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**Tort Damages for Non-economic Losses
(in cases of physical injury to the person)**

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I. Introduction and Focusing the Chapter

Imagine you are physically injured because of the negligence of another. Perhaps you have been run down by a careless truck driver. Perhaps a doctor has committed malpractice while treating you. Perhaps you have been hurt by a defective product. Perhaps you are injured while on someone else's property because the property owner failed to exercise due care to protect those invited onto the property. And so on. The formal law of most nations around the world, at least in principle, grants you a legal claim against the wrongdoer.¹ In the U.S. and other "common law" nations, this would be termed a cause of action in "tort." Elsewhere, it might simply be called a "civil action."

Assuming you file this sort of legal claim and a court eventually awards a judgment in your favor, what *damages* should you be entitled to? Although different words are used in different jurisdictions, damages in these sorts of physical injury cases may be grouped under two helpful headings: economic and non-economic damages -- or, as some would put it, pecuniary and non-pecuniary damages. The idea in grouping these two types of damages is to distinguish monetary recovery for monetary losses (pecuniary losses) like lost income and out of pocket expenses from additional monetary recovery for non-pecuniary harms that are, nonetheless, recoverable injuries.

With respect to *non-pecuniary* harms, for example, the victim might suffer physical pain, might no longer be able to engage in pleasurable activities he or she would otherwise have done but for the injury, might feel a loss of dignity or embarrassment stemming from a

¹ New Zealand is an important exception, where tort claims for accidental injuries have been replaced by a comprehensive accident compensation scheme. Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979).

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change in his or her body image, might suffer from fear of a shortened life expectancy as well as the inability to enjoy what otherwise would have been a fuller and longer life, and so on. Different legal systems use varying terms for these non-economic/non-pecuniary injuries, including pain and suffering, loss of amenities of life, loss of enjoyment of life, disfigurement or dismemberment, moral injury, and loss of dignity. Yet, the central idea commonly meant to be conveyed under this heading of non-pecuniary losses is that independent of whether these injuries produce financial losses these are nonetheless harms to the victim for which the victim is entitled to compensation. And, generally speaking, recovery for this sort of injury is very widespread around the world.²

To be sure, these types of non-pecuniary harms can sometimes be directly linked to economic injuries like lower earnings, increased medical expenses and so on for both the period between the injury and the resolution of the claim and into the future. However, compensation under the economic (or pecuniary) loss heading is meant to distinguish those actual and predicted economic losses from those that are compensated under the non-economic (non-pecuniary) loss heading.

This chapter focuses on non-pecuniary losses by evaluating possible recovery for pain, loss of pleasure, and the like as real harms in themselves quite apart from any financial consequences these injuries might have. The analysis proceeds in these steps. First, general reasons for awarding non-pecuniary damages at all are discussed. Then, attention is given to subtleties that must be attended to in making comparisons between countries. Following that,

² E.g., Fleming's Law of Torts 10th Edition (Sappideen and Vines eds. 2011); Linden and Feldthusen, Canadian Tort Law (8th ed. 2006); Markesinis and Unberath, The German Law of Torts: A Comparative Treatise 4th ed. 2002); Stephen D. Mau, Tort Law in Hong Kong: An Introductory Guide (2010) at 81-83; Norchaya Talib, Law of Torts in Malayasia (3rd Ed.2010) at 454-56; Mohd Altaf Hussain Aangar, Damages Under Malaysian Tort Law (2009) at 39-50.

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persistent issues that arise everywhere in the award of these damages are surfaced; these issues go primarily to concerns about fairness among victims. Next, some theories are offered about why countries might choose to provide very different amounts of non-pecuniary damage awards as compared with other nations. With all of this positioning complete, the chapter finally turns to detailed comparisons among a number of illustrative national legal systems. Conclusions complete the chapter.

II. Purposes Underlying Recovery for Non-pecuniary Losses in Cases of Physical Injury

If there is to be any legal recovery for physically injured tort victims for non-pecuniary losses, legal systems today will provide that recovery through money damages. Hence, at the outset this sort of recovery may appear to reflect something of a contradiction. The victim gets money for an injury that is not a monetary loss. However, contemporary legal systems have generally evolved to provide no other recourse: victims get money or nothing.

Although it is certainly possible to imagine other legal remedies, legal systems today for good reason generally do not generally grant them. For example, one could imagine a legal remedy that required the injurer to offer the victim a sincere apology. However, victims may well consider forced apologies as insincere and hardly sufficient as a remedy in any number of circumstances. So, too, contemporary law rejects granting you or your family or kin members the right to subject your injurer to the same physical harm you suffered and may well be still suffering. Today, this sort of “eye for and eye” remedy is not generally tolerated as a legal matter, even if vigilante actors do sometimes act on behalf of victims by responding to violence with violence in many parts of the world.

Moreover, there is arguably a closer connection between money and non-pecuniary injuries than may first appear. Pain and suffering,

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loss of pleasure, a shortened life, dismemberment, disfigurement and the like are clearly injuries. They are harms that nearly everyone would prefer to avoid. Indeed, if offered the choice, people would opt to pay money to avoid suffering these injuries rather than suffer them. In fact, to avoid some grievous harms people would be willing to give up all or nearly all of what material wealth they have. To take an extreme example, kidnap victims who genuinely fear for their lives often want their families to offer all or nearly all of what material wealth they have in order to free them.

Hence, when people are involuntarily subjected to these sorts of injuries, it is understandable that they feel aggrieved. In a world where money can often be used to buy pleasure or relief from pain, and where having money is typically associated with status and power, it is understandable that victims themselves might want to receive money in compensation for their injuries. Victims have suffered a loss compared with what they had before they were injured, and money may be the best practical means of making them whole. From this perspective, therefore, non-pecuniary damages in personal injury cases are generally understood to be compensatory in the same way that forcing an injurer to pay for the victim's medical expenses is compensatory.

But providing monetary compensation to victims after the fact is not the only social purpose that might be served by a legal system's willingness to offer such a remedy. One additional goal behind awarding money damages for these sorts of non-pecuniary losses is to discourage private vengeance through physical redress. The prospect of money, in effect, may be seen as intended to buy off the victim's wish to retaliate in kind.

In addition, while a non-pecuniary damages award is not generally intended or even theorized by judges and scholars as "punitive," nonetheless some victims might internalize this financial recovery as properly punishing their wrongdoers by compensating

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them beyond their lost income and expenses they have had or will have to incur. That is, it is precisely because of their “softer” quality that non-pecuniary damages might be perceived as punitive in ways that “hard” pecuniary damages may not be. Of course, it is another matter as to whether the award of pain and suffering damages can actually punish wrongdoers in a regime where liability insurance is permitted, regularly obtained, and frequently the only source of compensation that victims might practically be able to tap. In such instances, while there could be an illusion of punishment through the award of non-economic loss damages, the actual financial harm falls on the insurer and indirectly on all policyholders.

The award of non-pecuniary damages may serve the additional goal of helping to efficiently deter wrongdoing. If you are going to have to pay for more than mere economic losses when you carelessly harm another, then that extra obligation may make you more careful at the outset. If so, then the threat of non-pecuniary damages may advance the safety-promoting function of civil liability. For those eager for tort law to move society towards efficient investments in safety, a regime that includes the award of appropriate amounts of non-pecuniary damages is a step in the right direction. After all, without such damages awarded, the cost of injuring others may not be expensive enough to encourage risk averting behavior and therefore accidents and injuries would be unnecessarily more common than is socially desirable. Of course, by the same token, excessive awards for non-pecuniary damages could lead to an over-emphasis on safety where society’s resources are overly diverted towards accident prevention and away from more productive uses.

Also relevant to the efficient allocation of society’s resources is the notion that, when undue risk-taking causes injuries that should have been avoided, the full social costs of those injuries should be internalized into the cost of the risky activity that caused the harm. Imposing non-pecuniary damages on those negligently causing physical injury may be thought necessary in order to do that.

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Finally, the award of money damages for non-pecuniary losses may be justified on quite practical considerations. For example, many observers believe that, in reality, victims are typically unable to anticipate and prove all of the future financial losses they are ultimately going to incur from their injury (especially in cases where the injury is serious and ongoing). Despite this, it is generally the rule that claimants receive their full recovery in a lump sum following trial rather than being paid over time as losses materialize. This approach is much less burdensome to courts and gives victims, once paid, a strong incentive to rehabilitate. In contrast, periodic payments of damages as losses occur would create an incentive to malingering and generate ongoing disputes over whether a specific expense or loss of income was actually caused by the initial injury and not some subsequent event.

Given that the civil justice system awards lump sum payments, allowing the system to provide non-economic loss recovery can serve to top up the award of past and projected future economic losses. Victims can squirrel away these proceeds for later use if their economic losses turn out to be more than anticipated at trial. Alas, in practice many successful claimants will spend, perhaps squander, much of their lump sum award even if some of it is intended to be saved to cover future needs. Paying extra for non-pecuniary losses might increase the chances that profligate victims will still have some proceeds of their legal recovery available later on. Some legal systems deal with this risk by promoting arrangements in which the parties agree to a structured settlement so that a substantial portion of the monetary award is, in effect, converted into an annuity and paid out to the claimant in fixed amounts over time.

A different practical justification for the award of non-pecuniary damages is that in some legal systems victims who pursue their rights need money to pay for their attorneys' fees and other costs of litigation. Drawing money from the recovery for non-pecuniary

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losses is one way to fund those costs that does not interfere with the victim's need to pay medical bills and receive income replacement for what he or she otherwise would have earned but for the injury. This is clearly the situation in the U.S. where successful claimants, in their own private mental arithmetic, probably think in terms of paying for these costs of representation out of the non-pecuniary loss portion of their recovery.

To be sure, this is not the only way to pay for legal costs. Indeed, in the vast majority of jurisdictions the formal rule appears to be "loser pays." This means that if the claimant is successful (whether through settlement or as a result of a completed trial), funds to cover the victim's legal costs are added to the amount otherwise awarded in compensation. Where this happens, defendants, not plaintiffs, ultimately are supposed to pay the lawyers in successful claim cases, and victims need not dip into their recovery for that purpose. However, in practice, some "loser pays" jurisdictions require defendants to pay what turns out to be only part of the real legal costs of bringing a case. In those settings it is often the practice that the victim's lawyer (by contract) will take some of the compensatory award to cover legal expenses not specifically paid for by the losing defendant. Such legal systems fall somewhere in between the U.S. scheme and a genuine loser-pays regime.

What is absolutely crucial to appreciate here is that these differences in the way that lawyers are paid can make a big difference in comparing the amounts awarded for non-pecuniary losses for the same injury between countries, a matter taken up later in the chapter. Next, however, consideration is given to additional differences from place to place that potentially can confuse cross-nation comparisons.

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III. Subtleties in Comparing Legal Systems' Approaches to Non-economic Loss Recovery

A. Is it really compensation for non-economic loss?

In comparing legal systems with one another, one has to be careful to attend to subtle distinctions. For example, two countries might appear to award similar specified sums for specified disabilities and dismemberments – e.g., the loss of an arm or blindness. However, those sums may be meant to compensate for different harms in different legal systems. In one country, the money may be meant as a very rough substitute for future income losses that a victim with this sort of harm might suffer because of his or her injury. In such a country, there is no other recovery for future lost income; individualized awards for income losses might only be made with respect to the period up until the time of trial or settlement. This sort of recovery should be put in the pecuniary loss category.

By contrast, in a second country the victim may be entitled to recover pecuniary losses on an individualized basis for his or her predicted future income losses arising from the injury as well as *an additional amount*, say for loss of an arm or blindness, which are standardized sums meant to be awarded for the non-pecuniary losses caused by these injuries. The overall amount awarded in each system for “loss of an arm” might seem to be the same but the amount represents different recoveries.

Complicating things further, some jurisdictions distinguish “special” and “general” damages, but the meaning of those words can differ from place to place. Sometimes, the term “special damages” refers to economic losses incurred up until the time of the claim’s resolution – that is, things like income losses and medical expenses already incurred. The phrase “general damages” then refers to everything else. This includes both past and future non-pecuniary losses plus as yet incurred future pecuniary losses. But in other

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places, “special damages” includes both past and future economic losses and the heading “general damages” refers to non-economic losses, incurred both up until the claim is resolved and into the future. Because of this inconsistency, these terms will not be further used here.

B. Distinguishing punitive damages

Compensatory damages for non-pecuniary losses need to be kept separate from damages that are specifically awarded for the purpose of punishing defendants. In most legal systems when an accident victim is harmed by mere negligence, all monetary recovery is understood to be compensatory and, as noted above, punishment is not formally calculated into recovery. But the result may be different where the victim’s injury is intentionally inflicted, or perhaps when the injurer’s behavior seems highly morally offensive. In such cases where an injurer, through his despicable conduct, acts with reckless disregard for the interests of those endangered, some legal systems allow the award of additional damages termed “punitive” or “exemplary” damages. These damages are also non-pecuniary, but they are not the type of damages on which this chapter is focused.

Of course, a victim who is entitled to and actually recovers punitive damages receives the same sort of currency that a victim receives for, say, pain and suffering. Yet, the reasons underlying a legal system’s willingness to make these two types of awards are quite different.

Punitive damages focus on the injurer and are meant to punish, whereas the damages primarily explored here focus on the victim’s losses and are therefore meant to compensate. By recognizing punitive damages, tort law may be seen to take on something of a criminal law function. Indeed, where punitive damages are allowed, it is frequently said that the suing victim is acting, in part, like a private attorney general, acting on behalf of the community to hold

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accountable an actor who has decidedly and deliberately violated a very strong social norm. Given this perspective, in some legal systems the money recovered in the form of punitive damages is, at least in part, turned over to the government though leaving the victim and his or her lawyer with enough to make it financially worthwhile for them to pursue the punitive damages claim in the first place.

Punitive damages may also serve other goals already discussed. For example, the threat of punishment, in the form of punitive damages, may operate as a strong deterrent in the first place, more powerfully discouraging people from intentionally and wrongfully injuring others than would be achieved merely by the threat of awarding compensatory damages.

The thirst for vengeance may well also be greater when the initial harm to the victim was not merely wrongful (i.e., negligent) but intentionally inflicted by the injurer. Because a wish to retaliate is perhaps stronger when someone else deliberately violates your bodily integrity, the urgency of offering up money so as to discourage retaliation may be thought even more important in such circumstances.

Nevertheless, many legal systems do not permit recovery for punitive damages by private claimants. Those systems prefer a clearer distinction between private claims and the criminal law, and punishment is thought properly to be the exclusive domain of the latter. In such places vengeance itself is probably seen either as not a substantial threat to the peace of the community and/or something that can be deterred by threats of criminal prosecution of those who take physical revenge.

The term “aggravated damages” complicates things further as this term refers to extra damages obtained that do not amount to punitive damages. Aggravated damages might be available, for example, when the injurer has acted recklessly or with gross

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negligence but not so outrageously as to entitle the victim to punitive damages. The concept of aggravated damages recognizes that acting with fault is best understood as a continuous matter and not a discrete matter that neatly falls into one of two stark categories. The aggravated damages heading allows more ambiguous cases to be put into a third “in-between” category, providing some extra money to the victim but probably not as much as would flow were punitive damages available.

Sometimes it is said that aggravated damages are awarded for the special insult or indignity that the victim suffers because his or her body was invaded in such a faulty manner, thereby suggesting that aggravated damages are meant to be compensatory. But of course this way of thinking could in turn be used to characterize punitive damages as compensatory as well. In any event, no further attention will be given here to either aggravated or punitive damages.

C. Distinguishing non-economic loss recovery for non-physical Injuries

While this chapter focuses on recovery for physical injury, victims who suffer non-physical injuries may also recover in tort for both non-economic as well as economic losses. Consider, for example, a legal system that recognizes the tort of the invasion of privacy. This tort, which comes in many flavors, may include instances of both (a) exposing to the public some private facts about an individual that the law believes should have remained private and (b) intruding on an individual’s private life, say, by inappropriately peering into his or her bedroom, by tapping his or her telephone or hacking his or her computer. Certainly, these sorts of wrongdoings can cause monetary losses to victims in the form of lost income and expenses. For example, medical expenses for psychiatric treatment may be made necessary by the privacy invasion.

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But a central function of the privacy tort is to provide recovery for non-economic loss – for the loss of privacy itself. When someone invades your privacy you suffer embarrassment, loss of dignity, a sense of exposure, an infringement on your liberty, and a general destruction of your right to keep your behaviors (past and present) to yourself. The privacy tort provides a remedy for these types of losses.

Similar arguments could be put forward about the torts of defamation and false imprisonment. Although some victims of these sorts of wrongdoings may be seeking punitive damages and/or recovery for pecuniary losses caused by the wrongdoer, a central function of tort law in these cases is to compensate for the non-pecuniary harm to one's reputation or liberty. However, this chapter focuses on non-pecuniary compensation for physical injury rather than recovery for these other types of non-physical injuries.

D. Distinguishing emotional distress claims

Some jurisdictions provide recovery in claims for the wrongful imposition of emotional distress. Suppose a runaway train nearly runs you down and you miraculously escape being hit. However, as a result of this near-death experience you suffer shock, fright, nightmares, an inability to sleep well or a fear of going outside. Suppose you are waiting at the curb for your young child to come to you across the crosswalk and you see your child run over and injured or killed by a careless driver. As a result you suffer the same sorts of emotional distress described above in the near train crash example. Some legal systems allow recovery for one or both of these injuries. If so, damages then will generally include recovery for both pecuniary and non-pecuniary losses. However, recovery of non-pecuniary damages in these settings is put aside here.

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IV. Within-Jurisdiction Considerations in Determining Amounts Recoverable by Different Victims for Non-economic Losses from Physical Injuries

It is widely agreed that the actual amount of money to be awarded for non-economic losses in cases of physical injury will be arbitrary. Beyond lost income, medical and related expenses, just how much are you hurt in terms of monetary value when you lose an eye or become blind? Who can say?

A. What approaches should be used to evaluate non-economic losses?

One might start by trying to establish how much people would pay to avoid having those losses. But this approach is quite problematic. First, because many individual victims are of very modest means, even if they would have been willing to give up all or almost all of their possessions and savings to avoid a serious disabling condition, that amount would still be very little. Would it then follow that those with modest means would be entitled to less money from their injurers relative to those with more wealth? This result seems quite unjust.

To be sure, when it comes to replacing the lost income of tort victims, the law generally provides more money to high earning victims than to low or non-earner victims who suffer the same physical harm. This arguably “regressive” feature of the law of damages follows from a principle of justice deeply embedded in tort law which calls for making victims “whole.” At the extreme, this principle calls for extraordinarily high levels of compensation to the so-called top 1% who, in many nations, earn enormously more than the nation’s average earners. Certainly, an individual nation might temper this outcome to account for countervailing considerations, especially in the modern world where insurance often funds tort judgments and where the population at large pays for such judgments

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via premiums. Hence, for example, in New South Wales, Australia income replacement damages are now capped to a maximum of three times the average wage.³ However, for those with income under this cap, wage replacement benefits match the victim's actual income losses. In other words, even in New South Wales, tort law passes no judgment on the fairness of differing earnings levels within the society up to the ceiling, treating victims as entitled to what they would have otherwise earned. Income inequality, within a range, may be accepted as a necessary or even desirable feature of a nation's economic system and economic damages in many tort systems reflect this feature.

However, it is quite another matter to say that with respect to pain and suffering, lost pleasures, lost dignity and the like, losing a limb or eyesight means less to a poor person than a rich one. Indeed, to the extent that lower income people may depend more on their bodies than their minds for their off-work pleasures than do those with higher incomes, physically disabling conditions could be even more harmful to the poor than to the rich. In any event, to base monetary recovery on what this victim would have paid to avoid the loss seems quite unfair.

Moreover, many of the very wealthy would be willing to pay to avoid certain disabling conditions what to the rest of the society seems like a staggeringly large amount of money – millions of Euros or dollars – especially if those sums are but a small share of their fortune. Should the legal system then really provide the wealthy with these vast amounts when they are so injured? To most people, that recovery seems like too much.

What, then, about the amount that an average person in the society would be willing to pay to avoid the injury in question? Should everyone when negligently injured be awarded this average sum?

³ Fleming's The Law of Torts 10th Edition (Sapideen and Vines eds. 2011).

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This possible solution, albeit not individualized, takes us to the next difficulty which is determining in a reliable way what even average people are actually willing to pay to avoid these losses.⁴ That sum is not easy to discover because there is no clearly functioning market by which to measure this willingness to pay. Furthermore, surveying people about their willingness to pay may well generate highly unrealistic numbers. In addition, there are difficulties as to whether the potential loss is a certainty or merely a possibility as people have different risk tolerances. For example, if you ask people how much they would be willing to pay to avoid a 1% chance of losing a limb, most people would not find it to be worth exactly 1/100 of what they would value a certain loss. Some may altogether disregard the loss of a 1% chance as not a salient risk. Still others would exaggerate it.

One might look to the coverage provided under “accidental death and dismemberment” (“ADD”) insurance policies that are available in many countries. These policies provide for the non-pecuniary payment of specified monetary sums for the accidental loss of life as well as the loss of certain body parts, like a limb or vision. Maybe tort awards should be linked to ADD benefits. But, it would probably seem troubling to many to draw on this evidence when these insurance policies are not widely purchased. Moreover, many experts view these policies as unwise purchases both because of the high sales commissions built into the price of the product and because the definition of accident is so often construed to be insurer-friendly.

Further, the amount of payout provided by such contracts generally varies in terms of how much coverage one wishes to buy (as with life insurance generally). Perhaps one could look to the “average” amount of ADD coverage that is purchased, but this too is problematic. However, many people would say that they have no

⁴ For a proposal along these lines, see Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 *California Law Review* 775 (1995).

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interest in buying ADD coverage for all sorts of risks like accidentally losing a hand or a leg or their hearing. They, in effect, are willing to self-insure for the non-economic losses arising from such injuries, knowing that often they will have accidentally inflicted these harms on themselves. They might well prefer to spend their money instead on health insurance and disability insurance that cover the costs of medical care and income loss associated with such harms. However, when they are wrongfully injured by another, they are offended and might wish for financial protection for such harms, protection that is, in principle, provided through the award of damages for non-economic losses in tort law.⁵

If, therefore, one cannot comfortably rely on direct or indirect measures of the willingness of victims to pay in advance to avoid certain harms, how should non-economic losses be measured? Perhaps one could think about how much money it would take to buy pleasure or happiness in an amount to offset the loss the victim suffered. But this too, for similar reasons to those just discussed, is not readily determinable in coherent ways. The same problems seem to arise were one to try to base recovery on how much money people would insist upon receiving in return for having certain harms imposed on them.

Ultimately, most nations resolve this issue of determining non-economic recovery by relying on those who set the amounts to arrive at a sum that, for that society, appears fair. Those setting the recovery amounts could be legislatures, governmental agencies, courts, or, as in the U.S., lay juries, or perhaps some combination of these actors.

Nations may or may not look seriously at what other countries do in deciding how much money victims should fairly receive for their non-economic losses. To the extent nations do look outward they may draw quite different conclusions from the experiences or

⁵ Avraham, Should Pain-and-Suffering Damages be Abolished from Tort Law: More Experimental Evidence, 55 *University of Toronto Law Journal* 941 (2005).

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practices of others. Hence it is perhaps not surprising that victims with what appear to be the “same” injuries receive enormously different financial awards for non-economic loss from country to country. Some reasons why this happens will be explored below. But before turning to that issue, it may be helpful first to focus on issues of fairness that arise within any country’s legal system.

B. Horizontal and vertical equity considerations within any legal system

In creating a system for the award of damages for non-economic loss, most would agree that there is considerable merit in treating like cases alike. This concept is called horizontal equity. So too it would seem only fair that those with more serious injuries should receive more money than those with less serious injuries. This concept is called vertical equity.

The principle of horizontal equity means that, those with the same injury, other things equal, should be awarded the same sum for their non-economic losses. For example, the loss of sight in one eye to A and to B should generate the same level of non-pecuniary damages to each of them when A and B are considered, for these purposes, to be the same.

But what are “the same” injuries? Think about the loss of a limb. Should losing a leg above the knee be considered the same as losing a leg below the knee? Or consider the victim’s situation before the injury. Should losing a leg be treated as the same thing for an amateur runner as for a person with a very sedentary lifestyle? Along the same lines, should the loss of hand be treated the same for a person who avidly plays the piano or plays video games as a hobby compared with a person who solely watches TV for pleasure? And should it matter how the loss of a limb occurred? In some cases the nature of the accident made the loss much more painful and/or there is substantially more ongoing pain. Also, maybe something in the genes

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or psychological condition of the victim contributes to the pain and/or difficulty in dealing with the loss of a leg. All of these examples are meant to illustrate the serious difficulties that arise in trying to decide what injuries should be considered as “the same.” They reveal that satisfying the horizontal equity objective may be difficult and controversial in practice.

Vertical equity raises similar problems. Is it worse to be blind than to lose a finger? Surely it must be so for most people. But the relative seriousness of other injuries is much less clear. Is blindness worse than deafness? What about blindness versus being a paraplegic (or a quadriplegic)? Is losing a hand worse than losing a leg? These are all matters on which people can differ. Moreover, cultural differences among nations can lead to different relative harm appraisals. Furthermore, differing accommodation arrangements that are available from place to place can also influence social judgments about the seriousness of differing disabilities. For example, being blind may be worse in one country as compared with another so that its relative harmfulness as compared with being confined to a wheelchair may be viewed differently. So, too, awareness of people with various disabilities and how they deal with those conditions can influence how decision-makers judge the seriousness of one disability as compared with another.

Moreover, even when one can agree that X injury is more serious than Y injury, the question becomes: “how much more serious”? Or more practically, how much more money for non-economic loss should be provided to those with X instead of Y: Ten percent more; fifty percent more; ten times as much?

The U.S.’s approach to these questions is somewhat an outlier.⁶ In most American states, disputes that are adjudicated (rather than settled) are decided by lay juries which are given enormous discretion

⁶ Fleming, *The American Tort Process* (1988).

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to award as much or as little as they think appropriate for non-pecuniary losses. To be sure, if juries award amounts so large that the trial judge believes the award to reflect whim or caprice, the case might be re-tried or the victim given an option of taking a lower recovery amount instead of a retrial. But this sort of intervention by the judge only occasionally happens. While the jury may be guided by arguments by the lawyers on both sides, neither side is permitted to introduce evidence of what other juries have previously awarded in similar cases. While a small number of American states have imposed a maximum limit on the amount of non-pecuniary loss damages that may be awarded, for cases under the cap, juries even in those states still have almost complete discretion. The theory behind this approach (apart from the strong American ideological commitment to trial by jury) is that each victim is to be treated entirely as an individual with his or her own special circumstances to be considered to the extent they arguably should influence the extent of the harm done. Needless to say, many observers of the system have concluded that both the horizontal and vertical equity norms are frequently violated by this approach as jurors bring their own idiosyncratic views to the matters before them, are influenced by the lawyers who present the case, are influenced by the status and other demographic characteristics of the parties before them and so on.⁷ This does not mean that jury awards for non-pecuniary loss are totally unpredictable by experts within the system. But, before the case is resolved, the predicted range of plausible outcomes is probably much wider in the U.S. than in other mature legal systems.

In contrast with the U.S., many jurisdictions have adopted arrangements that intentionally achieve not only greater consistency

⁷ Bovbjerg, Sloan and Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering" 83 *Northwestern University Law Review* 908 (1989). Blumstein, Bovbjerg and Sloan, Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury, 8 *Yale Journal of Regulation* 171 (1991).

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among similar cases but also easier and cheaper resolution of disputes over the amount of money damages to be awarded.⁸

First, of course, in litigated cases in which judges decide the amount to be awarded the decider has his or her own personal experience with prior cases to draw on. Second, in many nations official or quasi-official records of awards in prior cases are not only collected but also are formally turned to and generally relied upon by judges. In such nations, judges usually are not completely restrained in terms of how much to award, but if, for example, substantially more or less is to be awarded in a specific loss of leg case as compared with the pattern or band of recovery in prior loss of leg cases, the judge had better have a good reason for the deviation.

In legal systems that work in this way, both horizontal and vertical equity values are pursued, and what count as both similar and more (or less) serious harms are the result of accumulated experience that has built up over time. In short, other judges in past cases have made determinations that strongly influence later practice. To be sure, seemingly new types of harms sometimes come into play, and in those cases the judges have to decide how serious these harms are as compared with the pecking order of harms that has grown up over time. Yet, working new types of injuries into existing patterns and practices does not appear to be too difficult.

⁸ For a comparison of the approaches of several European nations with that of the U.S., see Commande, *Doing Away with Inequality in Loss of Enjoyment of Life, Personal Injury and Wrongful Death Damages Calculations: Transatlantic Dialogue*, 91 *Contemporary Studies in Economic and Financial Analysis* 255 (2009). For descriptions of “scheduled” damage awards in both personal injury and death cases for both pecuniary and non-pecuniary losses, see Minnehan, *Examples of “Schedules of Damages” Used in Europe and the United States*, in *Personal Injury and Wrongful Death Damages Calculations: Transatlantic Dialogue*, 91 *Contemporary Studies in Economic and Financial Analysis* 291 (2009).

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Of greater concern in a system like this is the matter of inflation. An award of 100,000 Euros for a certain sort of injury fifteen years ago might seem rather too little today if inflation has substantially eroded the purchasing power of the currency. Some nations deal with this matter by routine or ad hoc adjustments of their tables of past awards to reflect recent inflation. Nations may well also wish to adjust over time the sums awarded for non-pecuniary losses for reasons other than inflation -- including perhaps not only an increase in national wealth but also changing social norms about the desirability of more generous financial awards.⁹

In any event, it is important to emphasize that the tables of awards in such systems tend to be organized around injuries described in some physical way like, loss of a leg, blindness, fire burn on the face, scar, broken limb, and so on. This is to be contrasted with imagined tables that might instead focus on, say, mild pain versus searing pain and length of painfulness and/or mild or substantial or minor impact on prior non-work enjoyments, and so on. As a result, an approach which anchors awards (or creates something of a constrained band of awards) in specified physical conditions will tend to ignore (or at least downplay) substantial individualized differences in the harm incurred by what on their face might seem to be roughly the same cases. But, of course, truly determining differing degrees of injury from the same lost leg, for example, can be costly, difficult, and perhaps too often in the end influenced by inappropriate considerations. This is why it might be said that these sorts of schemes put convenience and the appearance of horizontal and vertical equity ahead of the very fine tuning that the U.S. system purports to pursue.

In some other nations, vertical and horizontal equity are promoted by externally imposed restrictions on what trial judges

⁹ For an illustration of dramatic growth in the size of pain and suffering awards over time in Poland, see K Baczyk-Rozwadowska, *Medical Malpractice and Compensation in Poland*, 86 *Chicago-Kent Law Review* 1217-50 (2011).

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decide. For example, one approach focuses the judge's attention on an appraisal of the percent the victim is disabled and then instructs the judge to base the amount awarded on that percentage.¹⁰ This strategy paves the way for medical and other experts to bring to bear their knowledge and practice of evaluating disability in other contexts. They testify or certify that this sort of harm, or this victim with this sort of harm, should be considered, say, 20% or 50% or 100% disabled. From that determination the monetary recovery is then specified by a table (or perhaps a modest range of recovery is provided by a table for the judge to employ as a guide). The connection between the percent disabled and the amount of money to be awarded itself could be made by legislation, by a government agency or by the judicial system acting through a committee, for example.

One positive benefit of this approach is that the amount of money tied to each percent disabled can readily be changed over time, both in response to inflation and possibly to social re-evaluations as to how much is an appropriate award for each level of disability. In short, under this approach the function of deciding which injuries are more serious and how much more may be kept separate from the function of assigning monetary amounts to those relative harms. Indeed, in such a system there need not be a linear connection between the percents on the table. For example, a 100% disability might attract 3 or 4 times as much of an award than a 50% disability. Indeed, a disability below a certain percentage might not attract any award. In New South Wales, for example, if the disability rating is below 15% no amount is to be provided for non-economic loss.¹¹ A

¹⁰ Commande, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 *Temple International and Comparative Law Journal* 241 (2005).

¹¹ Sugarman, *Tort Reform Through Damages Law Reform: An American Perspective*, 27 *The Sydney Law Review* 507 (2005); Sugarman, *Damages* (Chapter 10 of Fleming's *The Law of Torts* 10th ed. Sappideen and Vines eds. 2011).

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different way of creating a threshold on the award of money for non-economic loss would be to require that the injury in some way be permanent, so that accidents that might have caused considerable pain and loss of pleasure at the moment and relatively soon after the event might attract no compensation if the victim is fully recovered within a reasonably prompt period of time. An example of this sort of threshold comes from the state of Michigan in the U.S. in the way auto accidents are treated.¹² Tort claims for non-economic loss are only allowed if there has been a serious injury defined to mean a permanent disability or disfigurement or a temporary total disability lasting at least six months.

A still different way of establishing vertical equity and promoting horizontal equity is to have an outside body, say a legislature, roughly group a number of reasonably well understood and reasonably common harms into a number of categories, say, 7 or 15 or 25 of them, and then assign specific amounts of money (or set out a modest and constrained range of money) for each category. This approach has the deciding body determine both whether loss of a leg is to be treated as roughly the same as loss of an eye or an arm and roughly how much is to be given for such injuries. The job of the judge in such systems is to determine into which category the case falls and then to either simply make the appropriate award or exercise a modest amount of discretion in selecting a sum from a range already provided. This approach also tends to create its categories in terms of physical harms and so it too leaves relatively little or no room for highly individualized awards.

Still other legal systems simply determine a maximum award (perhaps inflation-adjusted) for non-economic loss that may be awarded to the truly most seriously harmed and then instruct the judges to appropriately assign lesser sums to the lesser injured with

¹² Sugarman, "Pay at the Pump" Auto Insurance (1993).

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that maximum in mind. This approach is to be distinguished from the “cap” approach adopted in some U.S. states. This U.S. cap approach serves only to cut off awards that juries make above the cap. It is not designed to influence amounts under the cap.¹³

Other strategies may be found in the scholarly literature. One proposes presumptively linking pain and suffering awards to an age-adjusted multiple of medical expenses incurred by the victim.¹⁴ A recent article suggests converting all pain and suffering into a loss of QALYs (Quality Adjusted Life Years) and then awarding a nationally appropriate sum for each QALY lost.¹⁵

Of course, these various approaches to the award of non-pecuniary damages may be combined. For example, a percent disabled approach maybe blended with a maximum award limit with judges then deciding individual cases either rather mechanically or perhaps with modest judgment allowing for special circumstances.

One additional matter that each legal system must address is whether a similar injury to a younger person is to attract more, less, or the same non-pecuniary damages as compared to what is to be awarded to an older person who suffers what otherwise seems to be the same harm. From one perspective a lost arm is a lost arm, and hence both victims should receive the same award. From another, a younger person will, on average, have to live longer with this disability and hence will necessarily suffer more. From a third, a

¹³ Sugarman, Compensation for Accidental Personal Injury: What Nations Might Learn from Each Other, 38 *Pepperdine Law Review* 597 (2011).

¹⁴ Avraham, Putting a Prince on Paid-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change, 100 *Northwestern University Law Review* 87 (2006).

¹⁵ Karapanou and Visscher, Towards a Better Assessment of Pain and Suffering Damages, 1 *JETL* 48, 64 (2010).

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younger person might well be better able to learn to live with the disabling condition and better overcome the physical hardship caused by the injury than will an older person. Different systems treat the age of the victim differently.

Finally, nations need to decide whether non-pecuniary damages are to be the same for all sorts of accidents. For example, in some places, auto accidents and, hence, auto victims are singled out for special treatment so that the loss of a leg in an auto crash might carry a smaller (or greater) recovery than if the injury occurred through a different tort.¹⁶ As another example, in some places the victim's right to recovery non-pecuniary damages may depend (or in part depend) on whether his or her tort claim is based on a theory of strict liability or whether the claimant must (and does) show the injurer to be at fault. In Germany for certain accidents, victims have a choice to forego recovery for non-economic losses in return for not having to prove that the injurer was at fault.¹⁷

Finally, some nations have taken certain types of accidents outside of the civil justice system, typically replacing their treatment with some sort of compensation plan. This is true for auto accidents in many places, childhood vaccine victims in a number of places, workplace accident victims in many countries including the U.S., and all accident victims in New Zealand. The relevant question here is the extent to which these alternative compensation plans also provide for recovery for non-pecuniary losses. The answers vary widely – e.g. not for work injuries in the U.S., very modest sums for accident victims in New Zealand, and much more generous sums to childhood vaccine

¹⁶ Sugarman, Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow, *Les Cahiers du Droit*, special issue, 109 (1998).

¹⁷ Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise* 4th ed.).

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victims in the U.S., auto accident victims in Israel and Quebec, and so on.

V. Why Jurisdictions Might Award Very Different Amounts for Non-economic Losses

Before turning to the actual amounts that different nations provide for non-economic loss recovery for various injuries, it seems useful to consider in advance reasons why the amounts awarded might vary considerably from place to place for what seem to be roughly the same harms.

For example, what is thought fair for the tort system to provide for the loss of a limb or the loss of sight in Denmark differs enormously from what is provided in Italy. The same goes when comparing Portugal and Ireland. By the way, according to one study, the high paying nations in these examples are Italy and Ireland; the low payers are Denmark and Portugal.¹⁸ According to a 2010 article, the maximum award for pain and suffering (measured in Euros) ranged from 88,500 in Denmark, through 122,000 in Sweden, 192,000 in the Netherlands, 330,000 in England, and 614,000 in Germany to 1,024, 000 in Italy.¹⁹ This article also refers to more recent Greek awards at a substantially more generous level than found in prior work. What might account for this nation-to-nation variation? Several factors may be at work here.

A. National income/wealth

Other things equal, one might expect that poorer nations would find it appropriate to award relatively smaller amounts for non-

¹⁸ Sugarman, A Comparative Look at Pain and Suffering Awards, 55 DePaul Law Review 399 (2006).

¹⁹ Karapanou and Visscher, Towards a Better Assessment of Pain and Suffering Damages, 1 JETL 48, 64 (2010).

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economic losses to tort victims. Perhaps people in poorer nations feel they can only afford to pay so much towards this sort of recovery which is ultimately born through the insurance premiums they pay and in the cost of goods and services they buy. Perhaps there is as well a general feeling that damages for non-economic losses should not overwhelm the damages paid for economic losses (or should in some way be reflective of the latter). If so, since lost earnings of tort victims in poorer countries will be less, it would then follow that non-economic loss recovery would also be less.

B. Social support for the disabled outside tort law

A second factor potentially influencing the amount of non-economic loss damages paid to tort victims is the nation's overall social welfare network. After all, individualized non-economic loss recovery in tort claims is not the only resource that a victim might be able to call upon to deal with a disabling condition caused by another. Hence, where community recreational centers, rehabilitation programs, housing for the disabled, and social welfare workers are abundantly available and free to nourish the needs of those with substantially disabling conditions, there may be less need for money to spend on things to offset the physical injury suffered by the tort victim.

These other social supports may be viewed as "collateral sources." All tort systems need to make choices as to how they deal with all sorts of collateral sources. For example, if there is a national health insurance plan that covers the tort victim's medical care, do those who commit torts pay for the medical care even though the victim may not have incurred any expenses? And if so, does the victim keep the award and gain a windfall recovery, or are the damages awarded for medical care then paid back to the national health plan by the tort victim? Countries vary in their approaches to these sorts of collateral sources.

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It does not appear that any country would expect victims to turn some of the money they are awarded for non-economic losses over to state social services providers. Nonetheless, if a nation has a generous social support system in place, the amount of money it is thought fair for injurers to pay to tort victims may be less.

In addition, broad cultural norms about disabled people may vary from country to country. Such norms could have an impact on how generous a nation's tort system is with respect to non-economic loss damages. But it is by no means clear which way these differences would cut. On the one hand, where the disabled are shamed, ignored, and/or isolated, it might be argued that more generous non-economic damage awards in tort are necessary to regain a decent life experience following a serious accident. However, the disadvantaged status of the disabled in such a society could be reflected in miserly treatment through tort law as well. By contrast, while the need for tort victims to obtain generous financial awards for non-economic losses may be diminished in places with generous treatment of all disabled people, the very political forces that created the generous support network might also work together to marshal generous tort awards to the disabled.

C. Social judgment about the role of individual money awards

Countries may differ in the meaning they attach to money. In some places having money is thought to be very important to having status and a strong sense of self-worth. Hence receiving money through the tort system for their non-economic losses may be psychologically quite powerful for victims. Money really can in some way replace what they have lost.

Elsewhere that may be not at all true or at least much less so. In some places, family, personal relations, honor, reputation and so on may be far more important than having available cash. And if so, people may feel they are gaining much less of an offset to the

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indignity of being a tort victim when they are awarded money for non-economic losses. That might lead a country where money means less to award less to tort victims. Alternatively, it might lead a country to award even higher amounts of money damages in order to fully compensate for non-economic losses.

D. Legal system features

The features of different legal system already described may themselves have an impact on the country's overall generosity in the award of non-economic loss damages. For example, the U.S. may be more generous because participants realize that victims' lawyers will take their fees and the cost of litigation out of the award, a feature that is typically absent (or at least partially so) from other systems. So, too, the use of inexperienced and reasonably unconstrained juries in the U.S. might lead to more generous awards if it turns out that juries are influenced in the amounts they award by what they have causally read in the newspaper or seen on television, which typically feature only very high award cases. The confidence that those running the system have that the awards made for economic losses are the right sums could also influence non-economic loss awards. For example, a belief that the economic awards are probably too low could prompt a more generous award of non-economic loss damages.

All of the discussion so far has focused on non-pecuniary loss awards in trials. But in many places most tort claims are settled. The real world of the settlement process might also impact the generosity of non-economic loss damages. For example, if it is typical for cases to drag on, victims may be willing to accept lower amounts, including lower awards for non-economic losses, in order to win a much quicker settlement. Those lowered amounts, then, become lowered benchmarks for future disputes. On the other side, a defendant's eagerness to avoid long and costly litigation in minor injury cases might, as it does in the U.S., enable lawyers for those with very small physical harms to extract disproportionately large non-economic loss

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amounts just so that the insurance company on the other side can get the case off its books.

VI. Comparisons of Amounts Awarded in a Variety of Legal Systems

A. Prior Work

A few years ago a number of studies were undertaken to gather information about how much money a variety of countries would award personal injury law victims for their non-pecuniary losses.²⁰ These inquiries primarily focused on Western European nations. An analysis of findings about nineteen countries found that although all of them would award some money to seriously injured personal injury victims with valid tort claims, the amounts provided for the same type of injury varied enormously from country to country.²¹ For example, Ireland, Italy, and England might well award as much as ten times the amount of money as would Denmark and Greece for similar harms. Austria and France fell roughly in between. Although no definitive explanation of this disparity was identified, an intuitive explanation on the low end is that the Greek legal system felt the nation was then too poor to award comparatively lavish sums and that the Danish legal system felt that disabled victims were already well cared for by the nation's comprehensive social welfare system. Why Ireland, Italy and England would be the most generous is quite unclear.

²⁰ E.g., *Personal Injury Awards in EU and EFTA Countries* (David McIntosh and Marjorie Holmes eds, 2003); *Compensation for Personal Injury in a Comparative Perspective* (Bernhard A. Koch and Helmut Koziol eds. 2003); Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 *DePaul Law Review* 379 (2006); and Markesinis, Coester, Alpa and Ullstein, *Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline* (2005). For an earlier effort, see H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (2001)

²¹ Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 *DePaul Law Review* 399 (2006).

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Analysis also demonstrated that, as measured by amounts awarded, countries tended to similarly characterize specific injuries as relatively more or less serious. For example, regardless of how much money a nation awarded for the gravest injuries, by comparison with other awards within each country, quadriplegia was typically treated as about as serious as it gets, with blindness a close second. By comparison, loss of a leg or an arm were treated as typically calling for somewhat less than half as much money in non-pecuniary damages, with limb losses being treated broadly similar whether it is an arm or a leg. Although there were some outliers, deafness was treated broadly equivalent to a lost limb.

Despite the very substantial differences among European nations in the amounts of money awarded, say, for quadriplegia or blindness, even the most generous countries provided quite modest sums as compared with what many similarly-injured victims obtain in the U.S. American awards tended to be considerably more variable than were awards within European nations, but enough data was gathered to get a sense of average and ranges. Put simply, American awards were often off the charts – typically being more than ten times as generous as the most generous European countries, and twenty times European averages. For example, in quadriplegia cases, U.S. victims might well win the equivalent of two and half million Euros, as compared the then European average of around one hundred thousand and the European most generous level of perhaps two hundred and fifty thousand.

Still, the American picture should not be described only in such sweeping terms. First, in at least some US states, there is a legal ceiling or cap on the award of pain and suffering damages and that sum, while often more than the maximum award in Europe is not overwhelmingly more. Second, and perhaps more important, as noted earlier the rule about the payment of legal fees is very different in the U.S. The European and general world-wide practice is to follow the

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“loser pays” rule so that a successful tort claimant is entitled to the payment of his or her attorney fees and legal costs by the defendant. Informal reports suggest that these frequently amount to something like ten percent of the total damages recovered. In the U.S., each side pays its own fees, win or lose. This avoids having ordinary people with plausibly valid claims deciding not to go forward for fear of being financially ruined by having to pay the other side’s legal expenses if the case is lost. But it also means that, when the claim is successful, the lawyer will take his or her fee out of the victim’s recovery, and in America the amount of the fee is routinely (although not invariably) one third.

For purposes of trying to make comparisons and taking into account the seeming psychological perspective of U.S. claimants, it seems fair to assume that, to the extent possible, the victim sees his or her own legal expenses as being paid out of the non-pecuniary portion of the award – even though the common one-third fee, of course, applies to the entire award. This means that the larger the pecuniary award (for lost income and expenses), the more of the non-economic portion of the award that goes to the lawyer.

Analysis of seventeen leg amputation cases showed that in a substantial majority of cases, a substantial majority of the award was for “pain and suffering.” In about a third of the cases, huge pain and suffering awards were made, leaving the victims, even if they paid their lawyers entirely out of the non-pecuniary award, with enormously more money than would be awarded to similar victims for non-pecuniary damages in Europe (fifty times as much on average). About half of the American victims wound up financially much better off but by more moderately so (perhaps six times the European average and twice that of the most generous European countries.)

But when the same analysis was applied to victims who were quadriplegic, the picture was quite different. Those U.S. victims, even if they recovered huge amounts for pain and suffering also

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recovered gigantic sums for economic losses, so that when the legal fees were treated as coming out of the pain and suffering award, in half of the twelve cases studied the legal fees were more than the non-pecuniary award, in effect, leaving the victim – in this respect – worse off than in Europe. And half of those who did wind up with net sums for pain and suffering after paying legal fees found themselves with amounts not much out of line with European numbers.

Finally, it is worth noting that were U.S. states to impose a \$250,000 cap on pain and suffering damages, as some states have done and many tort reformers have proposed, then many victims with lost legs would net out far worse off than European counterparts -- assuming that American victims would have to pay for their legal fees out of their non-pecuniary damages awards while the fees of European victims would be paid for by defendants. Put simply, were a \$250,000 cap in place, more than half of the seventeen American lost leg claimants, noted above would have needed to use all of their pain and suffering award and then some to cover their legal fees.

B. Broadened Inquiries

In the sections that follow new information is provided about several nations, all but one of which is located outside of what was traditionally understood to be Western Europe. That exception is England, with which this analysis begins so as to both bring the English data up to date and to give a generous European nation example as an anchor with which to compare other countries.

England.

In 1992 in England the Judicial Studies Board created a Working Party to develop and publish “Guidelines for the Assessment of General Damages in Personal Injury Cases.”²² Comprised of both judges and lawyers, the Working Party gathered together data on what

²² Judicial Studies Board, 1992.

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sums were actually being awarded for non-economic loss (pain and suffering damages) and organized them in terms of differing types of injuries. Now in its 10th edition (2010), the Guidelines provide information relevant to Injuries Involving Paralysis, Head Injuries, Psychiatric Damage, Injuries Affecting the Senses, Injuries to Internal Organs, Orthopaedic Injuries, facial Injuries, Scarring to Other Parts of the Body, Damage to Hair, and Dermatitis. Each new edition updates prior sums on account of intervening inflation, accounts for new decisions judges are making, and includes as appropriate awards for new types of injuries that are being recognized. Although these Guidelines do not have formal legal force, it is widely agreed that they have a substantial impact in the resolution of actual cases.

The table below illustrates how the Guideline numbers have evolved between the 7th edition in 2004 and the 10th edition in 2010 for a number of important illustrative serious injuries.

Table 1 England: Guideline Amounts of Non-economic Loss Recovery for Specified Injuries (2004 and 2010) All of the data is reported in 1000s of GB pounds.

	2004 ²³	2010 ²⁴
Quadriplegia	175-220	212-265
Paraplegia	120-155	144-186.5

²³ Judicial Studies Board, Guidelines for the Assessment of Genreal Damages in Personal Injury Cases, 7th Edition (2004).

²⁴ Judicial Studies Board, Guidelines for the Assessment of Genreal Damages in Personal Injury Cases, 10th Edition (2010).

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Total Blindness	147.5	175
Total Deafness	50-60	59.5-72
Loss of Arm (above elbow)	60-71.5	72-86
Loss of Arm (below elbow)	52.5-60	63-72
Both Arms	132.5-165	158-197
Loss of Leg (above knee)	52.5-77	63-92
Loss of Leg (below knee)	50-71.5	60-86
Both Legs	132.5-155	158-185

It should also be noted that the high end of the range for quadriplegia (265,000 GB pounds) is also the Guideline amount for combined Total Blindness and Deafness, as well as the high end of range for Very Severe Brain Damage. These three conditions, in short, are viewed as the most serious specific harms and for which the largest amount of non-economic loss damages is potentially available. With respect to horizontal equity, note that the ranges provided tend to give judges about a 20% leeway in fitting the specific facts before them to the Guideline. When a single number is provided, the Guidelines are careful to note “”in the region of.”

With respect to vertical equity, note how the 2010 Guidelines comparatively rate the injuries in Table 1.

Table 2 England: Vertical Equity (2010) – Percent Comparisons for Non-Economic Loss Awards for Specified Injuries (using the midpoint of the ranges from Table 1 for comparisons).

	2010
Quadriplegia	100%
Paraplegia	69
Total Blindness	73
Total Deafness	28
Loss of Arm (above elbow)	33
Loss of Arm (below elbow)	28

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Both Arms	74
Loss of Leg (above knee)	32
Loss of Leg (below knee)	31
Both Legs	72

Using this English data as benchmark, comparisons will next be made about a number of nations around the globe. The focus here is on nations outside of Western Europe which, as already noted, have been the focus of most prior work.

Canada.

Detailed data for awards in Ontario, Canada were obtained,²⁵ and for Canada in general reasonable estimates from experienced lawyers were gathered to provide a helpful comparison of Canada with England.²⁶ In 1978, the Canadian Supreme Court set 100,000 Canadian dollars as the maximum amount of non-economic loss to be awarded with two understandings. First, this sum was to be increased with inflation, and it has become \$326,000 in 2012. Second, this is the sum to be awarded for the most severe injuries with less serious injuries to receive appropriately lower sums.

As with England, Canadian lawyers think in terms of ranges of awards for specific types of injuries depending on the detailed circumstances of each case. Moreover, as data about Canadian decisions in Ontario show, many victims do not simply have clean injuries that are restricted to the categories created here. Rather, often a loss of an arm or leg or loss of sight or hearing is combined with other harms. This makes it even more precarious to confidently predict the likely award of non-economic loss damages for victims

²⁵ Chadwick, *Compendium of Damages Awarded in Personal Injury Actions Across Ontario 1999-2010*

²⁶ With special thanks to David Cheifetz and Linda Phillips-Smith.

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with essentially a single injury. With these caveats, Table 3 presents for Canada some soft target sums for the sorts of injuries shown in Table 1 concerning England.

Table 3 Canada: Estimated Amounts of Non-economic Loss Recovery for Specified Injuries (2012). All of the data in column (a) is reported in 1000s of Canadian dollars and in column (b) as a percentage of the Canadian maximum.

	\$Cdn	%
Quadriplegia	326	100
Paraplegia	200-250	69
Total Blindness	150-250	61
Total Deafness	150	46
Loss of Arm	125-175	46
Loss of Leg	150-200	54

Japan.

In Japan, automobile cases are specially handled.²⁷ But for other accidents judges have available to them a book containing amounts suitably awarded for non-economic loss in personal injury cases.²⁸ Think of this as similar to the English Guidelines. As in England, Japanese judges are also permitted and do award other than the specific target amounts, based on circumstances in individual

²⁷ For an earlier description, see Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 *Law and Society Review* 651 (1990).

²⁸ With special thanks to Sachie Yamada Nakazawa and Judge Ryo Nakazawa.

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cases, but in general the awards hover around the targets. Table 4, modeled on Canadian data in Table 3, presents Japanese data.

Table 4 Japan: Target Amounts of Non-economic Loss Recovery for Specified Injuries (2012). Column (a) shows target awards (in 1,000,000s of Japanese yen) for various injuries, and column (b) shows percentages as compared with the highest award targets.

	JPY	%
Quadriplegia	28	100
Paraplegia	28	100
Total Blindness	28	100
Deafness	16.7	60
Loss of Arm	14-16.7	55
Loss of Leg	14-16.7	55

It would be wrong to assume from this table that the Japanese consider paraplegia just as serious an injury as quadriplegia. Rather, the data is better understood as setting 28,000,000 Japanese yen as the maximum to be awarded for very serious injuries, together with the judgment that all three of the first listed injuries are considered so serious as to attract the highest award available.

Australia (New South Wales).

This phenomenon of compression at the top just shown for Japan is even more pronounced in New South Wales in Australia. There, by statute, a maximum award for non-economic loss has been set, which, as in Canada, increases with inflation. As of 2012 it is 535,000 Australian dollars. This is the amount to be awarded in “a most extreme case.” But Australian courts have interpreted this phrase not to mean solely something that is about as grave as one can imagine, such as quadriplegia, but rather to include as well many

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other very serious, but not as serious, harms. Informed academic sources report, therefore, that by now all of the injuries shown in Tables 3 and 4 would be considered as “extreme” and hence all of them would be expected to result in awards of the 535,000 dollar maximum.²⁹ Less serious injuries are given lower ratings and awarded proportionately lower sums for non-economic loss, and if an injury is considered only 15% or less severe as extreme injuries, nothing is to be awarded for non-economic loss (a threshold requirement).

Hong Kong (then).

In Hong Kong as of 2002, a somewhat different strategy had become well developed.³⁰ In 1980 the Hong Court of Appeal identified four categories of injuries for which an increasing range of damages for pain and suffering and loss of amenities would be awarded. Apparently, for injuries less harmful than the lowest category, no money was to be awarded for non-economic loss, a threshold that is analogous to today’s scheme in New South Wales, Australia (where the threshold level of harm may be somewhat lower). Under the Hong Kong plan, “serious injury” is the lowest category and involves a permanent disability that “mars general activities and enjoyment of life.” This would include, for example, loss of a limb replaced by a prosthetic device or a bad fracture that results in permanent pain. At that time, awards for these types of injuries would be in the HK\$60,000-80,000 range. More money was to be awarded for “substantial disability” covering cases of prolonged hospitalization and permanent reduced mobility, such as a loss of a leg at the thigh that did not permit a satisfactory prosthetic device. For those cases non-economic loss damages were to be in the HK\$80,000-100,000 range. “Gross disability” cases were to be awarded in the

²⁹ With special thanks to Professor Prue Vines.

³⁰ Rick Glofcheski, *Tort Law in Hong Kong* (2002) at 321-325. More recent information about awards in Hong Kong has not been obtained.

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range of HK\$100,000-150,000 and included very restricted mobility or serious mental harm cases including paraplegia. And finally, the “disaster” cases were to receive more than HK\$150,000, a category that includes those requiring constant care and incapable of leading independent lives, such as quadriplegia. Over time the amounts assigned to each category were sharply increased so that, for example, as of 1996 they were HK\$400,000-540,000 for serious injuries, HK\$540,000-660,000 for substantial disabilities, HK\$660,000-1,000,000 for gross disability, and more than 1,000,000 for disaster cases. By 2002, cases had been reported in which awards to disaster category victims reached 1.7 and 1.8 million \$HK (and paraplegic cases involving multiple injuries appeared in a few cases to exceed the range then designated for gross disability cases).

This Hong Kong approach, while lumping all serious injuries into but a few categories, appears to give judges somewhat more discretion than the English approach whose Guidelines lists hundreds of individual injuries. Still, one sees the same general hierarchy of injuries with conditions like quadriplegia at the top, paraplegia next, and loss of individual limbs considerably down the list. Moreover, the Hong Kong judges had available to them the specific award levels of cases that had been deemed to fall within each of the categories so as to provide guidance for them to determine the appropriate award in the actual case before them.

From this data a simplified version of Table 3 for Hong Kong as of 2002 can be created.

Table 5 Hong Kong (2002): Approximate Pain and Suffering and Lost Amenities Awards. Column (a) shows award ranges in HK\$ (in 1000s) and column (b) shows percentages compared with highest recorded award.

	HK\$	%
Disaster (highest) (quadriplegia type)	1,800	100

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Gross disability (paraplegia type)	660-1,000	46
Substantial disability (high leg loss)	540-660	33
Serious injury (low leg loss)	400-540	26

China (now).

China's tort law is quite new and it is difficult to say with confidence how it will be implemented in the years ahead. As of now, however, at least it appears that certain accident compensation mechanisms are in place. For workplace accidents there is a workers' compensation program that seems to be parallel to the arrangement in the U.S. in that scheduled benefits for medical expenses and income losses are provided. These include, as is the case in some of the American states and elsewhere, coverage of future income losses through impairment-based recoveries. But, as in the U.S., there is no compensation for non-economic loss.

For other accidents, however – both auto accidents and other sorts of tort claims -- China's new law provides for recovery for not only pecuniary losses but also for pain and suffering.³¹ Adopting a somewhat more detailed scheme than traditionally in place in Hong Kong, China's plan creates ten degrees of injury (other than death), with first degree injuries being the most serious. Two consequences follow from a tort victim being determined to be disabled in, say, the first degree. First, a disability compensation benefit may be awarded which is a proxy for income loss. Second, a separate award for pain and suffering is to be made. It appears that implementation of the regime may well vary from place to place in China. For the Beijing area, claims are to be divided into Urban and Rural for purposes of determining the disability benefit; that is, the income benefit for Urban victims is to reflect the prior year's average income for urban

³¹ With special thanks to Qing Chu and Han Zhang.

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citizens in Beijing, which currently stands at 32,903 RMB, and the income benefit for Rural victims is to reflect the prior year's average income of farmers in that area outside the city, which currently stands at 14,736 RMB. So an urban victim suffering a First Degree (or 100%) disability would recover 20 times 32,903 or about 658,000 RMB whereas a rural victim suffering the same injury would recovery 20 times 14,736 or about 295,000 RMB (with yet further modest downward adjustments if the victim is age 60 or older). By contrast were the injuries much less, falling into the Tenth Degree (or 10%) category, then the recovery would be only 10% of the above numbers, or about 65,800 RMB and 29,500 respectively.

It is useful to have these numbers in mind when comparing them with the sums to be awarded for pain and suffering. These amounts are given as a range for each Degree of injury. And for each range the upper bound is twice that of the lower bound, with the judge in the case to determine where within the range the award should be made given the specific circumstances of the victim. But, in contrast with the disability compensation benefit, the ranges are the same for both urban and rural victims, which is quite understandable. As with the disability compensation benefit, the range amounts drop by 10% as one moves through the degrees to the less seriously injured victims. More precisely, those with First Degree injuries are to receive pain and suffering amounts in the 50,000-100,000 RMB range, whereas those with Tenth Degree injuries are to receive pain and suffering amounts in the 5,000-10,000 RMB range. Notice how, at each degree, this range of awards is far wider than the English Guidelines provide (a 100% range versus a typically 20% range). Yet, note too that the Chinese judges have only ten categories into which to fit all qualifying injuries short of death, whereas English judges have hundreds of specific injuries for which guidelines are provided.

To get a preliminary feel for the comparative amounts involved in China, these numbers mean that a maximum of about 12,000 Euros is to be awarded for non-economic loss in the most serious case and

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just over 600 Euros at the low end of the range for someone with a Tenth Degree injury.

Although it is not clear yet at what degree the types of injuries that have been here explored would fall, with advice from experts in China one can estimate that quadriplegia would probably be a First or possibly Second Degree injury, paraplegia might well be a Third Degree, blindness might possibly be a Third Degree, a loss of leg or arm might be Fifth or Sixth Degree, and deafness might fall somewhere in the Fourth to Seventh Degree range. Based on these assumptions a rough estimate table of intended awards can be constructed.

Table 6 China: Rough Estimate of Range of Pain and Suffering Awards (in 1000s RMB).

	RMB
First or Second Degree (quadriplegia)	45-100
Third Degree (paraplegia or blindness)	40-80
Fifth or Sixth Degree (loss of limb—arm or leg)	25-60

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Fourth to Seventh Degree 20-70
(deafness?)

A recent article about medical malpractice claims in China reveals at least two important things that raise questions about the reliability of the table-based numbers presented here as reflecting the actual Chinese practice.³² First, for medical injury claims it appears that two different and conflicting legal regimes are on the books (one of which calls for more generous damage awards), and the judges and lawyers so far have seemingly not worked out a way of dealing with these inconsistencies. Second, and more importantly, in a not insignificant number of situations in which medical malpractice of doctors and hospitals is alleged, family members and/or villagers have appeared in protest and engaged in violence against medical personnel and facilities. This mob activity has in turned often resulted in the working out of informal settlements outside the regular legal system with payments being made that are frequently substantially larger than claimants could have obtained through the courts even if the more liberal of the award regimes were applied. While this prompt intervention to quell protests and reduce possible large scale rioting is understandably part of the Chinese leadership's wish to dampen this sort of activity around all sorts of issues in that country, it makes it rather unpredictable just how tort claims for non-economic loss are going to be handled in the future.

South Africa.

South Africa treats both work injuries and auto injuries differently from other accidents. Work injuries are covered by a special compensation scheme that, as in the U.S., provides an exclusive remedy for employees and only awards cash benefits for pecuniary loss.

³² Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 *Columbia Law Review* 2013 forthcoming).

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Auto injuries are covered by a special compensation plan whose terms are changing (and narrowing) over time. In 2008 new rules came into effect that eliminated the right of auto accident victims to recover compensation for their non-pecuniary losses unless their injuries were “serious.”³³ The definition of serious draws upon a combination of American Medical Association Guides for determining whether a person is at least 30% impaired and a verbal test of disability that broadly follows language used in both Australia and the state of Michigan in the U.S. Prior to this change, even minor claims for pain and suffering were compensable, as they are under South Africa’s general tort law. Starting in 2014, however, road accident victims are scheduled to lose the right to recover anything for non-pecuniary losses, which largely will put them on the same footing as are such victims in New Zealand.³⁴

For tort claims in South Africa, there is a long history of collecting and publishing reported judicial opinions (and some settlements) awarding damages for non-economic loss by injury type. This extremely valuable information broadly parallels the reports of the Judicial Studies Board in England. While the South African compilation, called *The Quantum Yearbook*, is wholly private and organized by Robert J. Koch, it nonetheless serves as an essential guide for both lawyers and judges.³⁵ *The Quantum Yearbook* lists awards going back more than 50 years in some cases, all shown in the original amount and updated to reflect inflation. This data reveals that the range of awards for the sorts of specific injuries tallied here is not only considerably wider than in England, but also considerably wider than expected in China. This suggests that the South African judges

³³ Koch, *How to Qualify for General Damages Under the RAF Amendment Act*, *De Rebus* October 2010 at p. 32.

³⁴ With special thanks for information about South Africa to Nicolette Koch.

³⁵ Koch, *The Quantum Yearbook* (2012).

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exercise considerable discretion in tailoring the amount of non-pecuniary damages to the special facts of each case. Still the overall pattern broadly reflects that already shown for many other nations.

Table 7 South Africa: Column (a) Range of Awards (outlier older awards excluded) for Non-economic Loss for Specified Injuries (2012 adjusted for inflation). All of the data is reported in 1000s of South African Rand; Column (b) shows mid-range awards as percentages of average quadriplegia award.

	SA Rand	%
Quadriplegia	429-2028	100
Paraplegia	213-1108	55
Blindness	225-1084	54
Deafness	177-406	24
Loss of Arm(s)	137-708	35
Loss of Leg (above knee)	255-554	34
Loss of Leg (below knee)	133-402	22

Israel.

Israel has a special compensation scheme for victims of road accident that is broadly similar to the auto no-fault plan Quebec, Canada. As with the Quebec scheme, benefits specifically include sums for non-economic loss. That sum is determined by a two-part formula.³⁶ First, and typically most importantly the amount awarded is based upon an assessment of the percent the victim is deemed to be permanently disabled. That percent is applied to a maximum award number which currently is approximately 200,000 Israeli shekels. That number is updated over time (primarily for inflation) and downwardly reduced based on the victim's age as noted below.

³⁶ With special thanks to Professor Ariel Porat.

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So, for example, at present were a 25 year old victim with quadriplegia deemed 100% disabled, then under the first part of the formula the award would be 200,000 IS. If, say, paraplegia were deemed to be, say, a 70% disability, and the loss of a leg, say, a 35% disability, then under the first part of the formula the amounts to be awarded to a 25 year old would be 140,000 IS and 70,000 IS respectively.

Under the second portion of the formula the award is increased by multiplying the number of days the victim was hospitalized times 2% of the maximum award, which at present would be 4000IS per day, subject to an age adjustment noted below. Hence if a young person suffering from paraplegia or the loss of leg were hospitalized for 100 days, the second part of the formula would provide another 40,000IS for non-economic loss, thereby bringing the awards assumed above to 180,000IS and 110,000IS respectively.

If the victim is older than 30, however, the maximum award level for the first part of the formula is reduced by 1% for every year over 30. Hence for a 40 year old, the maximum would be 180,000IS, and for a 60 year old it would be 140,000IS.

For relatively small injuries courts have the discretion to award up to 10% of the maximum award, or up to 20,000IS at present.

For non-auto accidents there is no official formula and detailed data is difficult to obtain, but experts suggest that the amount currently awarded in torts cases (which are based on fault) may be perhaps two to three times as much as in road accident claims. Interestingly enough, in Israel workplace injuries are covered by regular tort law and not by a special substitute workers' injury compensation scheme.

Given this limited data it is not possible to construct a highly reliable table for Israel like those presented so far, but some rough

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numbers may be presented if certain plausible assumptions are made about a) the percent disabled assigned to the serious injuries that have been the focus here, b) a range of days in hospital is assumed, and c) a age range of victims is assumed (say, 18-65).

Table 8 Israel: Rough Estimate of Range of Awards in 1000sIS for Non-pecuniary Loss for Auto and Non-Auto Victims (with the sums in column (b) set at 2.5 times those in column (a) for victims ages 18-65)

	Auto Claims (a)	Tort Claims (b)
100% disability plus 100 hospital days (quadriplegia)	170-240	425-600
70% disability plus 70 hospital days (paraplegia/blindness)	119-168	298-420
45% disability plus 45 hospital days (loss of limb/deafness)	77-108	193-270

Poland.

In Poland courts make awards for non-pecuniary damages on a discretionary basis, but they are guided by past decisions. Individual circumstances, however, are carefully taken into account in terms of both the details of the injuries actually suffered, the age of the victim, and so on.³⁷

In 2009, in an extremely grave injury case involving permanent disability arising from severe brain injuries the Supreme Court raised the lower court's award for non-pecuniary damages to 343,000 zloty

³⁷ With special thanks to Professor Ewa Bagińska.

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(PLN). This decision suggests that the award by a regional court in 2006 to a comatose victim of medical malpractice of 500,000 PLN for non-pecuniary damages is unusually high and perhaps beyond what is currently understood to be roughly the maximum allowable.

More generally, insurance practice in Poland today suggests that in quadriplegia cases 300,000 PLN would be a likely award for non-pecuniary damages and that in cases of paraplegia the award would likely be in the 100,000 – 300,000 PLN range. Loss of an arm or a leg would likely result in the award of between 75,000 and 105,000 PLN depending on the specifics of the injury. It appears that awards for deafness might well top out at 75,000 PLN, but that awards for blindness are likely to be considerably more, indeed well more than 150,000 PLN for loss of sight in both eyes.

These numbers might profitably be compared with a case involving a serious auto accident in which the victim had multiple fractures, needed four years of medical treatment, and was left 75% disabled and who obtained an award for non-pecuniary damages that was increased to 150,000 PLN by the Supreme Court.

Table 9. Poland Estimated Amounts of Non-economic Loss Recovery for Specified Injuries. Column (a) shows estimated awards (in 10,000s of Polish zloty or PLN) for various injuries, and column (b) shows percentages as compared with the likely highest award.

	PLN	%
Quadriplegia	300	100
Paraplegia	150-250	67
Total Blindness	150-300	75
Deafness	75	25
Loss of Arm	75-105	30
Loss of Leg	75-105	30

*TORT DAMAGES FOR NON-ECONOMIC LOSSES**India.*

For India it has proved very difficult to get reliable information concerning the award of non-economic damages in personal injury claims filed under basic tort law. In India, however, both work injuries and auto accident injuries are covered by special schemes. These, of course, are the source of many accident claims and more is understood about them.³⁸

It appears that with respect to work injuries India also follows the U.S. practice. This means, first, in contrast with the law in many European nations, claims under the workers' compensation system are the victim's exclusive remedy (i.e. the employer may not be sued even if clearly at fault), and second, the compensation system itself does not provide benefits based on non-economic loss. Like many U.S. states, the plan does award sums based on specific injuries like amputation of one leg, or absolute deafness, or loss of sight, or loss of an arm. These injuries are then put into a formula that is designed to create a presumptive determination of lost future income, reflecting the injured worker's wages at the time of injury. E.g. amputation of one leg below the knee is scheduled as amounting to a 40% disability and blindness is scheduled as 100%. These percentages are then applied to prior earnings, in lieu of an individualized attempt to determine the injured worker's prospects of future employment. The minimum award for permanent total disability has been raised to Rs.90000, but again this reflects a floor on what is presumed to be income loss. All of this is to be distinguished from non-economic loss recovery which is not intended to be compensated in the case of work injuries.

For auto injuries, there is also a formula that specifies recovery for future income loss in cases of total and partial permanent

³⁸ With special thanks to Rajeev Kadambi.

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disability, as well as awards to survivors in fatal accident cases (for which the award is to be no less than Rs. 50,000 in any event). But with respect to pain and suffering itself, it seems that only very modest sums are available – Rs 5000 for grievous injuries and Rs.1000 for non-grievous injuries.

Cross National Comparisons

Given both common experience and findings of prior research, it is perhaps not surprising to see that of the six serious injuries focused upon here, all nations put quadriplegia at the top of the list in terms of seriousness and hence the amount one would predict to be awarded for non-economic loss. To be sure, we see that in both Australia and Japan other very serious harms can be expected to attract a similarly high end award amount. Those systems, in effect, have a ceiling that is viewed as an appropriate award for quadriplegia plus a range of other serious, if not equally serious, injuries. This is sharply in contrast with, say, England, Canada, South Africa and Poland (and probably Israel).

It is also important to note that paraplegia and blindness are typically recognized as rather more serious than loss of a leg or an arm and hence would attract a substantially larger monetary award of damages in the countries discussed here (Australia aside). Losses of arms and legs tend to be treated broadly the same. Still the relationship between lost limbs on the one hand and the highest awards available in a country is somewhat different from place. That is, awards for lost limbs appear to be in range of 20-35% of the amount awarded for quadriplegia in South Africa, England, Poland and Hong Kong (2002) but in the 45-55% range of what is awarded for quadriplegia for Canada and Japan (with China and Israel possibly falling in between these two groups of countries). Yet, not too much should be made of these latter differences in light of peculiarities of each system.

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Finally actual amounts likely awarded from country to country are next compared. In the table that follows, data has been drawn from the prior tables, using mid-points of ranges where ranges are provided, and with award levels in local currencies converted into Euros as of November 2012.

Table 10: Cross National Award Comparison of Range Mid-point Awards for Non-economic Loss in 1000s Euros (November 2012) (data drawn from Tables 1-9 above)

Country	Eng	Can	Jpn	SA	IS	Pol	AU	China
Injury								
Quadriplegia	296	255	267	108	102	75	433	9
Paraplegia	205	176	267	58	72	50	433	7
Blindness	217	157	267	58	72	56	433	7
Deafness	82	117	162	26	46	19	433	5
Arm Loss	93	117	143	37	46	23	433	5
Leg Loss	93	137	143	30	46	23	433	5

It is perhaps best to allow these numbers primarily speak for themselves. A few simple points may be made however. First, they should not be taken as precise, but rather as indicators. Second, there are interesting differences between England, Canada and Japan: e.g. Canadian awards quickly fall off in amount once the harm is

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something less than quadriplegia; English and Japanese awards only sharply fall off below the third category (blindness) and then English awards fall off much more sharply. Yet, more broadly viewed, the awards in these three nations are far more similar in amounts than in the others. China, of course, is shown to be far more modest in what it awards, and it will be interesting to see whether award amounts for non-economic loss will be quickly adjusted upwards as there is more experience with tort law there and as incomes grow. New South Wales, Australia, on the other hand, is not only considerably more generous in what is to be awarded to the most gravely disabled, it is even more dramatically generous to, say, lost limb victims at the bottom of this chart -- given the decision there to treat all of these listed injuries as examples of an extreme case. South Africa's, Israel's and Poland's average awards for the injuries shown here appear to be relatively similar and roughly between one quarter and one half of English awards. How much this reflects differences in living standards among the three countries is not at all clear.

Finally, a few comments will be offered that compare these numbers with those reported in earlier and other work noted above.

Based on data from 2000, awards for non-economic loss for quadriplegia were estimated in Euros to be approximately:

Denmark	27,000
Sweden	59,000
Netherlands	125,000
England	218,000
Germany	240,000
Italy	200,000

More recent data suggests that the highest reported awards in Euros for non-economic loss in those nations are much larger:

Denmark	88,500
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Sweden	122,000
Netherlands	192,000
England	330,000
Germany	614,000
Italy	1,024,000

Still, one sees that South Africa and Israel appear more generous than Denmark; that Canada, Japan and Australia appear to be considerably more generous than several European nations, with Poland at the bottom of the European nations described here; and that China lags dramatically.

Current U.S. comparisons are not attempted here, but just two examples drawn from prior work using data up to 2003 show a continuing marked contrast if the focus is only on non-economic loss award amounts. The median reported award for non-economic loss for quadriplegia in the U.S. was then about 2,700,000 Euros (at today's conversion rates) and about 390,000 Euros for the loss of a leg. The former remains many times the highest awards for all of the nations noted here, and the same seems generally true for the loss of a leg (Australia aside).

Yet, recall that U.S. victims must fully pay for their lawyers from their awards, which is not the practice elsewhere, and even if some portion of their own legal fees must be covered by victims in some other systems, the amounts are typically proportionally quite small when compared with the typical U.S. fee of one third of the total recovery (plus American claimants must also reimburse their lawyers for the expenses of litigation, including not just court costs but costs of investigation, discovery, and expert witnesses). Hence, as was earlier shown, after covering their legal fees and costs of litigation, many U.S. victims will wind up no better off and sometimes worse off than counterparts elsewhere, a situation that is likely even more the case today than a few years back.

*COMPARATIVE TORT LAW***VII. Conclusion**

Tort victims who suffer serious injuries are entitled to monetary payments for non-economic loss in the legal systems of nations around the globe. Yet, the amounts so awarded vary sharply, and while differences in gross domestic product (or other measures of how wealthy a country is) surely contribute to these variations, that is hardly the full explanation. It is not possible to provide a convincing justification for these differences from the data provided here, but at least two things seem noteworthy. First, the process by which awards are determined clearly varies. Some places amounts grow out of past judicial decisions (with judges paying varying degrees of attention to past averages as compared with the peculiar facts of the case before them). In other places the legislative/executive process lays down somewhat detailed criteria for judges to apply (although how judges interpret those commands can have a big impact, as in New South Wales). Second, once a system settles into place, future awards seem importantly path dependent, as those applying the system seek to maintain at least some degree of consistency from year to year (apart from adjusting for inflation) and among those with broadly similar injuries.

In many places, judges and relevant legislative and executive leaders may be quite unaware of how their national (or local) regime compares with other places in the world. This chapter, perhaps best seen as a work-in-process, may help to promote wider awareness and understanding of what other countries do, whether or not this information prompts nations to alter their own arrangements.