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Let the Damages Fit the Wrong: An Immodest Proposal for Reforming Personal Injury Damages

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LET THE DAMAGES FIT THE WRONG: AN IMMODEST PROPOSAL FOR REFORMING PERSONAL INJURY DAMAGES

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The modern legislative approach to tort reform has been a piecemeal process of altering single rules rather than reconsidering the fundamental principle of compensatory damages—the goal of making victims whole. When some aspect of damage doctrine has become disfavored, such as joint and several liability, legislatures[1] and sometimes courts[2] have made a change in that one rule.[3] Lawmakers have focused little on the overall remedial scheme in tort[4] and even less on the basic premise of compensatory damages and whether it is still justifiable.

Rather than comment on the wisdom of piecemeal reform, this

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1. State legislatures have taken a variety of actions on this specific rule—abolishing it, modifying it, or applying it only to particular types of recovery. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5 (West 2001) (abolishing joint liability in personal injury actions); N.J. STAT. ANN. § 2A:15-5.3 (West 2001) (modifying rule such that a defendant less than 60% responsible is severally liable only); Cal. Civ. Code § 1431.1 (West 2001) (stating that liability of each defendant for noneconomic damages is severally liable only).

2. *See, e.g.*, Degener v. Hall Contracting Corp., 27 S.W.3d 775 (Ky. 2000).

3. The same process has occurred with other isolated doctrines, such as the collateral source rule. It has come under legislative attack in some jurisdictions with resulting abolition or modification of the rule in some states. *See, e.g.*, COLO. REV. STAT. § 13-21-111.6 (West 2000) (abolishing the rule—court shall reduce the verdict by the amount of any collateral payments not paid as a result of a contract entered into and paid for by or on behalf of the plaintiff); Ind. Code Ann. § 34-44-1-3 (West 2001) (modifying the rule—proof of collateral benefits shall be considered by the trier of fact in assessing damages).

4. For a helpful discussion of medical malpractice statutory reforms, see *Catherine M. Sharkey, Caps and the Construction of Damages in Medical Malpractice Cases, in* MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM: NEW CENTURY, DIFFERENT ISSUES 148-66 (Rogan Kersh & William Sage, eds. Cambridge University Press) (forthcoming 2006).

article questions the premise of compensatory damages and takes the position that make-whole recovery is an unnecessary consequence of liability and does not necessarily achieve just results. With apologies to Gilbert and Sullivan who contributed the refrain "[L]et the punishment fit the crime,"[5] I propose that civil damages should fit the wrong.[6] Compensatory damages should abandon the make-whole premise and be measured by three factors: the degree of the wrongfulness of the tort, the severity of the harm, and the extent to which the risky conduct was directed at the plaintiff—which I call connectedness.

The popular outrage at highly-publicized tort cases[7]—or caricatures of those cases—is directed not at the fact of liabitiy but at the amount of damages. One can only speculate how the public would have reacted to the McDonald's coffee case[8] if the headline had read "Woman Recovers Ten Thousand Dollars After Receiving Burn from Scalding Hot Coffee." Similarly, one wonders how the public would respond to a headline "Drunken Surgeon Pays Millions to Patient After Botched Operation." If society's sense of justice demands that a drunken surgeon pay more for botching an operation than a restaurant pay for serving scalding coffee, then why should the recovery turn on the circumstances of the plaintiff's loss? It is entirely possible that the botched operation caused less damage than the scalding coffee. Maybe the surgeon removed a healthy appendix instead of a cyst and the patient simply needed a second surgery. Maybe the scalding coffee caused second degree burns in the crotch when it spilled between the patron's legs.[9] Although tort liability should not turn on a public opinion poll, the purpose of this observation is to suggest that notions of fundamental justice do not require the make-whole rule. Other rules might serve societal goals as well.

My suggested reform of the compensatory principle of personal

5. W.S. GILBERT & ARTHUR SULLIVAN, THE MIKADO, *in* THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 343, 382 (1936).

6. My apologies must extend to Professor Jeffrey G. Sherman as well. He wrote a wonderful piece explaining how W.S. Gilbert and his work have been misunderstood, but I am simply adding on to the popular misuse. *See* Jeffrey G. Sherman, *Law's Lunacy: W.S. Gilbert and His Deux ex Lege*, 83 OR. L. REV. 1035 (2004).

7. For a thoughtful account of the tort crisis, including a critique of the metaphors used for the "torts crisis" and the types of cases portrayed as "bad," see Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989 (1998).

8. There is no reported opinion of this highly-publicized trial in New Mexico, *Liebeck v. McDonald's Restaurants*, P.T.S., Inc., but it is famous enough to be referenced by the Seventh Circuit Court of Appeals in *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 654 (7th Cir. 1998).

9. *Id.* at 653 (explaining plaintiff's injuries, which are analogous to plaintiff's injuries in the McDonald's coffee case).

injury damages would not necessarily favor either plaintiffs or defendants.[10] Its purpose is to cut transaction costs and to redistribute personal injury compensation such that small claims would be more viable than they are currently, and large claims would not produce a windfall to attorneys or, through punitive damages, to litigants. The tools to achieve these goals are: (1) altering the measure of compensatory damages to subsume the wrongfulness of the conduct and thus to eliminate punitive damages; and (2) permitting hourly attorney fees for prevailing plaintiffs in place of contingency fees, thus increasing the availability of representation for small claims without altering availability for large claims.

The suggested reform would alter the basis for recovery and produce results satisfying the other goals of tort law beyond the make-whole principle. Actors would be deterred from engaging in conduct that risks injury to others and especially serious injury toward identifiable victims. To the extent that some plaintiffs would not receive full compensation for their losses, other societal safety nets are necessary; that result is no different from the situation of plaintiffs who are injured by conduct that is not tortious or that is committed by actors who are judgment-proof. The proposed scheme meets other goals of tort law: deterrence, retribution, and a societal sense of justice. Compensation is still present as well, but the goal of make-whole compensation is not.

This proposed reform permits compensatory damages on the basis of three factors: the degree of the wrongfulness of the tort, the severity of the harm, and the closeness of the connection between the wrong and the harm. The resulting damages combine some (but only some) elements of traditional compensatory damages (the severity of the harm)[11] with some elements from punitive damages (the wrongfulness of the conduct)[12] and some elements of legal causation (connectedness).[13] By necessity, the new approach would replace both compensatory and punitive damages and would not be governed by the existing law related to those standards. The connectedness requirement would supplement other proximate cause inquiries to proportion liability for remotely

10. The lack of favor to one interest group may well make this piece academic in all senses of the word. Without an interest group to promote such a legislative scheme, it has little chance of passage. Nonetheless, cynicism should not prevail to dampen public discussion of the issues.

11. For shameless self-promotion, see ELAINE W. SHOBEN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS ch. 11 (3d ed., Foundation Press, 2002).

12. *Id.* at ch. 15.

13. *Id.* at ch. 13.

caused injuries. Concepts of contributory and comparative negligence remain and function to reduce recovery in much the same manner as current law.[14]

A significant goal of this proposed reform is to provide a more consistent and predictable framework for assessing damages.[15] Consistency and predictability would foster the goal of compensating a greater number of tort victims in levels proportionate to the degree of injury and wrong to the level of monetary recovery. Consistency and predictability also foster settlement and thus reduce the transaction costs of trial preparation. A more predictable amount of liability, with interest dating from the time of filing suit, fosters speedier settlement and delivery of compensation to victims when they need the money for rehabilitation. Finally, the proposal includes an award of attorney's fees. In place of contingency fees, plaintiff's attorneys could recover fees on a reasonable hourly basis. The extensive litigation surrounding such awards in the civil rights context provides ample precedent for this change.

I. THE PROPOSED THREE ELEMENTS FOR TORT DAMAGES

A. Degree of Wrongfulness

The first element of the proposed reform measure of personal injury damages is the degree to which the defendant's conduct was wrongful. Practitioners have long recognized that this factor is already one that affects juries even though the judge does not include it in the instructions for measuring compensatory damages.[16] It is frequently noted, for example, that negligence is "hot" and strict liability is "cold" such that a

14. *Id.* at ch. 11.

15. *See* Catharine Pierce Wells, *A Pragmatic Approach to Improving Tort Law*, 54 VAND. L. REV. 1447 (2001).

16. Conventional wisdom has been scientifically documented.

> [J]urors in tort cases seek 'total justice' in a number of interrelated senses. . . . It is in this sense that jurors' susceptibility to the hindsight effect and inability to disregard certain pieces of information come into play. This "holistic" approach to jury decision making often leads jurors to make global judgments about who did what to whom, who should pay for it, and how much, rather than separating judgments about liability and damages, or about different types of damages, into discrete steps as the law requires. As a result, jurors have a tendency to fuse discrete judgments into a jumbled, interrelated whole.

EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 142 (American Psychological Association 2002) (citing NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (American Psychological Association) (2001)).

good plaintiff's attorney would never fail to put before a jury the facts showing that risk was taken even if liability could be established without negligence.[17] The proposed reform elevates that concept to a legal standard in measuring damages.

Consider five plaintiffs, each of whom suffers brain damage from tortious conduct. Plaintiff One is a college student who was the victim of a brutal beating by defendants who hated him because of his sexual orientation. Plaintiff Two is an employed adult injured in an auto accident caused by a drunk driver. Plaintiff Three is a baby who lost oxygen to the brain during birth through the negligence of a resident doctor in the hospital. Plaintiff Four is a baby whose mother ingested a drug during pregnancy that caused brain damage to the developing fetus. PLaintiff Five is a baby that was injured in an auto accident when the child restraint device malfunctioned because of an unforeseen design defect.

Assume that each of these five plaintiffs can establish liability and that all five suffered permanent brain damage. Under modern damages law, each of these brain-damaged plaintiffs would recover differing amounts based upon the life circumstances of the five. All would receive money for a lifetime of care. The babies would recover for a lifetime of lost average wages. The recovery of the employed adult would turn on his or her socio-economic status in terms of lost future wages. The college student's recovery would turn on the evidence of his probable future earning capacity based upon his existing record. These amounts will vary greatly on the basis of the legal standards applied to damages, even without regard to the natural variability that one would expect from the degree of uncertainty inherent in the calculation of these amounts and the presentation of these issues before different fact-finders.[18] The amount actually received by each plaintiff will turn on even more factors: the presence or absence of state statutory caps on damages, tax calculations, estimates of future inflation, reduction to present value, and so forth. Punitive damages may also be available for

17. Consider, for example, the asbestos injury claim in *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999). The plaintiff, a construction worker who developed lung disease after working with defendant's asbestos product for years, had two theories of liability: strict liability and negligence. The negligence theory was that the company continued to manufacture the product with asbestos rather than safer materials after it learned of the hazards of asbestos. This theory also supported punitive damages on the grounds that the conduct displayed a reckless disregard of the safety of others.

18. *See generally* JURY VERDICT RESEARCH, CURRENT AWARD TRENDS IN PERSONAL INJURY (LRP 44th ed. 2005) (reporting wide ranges of recovery for similarly situated personal injury victims).

the first plaintiff and possibly for the second, but, absent additional facts, not for the babies. Finally, whatever the final mystery sum becomes the damages for each of these five, the plaintiff's attorney will probably take a third.

Under the proposed reform, the variability in recovery would turn on the basis of the defendant's liability. This factor would weigh heavily against the brutal attackers of Plaintiff One. It would weigh lightly against the defendant who injured Plaintiff Five, against whom we have assumed liability that would have to be on the basis of absolute liability.

B. Severity of the Harm

The second factor in the proposed reform is the severity of the harm to the plaintiff. This factor is the one that most closely resembles current law.[19] A plaintiff who receives a scratch should receive less than one with severe injuries, even if both were maliciously inflicted. Where the proposal differs from current damage law, however, is that evidence would be restricted to the most general kind of proof of the severity of the injury. Juries would not hear about the projected costs of future surgeries, for example, but would simply learn that the plaintiff's injuries are such that future surgeries will be necessary. Similarly, plaintiffs could not produce evidence of projected future lost wages, but they could prove the length of time for which it will not be possible to work in establishing the severity of the harm.

This element, unlike the wrongfulness of the defendant's conduct, may cause over-deterrence in the same manner that it does in the current tort system. When an actor takes a risk of a small harm to another but a great harm occurs, the resulting civil "punishment" may be excessive to the degree of harm risked. Tort law has long struggled with the conflicting goals of compensation and deterrence in this context. The factor of the severity of the injury remains an element of recovery in this proposal as a compromise between the conflicting interests at stake. Unlike modern law, this factor is only one of three, such that there will still be large recovery for severely injured plaintiffs, but less so for those who were unfortunate enough to suffer large injury when the defendant took a small risk (or no risk for strict liability).

19. *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES 369, 369-423 (Matthew Bender & Co. 1999) (discussing remedies for various bodily injuries).

C. Connectedness between Defendant's Wrong and Plaintiff's Injury

The final element of the three proposed factors is the extent to which the actor's risk was connected to the plaintiff's harm. Although issues of connectedness affect the substantive question of liability through proximate cause and other doctrines, this issue is appropriately reintroduced as a damages limitation capable of assessment on a sliding scale.

Injuries that are remote in time or space may not be the legal, or proximate, cause of the harm, and such lack of connectedness may preclude all liability. For those cases that survive to damages, the connectedness limitation ought to be a factor in determining the amount of damages. Injuries that are remotely connected to the wrong in terms of time or space are less compelling cases for compensation than those that are closely connected. The DES daughters cases,[20] for example, involved liability for the effects of medication that occurred a generation later when adult women were adversely affected by an anti-miscarriage pill taken by their mothers when the daughters were in utero. Once liability is found, it would be appropriate under this proposal to make the remoteness of the injury a factor in the damage assessment.

Connectedness takes many forms. First, reconsider the famous set of hypothetical plaintiffs in Judge Andrews' dissenting opinion in *Palsgraf v. Long Island Railroad*.[21] A car accident unforeseeably causes an explosion of dynamite, and individuals are injured both near and far from the accident. Judge Andrews argues that recovery ought to depend on how naturally the chain of events flowed from the accident. He criticized the majority opinion written by Judge Cardozo for artificially limiting liability to those individuals who were foreseeably injured at the time of the negligent act, specifically, those who were within the contemplation of the actor at the time of the risk. Many jurisdictions follow the Cardozo rule to limit liability as a matter of substantive law, but many others continue to permit more remotely foreseeable plaintiffs. When those claims survive to the damage stage, it is appropriate under this proposal to factor in the remoteness of the claim in the calculation of damages.

II. REPLACEMENT OF CONTINGENCY FEES IN PERSONAL INJURY CASES

The "American Rule" with respect to attorney's fees holds that each

20. *See* Sindell v. Abbott Lab., 26 Cal.3d 588 (1980).

21. 248 N.Y. 339, 353 (N.Y. 1928) (Andrews, J., dissenting).

party bears its own costs of litigation. Attorneys' fees are traditionally not awarded to the prevailing party in litigation absent an exception. Those exceptions include statutory authorization, contractual agreement, and certain equitable considerations such as bad faith litigation. The American Rule is distinguished from the approach used by jurisdictions sharing our Anglo legal heritage that allows the prevailing party to recover attorney's fees.[22]

The function of the American Rule in personal injury cases is to make recovery of fees for the plaintiff's attorney based on a contingency contract. In the typical contingency contract, the plaintiff's attorney recovers no fees unless the claim produces a monetary award or settlement. In that event, the attorney typically recovers a third of the award.

The usual policy consideration that supports the American Rule is that imposing fees may discourage the legitimate use of the court system and be difficult to measure. A frequent objection to the rule is that it encourages litigation by not penalizing losers.[23]

The last half of the twentieth century has produced data that should alter the assessment of the policy considerations affecting the American Rule. Fee-shifting in civil rights and employment discrimination cases has produced an ample body of case law and practical experience with fee-shifting in favor of prevailing plaintiffs[24] and, in rare cases, for prevailing defendants.[25] The same scheme could profitably be used for personal injury plaintiffs.

The Civil Rights Attorney's Fees Awards Act of 1976[26] provides that the court, in its discretion, may allow the prevailing party to recover a reasonable attorney's fee as part of the costs. Title VII of the Civil Rights Act of 1964[27] makes a similar provision for employment discrimination litigants. Courts presumptively allow recovery of fees to the successful plaintiff under these statutes and do not require a showing of bad faith. The calculation of fees is based on a number of factors.[28]

22. On the role of attorney's fees as a deliberate remedy, see the general discussion in the Supreme Court's opinion in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 264 n. 39 (1975).

23. The Supreme Court discusses these principles generally in a copyright case involving attorney's fees. Fogerty v. Fantasy, Inc., 510 U.S. 517, 522-31 (1994).

24. *See, e.g.*, Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 401-02 (1968).

25. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

26. 42 U.S.C.§ 1988.

27. 42 U.S.C.§ 2000e.

28. The Supreme Court endorsed the "lodestar" method for calculation of statutory attorney's fees—a reasonable hourly rate multiplied times the number of hours reasonably expended—in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In that case it further endorsed the factors for

The federal fee-shifting statutes typically provide for the recovery of attorney fees to the "prevailing party" or "prevailing plaintiff." The Supreme Court has held that a party is prevailing within the meaning of the Civil Rights Attorney's Fees Awards Act "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[29] The same approach could be used for personal injury plaintiffs.[30]

Although many federal fee-shifting statutes provide for the recovery of attorney fees to the "prevailing party," the Supreme Court has applied a higher standard for awarding fees to successful defendants. It has held that a prevailing plaintiff in a Title VII discrimination case under the Civil Rights Act of 1964 ordinarily will receive a fee award absent special circumstances, but a prevailing defendant can recover fees only by showing that the plaintiff's claim was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[31] The dual standard was justified to encourage private attorney general suits to protect civil rights while also to shield such claimants from potential fee liability when the suit was meritorious yet unsuccessful.

Although the private attorney general rationale does not apply to personal injury plaintiffs, the experience with fee-shifting in this body of law can support a statutory scheme for personal injury plaintiffs that would overtly apply a different standard for prevailing plaintiffs and

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determination of the reasonable fee in *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974). The Court in *Johnson* identifies 12 factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19.

29. Farrar v. Hobby, 506 U.S. 103, 111-12 (1992).

30. The issue is the policy question of whether to encourage the advancement of this type of litigation through the use of attorney's fees. The Supreme Court addressed the related question in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), where the Court held that a prevailing defendant in a copyright infringement action would be awarded fees on the same basis as a prevailing plaintiff under the Copyright Act. The Court noted that the public interest concerns in advancing civil rights were not equally present in the goals of the Copyright Act, and thus it did not use the approach previously outlined in *Christianberg Garment*, 434 U.S. 412. *See Fogerty*, 510 U.S. at 526-27. The Court nonetheless declined to follow the "British Rule," which awards attorney fees as a matter of course to the prevailing party, and it noted that the trial court still retains equitable discretion in making the award. *Id.* at 534-35.

31. Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 421 (1978).

defendants. Suits that are filed frivolously, unreasonably, and without foundation can support attorney's fees for defendants, but such findings have been rare in civil rights cases. Plaintiffs would not be deterred from filing reasonable claims for fear of fee liability, but plaintiff attorneys would not recover more than a reasonable hourly fee for their successful claims.

III. SCALES

The following illustrations are provided as only the most general kind of examples of how such a system could work. It is a primitive beginning to illustrate the potential for thinking along the lines of measuring damages more simply. The idea is to take some kind of indicator number (such as a percentage of the median house price in the United States) and multiply it by some scale representing the severity of the harm, the wrongfulness of the conduct, and the degree of connection between the defendant's wrong and the plaintiff's injury. Then the jurisdiction could use whatever comparative negligence rule it has chosen. For purposes of this example, a pure comparative negligence system has been assumed (and even further simplified for illustrative purposes).

The scales here are meant only to illustrate how a jurisdiction could construct such a system. The idea is to provide a scale with benchmark examples with which to compare a current situation to the exemplars. I have used driving exemplars because they are common and provide simple comparisons. Thus, a case involving medical malpractice or products liability, for instance, would be comparing the degree of wrongfulness to the exemplars even though they relate to a different kind of behavior.[32] Judges are already accustomed to making such comparisons when discussing cases for remittitur, and jurors could make good use of the same kind of information.[33]

32. Reconsider the case of *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999), where the plaintiff, a construction worker, developed lung disease after working with defendant's asbestos product for years. The plaintiff established that the company continued to manufacture the product with asbestos rather than safer materials after it learned of the hazards of asbestos. This behavior would be analogous to a truck driver failing to use an accessible flare to warn cars of his or her stalled truck in a roadway in the dark where there is a significant likelihood of other vehicles crashing into truck—the example of reckless behavior on the sample scale of wrongfulness.

33. *See, e.g.*, Moore v. Comm'r of Internal Revenue, 53 F.3d 712 (5th Cir. 1995) (applying Texas law: appropriate factors include comparisons of the nature of the wrong, the character of the conduct involved, and the defendant's degree of culpability); Alkire v. First Nat'l Bank of Parsons, 475 S.E.2d 122 (W.Va. 1996) (appropriate comparative factors include the relationship between the

The reason for the "betweens" in the scale is to satisfy the inevitable situations where the actual case seems to fall between two situations.

A. Degree of wrongfulness

½ No wrongfulness; strict liability basis for recovery

1 Small negligence: Defendant took a small but unnecessary risk of harm to others (such as inattention for a moment when driving)

3 Between small and common negligence

5 Common negligence: Defendant took an unnecessary risk of harm to others (such as driving at the speed limit when road conditions and/or visibility are too poor for driving that fast)

7 Between common and significant negligence

9 Significant negligence: Defendant took a large and unnecessary risk of significant harm to others (such as a driver of a car racing across train tracks to beat a fast approaching train)

11 Between significant negligence and gross negligence

13 Gross negligence: Defendant took large risk of harm with no social utility to risk (such as drunk driving)

15 Between gross negligence and recklessness

17 Recklessness: Defendant acted deliberately in reckless disregard for the safety of others (such as truck driver failing to use an accessible flare to warn cars of a stalled truck in roadway in dark where there is a significant likelihood of other vehicles crashing into the truck)

19 Between recklessness and malicious behavior

21 Malicious behavior by defendant directed toward plaintiff specifically or toward a small group to which plaintiff belonged (such

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harm from the defendant's conduct and the damages and the reprehensibility of the defendant's conduct). *See also* Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153 (1999).

as deliberately driving car into crowd on sidewalk)

B. Severity of the Harm

The scale for the severity of the harm to the victim contemplates a crude division of injuries into categories based on degree of severity. This scale does not contemplate special conditions of the victim. For example, the injury to the hand of a concert pianist would not be a more severe harm than the injury of an ordinary person's hand. Similarly, the "eggshell head" plaintiff who suffered greater harm than normally expected from a certain type of injury would not receive compensation for those additional injuries. It should be permissible, however, to include the life expectancy of the victim as a factor relevant to the severity of the harm, such that a permanent disability to a younger person might be a step higher on the severity scale than a similar injury to a retired person, simply because of the differing amount of productivity that would be impaired over the remaining life expectancy.

1/4Technical injury only, no monetary loss

1/2 Minimal injury, no permanent effect, little productivity lost (such as little or no time lost from work), small medical bills

1 Notable injury, treatment by specialists, some productivity lost (such as some time lost from work or other consequences from temporary disability) and medical bills beyond the "small" ones of a minimal injury (such as broken bones)

3 Between notable and significant injury

5 Significant injury (which may include hospitalization) months lost of work, and/or very large medical bills, with some permanent effects but not a permanent and serious disability (such as loss of limb)

7 Between significant and permanent injury

9 Permanent and material injury that permanently alter ability to live normally (such as loss of limb)

11 Between permanent and catastrophic injury

13 Catastrophic injury to formerly productive and healthy person who

experiences significant impairment in the ability to work and enjoy important aspects of life (e.g. paralysis)

C. Degree of Connection

This scale contemplates several factors that are also relevant in the first instance to the determination of liability. Even when liability is found, these factors should be relevant to the determination of damages: the degree of connection in time and space; number and significance of intervening events; relationship between plaintiff and defendant (versus indirect contact through marketing); degree to which defendant is solely responsible for the harm; and other factors that attenuate the injury from the defendant's wrongful conduct.

1/2 Distant connection, because of time, space, intervening forces (such as third persons who contributed to the injury), indirect relation of the plaintiff to the defendant

3/4 Between distant and direct

1 Direct connection between defendant's wrong and plaintiff's harm, with little distance in time or space, no third party intervening forces, and no other attenuating factors

Contribution: Degree of plaintiff's own contribution to injury

1 No contributory negligence

3/4 Plaintiff's failure to use due care contributed 75% to the injury

1/2 Plaintiff's failure to use due care contributed 50% to the injury

1/4 Plaintiff's failure to use due care contributed 25% to the injury

IV. FORMULAS AND ILLUSTRATIONS

A. Formulas

Once scales are established to define severity, wrongfulness, and degree of connectedness, the crucial issue becomes how to relate the

scales to recovery. A jurisdiction would need a formula that reflects its values for compensating personal injury plaintiffs. The three factors of severity, wrongfulness, and connectedness can be weighed in any fashion. A simple formula would be most accessible, but a multiple regression equation [y = (a x wrongfulness) + (b x severity) + (c x connectedness) + K] would be most accurate at achieving the desired results.

Jurisdictions would also need a monetary indicator to which to apply the formula. It would be useful if the indicator were pegged to some number that reflects inflation and economic trends. It could be a fixed number that adjusts with the CPI, or it could be some number that otherwise reflects economic conditions, such as some percentage of the median price for homes.

For purposes of the following illustrations, I have chosen a simple formula and an indicator pegged to the national median price of a home. There is no magic to these choices; they simply show the practical dollar effect of the proposal and produce results for the "ordinary case" that reflect current trends in personal injury awards. If one begins by observing the current median award in a run-of-the-mill personal injury case, then it is possible to see how the award is altered respectively by changes in the wrongfulness, severity, and connectedness.

B. Illustrations

The bottom line of these illustrations is that the proposal will keep damages in the small cases small, but it will add attorney's fees as an incentive to have them resolved. The historically blockbusting personal injury cases would yield lower damages under this proposal. The most severely injured plaintiffs will not "win the lottery" in the tort system, particularly not with a large punitive damage award, but they will still have a large enough recovery to provide incentives for structured settlements that can provide for them in their lifetimes.

The relatively large reduction in awards to severely injured plaintiffs is tempered by the provision of reasonable attorney's fees. Therefore, in order to compare the recoveries for severely injured plaintiffs in these illustrations to the recoveries of their current tort plaintiff counterparts, it is necessary to reduce the current recoveries by a third to reflect the typical one third contingency fee arrangement that now prevails in such cases. Thus, under current law, a plaintiff who wins an award of one and a half million dollars loses one third (half a million dollars) to the attorney.

In these illustrations, the forumula simply multiplies the wrongfulness, severity, connectedness, indicator, and contribution. It is mathematically the simplest formula based on the proposed scales above.

For purposes of these illustrations, the indicator number roughly represents ten percent of the national median price for a home, $20,000. It has the advantage of providing a easy contrast for the differing situations below.

1. Example # 1

Future defendant driver D and future plaintiff P were driving on a freeway during a rush hour commute. D was fiddling with the radio and therefore failed to see that the traffic had suddenly stopped. D's car crashed into the back of P's car and caused P's airbag to inflate. P suffered a shoulder injury, which caused some medical expenses and a little lost time from work.

If this case were to get to trial, the trier of fact might find the following numbers in this situation:

Wrongfulness = small negligence = 1/2
Severity = minimal injury = 1/2
Connection = direct connection = 1
Contribution = no contributory negligence = 1

Formula: 1/2 x 1/2 x 1 x $20,000 x 1 = $5,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

Example # 1 variations

If we discover that D was driving drunk at the time of the accident, then the wrongfulness number goes to 13, and the calculation would be 13 x 1/2 x 1 x $20,000 x 1 = $130,000, plus attorney's fees and interest.

If P negligently changed lanes in front of D when D was fiddling with the radio, the comparative negligence rules of the jurisdiction would reduce the award accordingly.

2. Example # 2

Defendant 1, a drunk driver, hits Plaintiff, a pedestrian, and caused injuries that require several operations and preclude the Plaintiff from

working for one year. The City, Defendant 2, contributed to injury by failing to remove a dangerous object from side of road, which further injured the Plaintiff who was thrown by the impact of the car. The Plaintiff failed to look when stepping into the roadway.

If this case were to get to trial, the trier of fact might find the following numbers in this situation:

Defendant 1 - drunk driver

Wrongfulness = gross negligence = 13
Severity = significant injury = 5
Connection = direct connection = 1
Contribution = contributory negligence = ½

Formula: 13 x 5 x 1 x $20,000 x 1/2 = $650,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

Defendant 2 – city

Wrongfulness = minimal negligence = 1/2
Severity = significant injury = 5
Connection = distant connection = 1/2
Contribution = contributory negligence = 1/2

Formula: 1/2 x 5 x 1/2 x $20,000 x 1 = $25,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

3. Example # 3

Reconsider the baby who was earlier hypothesized to suffer brain damage in an auto accident from the unforeseen design defect in a child restraint device. Assuming that the jurisdiction permits liability and that the defect in the car seat, if knowable, would foreseeably cause harm to a child in a car crash and thus be directly connected to the injury. The trier of fact might find as follows:

Wrongfulness = technical = 1/4
Severity = catastrophic injury = 21
Connection = direct connection = 1

Contribution = no contributory negligence = 1

Formula: 1/4 x 21 x 1 x $20,000 x 1 = $105,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

The wrongfulness factor significantly reduces an award for a severe injury, such as a products liability case. Although critics may say that this reform is at the expense of innocent victims (such as this baby), the counterargument is that jurisdictions could permit liability in such circumstances without fear of exposing businesses to excessive liability from multiple victims.[34] Further, manufacturers would have a strong incentive to cure such a defect once it is known (as under present law) because the wrongfulness number would rise dramatically if the design defect is not corrected once it is known.

The theory for the tradeoff in such a products liability case—permitting liability with a smaller recovery plus attorney's fees—is that greater numbers of victims in products liability cases could recover more predictably, yet defendants would not have unchecked exposure to liability. Attorneys for plaintiffs would still have an incentive to prove that the injury was caused by a defect because the costs of such a successful investigation would be recoverable fees, and the novelty of the claim would be an appropriate multiplier for the attorney's fees, like current civil rights law. Thus, the benefit of the current system in uncovering behavior, such as product defects, that causes injuries would not be lost because attorneys could still recover substantial fees even if their clients do not receive very high awards. The clients would receive enough of an award to support a good structured settlement or to purchase a good annuity; thus, the injured parties would still have an incentive to pursue their claims even in the absence of a possible windfall. The manufacturer would have an incentive to settle quickly with other claimants—thus distributing that possible windfall to other victims who would recover more quickly—because of the mounting costs of additional attorney's fees and interest that will result from delay.

4. Example # 4

Defendants, homeowners, failed to fix boards on the front steps that

34. For a discussion of the inconsistencies in punitive damages awards under current law, see the article in this forum, Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019 (2006).

they knew to be rotting. The defect was not obvious, but the boards collapsed from the rot when Plaintiff, a social guest, fell through them and suffered a broken ankle. The homeowners had forgotten to warn Plaintiff about the rotting steps. Assume that Plaintiff's status as a visitor on the land would permit recovery in the jurisdiction. A fact finder could find:

Wrongfulness = small negligence = 1
Severity = notable injury = 1
Connection = direct connection = 1
Contribution = no contributory negligence = 1

Formula: 1 x 1 x 1 x $20,000 x 1 = $20,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

5. Example # 5

Defendant owns a large dog known to be vicious toward children, but lets the dog run unrestrained. The dog attacked a child on the way home from school and caused a permanent and disfiguring facial scar from its bite. A trier of fact could find:

Wrongfulness = recklessness = 19
Severity = permanent injury = 9
Connection = direct connection = 1
Contribution = no contributory negligence = 1

Formula: 19 x 9 x 1 x $20,000 x 1 = $361,000
Plus reasonable hourly attorney's fees
Plus interest from date of accident

V. CONCLUSION

The state of personal injury damages law is shockingly bad. The public appears to have lost confidence in the tort system and, although that loss of confidence may not be for reasons that I would consider the "right" ones, this loss of confidence presents an opportunity to reconsider the function and functionality of this area of the law.

Current personal injury damages law involves costly trial preparation that yields a highly unpredictable monetary outcome even when the defendant admits liability. This article proposes to streamline

much of the personal injury damage law by creating gross categories of injury and restricting proof of injury to evidence that relates only to proper categorization. For example, matters such as the expense of adult diapers for a lifetime would not be admissible, whereas medical bills would be admissible as an indication of the severity of the injury. Most notably, pain and suffering evidence would not be admissible, and such awards would be subsumed by the overall severity of the injury category.

Secondly, the proposed scheme would make the degree of the defendant's wrongfulness an overt basis for adjusting the personal injury award. The propensity of juries to make such an adjustment without instruction suggests that it should be permitted and done in a manner that is transparent. The proposal is to have a scale of wrongfulness that serves to adjust the award upwards or downwards, depending on whether the conduct was malicious at one extreme or a matter of strict liability at the other extreme. This scale would replace punitive damages because it permits an adjustment of compensatory damages on the basis of wrongfulness.

Third, the proposal includes an adjustment for connectedness, meaning that the compensatory damages are adjusted downwards when the facts show a remote connection between the defendant's wrong and the plaintiff's injury. This factor supplements the proximate cause inquiry. Whereas courts still may use the element of proximate cause to deny liability altogether, the advantage of this element in the damage calculation is that it permits liability to go forward—but to be reduced—when the connection is remote. For example, when there are intervening forces that separate the defendant's negligence from the plaintiff's injury, recovery will be reduced, if it is permitted at all.

When these three factors of wrongfulness, severity, and connectedness are determined numerically on a scale chosen by a jurisdiction, they would need to be related to some monetary indicator—some identifiable number fixed by the legislature and adjusted for inflation, or perhaps pegged to some easily identifiable number such as a percentage of the median home price at the time of the injury.

The formula used to relate the three factors of wrongfulness, severity, and connectedness to the indicator would reflect the jurisdiction's public policy about the manner and degree that it wishes to compensate personal injury victims.[35] The formula could be complex or

35. *See generally* Rachel M. Janutis, *The Struggle Over Tort and the Overlooked Legacy of the Progressives and Populists*, 39 AKRON L. REV. 943 (2006).

simple. The advantage of a complex formula is that it can fine-tune interests, but the disadvantage is its relative lack of accessibility and transparency.

Finally, the resulting monetary award can be adjusted by the jurisdiction's rules on comparative negligence. This proposal does not affect that area of the law, nor does it affect the substantive basis of liability. It simply proposes replacing the typical measures of compensatory damages with these three factors.

Two important additional elements of recovery are reasonable attorney's fees for prevailing plaintiffs and interest from the time of the accident. These factors promote early settlement and justify the overall lower awards.

The advantages of this proposal are that more tort victims will recover for their injuries with the assistance of counsel, and the amount of the award will reflect not only the severity of their injuries, but also the wrongfulness of the conduct and the degree to which the defendant's wrong is connected to the injury. With this re-focus on the nature of compensatory damages, punitive damages can be eliminated because the concepts underlying punitive awards are subsumed in compensatory damages. Further, courts could permit changes in the substantive law of torts without the concern of creating excessive liability. Finally, as a result of the reduced costs of trial preparation, more dollars would reach the pockets of the victims. A reconceptualization of compensatory damages—ending the focus on compensation as the primary goal—could advance tort reform far more than the special interest legislative reforms of recent years.