A COMPARATIVE LAW LOOK AT PAIN AND SUFFERING AWARDS

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INTRODUCTION

Most discussions of "pain and suffering" awards in American tort law look inward, at most comparing one state with others. This Article looks outward, exploring what other "Western" nations award in pain and suffering damages, and comparing those outcomes with the American practice.

As a starting point, there is a fundamental commonality. The legal systems of Western Europe, Canada, and Australia all provide financial compensation to personal injury victims for what we in the United States interchangeably call "pain and suffering," "noneconomic losses," and "general damages." However labeled, this is money meant to compensate for things like the physical pain and suffering that goes along with a physical trauma, the emotional harm that can come from an injury to one's self or a loved one, the disappointment or embarrassment arising from one's changed appearance or altered abilities to engage in pleasurable activities and favorite pastimes as a result of an injury, the harm to one's dignity or one's health from being wrongly injured by another, and so on. These injuries are widely acknowledged by Western democracies by ordering legally liable defendants to pay money to their victims in recognition of these harms.

Despite this basic similarity among nations, the U.S. regime in most states is enormously more generous than other legal systems in the amounts it awards for pain and suffering. In some American states, gravely injured plaintiffs can win millions of dollars of such damages from their defendants. These sums are unheard of elsewhere. Indeed, as shown below, for the same injuries, typical American awards are often more than ten times as much as those awarded in even the most generous of the other nations.

Some critics of the American common law of personal injury damages have long objected that the sums we award for pain and suffering

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are inappropriately large.[1] In recent years, several American states have bluntly responded by putting a cap on the amount of pain and suffering damages that a single plaintiff obtains (e.g., $250,000).[2] Usually, these caps require trial judges to wipe out any amounts that juries award above the allowable maximum. As a result of these statutory changes, U.S. law on pain and suffering awards now varies considerably from jurisdiction to jurisdiction—at least for those with more serious injuries who are affected by these caps. Several other wealthy nations have also put a limit on awards for pain and suffering, although their solution, as explained below, is actually quite different from ours.

Some critics of the American regime object to the uneven nature of our awards.[3] As they see it, different juries award those with similar injuries very different sums for reasons other than the inherent justice of their claims. Critics point out that our juries ordinarily learn nothing of what other juries previously awarded in similar cases, and so they are probably importantly influenced by their own experience, the talents of the lawyers in the case before them, their empathy for the victim or dislike of the defendant, and so on. To be sure, most American tort claims are settled without a trial, and lawyers on both sides are generally familiar with outcomes of prior trials and settlements. Hence, all things equal, we would expect U.S. settlements to have less variability than trial outcomes. Even so, practitioners with experience bargaining in the "shadow of the law" are well aware that the amount claimants can obtain in settlement may depend on variables such as

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1. *See* 2 AM. LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 199 (1991). *See generally* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1953); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989); Jeffrey O'Connell & Rita James Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L.F. 1.

2. A reasonably up to date list of state reforms may be found on the website of the American Tort Reform Association (ATRA), http://www.atra.org/show/7340 (last visited Sept. 15, 2005) [hereinafter ATRA site].

3. *See generally* Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. REV. 908, 924–27 (1989); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 768–69 (1995); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 313–17 (1998); Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303, 307–11 (1989); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997, 997–99 (1990); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203 (1988).

whether the case would be tried in an urban or rural area of the same state, or how the plaintiff is likely to be viewed by the jury.

I briefly explore here how several nations have been able to assure greater consistency in their pain and suffering awards. When contrasting the United States with other nations on this dimension, it should be remembered that these days we are largely alone in relying heavily on jury trials in personal injury cases. Yet, American states could adapt other nations' consistency-promoting strategies to our jury-based scheme if they wished.

Notwithstanding the success of many other countries in achieving less internal variability in awards than we have, it should not be assumed that other Western legal systems generally have similar award levels. To the contrary, I will also show that other nations vary enormously in the amounts they generally award for pain and suffering for similar injuries. This nation-to-nation variation has nothing to do with juries, however, and presumably arises from different national values.

In comparing the United States with other nations, it is also important not to forget the different ways in which lawyers are compensated. Outside the United States, a "loser pays" rule generally applies.[4] This means that a liable defendant pays the plaintiff's legal expenses. American victims, by contrast, have to cover their legal expenses out of their awards. Attorney fees are generally set by contract as a percentage of the recovery, frequently thirty-three percent. Although this means that the legal fee is assessed against the entire award, I believe it is fair to assume that, as a psychological matter, U.S. claimants understand that the burden of attorneys' fees and related costs comes first from their pain and suffering awards. And the question for claimants is how much money, if any, is actually going to be left for them for pain and suffering. That is, how much will they net beyond what they are receiving for out-of-pocket losses like medical expenses and lost income?

My findings, shown below, demonstrate that, because of this difference in the payment of lawyers, those victims with relatively high awards for out-of-pocket losses may well find themselves no longer advantaged by the American regime of large payments nominally intended for pain and suffering. Instead, American lawyers are often the main beneficiaries.

My findings also show that the obligation in the United States to pay one's own lawyer additionally means that the caps on pain and

4. For a comparison between the U.S. rule and the rules elsewhere, see JOHN G. FLEMING, THE AMERICAN TORT PROCESS 187–234 (1988).

suffering awards that are typically proposed and enacted in the United States will often leave seriously injured American tort victims worse off than their counterparts in many other wealthy nations.

II. THE EUROPEAN PICTURE

In this part, after explaining where I obtained the data upon which I base my analysis, two broad themes are explored. The first, which I call "vertical equity," considers the extent to which European countries similarly view the relative seriousness of various injuries. For example, do they consistently treat losing an arm with the same gravity ratio (for example, fifty percent as grave) relative to becoming blind? I term the second theme a matter of "horizontal equity." There I examine the degree to which awards differ from one European nation to another for the same sort of injury, such as losing a leg.

A. Data Sources

I have not gathered primary data about European awards for pain and suffering. Instead, I rely upon the work of others who have explored this issue, and most importantly on *Personal Injury Awards in EU and EFTA Countries*, which contains reports from experts from twenty nations.[5] This compilation, edited by David McIntosh and Marjorie Holmes, is the third edition of the same project, the other two having been published in 1991 and 1994. This volume generally reports data from 2000 (although there is modest variation from nation to nation).

In the McIntosh and Holmes study, expert lawyers were told to imagine two different tort victims who were not at all at fault in causing their own injuries—a married male doctor, age forty, with two children, and an unmarried female legal secretary, age twenty, with no dependents. The experts were to then assume that the victims suffered fifteen alternative injuries, ranging from instant death to repetitive strain. They were then instructed to report how much money these victims would likely recover in tort for each of the injuries. In predicting the overall amount of recovery, the reporters were also told to indicate separately how much of that amount would likely be awarded for pain and suffering, and those are the numbers that I concentrate on here.[6]

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5. PERSONAL INJURY AWARDS IN EU AND EFTA COUNTRIES (David McIntosh & Marjorie Holmes eds., 2003) [hereinafter PERSONAL INJURY AWARDS].

6. A somewhat similar strategy of the hypothetical case was employed in a different comparison of European tort law. *See* COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE (Bernhard A. Koch & Helmut Koziol eds., 2003). This project did, however, generate

I put aside the experts' reports on total compensation and its component parts other than pain and suffering. I concede that it is possible that cross-nation comparisons of pain and suffering are flawed because in some nations the amount awarded for pain and suffering could depend on what is included or excluded in the other categories of compensation. But, based upon advice I have received from European law scholars, I do not believe this is important for purposes of this Article.

I also recognize (as do the study directors) that the experts' numbers used in the McIntosh and Holmes project might be in error. A few of the national reports rely on a team of experts in order to arrive at the numbers they submitted, and that may help improve the reliability of the reporting. Yet, in most of the reporting nations, one person alone provided the sum. As shown in Table 8, below, for most nations, a precise figure was reported, whereas a modest range (usually less than a thirty percent range) was reported for a few of the nations (primarily for Ireland, Germany, and the Netherlands). As a general matter, it is difficult to know whether to take more comfort in precision. A range might reflect sensible uncertainty, or perhaps a keen awareness of variation among similar cases (perhaps from place to place around the country or perhaps in other ways). A single number might convey a false precision.

In any event, the reliability of the national reports is likely to depend on other differences among the countries. In Germany, for example, there are very good compilations of primary data on personal injury awards for all sorts of different harms.[7] Hence, to the extent that the hypothetical injuries in the study parallel injury types contained in these compilations, the German reporters would be expected to be quite confident about their replies. In nations without such compilations, the task of the expert in providing a reliable report would be harder.

Indeed, in connection with the first version of this project, the experts from Italy pressed the study directors to provide a number reflecting the percent disabled they should assign to each of the injuries that they were to convert into predicted damage awards, and the directors complied. The directors based the percentages on how they

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the sort of detailed information by which comparisons can be made of the sort presented here. For an earlier effort to compare European awards using several hypothetical cases, see PAUL SZÖLLÖSY, COMPENSATION FOR PERSONAL INJURY IN EUROPE (1992); Paul Szöllösy, *Recent Trends in the Standard of Compensation for Personal Injury in a European Context*, 3 NORDISK FORSIKRINGSTIDSSKRIFT 191 (1991).

7. *See, e.g.*, ALLGEMEINER DEUTSCHER AUTOMOBIL-CLUB (ADAC), SCHMERZENSGELD-BETRÄGE (Susanne Hacks et al. eds., 17th ed. 2001) [hereinafter ADAC].

believed the English Department of Social Services would rate each disability in connection with the award of workers' compensation benefits (although the directors also instructed reporters to base their estimates on different percentages if other numbers were used in their own nation).[8]

And finally, because of the way the Spanish data is reported, clearly separate sums for noneconomic loss are not readily identifiable, and hence in this Article I have ignored the Spanish data and include results from only nineteen of the twenty nations in the McIntosh and Holmes project.

As I have explained, the McIntosh and Holmes study on which I primarily rely is based on expert predictions about hypothetical cases. As a check on their reliability, I have compared these predictions against some results in actual cases, relying for that purpose, among other things, on two other helpful volumes.[9] Based on those comparisons, I have concluded that the McIntosh and Holmes expert valuations are reasonably reliable. McIntosh and Holmes have also done some cross-checking and, while they realize that individual results in real cases are likely to vary from the numbers they provide, they too are reasonably confident that their study reports broadly accurate estimates.[10] I should also add that it appears that the McIntosh and Holmes experts saw it as their job to report how much the hypothetical victims would obtain in court, rather than in settlement, although, based on informal conversations with European lawyers, I have a sense that the settlement discount is much less there than in the United States.

Moreover, for my purposes, even fairly large errors in the numbers reported by McIntosh and Holmes are not terribly important because my attention is primarily on gross differences, both among the reporting nations and as between them and the United States. Before discussing the results of the McIntosh and Holmes project, I should make clear that this effort says nothing about the frequency of litigation for similar accidents and similar harms from nation to nation.[11] Nor do I

8. PERSONAL INJURY AWARDS, *supra* note 5, at 2.

9. *See* DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE (W.V. Horton Rogers ed., 2001); THE JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (6th ed. 2002 & 7th ed. 2004) (reporting detailed results for specific injuries from England and Wales).

10. *See* PERSONAL INJURY AWARDS, *supra* note 5, at 3.

11. For a general discussion of lawsuit frequency from country to country, see Erhard Blankenburg, *Civil Litigation Rates as Indicators for Legal Cultures*, *in* COMPARING LEGAL CULTURES 41 (David Nelken ed., 1997). For more general information comparing the personal injury law schemes throughout Europe (and elsewhere), see INTERNATIONAL PERSONAL INJURY COMPEN-

directly concern myself with the availability of alternative compensation schemes in the countries, the existence of which could be an important factor in litigation rates.

B. Results

My analysis focuses on six of the fifteen hypothetical injuries covered in the McIntosh and Holmes survey: quadriplegia, total blindness, deafness, amputation of an arm above the elbow, amputation of a leg above the knee, and facial burns. Intuitively, these seemed to reflect a diverse range of reasonably distinct harms. To be sure, the actual pain and suffering of any individual could easily vary because of the imprecision of the descriptions used in the study. For example, was the amputated arm the person's writing arm? Precisely how bad were the facial burns? Had the person who lost a leg been an avid skier? Nonetheless, as already noted, for the most part, the expert reporters had little trouble specifying a single sum as the amount likely to be awarded in their country for pain and suffering for each of the hypothetical injuries.

1. Basic Data

TABLE 1
PREDICTED AWARDS FOR PAIN AND SUFFERING IN THE MEDIAN NATION BY TYPE OF INJURY AMONG NINETEEN EUROPEAN NATIONS (€1000s)

Quadriplegia	92
Blindness	65
Leg Amputation	41
Arm Amputation	38
Deafness	31
Facial Burns	14

Table 1 shows the predicted median award (in euros) for pain and suffering for the hypothetical doctor suffering each of the six injuries I explore (i.e., the nation whose predicted award for that injury ranked tenth among the nineteen examined here). For example, what might be termed the "typical" European pain and suffering award is €38,000 for the loss of an arm, €65,000 for blindness, and so on. Shortly, I will present the range of these awards for the nineteen nations and then compare them with U.S. data. This section presents some data relevant to the question of whether there is general agree-

SATION (Dennis Campbell ed., 1996); PERSONAL INJURY COMPENSATION IN EUROPE (Marco Bona & Philip Mead eds., 2003).

ment among European nations (as reflected by the expert reports) as to the relative seriousness of these six injuries.

2. *Relative Seriousness of the Various Injuries ("Vertical Equity" Within Europe)*

Do the nineteen reporting nations broadly agree on which injuries deserve more money for pain and suffering and which deserve less? And, if so, do they broadly agree as to what should be the relative size of the awards for each of these harms? This inquiry can be viewed as a matter of "vertical equity."

I calculated a "relative-seriousness" rating for the six injuries for each nation by determining what percentage each predicted award amount is of the largest predicted award for that nation. (Where a range of predicted recovery was supplied, I used the middle of the range.) Table 2 displays the results for the nineteen countries for the injured doctor case. This table allows the viewer to see not only the ordering of the injuries for each nation, but also the range between the injuries in each nation.

TABLE 2
NATIONAL AWARD PROPORTION FOR EACH INJURY AS A PERCENTAGE OF HIGHEST PREDICTED FOR EACH NATION

	Facial Burn	Deaf	Arm Loss	Leg Loss	Blindness	Quadriplegia
Austria	11	30	34	44	46	100
Belgium	23	58	54	56	73	100
Denmark	21	59	59	59	100	72
England	37	32	37	37	70	100
Finland	18	52	58	41	100	100
France	8	31	58	41	100	100
Germany	13	13	13	15	25	100
Greece	29	35	47	47	100	100
Iceland	21	42	53	44	100	100
Ireland	32	39	67	67	94	100
Italy	8	52	20	20	90	100
Liechtenstein	14	30	34	45	46	100
Luxembourg	26	100	41	51	96	85
Netherlands	12	29	32	37	58	100
Norway	11	40	28	28	100	100
Portugal	10	70	60	60	90	100
Scotland	19	14	42	42	77	100
Sweden	7	44	44	32	88	100
Switzerland	10	65	50	50	99	100

Table 2 indicates that in most countries, quadriplegia and blindness are considered most serious and facial burns as least serious. Report-

ers for twelve countries predicted the highest pain and suffering award for quadriplegia, one predicted the highest pain and suffering award for blindness, and five predicted essentially equal awards for both. (One reporter ranked deafness ahead of both blindness and quadriplegia.) At the other end, seventeen of the nineteen national reports predicted the lowest pain and suffering award for facial burns. Among the other three injuries—deafness, loss of an arm, and loss of a leg—there was no clear rank ordering. Overall, it seems fair to say that all three of those injuries were treated as likely to attract roughly the same awards by most reporters, although the data provided by the reporters is least consistent with respect to deafness.

In comparing the predicted awards of the secretary with those predicted for the doctor, I found that in six of the countries there was little or no difference in the sums, regardless of the injury.[12] In eight of the countries, the awards predicted for the secretary were modestly higher for most or all injuries. I will assume that, in these nations, age is taken into account in determining the amount of pain and suffering and the extra sum for the secretary basically reflects that she is fifteen years younger in the hypothetical and so has more years ahead of her to live with her disability.

The differences between the predicted awards for the doctor and the secretary are harder to understand for the remaining countries. In Belgium, for example, the secretary was predicted to receive more than the doctor only for facial burns. Perhaps this discrepancy reflects an assumption that, as a young, unmarried woman, this disfigurement was seen as more painful to her than to him, even when blindness would not be. More difficult to understand is the report from Switzerland, for example, where both deafness and facial burns were predicted to yield higher pain and suffering awards to the secretary, even though loss of limbs, blindness, and quadriplegia were not. Given what are relatively modest differences in predicted outcomes for both victims, the data I present here is drawn only from the numbers predicted for the doctor case.

TABLE 3
EUROPEAN "VERTICAL EQUITY": MEDIAN NATION AWARD PROPORTIONS (%) (FROM TABLE 2)

Quadriplegia	100	Arm	44
Blindness	90	Deafness	40
Leg	44	Facial Burns	14

12. The data for the secretary is not shown here, but is available from the author.

Drawing on the data from Table 2, Table 3 presents the median nation's percentage for each of the six injuries. To be clear, Table 3 shows that the median nation—the one with the tenth highest proportion of the nineteen reporting—was expected to award forty-four percent as much in pain and suffering for a leg amputation as compared with what the median was expected to award for whatever it viewed as the most serious injury of the six. Hence, Table 3 presents a rough, comparative measure of the European-wide average seriousness of the six injuries.

TABLE 4
EUROPEAN "VERTICAL EQUITY": PRESUMPTIVE DISABILITY PERCENTAGES PROVIDED BY THE STUDY DIRECTORS

Quadriplegia	100
Blindness	100
Deafness	50
Leg Amputation	35
Arm Amputation	30
Facial Burns	Up to 20

Recall, at the request of the Italian team, the study directors previously provided percent-disabled figures for each of the hypothetical injuries. Table 4 presents those numbers. Comparing them with the numbers calculated and presented in Table 3, one sees a reasonably close fit between the median nation data and the study director's estimates of percent-disabled. (To be sure, for some reporters, the study directors' percent-disabled message may have been too influential, thereby contributing to a similarity between the rankings on the two tables.)

TABLE 5
EUROPEAN "VERTICAL EQUITY": RANGE OF AWARD PROPORTIONS (%) FOR FIFTEEN (OF NINETEEN) MIDDLE-RANKING NATIONS

Quadriplegia	85–100
Blindness	46–100
Deafness	29–65
Leg	28–60
Arm	28–59
Burns	10–26

Averages can be deceiving. Table 5 draws together data from Table 2 by showing a restricted range of the percentages calculated for each injury. For this illustration, I have eliminated the two nations at both extremes. But even for the middle fifteen nations, Table 5 shows a

range of percentages of at least a two-to-one ratio for the five injuries generally rated less serious than quadriplegia.

To illustrate this point with a few examples (drawn from Table 2), the Netherlands reporter predicts an award for deafness at twenty-nine percent of the award in the Netherlands for quadriplegia, whereas in Switzerland the deafness award is sixty-five percent of quadriplegia. In the same vein, the predicted arm loss award in Norway is twenty-eight percent of the quadriplegia award, whereas in Denmark it is fifty-nine percent. Moving to blindness, the pain and suffering award in Austria is predicted to be only forty-six percent of the quadriplegia award, whereas in several nations it is equal to the quadriplegia award.

In short, looked at in this latter way, I see considerable variation from country to country in its assessment of the relative seriousness of the six injuries.

3. *Awards From Country to Country ("Horizontal Equity" Within Europe)*

"Horizontal equity" refers to the extent to which victims with the same injuries are awarded the same sums for pain and suffering. The nineteen-nation survey provides little useful information on this question with respect to intra-national differences. As noted, most reporters offer a single sum for each injury, and only a few provide a range. Moreover, as earlier suggested, those providing a range of recovery may well be saying only that there are different sorts of cases captured by these broad injury titles. Greater attention will be given below to intra-national consistency.[13]

But these nineteen-nation reports do permit the examination of horizontal equity by making inter-national comparisons *across nations* for the same injury. Of course, there may be quite understandable reasons why different nations would award different sums for the exact same injury, reflecting different values that different legal systems seek to advance with pain and suffering awards. Nonetheless, in preparing to make a comparison with the United States, this inquiry allows us to consider how uniformly Europeans approach the issue.

13. Professor Giovanni Comandé elsewhere reports that, within Italy, different jurisdictions assign different multipliers to what are in effect the same tables, thereby awarding different sums for pain and suffering for the same injury based on the location of the trial. Giovanni Comandé, Non-Pecuniary Damages for Personal Injury in Europe and the U.S.A.: A Proposal for Judicial Scheduling Models (unpublished article, on file with author).

TABLE 6
NATIONAL RANKINGS (ONE TO NINETEEN) BY AMOUNT OF AWARD BY INJURY AND OVERALL AVERAGE

	Burns	Deaf	Arm	Leg	Blind	Quad	Average
Ireland	1	4	1	1	1	1	1.5
England	2	5	3	3	3	3	3
Belgium	3	3	2	2	5	6	3.5
Italy	7	2	7	10	2	4	5
Luxembourg	6	1	5	5	6	9	5
Scotland	4	17	3	3	4	5	6
Germany	5	9	12	11	10	2	8
Netherlands	10	7	9	8	9	7	8
Liechtenstein	8	8	8	7	13	8	9
Iceland	9	12	10	12	8	13	11
Austria	12	15	11	9	15	10	12
Finland	11	10	13	14	11	14	12
France	15	14	6	6	18	11	13
Switzerland	17	6	14	13	12	16	13
Norway	13	13	18	16	7	12	13
Portugal	18	11	15	17	16	17	16
Denmark	14	18	17	15	17	18	17
Sweden	19	16	16	18	14	15	17
Greece	16	19	19	19	19	19	19

Before turning to the detailed monetary figures that the reporters predicted would be awarded for various injuries under their nation's legal system, Table 6 presents the relative rank of each nation in terms of how much money its reporter predicts would be provided in pain and suffering damages to the hypothetical doctor for each of the six injuries. For example, a "six" under burns means that the amount of this nation's pain and suffering award for burns was the sixth highest of the nineteen, whereas a "thirteen" under burns means that this nation's award for burns was thirteenth highest.

Not surprisingly, no nation shows exactly the same rank for all injuries. Nonetheless, some patterns emerge. Looking at both their average rank and their individual scores, it appears that all but one of the nineteen nations falls reasonably easily into one of four subgroups.

Six "Group One" nations—Ireland, England, Scotland, Belgium, Luxembourg, and Italy—represent the most generous countries in terms of pain and suffering awards. Nearly all of their comparative numbers are seven or less. At the other end, four "Group Four" nations—Greece, Portugal, Sweden, and Denmark—represent the least generous countries. Nearly all of their comparative numbers are fourteen or more.

Five "Group Three" nations—Finland, Iceland, Switzerland, Austria, and Norway—have reasonably similar numbers that put this

group somewhat above the least generous group. Three "Group Two" nations—Germany, Netherlands, and Liechtenstein—appear clustered somewhat below Group One in terms of generosity. France, with such varied numbers shown in Table 6, resists categorization.

Although I will not make too much of it here, there are national characteristics (or some might say, stereotypes) that one might associate with these groups. At the least generous end (Groups Three and Four) we find that:

- two relatively poor nations among the nineteen (Greece and Portugal) perhaps simply cannot afford the more generous awards paid elsewhere in Europe;[14]
- five Scandinavian nations (Sweden, Denmark, Norway, Iceland, and Finland) are well known for having strong social welfare programs, and that may cause these countries to favor putting national resources into their more collective schemes instead of individualized tort law recoveries; and[15]
- two Germanic nations (Switzerland and Austria), whose citizens I think of as being relatively "tough," might translate that characteristic into relatively lower monetary awards.

At the more generous end (Groups One and Two) we find that:

- three common-law nations (England, Scotland, and Ireland) not only have a historic tradition of jury-based awards that may influence today's award levels, but also the common-law experience might translate into a more individualized sense of corrective justice; and
- four highly Catholic states (Belgium, Luxembourg, and Italy—plus Ireland, as well) are relatively more generous for reasons that are not at all clear to me—although one European colleague suggested to me that it is possible that Catholics may pity victims more than Protestants who may be more stoic.

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14. *See* World Bank Group, http://www.worldbank.org/depweb/english/modules/economic/gnp/dataeuro.html (last visited Nov. 10, 2005) (revealing that Greece and Portugal have a fairly low gross national product (GNP) per capita ($11,740 and $10,670 respectively), while other countries such as Germany, Switzerland, and Austria each have a GNP of $26,570, $39,980 and $26,830 respectively).

15. *See* COLUMBIA ENCYCLOPEDIA (6th ed. 2005), *available at* www.bartleby.com/65/so/socwelf/html (indicating that "[n]ot all governments have equally extensive social welfare systems. Great Britain and the Scandinavian countries, often termed 'welfare states,' have wide-ranging social welfare legislation").

TABLE 7
EUROPEAN "HORIZONTAL EQUITY" AMONG THE NINETEEN NATIONS, MEDIAN NATION AND RANGE OF NATIONAL AWARDS FOR PAIN AND SUFFERING BY TYPE OF INJURY (IN €1000s)

	Median	Range
Quadriplegia	92	15–250
Blindness	65	22–235
Leg Amputation	41	10–166
Arm Amputation	38	10–166
Deafness	31	7–124
Facial Burns	14	4–80

Turning now to actual monetary figures, Table 7 shows the full range of predicted pain and suffering awards for each of the six injuries for the nineteen reporting nations. The extremes of the range are very substantial. Notice that for each of the six harms, the most generous system is predicted to award *more than ten times* what is paid by the least generous system. Table 7 also repeats the data from Table 1, showing the award for each injury for the median nation. Those data reveal that the extremes vary substantially in both directions from what I am terming the typical award.

For those wishing to see the fuller data set, I present in Table 8 detailed monetary figures for each nation for each assumed injury in the doctor's case.

TABLE 8
NINETEEN-NATION DATA: PAIN AND SUFFERING AWARDS BY TYPE OF INJURY (IN EUROS)

	Burns (face)	Deafness	Amputation arm (above elbow)	Amputation leg (above knee)	Total Blindness	Quadriplegia
Austria	6980-12692	27286	31729	41247	41882	92013
Belgium	41206	101400	94827	98839	128128	175217
Denmark	7971	22037	22037	22037	37100	18521-34932
England/Wales	79750	68875	79750	79750	152250	217500
Finland	10689	31004	29400	24586	59881	59881
France	7324	27296	50596	59917	29958	86548
Germany	22308-44615	31230-33462	26770-35692	33462-40153	58000-71385	178462-312308
Greece	5124-7688	7688	10250	10250	21780	15374
Iceland	14992	29983	37978	31983	71961	71961
Ireland	66483-94083	83085-110687	166031	166031	221374-249046	221374-276718
Italy	15785-15883	104877	40899	40899	178805	199671
Liechtenstein	15699	33751	39246	51018	51804	113812
Luxembourg	32437	124986	50894	63403	120749	106233
Netherlands	13866	29713-39617	29713-47541	39617-49522	59427-79235	19235-158471
Norway	8135	29022	20897	20897	73126	73126
Portugal	4356	30489	26132	26132	39199	43555
Scotland	36250	26100	79750	79750	130500	188500
Sweden	1241-6634	26536	25967	19144	51366	58758
Switzerland	5732	37252	28656	28656	57313	57313

C. European Conclusion

Based on the data reported here, these nineteen European nations tend to rank fairly similarly the "relative-seriousness" of the six injuries. Nonetheless, there are some noticeable differences in national perceptions of relative-seriousness of the six injuries. But this modest amount of vertical inequity is dwarfed by a much higher level of horizontal inequity. Simply put, European nations are predicted to award vastly different amounts for pain and suffering damages to victims with the same injury. While the cause of these differences exceeds the scope of this article, it is at least clear that the legal awards for pain and suffering across Europe are enormously varied from country to country.

III. THE U.S. PICTURE

This section presents American data on pain and suffering awards to victims who suffered broadly similar injuries to the six injuries discussed in Section II.

A. Data Sources

The American data is from the results of both actual trials and settlements (although, so far as we could tell, none of the reported results was reduced in amount because of a statutory cap on pain and suffering awards). These data come primarily from James P. Munger, *What's It Worth: A Guide to Current Personal Injury Awards and Settlements*, and Jacob A. Stein, *Stein on Personal Injury Damages*.[16] There are good reasons not to treat these data as precisely capturing typical American awards. On the other hand, there are good reasons to view them as being roughly in the ballpark in terms of what American tort victims with these sorts of injuries might expect to recover.

It is important to remember that a victim will often suffer multiple injuries, and we have sought to exclude those cases. Thus, as best we can determine, the U.S. outcomes here reflect awards for victims with a single basic harm. Most of the American data we draw on here includes information on both the amount of pain and suffering damages awarded and the total amount awarded, although there are some incomplete reports.

Nonetheless, I appreciate that the cases we found are neither a complete nor random sample of all the cases in which victims recov-

16. *See* JAMES P. MUNGER, WHAT'S IT WORTH: A GUIDE TO CURRENT PERSONAL INJURY AWARDS AND SETTLEMENTS (2004); JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES (3d ed. 2003).

ered at trial for the harms we examined. Hence, there is reason to be concerned that the data sources we relied upon exaggerate recovery levels because they may not include a representative share of the cases in which a lower recovery was obtained. It is also fair to assume that settled cases (which are most cases, after all) on average result in lower recovery than tried cases, and I would be willing to assume a discount of one-third.

Still, as will become clear in the analysis, it would appear that all of my basic points would follow even were the numbers reported here twice as much as (or even more than) the typical results in the real world.

B. Pain and Suffering Awards for Broadly Similar Injuries to Those in the European Study

1. Quadriplegia

Research revealed seventeen reported awards in quadriplegia cases from a wide range of U.S. jurisdictions from the years 1986–2003, with most of the cases coming from years fairly close to 2000. Of these, the pain and suffering portion has been separately identified in twelve of them.

TABLE 9
U.S. "HORIZONTAL EQUITY": PAIN AND SUFFERING AWARDS IN TWELVE QUADRIPLEGIA CASES (IN $ MILLIONS)

1.0
1.5
2.0
2.5
3.0
3.4
Median
3.5
4.0
4.6
4.9
6.0
6.0

As shown on Table 9, the median pain and suffering award was just under $3.5 million. As the awards ranged from one million to six million dollars, the highest award was six times that of the lowest award.[17]

17. The level of these U.S. quadriplegia awards does not generally decrease with age (data on file with the author). Indeed, the average award for those ages twenty to thirty is slightly higher

2. *Leg Amputation*

We identified twenty-six U.S. leg amputation cases from 1983 through 2003 (again with most of the cases coming from years fairly close to 2000), and we have separate amounts for the pain and suffering awards in seventeen of them. Of these, only four involved amputation of one leg above the knee—the facts of the European hypothetical discussed earlier.

TABLE 10
U.S. "HORIZONTAL EQUITY": PAIN AND SUFFERING AWARDS IN SEVENTEEN LEG AMPUTATION CASES (IN $ MILLIONS)

• Above the Knee:	0.400, 4.000, 5.600, 7.500
• Both Legs:	0.1500, 6.000
• One Leg Below the Knee:	0.150, 0.200, 0.400, 0.490, 0.500, 0.615, 1.000, 1.550, 1.750, 5.580, 9.750

The results for all seventeen cases are shown in Table 10. For the four above-the-knee amputation cases, the range of the pain and suffering awards was huge. Two cases involved loss of both legs and the pain and suffering awards in those cases were also radically different. Most of the cases we uncovered involved an amputation at or below the knee of one leg. These awards also varied enormously, with the largest recovery more than sixty times that of the smallest. The median of all seventeen of the awards for pain and suffering was one million dollars.[18]

3. *Blindness*

TABLE 11
U.S. "HORIZONTAL EQUITY": PAIN AND SUFFERING AWARDS IN ELEVEN BLINDNESS CASES (IN $ MILLIONS)

• Both eyes:	4.400, 4.500, 5.000
• One eye:	0.245, 0.300, 0.500, 0.500, 0.800, 1.500, 5.600

We identified only six reasonably recent U.S. cases of total blindness, and the awards separated pain and suffering for only three of them. Table 11 shows that in those cases, amounts of $4.4 million, $4.5 million, and $5.0 million were awarded for pain and suffering.

than the average award for those under age twenty. In general, there is little variation on average by decade of life.

18. Unlike the case of quadriplegia, for the leg amputation cases there is a reasonably strong connection with age (data on file with the author). The highest of the five awards made to those over fifty was $615,000, whereas all seven of the awards over one million dollars, where we know the age, were made to those under age fifty.

Thirteen fairly recent U.S. cases were identified in which one eye was blinded and, of these, pain and suffering awards were separated out in eight. For those eight cases, as shown in Table 11, pain and suffering awards ranged from $245,000 to $5,600,000, a ratio of more than twenty to one.

4. *Arm and Finger Loss*

TABLE 12
U.S. "HORIZONTAL EQUITY": PAIN AND SUFFERING AWARDS (IN $1000s)

Seven Finger-Loss Cases (P&S in $1000s)	20, 50, 100, 137, 400, 569, 850
Five Arm-Loss Cases (P&S in $1000s)	700, 1470, 1500, 2454 (various types)

To provide something of a contrast with lost arm cases, we identified eight recent U.S. cases of a lost finger, with pain and suffering awards separated out for seven of them. As shown in Table 12, those seven awards ranged from $20,000 to $850,000 with a median of $137,000.

We also identified five arm amputation cases (see Table 12), two below the elbow and one involving the loss of both arms. Because of the low numbers of cases and their variety, perhaps not much should be made of these awards, although the median pain and suffering award for them was $1,500,000.

5. *Vertical Equity in the United States*

Because of the limited data, I am reluctant to draw too strong conclusions about comparing the relative ranking of the injuries examined in the United States with the European picture. Let me simply report that (as shown in the prior tables) the median awards for quadriplegia, loss of an arm (all types), loss of a leg (all types), and loss of a finger, were $3.5 million, $1.5 million, $1 million, and $137,000, respectively. The very few total blindness cases averaged $4.5 million (with $500,000 as the median award for the loss of one eye). Generally speaking, then, the median awards for quadriplegia, leg loss, and arm loss in the United States suggest a congruence with European awards, as described above, in terms of their relative seriousness. With respect to total blindness, just as a few European nations treated it as or more serious than quadriplegia, the limited U.S. data suggests something of the same thing here.

6. Ratio of High Versus Low American Awards for Types of Loss

TABLE 13
U.S. "HORIZONTAL EQUITY": U.S. RATIOS OF FULL RANGE OF PAIN AND SUFFERING AWARDS BY TYPE OF INJURY

Finger	42/1
Arm	3.5/1
One Eye	23/1
Leg	65/1
Quadriplegia	6/1

Table 13 presents the ratio of the high and low awards identified for the various injuries on which we are focusing in the U.S. data. What these numbers show is that, like variations in awards from European nation to nation, American awards can vary enormously from case to case. I want particularly to emphasize that we found ratios of more than twenty to one for several of the injuries.

Because state law caps do not appear to have been involved in these cases, it is not likely the case that the formal common law of damages varied importantly from state to state for these cases. Therefore, judges probably give roughly similar jury instructions on pain and suffering awards in most places. Still, variations in results from case to case could be the product of evidentiary and other rules that differ from place to place as to what lawyers are permitted to argue (for example in their closing arguments) and introduce as evidence (such as to what the daily life of the victim is now like). I believe it is more likely, however, that these widely varying results are more importantly a reflection of what I noted at the start—the American regime of pain and suffering awards makes no use of precedent, and so the amount awarded in each case typically reflects what a single jury concluded would be fair from everything it learned and considered on this occasion.

IV. AMERICAN-EUROPEAN COMPARISONS

TABLE 14
CROSS-NATIONAL AWARD SIZE COMPARISON COMPARING U.S. MEDIAN PAIN AND SUFFERING AWARDS WITH EUROPEAN AWARDS

	U.S. Medians in $1000s	U.S. Medians in €1000s (approx.)	European Medians €1000s	European Range €1000s
Finger	137	100	–	–
Arm	–	–	38	10–166
Leg	1000	750	41	10–166
One Eye	500	375	–	–
Blindness	4500	3375	65	22–235
Quadriplegia	3400	2550	92	15–250
(€1 = $1.333)				

Having provided separate data as to award levels for the different legal systems, this section turns to American-European comparisons. Drawing on the prior tables, Table 14 first displays median U.S. pain and suffering awards in both dollars and euros for the type of injuries examined.[19] Then, Table 14 displays what I earlier termed the typical European nation award, plus the full range of predicted European nation awards.

The most important point these numbers show is that the amounts awarded for pain and suffering in the American cases we examined are vastly greater than the predicted awards in Europe. This is true when looking at averages as well as the full range of European awards. Indeed, these data show that the U.S. median awards are enormously larger than the highest predicted awards for similar injuries in Europe, notwithstanding the great diversity of award levels throughout Europe.

More specifically, the median pain and suffering award in the United States for quadriplegia was more than twenty-five times greater than the predicted award for quadriplegia in the median European nation and more than ten times the highest predicted European award.

For loss of a leg, the median American award, even taking into account a wider range of leg injuries including the perhaps lesser injury of a loss below the knee, was nearly twenty times the predicted award

19. I converted dollars to euros at the rate of $1.333 per euro. This is admittedly somewhat arbitrary, since the euro's value against the dollar has been quite volatile in the past few years, amounting to $1.22 per euro at the time this is written. The U.S. case reports are possibly, on average, somewhat newer than the European data, suggesting that taking account of a year or two of European inflation might be warranted. On balance, the figure appears to be sensible.

in the median European nation, and more than four times the highest predicted award. Indeed, the loss of a finger in the United States tends to generate almost three times the median European nation pain and suffering award for loss of an arm.

Loss of one eye in the United States tends to attract more for pain and suffering than does total blindness in Europe.

V. Taking Legal Expenses Into Account

From the data presented so far, it appears as though the United States is far more lavish than Europe when awarding pain and suffering damages. As noted at the outset, however, one must remember that, in Europe, losers in torts cases pay the legal fees and costs of winners. Therefore, the European pain and suffering awards represent what the victims (approximately) keep.

In the United States, by contrast, each side pays its own expenses. For purposes of this exercise, I am going to reduce the American plaintiff's total award by thirty-three percent to account for attorneys' fees and expenses. I view this as a conservative estimate. This is because, apart from special cases (e.g., those involving minors), it would be rare for the lawyer's fee itself to be less than thirty-three percent in a case that actually goes to trial (and often it would be forty percent). Moreover, litigation costs are typically increased by the ordinarily substantial out-of-pocket expenses of litigation for expert witnesses, depositions, investigations, and the like. On the other hand, I concede that cases that are settled relatively quickly typically require considerably fewer expenses and generally involve a lower fee for the successful lawyer (say, twenty-five percent).

As I explained earlier, fees and costs in the United States are not assessed against any specific portion of the recovery, but against the total recovery. Nonetheless, it seems sensible to assume that the fees and costs are best understood by the victim as coming (first) out of the pain and suffering award. After all, if the victim pays the fees and costs out of the portion of the recovery that is based on lost income or medical expenses, then those economic losses will not be fully compensated (although admittedly, in the United States, a substantial share of the economic loss awarded in cases of serious harm is likely to be based on often uncertain projections as to future medical expenses and wage losses).

Once the matter of legal expenses is taken into account, American-European comparisons become more complicated to make. This is because the net position of American victims is strongly influenced by the relative share of the total award that is meant for pain and suffer-

ing. This is made especially vivid when comparing leg amputations with quadriplegia.

TABLE 15
WHAT IS LEFT FOR VICTIM PAIN AND SUFFERING AFTER TAKING LEGAL FEES INTO ACCOUNT: U.S. LEG AMPUTATION AWARDS

P&S Amount ($1000s)	Total Award ($1000s)	P&S % of Total	P&S left (minus 33% for legal expenses) ($1000s)	P&S left (€1000s)
150	500	30	(20)	(15)
200	1442	14	(280)	(210)
150	400	38	20	15
400	435	92	250	190
452	633	71	240	180
490	573	86	300	225
500	734	68	260	195
615	716	86	380	285
1000	1500	67	500	375
1550	2420	64	740	555
1750	4493	39	250	190
4000	7568	53	1480	1110
5580	6343	88	1890	1420
5600	7670	73	3040	2280
6000	7497	80	3500	2625
7500	7510	100	5000	3750
9750	11426	85	5940	4460

For the seventeen leg amputation cases (of all types) presented earlier, there is data available on both the total amount of the award and the share of that awarded for pain and suffering. These data (in dollars) are shown in the first two columns of Table 15. The third column shows what share (percentage) of the total award was for pain and suffering, and one can see that it was more than sixty percent of the award in thirteen of the seventeen cases, and more than thirty-three percent in all but two cases. The upshot is that, in all but those two cases, the U.S. victim winds up with some money left for pain and suffering after paying assumed legal expenses of thirty-three percent out of the pain and suffering award. Indeed, as the fourth column of Table 15 shows, fourteen of the seventeen victims are assumed to wind up with fairly substantial amounts for pain and suffering, ranging from $240,000 to nearly six million dollars.

Column five then converts these nét numbers to euros. Notice how much larger many of these numbers are than is the median European award (€41,000) or even the European maximum (€166,000) predicted for leg amputations above the knee.

On the other hand, looking more carefully at the data, note that three of the seventeen are actually worse off than they would be in the most generous European nation, seven are near or modestly above the European high end, and only seven are well beyond the European maximum, six of which are dramatically so. In sum, even taking legal expenses into account as done here, American leg amputation victims typically net at least as much for pain and suffering, and often enormously more, than everywhere in Europe.

Although not fully discussed in this Article, the cases found for blindness (whether in one or both eyes) and for amputation of a finger or an arm generally suggest a similar pattern.[20] That is, even after reducing awards for legal expenses, U.S. victims in these types of cases tend to have more—often enormously more—money left for pain and suffering than those who lose their sight or their arm in Europe.

By contrast, however, the pattern in the quadriplegia cases is very different as shown by Table 16.

TABLE 16
WHAT IS LEFT FOR VICTIM PAIN AND SUFFERING AFTER TAKING LEGAL FEES INTO ACCOUNT: U.S. QUADRIPLEGIA AWARDS

P&S Amount ($1000s)	Total Award ($1000s)	P&S % of Total	P&S left (minus 33% for legal expenses) ($1000s)	P&S left (€1000s)
1,000	3,950	25	(320)	(240)
1,500	19,100	8	(5370)	(4025)
2,000	7,345	27	(450)	(340)
2,500	7,872	32	(125)	(95)
3,000	8,972	33	10	10
3,400	6,670	51	1180	885
3,500	8,187	43	770	580
4,000	17,770	22	(1920)	(1440)
4,600	21,360	22	(2520)	(1890)
4,900	9,500	52	1730	1300
6,000	9,000	67	3000	2250
6,000	16,530	36	490	370

Patterned after the prior table on leg loss, Table 16 demonstrates that because the share of the award intended for pain and suffering is often smaller than thirty-three percent, many of the victims face legal expenses in excess (and often substantially in excess) of the amount awarded for pain and suffering. As revealed in column five, after paying their presumed legal expenses, seven of the twelve victims would

20. Data on file with author.

be worse off in the United States than in the typical European nation, where €92,000 was the predicted pain and suffering award. Most strikingly, three American victims have more than a million euros deficit in pain and suffering and would have to surrender a significant share of their award for out-of-pocket losses to their lawyer. On the other hand, because of the variability in the U.S. data, two victims still wind up with more than a million euros for pain and suffering even after paying legal expenses, and therefore would still be financially far better off than in even the most generous European nation (€250,000).

The data shows that in the quadriplegia cases, although the total awards tend to be higher than in the leg loss cases, the typical share of the total award for pain and suffering is relatively much smaller. I assume that the reason for this is that the quadriplegia cases tend to involve high levels of both ongoing care and lost income. Notice that this analysis assumes that on the out-of-pocket loss side, both American and European law, one way or another, basically provide full compensation; I am not confident that this is a very reliable assumption, but I could not see what else to do given the data I have.

Despite the initial appearances that come from looking at the gross amount of the awards for pain and suffering, American victims need to have pain and suffering awards of, perhaps, at least half or more of their total award in order to meet or exceed the more generous European nations in terms of pain and suffering compensation. And while we see that this frequently occurs for grave injuries like the loss of leg that may carry with them relatively moderate medical costs and income loss, that pattern may not follow for severe disabilities with very large, ongoing medical and related expenses.[21] Simply put, even generous American juries seem unwilling to consistently award the necessary seven- or eight-figure amount for pain and suffering.

VI. LESSONS FROM ENGLAND AND COMMONWEALTH NATIONS

Although England (and Wales), Canada, and Australia remain largely common-law nations as to the substance of tort law (Quebec aside), they treat pain and suffering damages quite differently than

21. Overall, recovery for pain and suffering in the United States is generally thought to amount to about fifty percent of total compensatory awards. *See* Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 (1995); Geistfeld, *supra* note 1, at 777 (stating that "[a]t present, pain-and-suffering damages account for about half of the total tort damages paid in products liability and medical malpractice cases").

does the United States.[22] Most interesting, in my view, is the statutory scheme recently adopted in New South Wales, Australia.[23]

Under the new law, injuries are to be ranked, percentage-wise, in terms of their severity in comparison with the most extreme case.[24] Hence one injury, say a leg amputation, might be rated as thirty-five percent as severe as the most severe. In that case, a victim with this injury would receive in pain and suffering thirty-five percent of the sum that would be awarded to someone with the most severe injury. Moreover, the new law sets the maximum award at 350,000 Australian dollars (which is about $265,000 at current exchange rates), with that sum to be indexed by inflation.[25] Hence, an injury with a thirty-five percent rating would, for now, qualify for an award of about $120,000 Australian (or $90,000).

It is additionally critical to note that, as shown in Table 17, under the New South Wales scheme, for injuries that are thirty-three percent less severe than the most extreme, the awards for pain and suffering are not to be proportional to their severity. Instead, injuries rated as less than fifteen percent as severe as the most severe are to receive nothing for pain and suffering. And for injuries between fifteen percent as severe and thirty-three percent as severe as the most severe, the awards are increased to bridge the gap—two percent for an injury that is seventeen percent as severe as the most severe, five percent for one that is twenty-three percent, ten percent for one that is twenty-seven percent, twenty-three percent for one that is thirty percent.

22. *See generally* P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970); JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS (1967); ALLEN M. LINDEN, STUDIES IN CANADIAN TORT LAW (1972).

23. *See generally* Stephen D. Sugarman, *Tort Reform Through Damages Law Reform: An American Perspective*, 27 SYDNEY L. REV. 507 (2005); Prue Vines, *Faith, Hope, and Personal Injury: The Ipp Report and the Civil Liability Acts*, AUSTRALIAN CIV. LIABILITY 1 (2004). On Australian damages law generally, see HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH (4th ed. 2002).

24. Civil Liability Act, 2002, c. 16 (N.S.W.).

25. *Id.*

TABLE 17
NEW SOUTH WALES DISABILITY SEVERITY AND CORRESPONDING PAIN AND SUFFERING AWARD

Severity	Damages
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34–100%	34%–100% respectively

Put differently, New South Wales has imposed a threshold on awards for pain and suffering, requiring that an injury be at least fifteen percent as severe as the most severe for any award to be made, and then it has graduated the amount of the award in a way so that once the injury becomes thirty-three percent or more as severe as the most severe injury, the percentages are in lock step with the award linked to that made in the most serious case.

TABLE 18
"VERTICAL EQUITY": EUROPEAN-STUDY HYPOTHETICAL INJURIES UNDER NEW SOUTH WALES LAW

	Percentage Disability of the Most Severe	Percentage of Maximum Award for P&S in New South Wales
Quadriplegia	100	100
Blindness	100	100
Deafness	50	50
Leg	35	35
Arm	30	23
Burns	20	3.5

Table 18 illustrates how this new Australian law works by applying the New South Wales approach to the six injuries discussed in the European study, using the percentages of disability provided by McIntosh and Holmes to their expert reporters, and assuming for these purposes that quadriplegia is treated as the most severe injury. (In some sense, this is clearly not the case, because one can imagine someone suffering a combination of quadriplegia and blindness, for example; but this simplification is necessary for purposes of illustration.)

Looking at Table 18, note how the New South Wales scheme has an especially sharp impact on the loss of a leg as compared with the loss of an arm because those two disability percentages are stipulated as falling slightly on either side of thirty-three percent. Looking back to Table 2, no European nation's vertical equity percentages seem to precisely fit the assumed New South Wales pattern for loss of leg and loss of arm. Nonetheless, it is perhaps worth noting that Austria, Liechtenstein, and Luxembourg all award pain and suffering for a loss of a leg at least ten percentage points higher than loss of an arm. (Yet, note also that Finland, Iceland, and Sweden rank arm loss at least nine percentage points higher than leg loss.)

Table 18 makes vivid how the New South Wales scheme sharply reduces the award for harms that are only twenty percent as severe as the most severe. Hence, under this assumed application of the New South Wales law to the six injuries, the pain and suffering award for facial burns would be only 3.5% of that sum awarded for the most severe injury. No European reporter predicted an award for burns that is as low as 3.5% of the highest award for the reporter's nation. Nonetheless, several did report awards for burns that were quite low—seven percent of the highest in Sweden, eight percent in Italy and France, and ten percent in Switzerland and Portugal. Hence, one might well be seeing the rough equivalent of the New South Wales approach in these places. If nothing else, there appears to be a sharp discounting in these four nations for relatively lesser injuries.

It is also useful here to compare the Canadian approach. Some years ago the Canadian Supreme Court set a ceiling on awards for pain and suffering of 100,000 Canadian dollars, a sum that has grown with inflation to about 300,000 dollars today (or about US $250,000).[26] But this limit is not generally thought to work like caps do in the United States. Although there is some disagreement among Canadian courts, the dominant view appears to be that the maximum award is to

26. Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 265. *See generally* D. GARDNER, L'EVALUATION DU PREJUDICE CORPOREL (2d ed. 2002).

be made only for the most serious injuries and that the awards for other injuries should be scaled back from the maximum based on their relative seriousness.[27]

As noted earlier, caps in the United States seem intended only to influence the actual judgments awarded to those who receive jury verdicts above the maximum. Hence, one expects those victims with a wide variety of injuries to wind up clustered at the maximum.[28] By contrast, if the Canadian and New South Wales approaches were embraced in the United States, the ceiling would as well be intended to affect all of those plaintiffs whose jury verdicts are currently at or below the cap.

Comparing the Canadian practice with the New South Wales law, what appears quite special about the latter approach is the explicit threshold of a seriousness requirement before any pain and suffering award is to be made. With very little experience so far under the new law, however, it is not altogether clear what sorts of harms are going to be reliably excluded from pain and suffering recovery. To be sure, neither Canada nor Australia makes much use of juries in personal injury cases,[29] but as discussed later, this alone need not preclude American states from seeking to adapt the regimes of the sort just described.

Something very much like this "percentage of the most serious harm" approach recently adopted in New South Wales is already reasonably well developed in nations like Italy and France. There, injuries are, in effect, assigned a percentage of disability based upon expert medical determinations.[30] Once a victim's harm is assigned its percentage point, this number is then put into a formula (or a table) that determines the approximately appropriate sum to be awarded to that victim for noneconomic loss.

As for the details, for Italy at least, as reported and endorsed by Professor Giovanni Comande in an unpublished article on pain and suffering, the formula (like the New South Wales table) is not simply linear.[31] Rather, Comande argued that courts both do and should increase pain and suffering awards in more than a linear way as injury

27. *See, e.g.*, White v. Gait, [2004] 224 D.L.R.4th 347; Hodgson v. Walsh, [1999] 121 O.A.C. 255.

28. For some empirical evidence of the role of caps in slicing off recoveries for those with the most serious injuries, see David M. Studdert et al., *Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54 (2004).

29. *See generally* FLEMING, *supra* note 4.

30. Comandé, *supra* note 13.

31. *Id.*

severity increases.[32] This, broadly speaking, is what the New South Wales law does for injuries with severity rankings between fifteen percent and thirty-three percent, but not for those with rankings above thirty-three percent—as is done in Italy.

Courts in England and Germany have adopted what at first blush appears to be a different practice. In these legal systems very careful records about past awards for specific types of injuries are kept and publicly reported.[33] This reporting is done by private firms in Germany and by a quasi-public body in England. Courts then are quite faithful in following these past award sums from case to case (again, increasing the awards over time for inflation).

But so long as the pattern of past awards reflects a sense of relative seriousness of injuries, and so long as new types of injuries are thoughtfully compensated with amounts for other injuries in mind, this approach, in the end, seems little different than the "percent of the most serious harm" approach used elsewhere. Put differently, in England and Germany, the courts do not go through the intermediate step of assigning a specific harm a percentage of disability and then translating that percentage to a specific award. Yet, the British and German approach implicitly has that same strategy in mind.

One advantage of the "percent of the most serious harm" approach is that it is not necessary to keep track of inflationary adjustments for every injury. Instead, it suffices simply to keep the percent disabled ratings for each injury constant over time and then to increase the highest award with inflation. Moreover, if a nation concludes that its award schedule, in general, is lower than seems just, it can easily upwardly adjust all awards again simply by raising the ceiling. If such a decision were made in England or Germany, it would require that all the specific-injury reports be upwardly adjusted accordingly (which, in the end, is not all that difficult to do).

VII. POLICY DISCUSSION

A. Caps Without Change in the Payment of Legal Expenses?

Some U.S. advocates have called for a legislative cap of $250,000 on pain and suffering awards, and some states have already adopted a limit of this sort (often somewhat higher and often applicable only to medical malpractice cases).[34] As already explained, it is important to

32. *Id.*

33. *See, e.g.*, ADAC, *supra* note 7.

34. *See* ATRA site, *supra* note 2. *See also* Stephen D. Sugarman, Op-Ed, *The Legal Sting of Pain and Suffering*, L.A. TIMES, June 5, 2005, at M5 (stating that both President Bush and Senate

appreciate that, in the American context, a cap is generally intended only to affect awards that otherwise would be above the cap. That is, juries are not told of the limit, but if they make awards above the cap, their awards are simply reduced. Put differently, the financial burden of caps in the United States is meant to be borne only by those with the most serious injuries. The point of a ceiling elsewhere, however, is to create a framework within which all injuries are scaled and victims with similar injuries are awarded reasonably consistent sums from case to case.

The materials presented here demonstrate that, so long as winners in U.S. personal injury cases have to pay their own legal expenses, a cap of $250,000 in pain and suffering will typically leave a large share of U.S. victims with serious injuries considerably worse off than their European counterparts.

TABLE 19
U.S. LEG AMPUTATION AWARDS ADJUSTING FOR LEGAL FEES AND A CAP ON PAIN & SUFFERING OF $250,000 ($1000s)

Inadjusted		With $250K P&S Cap		P&S left (minus 33%) ($)	P&S left (€)
P&S	Total	P&S	Total		
150	500	150	500	(20)	(15)
200	1,442	200	1442	(280)	(210)
150	400	150	400	20	15
400	435	250	285	155	120
452	633	250	431	110	80
490	573	250	333	139	105
500	734	250	484	90	70
615	716	250	351	130	100
1,000	1,500	250	750	0	0
1,550	2,420	250	1120	(125)	(95)
1,750	4,493	250	2993	(750)	(560)
4,000	7,568	250	3818	(1020)	(765)
5,580	6,343	250	1013	(90)	(70)
5,600	7,670	250	2320	(525)	(395)
6,000	7,497	250	1747	(330)	(250)
7,500	7,510	250	260	165	125
9,750	11,426	250	1926	(392)	(295)

Table 19 shows what are assumed would be the awards for U.S. leg loss victims (drawn from Table 15) were pain and suffering amounts simply capped at $250,000. First, note that, as a result of the cap, four-

Majority Leader Bill Frist advocate a $250,000 cap on pain and suffering awards in medical malpractice claims).

teen of the seventeen victims would have their awards reduced, and in most cases by a dramatic amount.

Second, note that nine of the seventeen victims would find themselves with pain and suffering awards of less than thirty-three percent of their total award, thereby requiring them to pay legal expenses partially from their recovery for out-of-pocket losses.[35] All of these victims would, on my assumptions, clearly be worse off in terms of pain and suffering recovery as compared with similar victims in all of the European nations. Moreover, of those eight with some money left over for pain and suffering after covering legal expenses, none would net more than $160,000 or €120,000, and two of those eight would wind up with nearly nothing for pain and suffering. This compares with the median predicted European nation award of €41,000 for the loss of a leg and the highest predicted European award of €166,000 for the loss of a leg (see Table 14). Hence, on balance, on my assumptions, a $250,000 cap on pain and suffering would leave the typical American leg loss victim worse off than his or her European counterpart in terms of net recovery for pain and suffering (after legal expenses).

For the American quadriplegia victims we identified, were a $250,000 cap on pain and suffering in place, then every one of them would wind up having to use all of that award plus substantially more to cover his or her legal expenses. Indeed, as shown in Table 20 (drawn from Table 16), every one of the twelve victims with quadriplegia would have to use up all of the pain and suffering money and then dip into economic loss recovery by a minimum of $800,000 to pay the assumed legal expenses.

35. I put aside here the possibility that the jury would become aware of the cap and end run its limit by increasing its award for out-of-pocket losses by the amount of pain and suffering money it wishes to award above the cap. *See generally* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005).

TABLE 20
U.S. QUADRIPLEGIA AWARDS ADJUSTING FOR LEGAL FEES AND A CAP ON PAIN & SUFFERING OF $250,000 ($1000s)

Unadjusted		Total Award	P&S left
P&S Share	Total Award	w/$250K Cap	(minus 33% for legal fees)
1,000	3,950	3,200	(820)
1,500	19,100	17,850	(5700)
2,000	7,345	5,595	(1615)
2,500	7,872	5,622	(1624)
3,000	8,972	6,222	(1824)
3,400	6,670	3,520	(924)
3,500	8,187	4,937	(1395)
4,000	17,770	14,020	(4423)
4,600	21,360	17,010	(5420)
4,900	9,500	4,850	(1367)
6,000	9,000	3,250	(833)
6,000	16,530	10,780	(3343)

In short, U.S.-type caps of $250,000, when added to U.S. rules on legal expenses, are extremely harsh on seriously injured victims. Many American victims would find themselves far outside the range of European awards on the low side. This is in dramatic contrast to the way American victims are nominally treated by uncapped jury awards for pain and suffering.

Suppose U.S. jurisdictions adopted a scale of awards for pain and suffering like that of New South Wales, and set the highest award in 2005 at $500,000. Then, at today's currency conversion rates, nominal U.S. pain and suffering awards would be moderately above the high end of the awards made in Europe, Australia, and Canada, but they would not be way off the charts—as our awards are today.

Nevertheless, under such a scheme, unless victim legal expenses were also paid by defendants, many seriously impaired American victims would still likely wind up worse off than their counterparts in at least many of the comparison nations.

B. A New Regime for Both Pain and Suffering and Legal Fees?

To bring the American law broadly into line with the high end (or moderately above the high end) of the European and Commonwealth nations discussed here, a two-pronged change would be needed. That is, first, American states could adopt a ceiling approach of the sort used elsewhere—perhaps that recently enacted in New South Wales. As above, imagine for these purposes a ceiling of $500,000 (to be adjusted for inflation). Second, liable defendants would also be required to pay the victim's reasonable attorneys' fees and costs of litigation.

Under such a regime, a critical issue would be the method for determining what constitutes reasonable fees. One could adopt European-type approaches that envision payment based on the specific efforts performed (sometimes also taking into account the time put into the effort).[36] This is sure to be highly unpopular with plaintiffs' lawyers in the United States, many of whom detest the idea of keeping time sheets to record the specifics of their effort on the case. They would prefer to maintain a contingent fee percentage. If that mechanism were employed, however, it is not evident that so-called "market" rates now charged by lawyers would have to be embraced by statute.

For example, I have elsewhere proposed legal fees (paid by defendants) equal to ten percent of what defendants offer within, say, ninety days of the injury, and then forty percent of any amount eventually won beyond the amount of the initial offer.[37] This strategy is designed to stimulate a reasonable early offer and, in turn, a quick settlement. A different approach would be to adopt the fee schedule (or something like it) now contained in California's law governing medical malpractice cases.[38] Plaintiffs' lawyers may charge no more than:

> (1) Forty percent of the first fifty thousand dollars ($50,000) recovered.
> (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.
> (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.
> (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000).[39]

While I have not been able to gain any hard data on the level of legal fees in Europe as compared with tort recoveries, contacts of mine have informally reported that, in the end, lawyers in many countries wind up with legal fees of approximately ten percent of the tort award, regardless of the formal mechanism used to determine those fees. Compared with that, the California medical malpractice schedule is generous.

Just to illustrate how a new regime of the sort proposed here might work, Table 21 provides some examples drawn from the leg-loss and quadriplegia numbers used here (with a bit of rounding to make the presentation easier to follow). For simplicity, the table assumes that

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36. For a discussion of legal fees in a variety of nations, see William B. Fisch, *Professional Services*, *in* 8 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 78–86 (1999). *See also* FLEMING, *supra* note 4.

37. Sugarman, *supra* note 23.

38. CAL. BUS. & PROF. CODE § 6146 (a) (West 2003).

39. *Id.*

the maximum pain and suffering award would be paid to the quadriplegia victim ($500,000) and forty percent of that sum to the leg loss victim ($200,000). The table also assumes that defendants would pay victim legal fees according to the schedule of maximum legal fees applicable to California malpractice cases, as noted above.

TABLE 21
EXAMPLES COMPARING THE EXISTING REGIME WITH A PROPOSED NEW REGIME ($1000s)

	Existing Regime					Proposed New Regime			
	(1) P&S	(2) Total Paid by Defendant	(3) Legal Fees	(4) Net P&S to Victim	(5) Net Total to Victim	(6) P&S	(7) Total To Victim	(8) Legal Fees	(9) Total Paid by Defendant
Leg	500	750	(250)	250	500	200	450	125	575
Leg	1000	1500	(500)	500	1000	200	700	177	877
Quad	1000	4500	(1500)	(500)	3000	500	4000	672	4672
Quad	3000	9000	(3000)	0	6000	500	6500	1047	7547
Quad	6000	9000	(3000)	3000	6000	500	3500	597	4097
Quad	4000	15000	(5000)	(1000)	10000	500	11500	1797	13297

The examples set out in Table 21 show that under the proposed regime as compared with the common-law regime: (1) some victims would net more and others less (compare columns five and seven); (2) plaintiff lawyers would earn less (compare columns three and eight); (3) and defendants would generally pay less overall (compare columns two and nine). Put differently, from the victim's viewpoint, the reduction in the pain and suffering award (column one minus column six) is sometimes greater than and sometimes less than the saved legal fees (column three). And from the defendant's viewpoint, the reduction in pain and suffering obligation (column one minus column six) is usually greater than the new obligation to pay legal fees (column eight).

Not illustrated by this table is the envisioned impact on those with smaller injuries. In those cases, the predicted recovery for pain and suffering would generally be both less in amount (indeed zero in the least severe cases) and more consistent from case to case. Net recovery to victims and total cost to injurers would vary from the current regime based on the same factors already noted.

C. Values and Politics

In the end, I personally favor a reform of the American law of tort damages of the sort discussed here: (1) liable defendants would be obligated to pay the victims' reasonable legal expenses, just as they are obligated to pay victims' reasonable medical expenses; and (2) pain and suffering awards would be modeled after the New South

Wales approach, but with an initial ceiling of, say, $500,000 (instead of $350,000 Australian).[40]

The New South Wales approach could be implemented in our jury-based system by (1) instructing juries to determine the percent this victim's harm is as compared with the most serious harm, (2) allowing both sides to introduce evidence as to how past juries have rated roughly similar harm, and (3) instructing juries to award the amount of pain and suffering damages as the legislative-administrative table calls for when the percent of the most serious harm is as they have found it to be in the case.

Yet, perhaps people in the United States would not want the reform favored here, or perhaps this reform could not be politically achieved even if favored by the majority. First, Americans may actually prefer nominally to award huge sums for pain and suffering, a substantial share of which goes to plaintiffs' lawyers. Americans may like the current practice because, being a very wealthy nation, we may believe that victims of wrongdoing are entitled to enormous awards by world-wide standards—awards that we, as consumers, may be quite willing to pay for in the cost of our goods and services. Or perhaps because we are so rich, and so value money in our culture, we wish to assign extremely large money values to diminished life experiences when we think those worsened experiences are undeserved. Or maybe it is that we so value what personal injury lawyers do for us as consumers that we are more than happy to have them take a large bite from what are gigantic awards by worldwide standards.

Moreover, although many Americans might in some respects disapprove of unequal treatment of similar victims, we as a society may be unwilling to do anything to reduce our disparities because of our cultural commitment to individual juries doing what they see as individual justice to individual victims personally before them in the courtroom.

Furthermore, even if most Americans agreed that our pain and suffering awards are nominally too large, too unevenly awarded, and wrongly used to pay legal fees assessed against a victim's total recovery, legislatively enacting the sorts of reforms suggested here will be extremely difficult.

Not only is the personal injury bar politically very strong, but also it may well take some doing to convince ordinary people that reforms

40. I would most prefer to join these with other reforms in the law of damages that I do not address here. *See* Sugarman, *supra* note 23. *See also* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISM FOR VICTIMS, CONSUMERS, AND BUSINESS (1989).

that lower the overall cost of tort liability to defendants are actually translated into reduced costs of goods, services, insurance, and the like for society in general. In sum, as strange as what we now have seems to me, it may well be what most of my fellow Americans (on balance) want.

After all, pain and suffering damages are what drive our tort "lottery," and a large share of Americans seems to enjoy playing "lottery" games, notwithstanding their bad odds. Perhaps, therefore, a first step in selling my proposed reforms to the public would be to include a promise that, along with their monetary awards for pain and suffering in a U.S. version of the New South Wales plan, successful tort victims would also be given a number of actual lottery tickets in their state's lottery (or the equivalent).