<th>Median Award</th>
<th>Highest Award</th>
<th>Lowest Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Emotional only; fright, no physical damage</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Temporary insignificant; lacerations, contusions, minor scars</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Temporary minor; infection, fracture</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Temporary major; burns, brain damage, surgical material left in patient</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Permanent minor; loss of fingers, loss or damage to organs, non-disabling injuries</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Permanent significant; deafness, loss of limb, loss of eye, loss of one kidney or lung</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Permanent major; paraplegia, blindness, loss of two limbs, brain damage</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. Permanent grave; quadriplegia, severe brain damage, lifelong care or fatal prognosis</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. [Death]71</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Instruction to jurors:* The conditions following each severity category in the chart are merely examples. They are intended to help you determine the severity level of the injuries suffered by the plaintiff. The awards reported on the chart will inform you of the range of 71. It would be better not to provide the awards in wrongful death cases to jurors considering non-death cases, as the considerations are very different and the figures could lead to confusion.
awards made for pain and suffering in other New York State cases for the indicated level of severity of injury during the past five years. All figures reflect only awards reached after a trial and any appeal. The median number is the mid-point of all reported cases. In other words, in half of the cases the award was higher than the median and in half it was lower.

As explained in the judge’s charge to you, you are not bound by the range of awards reported here. These awards are provided to help you, the representatives of the community, as you determine the right amount of money that should be awarded to the plaintiff to compensate [him/her] for pain and suffering. If you believe that some aspect of the plaintiff’s injuries or suffering justifies a higher or lower award than was previously made for other plaintiffs who suffered the same severity level of injury, you may award that greater or lesser amount. After you determine the severity level, fill in the answers to following special verdicts:

1. We find that the most significant injury suffered by the plaintiff falls into severity level __.

2. We find that the plaintiff’s award for pain and suffering is $___.

A rough idea of what the figures might look like for one injury level can be constructed using Leebron’s database for wrongful death cases. He provides data for all wrongful death cases found using the West Reporter System and “other means.” I have constructed the grid in Figure 2 from all New York cases (thirteen) reported by Leebron in which an award for pain and suffering was made and survived judicial review. Because his data did not capture ages, I report all cases without regard to the victim’s age.

72. Leebron, supra note 1, at 291.
73. Id. at 291 n.139. The 256 cases are listed in Leebron’s appendix. Id. at 326-42 (Appendix A). Only officially reported cases are included.
FIGURE 2
Previous Pain and Suffering Awards in New York State
During Years 1980 - 1987, Keyed to Level of
Severity of Their Most Significant Injury

<table>
<thead>
<tr>
<th>Injury Severity Level</th>
<th>Median Award</th>
<th>Highest Award</th>
<th>Lowest Award</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Jurors would be given award information at severity 1 - 8 levels in each case that did not involve death. In death cases they would get only the award information for death cases.]74

9. Death
$70,000 $200,000 $50

If this proposal is adopted, determinations are likely to be more consistent with those in which similar facts were at issue. One can never be sure of the use jurors will make of a chart such as those presented in Figures 1 and 2, but it is reasonable to expect that they will try to develop a collective sense of the relative nature of the decedent’s suffering by considering its length, intensity, and the person’s level of consciousness, all of which will no doubt have been brought out at trial and referenced in summation. Jurors moved by what they conclude was extreme suffering by the plaintiff will probably return a verdict at or even above the highest award on the chart, but they are unlikely to return a verdict that is multiples higher or lower.

Because the jurors will be able to engage in a more informed deliberative process, they will be somewhat constrained against reliance on factors that the formal legal system regards as extraneous, such as the race and gender of the plaintiff, the deep pocket of the defendant or the context in which the injury occurred (auto accident versus medical malpractice). Jurors will be less inclined to rely on an impressionistic sense of what the right level of damages should be as garnered from casual reading of newspaper articles or insurance company advertising campaigns. I expect that jurors making damage determinations under the proposed system will also develop more re-

74. The reason for this is that in all categories other than death, the jurors' fact finding duties include choice of a severity-level; no such issue arises in death cases. In death cases it would be needlessly confusing for the jurors to be given award reports for other severity levels. In non-death cases, the awards given in death cases are irrelevant. I am grateful to Mark Geistfeld for his contribution on this point.
spect for the litigation process because of the more informed way in which they participate in it.

Since everyone involved in the personal injury litigation will also have access to improved information, the parties will be able to make a better informed assessment of the value of the case. Whether or not this leads to an increase in settlements, it could lead to more rational decision-making about whether to settle.

Courts confronted with attacks on verdicts, whether on appeal or post-trial, should have more confidence in the jury result because it will have been based on better information. Even a verdict that departs from the norm awarded for such injuries should be entitled to greater weight than at present because, in the absence of an indication of extraneous factors, the higher verdict presumably reflects the jurors' collective sense that there was something anomalous about this case. Alternatively, a court would seem to have absolutely no reason to tamper with an award that fell within the high-low range. Thus, my proposal would strengthen our commitment to the ideal of the jury as the finder of facts. Courts that conclude that for some reason additur or remittitur is indicated, will have a better sense of the degree of change justifiable in the light of the full range of experience in the jurisdiction, rather than the few (perhaps atypical) cases that were reviewed by that particular appellate court.

The publication of the tables on which the proposed grid would be constructed would likely be useful to insurers in rate-making and to policy makers in evaluating the health of the personal injury compensation system.\(^7\)

The proposal presented here could be adopted in any jurisdiction that has or will develop the necessary database. Like others who have addressed the problem,\(^7\) I conclude that development of better data is a key ingredient in bringing more predictability to the system. I urge this proposal to the special attention of New York policy makers. New York already has much of a suitable database available through the efforts of the *New York Jury Verdict Reporter.*\(^7\)

---

75. The value of improved information about jury verdicts has been recognized by several other commentators. See *supra* text accompanying notes 33-49.

76. See, e.g., Blumstein et al., *supra* note 3.

77. This reporter, published monthly, collects and reports approximately 90% of all jury verdicts in personal injury cases tried to verdict in the metropolitan New York area and 75% of all such verdicts in the remaining counties of the state. The results of post-verdict motions are also reported, but, so far as I am aware, appellate reversals of previously reported verdicts are not. Documented submissions by attorneys for the litigants are used as the prime
data base can include non-pecuniary damages as a separate item of recovery because New York now requires itemized verdicts in all personal injury actions; jurors must make a separate finding of the "pain and suffering" award. New York is also suitable because its courts, like those of other jurisdictions, have recognized the value of prior verdicts and judicial decisions as guides for courts deciding whether to set aside or affirm jury damage verdicts. It is hard to see why courts, but not jurors, construing the reasonableness of an award should have access to information about prior awards in similar cases.

In some respects, the proposed grid has strengths and weaknesses that are analogous to a jury aid used in New York and elsewhere—the standard mortality tables. Based on aggregate data that changes over time and that is not a valid predictor for discrete subsamples or for any individuals, these tables are nonetheless often admitted into evidence or even the subject of judicial notice. Cau-


Appellate decisions affecting awards would have to be added to the database to make it usable under my proposal. Further, the injuries described for each case by the New York Jury Verdict Reporter would have to be coded to the nine-point severity scale proposed for my grid. Expansion of the reported cases to 100% would be desirable but, in my view, is not a precondition to the utility of the data because of the large size of the reported sample and the apparent random nature of the cases reported.

78. N.Y. Civ. Prac. L. & R. 4111(f) (McKinney 1994); see also N.Y. Civ. Prac. L. & R. 4213(b) (McKinney 1994) (imposing the same obligation on the judge when an action has been tried without a jury).


80. See, for example, New York's Pattern Jury Instructions:

If you find that any of plaintiff's injuries are permanent, you must make such allowances in your verdict as you think that circumstance warrants, taking into consideration the period of time that has elapsed from the date of the injury to the present time and the period of time plaintiff can be expected to live. In this connection it is pointed out to you that plaintiff can be expected to live for ... more years, that is, until age ... , according to the most recent life expectancy tables published by the United States government.


In Vicksburg & Meridian Railroad Co. v. Putnam, the United States Supreme Court held that the plaintiff was entitled to recover for pain and suffering and loss of future income, and that life and annuity tables are competent evidence to assist the jury in making such an estimate. 118 U.S. 545, 554-55 (1866) (citing Phillips v. London & S.W. Ry., 4
tionary instructions are deemed sufficient to prevent the jury from over-reliance on them.\textsuperscript{81}

Finally, current New York practice makes its courts peculiarly susceptible to erratic verdicts. For example, a six-person jury is prescribed in civil cases and only five-sixths need agree to return a verdict.\textsuperscript{82} Adoption in New York would allow that state to serve as

Q.B.D. 406, 5 Q.B.D. 78 (1879) and Rowley v. London & N.W. Ry., 8 L.R.-Ex. 221 (1879)).

In Phillips, the English courts stated that while there was no precise rule as to the measure of damages, the jury must take a reasonable view of all facts and circumstances when awarding damages, and part of their consideration should be the life expectancy of the plaintiff. Phillips, 4 Q.B.D. at 407. Rowley involved an action under Lord Campbell's Act (English wrongful death statute), where the trial judge admitted the testimony of an accountant who gave an estimate of the probable duration of the life of the deceased, based upon the mortality rates collected in the Carlisle Tables. The Court of Exchequer held that the admission of such evidence was appropriate in a wrongful death action. The award of damages in a wrongful death action depends upon the ability of the jury to ascertain the probable duration of life at a given age, therefore it is material to know what the average duration of life is at that age. Rowley, 8 L.R.-Ex. at 226. There is no better means of showing probable duration of life than "by proving the practice of life insurance companies, who learn it by experience." \textit{Id.}

In People v. Security Life Insurance & Annuity Co., the New York Court of Appeals held that mortality tables are built on the long and varied experience of the insurance business, and are therefore deemed sufficiently reliable in the absence of a better basis to guide the courts in making calculations based upon the average life span of an individual. 78 N.Y. 114 (1879). New York courts may take judicial notice of mortality tables with the qualification that the tables are based on an average life span, and therefore the jury must also account for the plaintiff's health, constitution, habits, and manner of living. See, e.g., McKenna v. McGoldrick, 27 N.Y.S.2d 58 (App. Div. 1941); Giambrone v. Israel Am. Line, Inc., 208 N.Y.S.2d 215, (Sup. Ct. 1960).

81. The 11th Circuit utilizes the following instruction:

\textbf{4.1} \\
\textbf{MORTALITY TABLES—ACTUARIAL EVIDENCE} \\
(Life Expectancy In General)

If a preponderance of the evidence shows that the Plaintiff has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long the claimant may be expected to live. Bear in mind, however, that life expectancy as shown by mortality tables is merely an estimate of the average remaining life of all persons in the United States of a given age and sex having average health and ordinary exposure to danger of persons in that group. So, such tables are not binding on you but may be considered together with the other evidence in the case bearing on the Plaintiff's own health, age, occupation and physical condition, before and after the injury, in determining the probable length of his life.


82. There is evidence that six-person juries produce greater variation in awards than twelve-person juries. Leebron, supra note 1, at 315 (citing Hans Zeisel, \ldots And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 716-17 (1971)).
a "little laboratory" in which the approach could be evaluated.

Any proposal involves policy choices. Here I surface and comment on some that I have made differently from others in the literature on this general problem. As discussed earlier, I recommend the retention of non-pecuniary damages, and I reject flat caps.3 Beyond that, the key decisional points in this proposal are:

A. Preservation of Jury Control Over the Award for Non-Pecuniary Damages

My proposal involves no new direct restrictions on powers currently enjoyed by the jury. The jurors would simply be better informed than they are now. I am unpersuaded that the virtues of a fixed schedule of non-pecuniary damages would be a wiser course. Proponents of such an approach have not satisfactorily resolved the problems of individual, temporal, and jurisdictional variables. For example, the ALI study, Enterprise Responsibility for Personal Injury4 found attractive some features of mandatory schedules but ultimately concluded that "idiosyncratic cases" would best be resolved by juries, and that juries should have the authority to exceed even the top award on the scale.5 Moreover, even if indexed for inflation, binding schedules do not allow jurors, as an aggregate, to reflect a sea-change in community thinking about compensation for personal injury.6 We know from experience that such changes do take place, and the jury system seems a good way to allow their expression.

Even under my proposal, the possibility of an indirect impact on jury awards is raised because, inasmuch as the trial and appellate courts would also be better informed of prior awards in the jurisdiction by virtue of the availability of the grid, they might be tempted to overturn verdicts that depart even slightly from past patterns. This is not a necessary outcome. Departures from the norms represented by the grid may well (and appropriately) attract attention from the court, but the review should take into account the legitimate factors, if any, that moved the jury to its verdict and will allow them to stand if justified.

This problem is likely to be exacerbated when only five jurors need agree on the verdict. Zeisel, supra, at 716.

83. See supra pp. 765, 775-76.
84. 2 ALI REPORT, supra note 3.
85. Id. at 226-27.
86. Id. at 221-27.
B. The Use of a Relatively Simplified Grid

I do not recommend fine-tuning of injury types along the lines suggested by Baldus, MacQueen, and Woodworth for their reformed additur/remittitur process. They claim that

[to identify personal injury cases that are similar, it is necessary ideally to identify cases in which the location and type of injury are the same, i.e., it cannot be said that when a certain type of injury occurs to the arm that it is similar to that type of injury when it occurs in the legs... e.g., different symptoms occur, different treatments are required, different functional outcomes may occur—all factors that may bear on the level of the plaintiff's pain, suffering and loss of enjoyment of life.87

No doubt. It is also true, however, that an injury to my leg is not the same as an injury to that of the hypothetical chess hobbyist.88 And it is the case that not all leg injuries (or even amputations) are the same in the respects mentioned by Baldus, MacQueen, and Woodworth. The more one strives for close comparability, the more factors one must introduce in the grid. Reductio ad absurdum takes us back to the present regime of totally individualized jury awards and impressionistic judicial controls: No two plaintiffs are ever the same. The hard question, once one departs from the present approach, is to determine the right level of categorization.

In part the answer depends on the decisional body that must deal with the distinctions. The Baldus, MacQueen, and Woodworth approach has more to commend it when it is recommended for use by the judiciary in an enhanced additur/remittitur review than for jurors. By aptitude and training, judges are better able to assimilate and use a complex set of facts. I fear that the more complex the aids presented to a jury, the more likely it will confuse rather than clarify. As the list of factors to consider grows, the temptation to ignore them grows.

The use of the categories also bears on the level of detail desirable. In a system of binding schedules it is more appropriate to fine-tune the categories, whereas with a discretionary approach like that

87. Baldus et al., supra note 3.
88. I am an avid, if geriatric, softball player. The ALI Reporter's Study makes the same point by comparing the chess player with an amateur pianist. See 2 ALI REPORT, supra note 3, at 225.
presented here, more inclusive categories can be tolerated. The assumption is that, given the freedom to do so, jurors will take the relevant differences into account even if they are not scheduled.

Increasing the complexity of any scale proposal, whether binding or not, would seem to increase transaction costs at two points. A decisional body engaged in constructing the system to be adopted will necessarily find its task made more onerous as the lines needed to draw the complete picture are multiplied. The jurors who employ the system may also find it more difficult to agree on a series of mini-decisions than to pick an appropriate amount from within a general range.

The simplified grid implicitly rejects the use of injury "scenarios" beyond the brief examples that are included in the injury severity scale. Detailed scenarios keyed to recommended (or required) awards would be difficult to construct because of the myriad of differences in real-world fact patterns. Assignment of values would also be very controversial—it would defy principled solution. The start-up costs would be compounded by the difficulties jurors would likely encounter in digesting and applying the scenarios to the case at hand.

My suggested use of age and severity of injury as the only factors in the grid has empirical support. Bovbjerg and his colleagues report:

We investigated the influence of [various] factors empirically for their influence on past patterns of awards for non-economic loss . . . . This analysis shows that the severity of injury is the strongest correlate of amount, with the age of the victim next. Body part alone is not as predictive of non-economic damages as injury severity. Moreover, it is not possible to use body part in the same regression as severity because it is too closely correlated with the nine-point severity scale.

Their last point is especially telling, given my proposed use of the nine-point scale. The addition of body part to the matrix would be a kind of double counting.

To be sure, the collapse of all injuries, including death, into nine categories, introduces a wide range within each category. Some courts that engage in the review of jury verdicts by making comparisons with other verdicts have restricted the comparison to similar type as well as similar degree of injury. For example, in Wendell v. Super-

89. Bovbjerg et al., supra note 3, at 941.
markets General Corp., the plaintiff was a fifty-four year old woman who sustained two herniated discs, impingement of the spinal cord, and compression of the nerve to the shoulder and the arm. She was awarded $15,000 for past pain and suffering and $15,000 for future pain and suffering. The trial court ordered a new trial unless the defendant stipulated to $75,000 for past pain and suffering and $100,000 for future pain and suffering. On appeal, the Appellate Division held that the amount of damages for future pain and suffering deviated from what would be considered reasonable compensation in "similar circumstances." The court cited five cases: Reed v. Harter Chair Corp., Diorio v. Scala, Lamot v. Gondek, Bottone v. New York Telephone Co., and Hughes v. Peters. Each of the cited cases involved a severe back injury, as did Wendell. That is the only similarity, however, as the plaintiffs vary by sex, age, and the manner in which the injury occurred. Awards for pain and suffering in those cases ranged (after review) from $16,500 to $330,000. The Wendell court apparently felt comfortable with a figure somewhere in between, albeit on the low end.

The Wendell injury falls into category five on the nine-point scale, "permanent minor" injury. But so too does the injury at issue in Leon v. J&M Peppe Realty Corp. The plaintiff in this case was a twenty-six year old man who suffered partial amputation of the three middle fingers of his left hand (non-dominant hand) and a fifty to sixty percent disability. He was initially awarded $1,600,000 for past and future pain and suffering, but the trial court ordered the verdict set aside unless the plaintiff stipulated to a reduction for future pain and suffering from $1,500,000 to $750,000, although the award of $100,000 for past pain and suffering was allowed to

91. Id. at 896.
92. Id.
93. Id.
94. Id. at 897.
100. Wendell, 592 N.Y.S.2d at 897.
101. See supra Figure 1 accompanying note 71.
103. Id. at 382.
stand. The Appellate Division ruled on appeal that the awards, as reduced, were not out of line with recent awards sustained by the appellate courts, and cited to Dauria v. City of New York and Stiles v. Batavia Atomic Horseshoes, Inc., cases that both involved amputations. In Dauria, the loss of two toes was held to justify an award of $1,800,000 in pain and suffering damages. In Stiles, the loss of three fingers of the right hand plus permanent deformity of the left was at issue; the court affirmed as not excessive a total verdict (general plus non-pecuniary damages) of $1,705,000. All of the plaintiffs are within the same age group, but there is no indication whether this is a deliberate choice by the court or whether this occurred purely by chance. Thus, the Stiles court was comfortable comparing a partial hand amputation to one plaintiff who had serious injuries to both hands and to another plaintiff who had a toe amputation.

Under the nine-point grid the grouping would be even broader. Both the Stiles-type injury (amputation) and the Wendell-type (permanent back pain) would apparently fall into the same category, with a resultant spread of awards from $16,500 to $1.8 million. A legitimate criticism is that this range provides very little guidance. On the other hand, the median (approximately $300,000) would be useful as a starting point, and the jury could use the verbal description of the category to decide whether the case to be decided fit in the high or low end.

Another issue concerns the use of state-wide figures as opposed to smaller geographic units. Intra-state geographical differences in award patterns are probably nowhere as pronounced as in New York. These aggregate differentiations probably survive even ap-

104. Id. at 383.
107. Leon, 596 N.Y.S.2d at 382.
110. Id. at 794.
111. Category 5 reads: “Permanent minor; loss of fingers, loss or damage to organs, non-disabling injuries.” See supra Figure 1 accompanying note 71.
112. Stephen Daniels & Joanne Martin, Jury Verdicts and the “Crisis” in Civil Justice, 11 Just. Sys. J. 321 (1986) (reporting a significant difference between metropolitan New York and the rest of the state); see also supra Table II. No personal injury practitioner familiar with the state would be surprised.
pellate review. It is very unusual for any of the four appellate courts (or departments) that make up the Appellate Division of the Supreme Court to look to cases from another department in any area of law, and the jurisdiction of the departments is geographically based. To lump awards for the entire state on the grid, regardless of the venue of the action to be decided, as I propose, is arguably unfair, especially if, as some claim, geographic variations reflect differences in the wealth of the respective communities. On the other hand, variations can also be seen as one aspect of the irrationality of the current system. In a mobile society in which the prices of major goods are determined nationally, why should the wealth of a locality determine the rate at which pain is compensated? Are not regional variations sufficiently accounted for in awards for lost income and future medical expenses? My proposal offers a workable compromise: A statewide grid gives the jurors in each locale a more cosmopolitan awareness, but since they remain free to find the right number on (or off) the grid, we leave room for strong local tendencies to re-assert themselves.

V. CONCLUSION

The proposed grid can become law in one of three ways. A rule-making body, such as the Judicial Conference, or in New York, the Chief Administrator of the Courts, could promulgate a grid and revise it annually. Enabling legislation is, therefore, not necessary, but is also a possibility.

Alternatively, a grid could be developed by counsel, placed into evidence through expert testimony and then included in the charge. It was this process that eventually led to the general acceptance of the mortality tables. It would present the problem of potentially competing grids and battles between experts over which is more accurate. Legislative or administrative adoption, (after full opportunity for the interested public to comment) is therefore far preferable.

However adopted, the proposed grid or some variant would help to rationalize the process by which pain and suffering damages are awarded and would do so without substantive impact and with modest procedural cost.

113. See Baldus et al., supra note 3.
114. See supra note 80.