

**PAIN AND SUFFERING DAMAGES AT MID-TWENTIETH
CENTURY: A RETROSPECTIVE VIEW OF THE PROBLEM
AND THE LEGAL ACADEMY'S FIRST RESPONSES**

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INTRODUCTION

A major debate in contemporary American tort law concerns the award of pain and suffering damages in personal injury cases. The issue has attracted attention because of large jury verdicts, mainly in medical negligence and products liability cases.¹ Health care providers, manufacturers, and insurers, united under the banner of tort reform, have called for limits on noneconomic damages, the most common being for pain and suffering.² Many state legislatures have responded by setting maximum limits on noneconomic damages.³ Some laws limit

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¹ See, e.g., Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1402–04 (2004) (discussing a recent medical malpractice pain and suffering award of \$100 million); Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 115–17 (2000) (discussing the trend of increasing jury awards in products liability cases).

² See Wilson et al., *supra* note 1, at 87–89; Bill Rankin, *Tort Reform: Justice for Whom?*, ATLANTA JOURNAL-CONSTITUTION, Feb. 7, 2004, available at http://www.georgiawatch.org/docs/02.07.2004_ajc-_tort_reform_justice_for_whom.pdf. Noneconomic damages in a personal injury case may also include loss of spousal consortium, and the uninjured spouse may have his or her own loss of consortium claim. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 235 (Ohio 1970). Wrongful death statutes may also allow for other noneconomic damages, such as for loss of society. See, e.g., *Mitchell v. United States*, 141 F.3d 8, 19–20 (1st Cir. 1998) (applying Massachusetts wrongful death statute).

³ AM. TORT REFORM ASS'N, TORT REFORM RECORD 29–35 (Dec. 31, 2005), available at http://www.atra.org/files.cgi/7990_Record_12-31-05.pdf. A report published by the American Tort Reform Association found that twenty-three states have enacted laws limiting noneconomic damages since 1986. *Id.* at 1, 29. Courts in four of the states have held the laws to be unconstitutional. *Id.* at 29.

noneconomic damages in medical negligence cases only,⁴ while others apply to various personal injury lawsuits.⁵ Currently, Congress is considering legislation to impose a national limit on noneconomic damages in medical negligence cases.⁶

The academic community has been very active in the debate over pain and suffering damages, producing numerous studies on the subject. Some scholars believe that pain and suffering damages should be abolished because they are not compensatory, the jury has no rational way to assess them, they are inherently subjective, and they encourage fraud.⁷ Another group would allow for pain and suffering damages but propose new ways of measuring or limiting them.⁸ Yet others believe that they are compensation for the victim's injured feelings and serve the interest of corrective justice.⁹

⁴ See, e.g., CAL. CIV. CODE § 3333.2 (West 1997) (limiting noneconomic damages in medical negligence cases to \$250,000); MO. ANN. STAT. § 538.210 (West Supp. 2006) (capping noneconomic damages against health care providers at \$350,000 for each defendant, indexed for inflation).

⁵ See, e.g., KAN. STAT. ANN. § 60-19a01 (1994) (limiting pain and suffering damages in all personal injury actions to \$250,000).

⁶ On July 28, 2005, the House of Representatives passed the HEALTH Act of 2005. H.R. 5, 109th Cong. (2005). Section 4(b) of the bill places a \$250,000 cap on noneconomic damages. It reads, in pertinent part, "In any health care lawsuit, the amount of noneconomic damages, if available, may be as much as \$250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury." *Id.* § 4(b).

⁷ See, e.g., Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 171–80 (2004); Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 341–42.

⁸ See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 938–65 (1989); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777–90 (1995); 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, 796–840 (1995); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 775–819 (1985); Niemeyer, *supra* note 1, at 1418–21; Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 808–47 (1987); Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"*, 22 U. MICH. J.L. REFORM 303, 313–27 (1989).

⁹ See, e.g., Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 783–85 (1987).

Although pain and suffering damages are controversial today, the issue is not new. Debates on the subject commenced over fifty years ago.¹⁰ During the mid-twentieth century, when personal injury lawsuits were multiplying and pain and suffering awards were rising, law professors began viewing these damages as a discrete problem in negligence cases.¹¹ Throughout the 1950s, they produced the first legal scholarship examining pain and suffering damages with a critical eye.¹² Some professors proposed limits on pain and suffering awards,¹³ while others called for their elimination.¹⁴ The insights and ideas generated by these scholars laid the groundwork for present-day discussions of pain and suffering damages.

This Article revisits this period of transition in American tort law. The Article has four parts. Part I traces the development of the law governing pain and suffering damages. It shows how common law courts in the nineteenth century created the legal rules during a time when pain and suffering awards were not very numerous or large. The courts gave juries the power to compute these damages with little judicial guidance, evincing great faith in their ability to reach a fair result. The judicial standards of review reflected this faith, as jury verdicts could be overturned by the trial judge or the appellate court in exceptional cases only.

Part II focuses on the first four decades of the twentieth century, a time when the appellate courts expanded opportunities for recovering compensation for pain and suffering. The courts began recognizing the various types of physical pain and mental suffering that a personal injury victim might endure. Additionally, this Part shows how the appellate courts, at the urging of legal academicians who were influenced by developments in the behavioral sciences, steadily increased the availability of damages for mental injuries. The cases and scholarly literature paid little attention to how these damages would be quantified, the assumption being that the jury, guided by the usual pain and suffering instructions, would set them.

Part III examines the dramatic growth of personal injury litigation and the increases in pain and suffering awards after World War II. It discusses a variety of developments that accounted for this change, including the expansion of liability insurance for auto accidents, the rise of the

¹⁰ See discussion *infra* Part IV.

¹¹ See discussion *infra* Part IV.

¹² See discussion *infra* Part IV.

¹³ See discussion *infra* Part IV.D.1.

¹⁴ See discussion *infra* Part IV.D.2.

plaintiff's bar as a distinct segment of the legal profession, and the popular belief that accident victims should be fully compensated for losses.

Part IV shows how legal scholars in the 1950s began seeing pain and suffering damages as a discrete problem. This Part identifies the important scholarship on pain and suffering damages from the decade.¹⁵ These writings reveal a general dissatisfaction with the common law rules and a lack of confidence in the judiciary's ability to make reforms. The torts scholars who proposed changing the law governing pain and suffering damages expected that any meaningful results would come from the legislatures. Part IV also discusses the major proposals for change, which include limiting pain and suffering damages or abolishing them entirely in certain kinds of cases. It shows that some authors who favored broader compensation for the economic losses of accident victims also called for the elimination of pain and suffering damages because of the social cost.

The Article concludes by examining the 1950s scholarship in the context of present-day debates over pain and suffering damages. It reveals the effects of the early studies and proposals on subsequent scholarly discourse and the resulting legislative changes in pain and suffering law.

I. DEVELOPMENT OF THE LEGAL PRINCIPLES GOVERNING PAIN AND SUFFERING DAMAGES

Pain and suffering damages have long been part of the personal injury victim's recovery.¹⁶ Early in the nineteenth century, courts began holding that pain and suffering damages were an element of compensatory damages.¹⁷ Although some appellate courts questioned these damages in the mid-nineteenth century, they were already well-established by this point.¹⁸ For other courts, these damages must not have been controversial because there is no debate over their appropriateness in the reported

¹⁵ The decision to limit the discussion to roughly a ten-year period was not arbitrary. The first major law review articles on pain and suffering damages appeared during the 1950s. The volume of articles on personal injury law in general grew at a tremendous rate during the decade. *See* discussion *infra* Part IV.

¹⁶ For a history of pain and suffering damages, *see generally* Jeffrey O'Connell & Theodore M. Bailey, *The History of Payment for Pain & Suffering*, Appendix to Jeffrey O'Connell & Rita James Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L.F. 1, 83.

¹⁷ *See id.* at 93.

¹⁸ *Id.* at 94–95. In *Pennsylvania Railroad Co. v. Allen*, 53 Pa. 276, 277–78 (1867), for example, the court rejected the defendant's argument that damages for pain and suffering should not be allowed because they have no pecuniary value and there is no standard by which they can be estimated.

cases.¹⁹ By the century's end, pain and suffering damages were universally recognized as part of the plaintiff's award, a view reflected in the major legal treatises on the subject.²⁰

During these formative years, the appellate courts established the basic rules governing pain and suffering damages, which, in the absence of change through legislation, still apply today. They include the jury's role in setting pain and suffering damages and the law that permits the courts to protect against unjustified or excessive verdicts.

A. *The Jury's Role in Calculating the Award for Pain and Suffering*

At common law, the jury had the authority to award pain and suffering damages.²¹ This is not surprising because the jury traditionally determined damages.²² When the plaintiff was seeking pecuniary damages, such as for injury to property or medical expenses, the jury relied on marketplace equivalents to compute the amount.²³ Pain and suffering damages posed a special problem, however, for there is no market for pain and suffering. Although these damages are compensatory, the courts recognized that market measures did not aid in setting them.²⁴ In 1910, the California Supreme Court offered the following: "In truth the admeasurement of suffering in terms of money is a most clumsy device; but it is the best device which the law knows, and it is a device which the law will employ

¹⁹ Early California Supreme Court decisions involving pain and suffering damages, for example, do not indicate any judicial misgivings about these awards. *See* *Karr v. Parks*, 44 Cal. 46, 47, 50 (1872) (allowing girl to recover for pain and suffering resulting from attack by defendant's vicious cow); *Aldrich v. Palmer*, 24 Cal. 513, 515–17 (1864) (holding that a jury verdict, which included damages for pain and suffering when an iron shaft crushed a workman's foot, leading to amputation of toes and a permanent limp, was not excessive).

²⁰ O'Connell & Bailey, *supra* note 16, at 98–100.

²¹ *See, e.g.,* *Fredericks v. Atlantic Ref. Co.*, 127 A. 615, 619 (Pa. 1925) ("[T]here is a zone of uncertainty as to . . . compensation for pain and suffering, which is exclusively within the jury's province to determine."); *Chesapeake & Ohio Ry. v. Arrington*, 101 S.E. 415, 423 (Va. 1919) ("The law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering . . .").

²² *See, e.g., Chesapeake & Ohio Ry.*, 101 S.E. at 423.

²³ *See, e.g.,* *Stoll v. Almon C. Judd Co.*, 138 A. 479, 483 (Conn. 1927).

²⁴ *See, e.g.,* *Blakley v. Pittsburgh Rys.*, 90 A. 72, 72 (Pa. 1914). In *Blakley*, the Pennsylvania Supreme Court stated that pain and suffering damages do not have any market price: "[I]t is left to the good judgment and common sense of the jury to say to what amount the plaintiff should be compensated, or what amount should be allowed for the pain and suffering he has endured or may probably endure in the future." *Id.* (quoting charge to the jury in *Schenkel v. Pittsburgh & Birmingham Traction Co.*, 44 A. 1072, 1073 (Pa. 1899)).

until some better is discovered.”²⁵ The jury was asked to put a dollar amount on a loss for which there is no measure, to quantify the unquantifiable.²⁶ As an early California court stated, “[T]o ascertain what is a fair and just compensation . . . is a judicial problem of difficult, if not impossible, solution.”²⁷

Due to the unascertainable nature of pain and suffering damages, the jury instructions on them have never been very instructive. The jury was given broad discretion to set an amount to compensate for the pain and suffering that the victim was reasonably certain to endure.²⁸ The jury could take into account factors such as “the intensity and duration of the [plaintiff’s] pain . . . ; the plaintiff’s life expectancy; the age and physical

²⁵ *Merrill v. L.A. Gas & Elec. Co.*, 111 P. 534, 540 (Cal. 1910).

²⁶ CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 318 (1935). “Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can . . . only tell [the jurors] to allow such amount as in their discretion they may consider reasonable.” *Id.* (footnotes omitted). See also *Buffalo v. City of Des Moines*, 186 N.W. 844, 848 (Iowa 1922), where the court stated:

In one sense of the word there is no such thing as a money equivalent for a broken and crippled body or for physical or mental suffering, but as the nearest practical approach to satisfaction for torts of this nature the law allows the jury in proper cases to assess money damages.

²⁷ *Aldrich v. Palmer*, 24 Cal. 513, 517 (1864).

²⁸ See generally C.V. Venters, Annotation, *Instructions Regarding Measurement of Damages for Pain and Suffering*, 85 A.L.R. 1010 (1933) (providing examples of jury instructions from various states allowing pain and suffering damages).

California’s present day standard jury instruction on pain and suffering damages reflects the holdings of early precedents. The jury is instructed to award as follows:

Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and caused by the injury

No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.] In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence.

2 CAL. JURY INSTRUCTIONS: CIV. [BAJI] § 14.13 (9th ed. 2002).

condition of the plaintiff; the health, habits, and pursuits of the plaintiff;” the victim’s temperament and ability to withstand shock; and “the inconvenience and annoyance” associated with the injury.²⁹ When the plaintiff was maimed or disfigured, the plaintiff’s appearance could influence the jury.³⁰ Yet, placing a dollar figure on the loss was a daunting task, and the jury instructions gave little guidance.³¹ Juries could not compare the pre-accident and post-accident value of a person’s life, make a simple calculation, and award the difference. For this reason, pain and suffering awards were necessarily subjective and unpredictable.³² As one critic stated:

The ultimate practical consequence of the absence of any certain method of evaluating pain and suffering is that in appraising the potential recovery in any personal injury case there exists a vast imponderable. No one, not even the experienced claim adjuster, can say with any reasonable degree of certainty what a jury is likely to do in awarding damages for pain and suffering.³³

B. Limited Judicial Review of Pain and Suffering Awards

The common law courts set the standards for judicial review of jury awards for pain and suffering. Reflecting faith in the jury system, the courts generally refused to substitute their opinions on damages for those of the jury.³⁴ They recognized, however, that there would be exceptional cases when a jury would render an unjustified or excessive award,³⁵ so the trial judge served as the primary check against the runaway jury. The trial judge was expected to examine all damages awards, including those for pain and suffering, and decide, in light of the evidence, if they were

²⁹ J.R. Stewart, Comment, *Argument of Counsel—The Measure of Damages for Pain and Suffering*, 15 U. MIAMI L. REV. 85, 88 (1960) (footnotes omitted).

³⁰ See, e.g., *Collinson v. Cutter*, 170 N.W. 420, 427 (Iowa 1919).

³¹ See, e.g., Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221–22 (1953). “To put a monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise.” *Id.* at 222.

³² See Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 205–06 (1958).

³³ *Id.* at 208. Plant’s article is helpful because it lists many early case authorities on pain and suffering damages. *Id.* at 208–10.

³⁴ See, e.g., *Aldrich v. Palmer*, 24 Cal. 513, 516–17 (1864).

³⁵ See *id.* at 517–18.

appropriate. If the judge believed the jury verdict was excessive, then the judge would grant a motion for a new trial.³⁶

The role of an appellate court in reviewing pain and suffering awards was more limited. It could reverse a judgment where the trial court committed an error of law, such as by giving an erroneous instruction.³⁷ But the appellate courts did not re-weigh evidence or pass on the credibility of witnesses.³⁸ They intervened as to the amount of damages “only where the verdict [was] so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment.”³⁹ A jury verdict “will never be disturbed,” one court wrote, “unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury.”⁴⁰ Only in cases when a “candid man . . . would be either shocked or startled at the verdict” or when the amount was “suggestive of either passion or prejudice, or corruption,” would a court disturb the jury’s award.⁴¹

The standards for judicial review of pain and suffering awards were fraught with the same basic problem as the jury instructions, a fact that

³⁶ See *Redmond v. Alley*, 48 P.2d 971, 972 (Cal. Dist. Ct. App. 1935) (“Where the verdict appears to the trial court to be against the weight of the evidence, it is not only within its discretion, but it is its duty to set the verdict aside on motion for a new trial.”).

³⁷ See, e.g., *Rhodes v. Union Ry. Co.*, 102 N.Y.S. 510, 511 (1907) (holding that it was erroneous to give a “golden rule” instruction); Vernon X. Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216, 235–39 (1930).

³⁸ Miller, *supra* note 37, at 248–49.

The trial judge is in a better position than the appellate court to effect the compromise that is necessary. He has seen the witnesses and heard the evidence at the trial. He has had the experience and the professional training to enable him to deal with the problem presented. Unless the amount of damages is so great, after he has sustained the verdict, as to indicate prejudice, or even corruption, upon his part as well as the jury’s, what the trial judge has allowed should stand as the final judgment.

Id. (footnote omitted).

³⁹ *Zibbell v. S. Pac. Co.*, 116 P. 513, 521 (Cal. 1911) (quoting *Harrison v. Sutter St. Ry.*, 47 P. 1019, 1021 (Cal. 1897)).

⁴⁰ *Aldrich*, 24 Cal. at 516.

⁴¹ *Id.* at 518.

legal commentators were quick to point out: there were no objective guidelines for deciding if the damages were excessive. The outcome depended on whether the award was shocking to the reviewing judge.⁴² The subjectivity of appellate review led some critics to complain when the courts let large awards stand,⁴³ while those on the other side charged the courts with being defendant-friendly.⁴⁴

Nevertheless, there appeared to be consensus on two points: first, jury pain and suffering awards were inherently subjective and unpredictable; second, the standards for judicial review of these damages did little to clear the muddle. As personal injury litigation increased in the twentieth century, the deficiencies in the common law rules relating to pain and suffering damages would become more obvious and problematic.

II. REFINEMENTS IN PAIN AND SUFFERING DAMAGES LAW IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

The common law courts of the late nineteenth and early twentieth centuries refined the law governing pain and suffering damages in ways that would be helpful to attorneys seeking higher awards for their clients in the future. For instance, by the early 1930s a personal injury victim could recover for future pain and suffering in addition to past damages, so long as the plaintiff could prove with requisite certainty that future pain and suffering would result.⁴⁵ Although some courts required that future damages be discounted to present value, others refused, finding that this

⁴² See Miller, *supra* note 37, at 245. “An appellate court uses no formula more certain than any used by the jury or trial judge. Its calculation must be made on the basis of its own experience.” *Id.*

⁴³ See, e.g., Plant, *supra* note 32, at 208–10. Marcus L. Plant thought that the appellate courts were not reversing large pain and suffering awards enough.

In many cases, however, a person studying the appellate reports gains the impression that the tendency of juries is to award disproportionately large amounts for pain and suffering and that such awards are difficult for the courts to control in view of the absence of definitive principles to guide them.

Id. at 210.

⁴⁴ One author noted that appellate courts rarely found damages awards to be inadequate. William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 32 (1955).

⁴⁵ See generally C.S. Wheatley, Jr., Annotation, *Future Pain and Suffering as Element of Damages for Physical Injury*, 81 A.L.R. 423 (1932) (providing examples of states recognizing recovery for future pain and suffering).

would make the process of computing pain and suffering even more confusing.⁴⁶

Another refinement allowed jurors to consider the wide variety of physical pain and mental suffering that a personal injury victim might suffer.⁴⁷ Specifically, the appellate courts showed a new willingness to acknowledge the debilitating effects of mental suffering.⁴⁸ Although nineteenth century courts had allowed recovery for mental suffering that resulted from personal injury,⁴⁹ developments in the behavioral sciences led courts to dwell on the various ways in which mental suffering could be manifested. In *Merrill v. Los Angeles Gas & Electric Co.*,⁵⁰ for example, the California Supreme Court stated:

To mean anything[, mental suffering] must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent on his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating, and so through a long category, the enumeration of which it is unnecessary here even to attempt.⁵¹

Charles T. McCormick, in *Handbook on the Law of Damages*, noted, “The various forms of mental suffering are as numberless as the capacities of the human soul for torturing itself.”⁵² They include the injured person’s fright at the time of the injury, anxiety about how the injury might affect the victim’s future health and earning power, fear of death or insanity, and, in the case of a pregnant woman, concern over the health of the unborn child.⁵³ Courts also found that mental suffering damages could compensate for lifestyle changes.⁵⁴ Although the judge instructed the jury

⁴⁶ Plant, *supra* note 32, at 202.

⁴⁷ See *id.* at 201–04.

⁴⁸ See *id.* at 202.

⁴⁹ See, e.g., *Fairchild v. California Stage Co.*, 13 Cal. 599, 601 (1859), where the court wrote, “We cannot see why compensation should not as well be given for pain of mind as pain of body.”

⁵⁰ 111 P. 534 (Cal. 1910).

⁵¹ *Id.* at 540.

⁵² MCCORMICK, *supra* note 26, at 316.

⁵³ *Id.* at 316–17 (footnotes omitted).

⁵⁴ See, e.g., *Ryan v. Oakland Gas, Light & Heat Co.*, 130 P. 693, 696–97 (Cal. Dist. Ct. App. 1913).

to give one award for all varieties of physical pain and mental suffering, these decisions allowed the plaintiff's lawyer to identify for the jury the specific ways in which an injury affected the victim's life.⁵⁵

The legal academy played a key role in emphasizing the debilitating effects of mental suffering by campaigning for a widening of recovery for emotional injuries. During a period roughly spanning the first four decades of the twentieth century, torts scholars produced numerous articles calling for changes in the substantive law relating to the intentional⁵⁶ and negligent⁵⁷ infliction of emotional injury. These writers found the common law governing recovery for emotional losses to be a hodgepodge of inconsistent and illogical rules.⁵⁸ As a result, a person

⁵⁵ See *id.* at 696–98.

⁵⁶ See, e.g., Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426 (discussing the impact of intentional infliction of emotional injury in a variety of contexts); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) (detailing the history of intentional infliction of emotional harm); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) (discussing the apparent emergence of intentional infliction of mental suffering as a “new tort”).

⁵⁷ See, e.g., Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141 (1902) (discussing the controversy regarding recovery for negligence without direct physical impact); Francis H. Bohlen & Harry Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409 (1932) (commenting on the evolution of negligence emotional injury recovery in New York); Leon Green, *“Fright” Cases*, 27 ILL. L. REV. 761 (1933) (detailing instances of “fright” recovery); John E. Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933) (addressing the merits of recovery for negligent emotional injury); Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921) (discussing the history of fright recovery); Lyman P. Wilson, *The New York Rule as to Nervous Shock*, 11 CORNELL L.Q. 512 (1926) (discussing recovery for nervous shock in New York).

⁵⁸ See sources cited *supra* notes 56–57. With respect to the intentional torts, the appellate courts allowed damages for emotional injury in cases such as “assault, battery, false imprisonment, malicious prosecution, and seduction.” Prosser, *supra* note 56, at 880 (footnotes omitted). However, there was no independent tort for emotional distress resulting from outrageous anti-social conduct. See *id.* at 874. As Prosser stated, “‘Mental anguish’ has been an orphan child. Notwithstanding its early recognition in the assault cases, the law has been reluctant, and very slow indeed, to accept the interest in peace of mind as entitled to independent legal protection.” *Id.* (footnote omitted).

The negligence precedents were even more confusing. The general rule was that a victim could recover for physical injuries resulting from shock or fright only if there was some kind of bodily impact. Harold F. McNiece, *Psychic Injury and Tort Liability in New*
(continued)

suffering emotional distress would receive or be denied compensation based on what appeared to be arbitrary distinctions.

Educators at the nation's most prestigious law schools took the lead role in attacking the common law rules.⁵⁹ Their efforts intensified after World War I, a time when legal realism was taking hold in legal education.⁶⁰ Legal realism reflected an enhanced awareness of human behavior and closely tracked advances in the behavioral sciences.⁶¹ Some legal scholars were fascinated especially by developments in psychology.⁶² They believed that mental disorders could be explained scientifically and that emotional injuries could be just as serious as the physical.⁶³ For these reasons, torts scholars questioned the common law's limitations on compensation for mental injuries and worked to change the law by expanding liability in cases where the victim suffered emotional harm.⁶⁴

To make their case, the authors argued that emotional injury was a genuine element of damages. Herbert F. Goodrich, in his 1922 article *Emotional Disturbance as Legal Damage*,⁶⁵ relied on physiological studies to establish that fear was a real injury by dwelling on its physical manifestations.⁶⁶ "It is clearly demonstrated that it is impossible to have fear as a purely emotional thing," he argued.⁶⁷ Goodrich reasoned that the common law courts' general refusal to compensate for emotional injury reflected the dearth of scientific information on the subject that was available when the precedents were written.⁶⁸ He stated, "It does show that judicial language formulated, at a time when no one knew so much about the human organism as we do now, was inaccurate."⁶⁹ But times

York, 24 ST. JOHN'S L. REV. 1, 14 & n.40 (1949). Still, there were many exceptions where impact was not required. *See id.* at 32–65.

⁵⁹ Many of the leading torts scholars of the twentieth century participated in the discussion, including Francis H. Bohlen, Leon Green, Calvin Magruder, and William L. Prosser. *See* sources cited *supra* notes 56–58.

⁶⁰ *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 63–113 (expanded ed. 2003) (discussing the rise and prevalence of legal realism).

⁶¹ *Id.* at 103.

⁶² *See id.*

⁶³ *See id.* at 103–05.

⁶⁴ *See id.* at 104–05.

⁶⁵ 20 MICH. L. REV. 497 (1922).

⁶⁶ *Id.* at 498–99.

⁶⁷ *Id.* at 499.

⁶⁸ *See id.* at 501.

⁶⁹ *Id.*

had changed. Goodrich argued that because science recognized the negative consequences of emotional injuries, the law should follow.⁷⁰

In a law review article on the “new tort” of intentional infliction of mental distress, William L. Prosser also pointed to advances in science as justification for awarding damages for emotional injury.⁷¹ He wrote, “Medical science has long recognized that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves ‘physical’ injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye.”⁷² Suggesting a progressive view of common law development, Calvert Magruder predicted that the courts would first protect the interest in mental tranquility from intentional invasions; liability for negligent invasions would follow later.⁷³

In a further stage of development, cases might arise where liability would be imposed, though the defendant did not act for the purpose of causing the mental

⁷⁰ See *id.* at 503, 513.

It is then clear that fright as definitely affects the physical organism as does a blow with a club. With no desire or volition on the part of the individual he may suffer very marked physical effects as a result of fear, and effects that are very harmful to him. And what is true of fear is true in kind, though not in degree, of the lesser emotions such as worry and anxiety.

If the physical effect of strong emotional disturbance is a result that we can trace and can see, it should be clear that the plaintiff's right to recover for such disturbance should be recognized.

Id. at 503 (footnote omitted).

⁷¹ See Prosser, *supra* note 56, at 876.

⁷² *Id.* (footnote omitted).

⁷³ See Magruder, *supra* note 56, at 1058–59.

We would expect, then, the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.

Id. at 1058.

disturbance, but realized, or perhaps should have realized, that such a consequence would almost surely follow. The suggested formula is merely a conservative starting point consistent with the historical evolution of the law of torts.⁷⁴

Among the reasons given by appellate courts for refusing to expand recovery for emotional injuries were fears of a flood of litigation, a belief that mental injury could be feigned easily, that damages would rest on conjecture or speculation,⁷⁵ and that they would be difficult to measure.⁷⁶ The torts scholars discounted these concerns. They thought that a possible increase in litigation was not a valid reason for denying genuine claims.⁷⁷ They were also aware that mental injuries presented special problems of proof at trial,⁷⁸ but expected that medical experts could distinguish real claims from the spurious.⁷⁹ Some cross-discipline law review articles addressed the special problems surrounding proof of mental injury at trial, including the use of expert testimony.⁸⁰

Regarding the jury's ability to make a monetary award for emotional injuries, the scholars who addressed the question were confident that existing legal rules governing pain and suffering damages provided sufficient guidance.⁸¹ As Goodrich stated:

⁷⁴ *Id.* at 1059.

⁷⁵ *See, e.g., Mitchell v. Rochester Ry.*, 45 N.E. 354, 354–55 (N.Y. 1896), *overruled by Battala v. State*, 176 N.E.2d 729 (1961).

⁷⁶ In *Gatzow v. Buening*, 81 N.W. 1003, 1009 (Wis. 1900), for example, the court wrote, “[M]ental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages.”

⁷⁷ *E.g., Prosser, supra* note 56, at 877.

It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of litigation”; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.

Id. (footnote omitted).

⁷⁸ *See, e.g., Note, Developments in the Law: Damages—1935–1947*, 61 HARV. L. REV. 113, 140–41 (1947). “Since no clear standard for measuring mental distress is possible, the usual American requirement of certainty is not present in proof of such damages.” *Id.* at 141 (footnote omitted).

⁷⁹ *Id.*

⁸⁰ *See, e.g., Hubert Winston Smith & Harry C. Solomon, Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1944).

⁸¹ *See Goodrich, supra* note 65, at 508–09.

That a plaintiff's recovery must be in money damages need cause us little more difficulty in cases of emotional disturbance than in any other instance of non-pecuniary loss; the pain of a shattered foot, the loss of reputation from a defamation, the loss of liberty from false imprisonment. A judgment for money is a clumsy device, but it is the best the law has.⁸²

Archibald H. Throckmorton expressed confidence in the jury, writing that "the very function of the jury is to sift evidence and to determine whether an injury has been proved, the extent of the injury, and the proper measure of compensation in money."⁸³ The courts would be an adequate check against excessive jury awards.⁸⁴ Prosser, too, believed existing rules enabled courts to control jury decisions:

Just as a substantial verdict for personal injuries or for "physical" pain will be reversed when the evidence of damage consists of purely subjective testimony on the part of the plaintiff, unsupported by any independent proof, the court may refuse to permit recovery for "mental" suffering unless there is some sufficient assurance of the genuineness of the claim, either in the nature of the defendant's act itself, or in other circumstances proved.⁸⁵

To summarize, by the mid-twentieth century, the framework of rules governing pain and suffering damages was set. These damages were recognized universally as being part of the personal injury victim's award. The appellate courts allowed the jury to consider numerous forms of pain and suffering and showed a new willingness to allow compensation for mental injuries.⁸⁶ The courts acknowledged the inherent difficulty in

⁸² *Id.* at 509 (footnote omitted).

⁸³ Throckmorton, *supra* note 57, at 277.

⁸⁴ Goodrich, *supra* note 65, at 512. "There need be little apprehension that the older and more conservative members of a conservative profession, the judges who make up the body of our appellate courts, will be unduly hasty in extending protection against injured feelings further than principles either of justice or expediency call for." *Id.* at 512-13.

⁸⁵ Prosser, *supra* note 56, at 877-78 (footnotes omitted).

⁸⁶ In their torts casebook, Smith and Prosser listed forms of pain and suffering that the courts allowed, including

loss of sense of taste and smell, loss of fecundity, mental pain and suffering [following] from a consciousness that capacity to labor has been diminished for life, mental suffering of a virgin of strict religious

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placing a money figure on pain and suffering and understood that these damages were easy to prove and could vary from case to case for the same injury. Despite these problems, the courts had faith in the jury's ability to reach a fair result. Although the courts could overturn jury verdicts, as a matter of practice they limited their intervention to the unusual cases.

III. THE GROWTH IN PERSONAL INJURY LITIGATION AND PAIN AND SUFFERING DAMAGES AWARDS AFTER WORLD WAR II

Before World War II, pain and suffering damages as a discrete subject in personal injury cases did not attract much scholarly attention.⁸⁷ This may be because personal injury lawsuits were not very numerous and verdicts were not large.⁸⁸ In the postwar era, however, the situation changed. Torts scholars perceived that personal injury law was heading in a new direction. The volume of lawsuits increased and the dollar amounts of collectible jury awards and settlements were much higher than in the past.⁸⁹

faith because her hymen was ruptured by a doctor during a physical examination, acquisition of bad moral habits because of a head injury, permanent incontinence of urine, loss of desire for sexual intercourse and impotency, shock, change of personality . . . , fear of death, increased stuttering, nervousness, neurotic condition, insomnia and inability to drive a car, fear of paralysis, and fear of injury to an unborn child.

YOUNG B. SMITH & WILLIAM L. PROSSER, *CASES AND MATERIALS ON TORTS* 617 (1952) (footnotes omitted).

⁸⁷ For an early article mentioning pain and suffering damages as a component of personal injury damages, see, e.g., Miller, *supra* note 37, at 222–24.

⁸⁸ See Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 355, 365. Unfortunately, data on personal injury litigation at the trial court level for the late nineteenth and early twentieth centuries are thin, but the little information we have shows that the number of cases was small. For example, Lawrence Friedman reported on a study of personal injury case filings in Alameda County, California, between 1880 and 1900. *Id.* at 351. He concluded that only a small fraction of injuries resulted in legal claims and that few victims received any compensation. *Id.* at 355. He referred to tort law as a “system of noncompensation.” *Id.* In the few cases that went to trial, the average total award was \$3,651. *Id.* at 365.

⁸⁹ Although there was little empirical evidence that pain and suffering awards, specifically, had increased, the consensus was that they had. Facts gleaned from appellate cases and other anecdotal evidence were cited as support. For example, Marcus L. Plant wrote, “[A] person studying the appellate reports gains the impression that the tendency of juries is to award disproportionately large amounts for pain and suffering and that such
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The increase in litigation and the larger awards can be attributed to a number of developments. The first was a crisis in auto accident injuries, which, in turn, led to the expansion of liability insurance to cover the losses.⁹⁰ Following World War I, as the automobile became an ever more popular means of transportation, personal injuries involving automobiles grew at an alarming pace.⁹¹ In 1930, for example, over 30,000 persons were killed and another one million were injured in auto accidents in the United States.⁹² These troubling statistics raised questions about the fate of accident victims and whether they were being compensated for their losses.

In the late 1920s, the Columbia University Council for Research in the Social Sciences created a commission to study and report on the problem.⁹³ Fleming James of the Yale Law School would later call the Columbia report “the most significant contribution to the study of torts to appear so far in the twentieth century.”⁹⁴ The report, which was the subject of a 1932 symposium in the *Columbia Law Review*, concluded that the negligence system was failing.⁹⁵ Most accident victims did not receive compensation, even for economic losses.⁹⁶ If the defendant did not have liability insurance, the plaintiff had only a 25% chance of recovering anything.⁹⁷ When the defendant was insured, the plaintiff was likely to collect a larger percentage of the loss if the injury was trivial rather than serious, as insurers settled minor claims but aggressively litigated in cases where the damages could be substantial.⁹⁸ The Columbia report proposed major reform of the tort system with respect to auto accidents. It recommended replacing the negligence system with a no-fault program,

awards are difficult for the courts to control in view of the absence of definitive principles to guide them.” Plant, *supra* note 32, at 210. Louis L. Jaffe relied on lists of verdicts published by a plaintiffs’ attorney group to conclude that the personal injury awards had increased “enormously.” Jaffe, *supra* note 31, at 222 & n.10.

⁹⁰ See Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 786–87 (1932).

⁹¹ See *id.* at 786.

⁹² *Id.*

⁹³ See *id.* at 785 & n.1.

⁹⁴ Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 408 (1959).

⁹⁵ See Smith, *supra* note 90, at 793–94. The findings of the Columbia report are summarized in Smith’s article. I refer to this summary in the discussion that follows.

⁹⁶ See *id.* at 793–94.

⁹⁷ *Id.* at 793.

⁹⁸ See *id.* at 794.

similar to workers' compensation, in order to cover the victim's economic losses.⁹⁹ The Columbia report also called for abolishing pain and suffering damages in these cases, deeming it more important that economic losses be paid in full.¹⁰⁰

No state adopted the Columbia report's no-fault recommendation, but the report succeeded in identifying a crisis in auto accident cases.¹⁰¹ The report flagged the lack of insurance as a cause of the crisis and exposed the suffering of innocent victims who were forced to absorb losses resulting from the negligence of motorists.¹⁰² After the Columbia report, many states passed laws in order to encourage or require drivers to obtain liability insurance.¹⁰³ The most common was the enactment of "security-responsibility laws."¹⁰⁴ These statutes required a motorist involved in an accident causing losses over a minimum dollar amount to post security.¹⁰⁵ Their effect was to induce many drivers to purchase statutorily prescribed liability insurance.¹⁰⁶ By 1949, twenty-three states, including most with large urban centers, enacted this type of statute.¹⁰⁷ One state, Massachusetts, went even further by requiring compulsory liability insurance for all drivers.¹⁰⁸

These laws led to a tremendous growth in liability insurance coverage.¹⁰⁹ Previously, business defendants carried insurance to protect against liability for injuries resulting from their activities,¹¹⁰ so a person suing a transportation company or a manufacturer would likely collect the judgment. On the other hand, as the Columbia report illustrated, if a person was injured by a private individual without insurance, the

⁹⁹ See *id.* at 786, 797. This was not the first time that a system similar to workers' compensation had been proposed for auto accident cases. See, e.g., Ernest C. Carman, *Is a Motor Vehicle Accident Compensation Act Advisable?*, 4 MINN. L. REV. 1, 2 (1919).

¹⁰⁰ See Smith, *supra* note 90, at 800-01.

¹⁰¹ Joseph P. Chamberlain, *Introduction to Frank P. Grad, Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 300 (1950).

¹⁰² See *id.*

¹⁰³ Grad, *supra* note 101, at 307.

¹⁰⁴ *Id.* at 308-09.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 311.

¹⁰⁷ See *id.* at 309 & n.30. The states included California, Illinois, and New York. *Id.* at 309 n.30.

¹⁰⁸ *Id.* at 312.

¹⁰⁹ *Id.* at 311.

¹¹⁰ See Friedman, *supra* note 88, at 360. Friedman's study reveals that most personal injury suits were brought against business defendants. *Id.*

likelihood of recovering anything was low.¹¹¹ It made little sense to sue a defendant who could not pay. The security-responsibility statutes fundamentally changed the utilization of insurance.¹¹² The Columbia report found that only about 27% of registered vehicles were insured against liability in 1929,¹¹³ but by the mid-1940s, some states were reporting that almost 85% were covered.¹¹⁴ If a motorist had liability insurance, the successful plaintiff had a “deep pocket” from which to collect the judgment.

A second development accounting for the rise in litigation and pain and suffering awards was tied closely to the growth in liability insurance: more lawyers became willing to represent clients in auto accident cases.¹¹⁵ The chance of having a collectible judgment or settlement gave lawyers the incentive to take cases. The plaintiff’s attorney in a personal injury case usually was retained on a contingent fee basis, so the fee depended on the recovery.¹¹⁶ The portion of the award for economic damages was limited by market measures, but noneconomic damages were left to the jury’s discretion.¹¹⁷ For this reason, it was in the attorney’s financial interest to seek a high pain and suffering award.¹¹⁸ Lawyers could take cases when liability was questionable or the injuries were minor because the cost of litigation and the possibility of a substantial jury verdict could be enough to induce an insurance company to settle.¹¹⁹ Critics accused

¹¹¹ Chamberlain, *supra* note 101, at 300.

¹¹² See Grad, *supra* note 101, at 308–09, 311.

¹¹³ Smith, *supra* note 90, at 787.

¹¹⁴ Grad, *supra* note 101, at 311.

¹¹⁵ See LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 78–79 (1958).

¹¹⁶ CLARENCE MORRIS, *MORRIS ON TORTS* 349 (1953).

¹¹⁷ See O’Connell & Simon, *supra* note 16, at 4.

¹¹⁸ See MORRIS, *supra* note 116, at 349. Plaintiffs’ attorneys argued that pain and suffering damages provided a fund to cover the victim’s legal costs. Clarence Morris, *Liability for Pain and Suffering*, 59 *COLUM. L. REV.* 476, 477 (1959). Clarence Morris thought they did not equate to a reasonable attorneys’ fee. *See id.* If the pain and suffering award was small, the attorney was undercompensated; whereas if the award was large, the attorney received too much. *See id.* He also suspected that some jurors padded pain and suffering damages to cover attorneys’ fees. *See id.*

¹¹⁹ Morris estimated that less than five percent of cases were litigated to verdict. Morris, *supra* note 118, at 480.

“ambulance chasing” lawyers of bringing frivolous lawsuits to recover fees and line their pocketbooks.¹²⁰

This new flurry of litigation led to a major change in American legal culture. The plaintiffs’ personal injury bar emerged as a distinct segment of the legal profession. In 1946, a small group of lawyers founded the National Association of Claimants’ Compensation Attorneys (NACCA), the predecessor to the Association of Trial Lawyers of America.¹²¹ The NACCA was initially devoted to workers’ compensation law, but it soon took interest in personal injury cases.¹²² The group experienced rapid growth and established branches around the country in the 1950s.¹²³ It served as a clearinghouse for information on personal injury law and as an advocate for the rights of personal injury victims.¹²⁴ A major goal of the NACCA was to increase damages for personal injury, to secure for the accident victim “the adequate award.”¹²⁵ Through the use of demonstrative evidence¹²⁶ and other trial tactics, such as the per diem

¹²⁰ See Robert Monaghan, *The Liability Claim Racket*, 3 LAW & CONTEMP. PROBS. 491, 493 (1936). For an early discussion of the relationship between the contingent fee and insurance fraud, see *id.* at 493–94.

¹²¹ See O’Connell & Simon, *supra* note 16, at 4; Thomas F. Lambert, Jr., Editorial, *NACCA—Rumor and Reflection*, 18 NACCA L.J. 25, 27 (1956).

¹²² See Lambert, Jr., *supra* note 121, at 28.

¹²³ See *id.* at 27–28. Eleven lawyers founded the NACCA. *Id.* at 27. Ten years later the membership was 6,000, with branches and affiliates in forty-four states. *Id.* at 27–28. In 1972, the group, by then known as the American Trial Lawyers Association, had over 25,000 members. See O’Connell & Simon, *supra* note 16, at 4.

¹²⁴ Samuel B. Horovitz, *NACCA, Survey Report*, 8 NACCA L.J. 16, 17–18 (1950). The NACCA’s main activities were publishing the *NACCA Law Journal* for educational purposes, holding national conventions, encouraging the development of local branches, creating a library of books and briefs, and promoting the teaching of personal injury law at American law schools. *Id.* To gain respectability, the NACCA established lectureships at many schools. See *id.* at 19. Lecturers included Mark deWolfe Howe (Harvard), Roscoe Pound (U.C.L.A.), and Fleming James (Yale). *Lectureships*, 18 NACCA L.J. 24, 24 (1956). Pound served as editor-in-chief of the *Journal* for a few years during the 1950s. Lambert, Jr., *supra* note 121, at 28–29.

¹²⁵ See generally Melvin M. Belli, *The Adequate Award*, 39 CAL. L. REV. 1 (1951) (arguing that the then current system inadequately compensated victims for their injuries). Each issue of the journal contained a list of judgments over \$50,000 from reported and unreported cases. See, e.g., *Verdicts or Awards Exceeding \$50,000*, 7 NACCA L.J. 221, (1951) [hereinafter *Verdicts*]. Melvin Belli, an early president of the organization, was a leader in the campaign to increase personal injury damages. See Belli, *supra*.

¹²⁶ *Verdicts*, *supra* note 125, at 221. This early issue of the *NACCA Law Journal* told of how local chapters and the home office “have headquarters for the exchange of briefs and
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argument,¹²⁷ attorneys became more effective in explaining to the jury the kinds of physical pain and mental suffering endured by their clients.

A final development in the postwar years contributing to more frequent and higher personal injury awards was a belief that a wealthy nation could afford to compensate the injured. Louis L. Jaffe perceived a “growing sense of entitlement to ‘security.’”¹²⁸ If a person was injured, someone should be made to pay. As a result, Americans were becoming more litigious and “imaginative in the attribution of their ailments to the conduct of insured persons.”¹²⁹ This tendency may have affected jury deliberations, as jurors were seen as being more generous in their verdicts.¹³⁰ By the early 1950s, the reported decisions indicated that pain and suffering awards in personal injury cases were rising rapidly, in some cases exceeding the award for economic losses.¹³¹

The growth of liability insurance, the increase in litigation and jury verdicts, the development of the plaintiffs’ bar, and the popular sense that accident victims should be fully compensated, combined to put personal injury litigation in the spotlight. Against this backdrop, pain and suffering damages were identified as a problem. Some of the nation’s foremost torts experts weighed in on the subject, offering a variety of suggestions for change.

the more extensive use of demonstrative evidence, including pictures, charts, skeleton models, ship models, etc.” *Id.*

¹²⁷ See generally C. Hayes Cooney, Note, *Per Diem Evaluation of Pain and Suffering: Its Propriety in the Courtroom*, 15 VAND. L. REV. 1303 (1962) (detailing the arguments supporting and rejecting per diem evaluation). Under the per diem argument, the plaintiff’s attorney asks the jury to determine the amount of pain and suffering the victim will endure each day and to multiply that amount by the days and years that the pain and suffering is reasonably certain to last. See *id.* at 1303–04. This technique encourages juries to make higher pain and suffering damage awards. See *id.* at 1304–05. Many appellate courts ruled on the appropriateness of this form of argument in the 1950s and 1960s. See *id.* at 1305–08.

¹²⁸ Jaffe, *supra* note 31, at 222.

¹²⁹ *Id.* at 239.

¹³⁰ See *id.*

¹³¹ O’Connell & Bailey, *supra* note 16, at 101–03. It is difficult to compare pain and suffering awards before World War II with postwar awards because early verdicts did not break out pain and suffering damages separately. *Id.* at 101. In a 1930 review of appellate cases, one author found that verdicts of \$35,000 or more rarely survived appellate review and that damages of more than \$50,000 were affirmed in only four American cases. Miller, *supra* note 37, at 245–46. By the early 1950s, the reported cases revealed jury awards of \$100,000 and more for pain and suffering. O’Connell & Bailey, *supra* note 16, at 102–03.

IV. THE LEGAL ACADEMY'S RESPONSES TO THE PAIN AND SUFFERING DAMAGES ISSUE

Until the 1950s, torts scholars writing about personal injury concentrated on doctrinal issues, such as causation and assumption of risk.¹³² The law of damages in these cases was not seen as an intellectually stimulating subject.¹³³ As Charles Alan Wright stated in a 1958 symposium on damages for personal injuries, before World War II, verdicts were generally small, appellate review was limited by the common law rules, and there was a feeling that these damages were “essentially irrational.”¹³⁴ However, the increase in personal injury awards changed everything.¹³⁵ The mid-twentieth century marked the coming-of-age of personal injury damages as a discrete subject.¹³⁶ Many issues were now on the table, including whether monetary recovery for pain and suffering was “socially justifiable.”¹³⁷

The torts scholars who wrote on pain and suffering damages identified a number of basic problems. First, there was general agreement that the legal rules governing pain and suffering damages were outdated and needed change. Second, the consensus was that the judiciary could not be counted on to make reforms; the legislatures would have to get involved. Third, the social cost of pain and suffering damages was a major issue. Most writers questioned whether society could afford to continue paying them.

Yet the authors differed over the direction reform should take. Some wanted to eliminate pain and suffering damages for unintended injuries. Among this group were scholars who favored no-fault insurance and strict liability. Other writers proposed keeping pain and suffering damages, but looked for ways to limit them and make them more predictable.

A. *Deficiencies in the Legal Rules Governing Pain and Suffering Awards*

The starting point in virtually every law review article on pain and suffering damages was to identify deficiencies in the existing rules.¹³⁸ These problems were not hard to detect because, as we have seen, the

¹³² See WHITE, *supra* note 60, at 150–51; Charles Alan Wright, *Damages for Personal Injuries: Foreword*, 19 OHIO ST. L.J. 155, 155–56 (1958).

¹³³ See WHITE, *supra* note 60, at 150–51; Wright, *supra* note 132, at 155.

¹³⁴ Wright, *supra* note at 132, at 155–56.

¹³⁵ See *id.* at 156–57.

¹³⁶ *Id.* at 155.

¹³⁷ *Id.* at 157.

¹³⁸ See, e.g., James, Jr., *supra* note 94, at 408–09; Plant, *supra* note 32, at 200–01.

appellate courts openly acknowledged them: pain and suffering damages were not really compensatory, there was no reasonable way to measure them, jury awards were unpredictable, and damages for the same injury could vary substantially from case to case.¹³⁹ Most authors also believed that pain and suffering awards were getting out of hand.¹⁴⁰ They cited appellate court decisions¹⁴¹ and anecdotal information as evidence that awards were much higher than in the past.¹⁴²

To Marcus L. Plant of the University of Michigan, pain and suffering damages were problematic because they were easy to prove and there was no standard for their measurement.¹⁴³ Plant believed that “the existence of pain and suffering is one of the easiest elements to establish . . . in a personal injury action.”¹⁴⁴ He noted not only the absence of a fixed standard for measuring them,¹⁴⁵ but that they could “vary greatly from one individual to another” based on each person’s threshold of pain.¹⁴⁶ Sometimes the plaintiff’s testimony was the only evidence offered to help the jury determine damages.¹⁴⁷ William Zelermyer, a professor of business law at Syracuse University, agreed, writing, “pain and suffering damages have no dimensions, mathematical or financial;” they are “conceived at the end of a speculative and uncertain journey.”¹⁴⁸

Plant relied on published appellate court decisions to support the belief that pain and suffering awards had risen at a meteoric pace.¹⁴⁹ Statistical data on jury verdicts was sparse in the 1950s, but subsequent evidence of rising awards was impressive. Fleming James referred to a *NACCA Law Journal* claim that during an approximate nine-month period in 1957, there were fifty-three jury verdicts of \$100,000 or more.¹⁵⁰ He

¹³⁹ See discussion *supra* Part III.

¹⁴⁰ See, e.g., James, Jr., *supra* note 94, at 411; Plant, *supra* note 32, at 200–01.

¹⁴¹ See Plant, *supra* note 32, at 200–01.

¹⁴² See James, Jr., *supra* note 94, at 410–11.

¹⁴³ Plant, *supra* note 32, at 203.

¹⁴⁴ *Id.* at 205.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 206.

¹⁴⁷ See *id.* at 204–05.

¹⁴⁸ Zelermyer, *supra* note 44, at 28.

¹⁴⁹ See Plant, *supra* note 32, at 200–05. Included were cases where the plaintiffs were awarded substantial amounts for pain lasting only minutes or hours. *Id.* at 200–01.

¹⁵⁰ James, Jr., *supra* note 94, at 411 n.18.

compared this information to data collected in the early 1930s, which showed that awards in excess of \$10,000 were rare.¹⁵¹

James also noted that the way in which insurance companies settled claims was not equitable.¹⁵² He believed that most accident victims were not adequately compensated, even for economic losses.¹⁵³ Because insurance companies settled claims for minor injuries to save litigation expenses, these persons were often overcompensated.¹⁵⁴ On the other hand, victims with major injuries faced an aggressive defense.¹⁵⁵ When cases were tried, the verdicts were inconsistent.¹⁵⁶ This led to “jackpot justice,” where the winners got larger prizes, but the losers received little.¹⁵⁷ Zelermyer agreed, blaming plaintiffs’ attorneys for bringing “groundless claims” that often resulted in compromise “in order to avoid the unpredictable results of court proceedings.”¹⁵⁸

B. Loss of Confidence in the Judiciary’s Ability to Change Pain and Suffering Rules

The legal scholarship of the 1950s on pain and suffering damages was fundamentally different from the mainstream of torts scholarship. Because tort law rules generally originated in appellate court decisions, law review articles usually focused on judge-made legal doctrine.¹⁵⁹ Although authors sometimes criticized the rules and suggested new alternatives, the underlying assumption was that the judiciary, exercising its common law rulemaking power, was the branch of government responsible for implementing change. The scholarship on pain and suffering damages broke from this tradition.¹⁶⁰ The authors believed that the common law

¹⁵¹ *Id.* at 411. The sources cited did not identify the portions of the awards for pain and suffering. *See id.*

¹⁵² *See id.* at 408–09 n.6.

¹⁵³ *Id.* at 408.

¹⁵⁴ *See id.* at 408 n.6.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 411.

¹⁵⁷ *See id.*

¹⁵⁸ *See Zelermyer, supra note 44, at 37.*

¹⁵⁹ *See Wright, supra note 132, at 155–56.*

¹⁶⁰ I recognize that the legislatures altered the common law on a few occasions before this time. In the nineteenth century, they enacted wrongful death and survival statutes to create new causes of action, and in the early twentieth century they passed workers’ compensation statutes to remove workplace injuries from the tort system. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 218–19, 239–40 (2d ed. 2002). In the latter case, legal scholars contributed to the dialogue leading to the reform. *See id.* at 240.

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rules were flawed and they had little confidence that the courts would solve the problem.¹⁶¹ They looked to the legislatures for change.¹⁶²

Writing in the *Columbia Law Review*, Clarence Morris of the University of Pennsylvania Law School explored the role the common law courts could play in changing pain and suffering damages rules. He noted that the courts could simply reverse themselves and develop new rules, as they would “only modify law originally made by them on a subject that has attracted virtually no attention from the legislatures.”¹⁶³ Although this was a possibility, Morris believed it would not happen: “The probability that a court would make so bold an attempt to lead public sentiment and stick to its guns until the new policy became established is not very high.”¹⁶⁴ He recognized that appellate courts sometimes broke with established precedent to create new law, mentioning Justice Benjamin Cardozo’s opinion in *MacPherson v. Buick Motor Co.*¹⁶⁵ as an example.¹⁶⁶ But *MacPherson* was a popular decision. “The holding was so consonant with public sentiment that Cardozo was the spokesman of pre-existing justice; he did not sound like a lone, clever judge imposing his own ideas on the citizenry.”¹⁶⁷ Morris doubted the public would react so positively to a decision limiting personal injury damages.¹⁶⁸ He stated, “Courts should approach this change with special caution, because nothing in the public sense of justice challenges awards of damages for pain and suffering—on the contrary, the change would move away from street corner ideas of suitable reparation.”¹⁶⁹ Morris believed that the legislature was better suited to effect change because it “has facilities for investigation and law formulation beyond those available to any court.”¹⁷⁰

In the 1950s and 1960s, demands for legislation to change tort law, led by the academic community, became more commonplace. *See id.* at 242–44. The movement from contributory negligence to comparative negligence and proposals for no-fault automobile insurance are examples. *See id.* at 242–44.

¹⁶¹ *See Morris, supra* note 118, at 482–84.

¹⁶² *See id.*

¹⁶³ *Id.* at 482.

¹⁶⁴ *Id.* at 484.

¹⁶⁵ 111 N.E. 1050 (N.Y. 1916).

¹⁶⁶ Morris, *supra* note 118, at 483–84.

¹⁶⁷ *Id.* at 483.

¹⁶⁸ *See id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 482.

He predicted that insurance companies would soon sponsor legislation drastically limiting awards for pain and suffering.¹⁷¹

William Zelermeyer also thought that judicial tinkering with pain and suffering rules would not sit well with the general public.¹⁷² He wrote: “To quarrel with any rule by which a person injured through the fault of another may be compensated for pain and suffering endured, and to be endured, would not only contradict a practice of long standing but would also indicate a villainous disposition.”¹⁷³ He thought that the issue presented “fertile ground for legislative consideration.”¹⁷⁴ Other authors implicitly recognized that new approaches to the problems of pain and suffering damages would come through legislation,¹⁷⁵ perhaps as part of larger statutory reforms covering specific types of cases.¹⁷⁶

C. The Trend Toward Liability Without Fault and Concern over the Cost of Accidents

By the post-war years, the fundamental assumptions governing liability for unintended injuries were under attack. For over a century, liability was tied to negligence, such that an accident victim could only recover damages if the defendant was at fault.¹⁷⁷ During the mid-twentieth century, however, cracks in the negligence edifice appeared.¹⁷⁸ A generation of torts professors, inspired by the jurisprudence of legal realism, called for rejection of outmoded legal rules in favor of ones more responsive to society’s needs.¹⁷⁹ Scholars like Albert A. Ehrenzweig, Leon Green, and Fleming James argued for a shift in focus in cases of unintended injury from the defendant’s fault to compensation for the victim. No-fault insurance and strict liability were alternatives to negligence that would achieve the goal of broader compensation.

¹⁷¹ *Id.* at 485.

¹⁷² *See* Zelermeyer, *supra* note 44, at 28.

¹⁷³ *Id.* (footnote omitted).

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g.,* Jaffe, *supra* note 31, at 240; Plant, *supra* note 32, at 210–11.

¹⁷⁶ For example, proposals for no-fault automobile liability insurance often called for elimination of noneconomic damages. *See, e.g.,* GREEN, *supra* note 115, at 87–88 (calling for exclusion of pain and suffering damages as part of a legislative revision); James, Jr., *supra* note 94, at 424 (espousing legislation that would compensate only for economic losses in auto accident cases unless “common law development [could] produce a prompt, widespread, and, above all, equitable distribution of payments in accident cases”).

¹⁷⁷ *See* WHITE, *supra* note 60, at 149.

¹⁷⁸ *See id.* at 146–53.

¹⁷⁹ *See id.* at 139–41.

Fleming James, who wrote extensively about auto accidents, saw litigation not just as a private contest where the victim tried to shift the loss to the defendant, but as a process whereby losses were distributed widely through principles of insurance.¹⁸⁰ Compensating accident victims for losses, rather than finding fault, was the challenge for the legal system.¹⁸¹ James suggested that compensation be expanded through some form of "social insurance."¹⁸² At the time James was writing, cost-spreading through strict liability already was making headway in the area of defective products.¹⁸³ Rather than having the accident victim bear the loss caused by a product, the manufacturer could absorb it through insurance and pass the cost on to consumers through the item's price.¹⁸⁴ No-fault insurance for automobile accidents, a concept that had been around for years,¹⁸⁵ was once again drawing attention. As previously mentioned, automobiles were a leading cause of accidental death and personal injuries, but liability insurance only covered losses when the driver was at fault. No-fault would broaden coverage to include all

¹⁸⁰ See Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 551–52 (1948). James believed that insurance had already affected the law of negligence, so as to broaden liability. See Fleming James, Jr. & John V. Thornton, *The Impact of Insurance on the Law of Torts*, 15 *LAW & CONTEMP. PROBS.* 431, 431–32 (1950). He included the liberalization of the doctrines of *res ipsa loquitur* and last clear chance, and the extension of legal duties owed by manufacturers and suppliers, as evidence of change. *Id.* at 432.

¹⁸¹ See Fleming James, Jr., *Accident Liability: Some Wartime Developments*, 55 *YALE L.J.* 365, 365–66 (1946).

Fault is still the dominant principle though the crest of its dominance is past. There is a growing belief that in this mechanical age the victims of accidents can, as a class, ill afford to bear their loss; that the social consequences of uncompensated loss are dire and far exceed the amount of the loss itself; and that more good will come from distributing these losses among all beneficiaries of mechanical progress than by letting compensation turn upon an inquiry into fault.

Id.

¹⁸² *Id.* at 355–56. James cited workers' compensation as an example. *Id.* at 366.

¹⁸³ See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–41 (1944) (Traynor, J., concurring).

¹⁸⁴ See ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 *CAL. L. REV.* 1422, 1439–41 (1966).

¹⁸⁵ See, e.g., Carman, *supra* note 99, at 2.

personal injuries, regardless of the motorist's negligence.¹⁸⁶ Because strict liability and no-fault depended on insurance coverage, it was expected that insurance costs would rise.¹⁸⁷ For those who favored these reforms, the question boiled down to the kinds of personal injury damages society could afford to pay. Pain and suffering damages came under scrutiny in discussions of cost.

D. Proposals Addressing the Pain and Suffering Damages Problem

Although there was a consensus that pain and suffering damages were a problem and that legislative intervention was necessary, the authors had different suggestions for change. Some believed there was a legitimate place for pain and suffering damages but saw the need for fair and consistent ways of valuing them. These authors proposed setting maximum amounts for pain and suffering. Others called for elimination of pain and suffering damages because they were too costly, preferring to devote society's limited resources to fully compensating accidents victims for economic losses, rather than directing them to intangible injuries.

1. Recommendations to Set Maximum Limits on Pain and Suffering Damages

Two authors wrote articles suggesting that pain and suffering damages be retained, but that the legislatures set maximum limits on awards. These were the first calls for capping pain and suffering damages. The proposals were not very refined; the main purpose was to open a dialogue on the subject. Both plans were designed to make pain and suffering awards commensurate with the injury, so as to favor accident victims with serious permanent conditions.

The first article, by William Zelermyer, appeared in the *Syracuse Law Review*.¹⁸⁸ Zelermyer directed his article at reforming pain and suffering law in New York, a state where personal injury awards were notoriously high.¹⁸⁹ Zelermyer modeled his plan after the compensatory aspects of the

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 5 n.13.

¹⁸⁸ Zelermyer, *supra* note 44.

¹⁸⁹ *See id.* at 34–37, 39–44. Louis L. Jaffe wrote of people who were “claim-conscious.” Jaffe, *supra* note 31, at 239. “This means not only that they press a claim when they have one. It means also that they have ample ideas of the magnitude of their injury and, further, that they are more imaginative in the attribution of their ailments to the conduct of insured persons.” *Id.* He singled out New Yorkers as having “high claims consciousness.” *Id.*

state's workers' compensation law.¹⁹⁰ He proposed that the New York Law Revision Commission, with the aid of medical experts, conduct a study leading to the creation of a list of the types of injuries that would give rise to claims of pain and suffering.¹⁹¹ The commission would determine a base financial figure to be used for the compensation of the least amount of suffering practical to consider, and then compile a schedule of graduated values based on comparative severity.¹⁹² Zelermeyer was confident that the commission could set appropriate minimum and maximum recoveries, although he recognized that "it may appear on the surface that the great variety of injuries, their severity and longevity, presents an insurmountable task of evaluation."¹⁹³

Marcus L. Plant wrote the second article for a 1958 symposium, sponsored by the *Ohio State Law Journal*, on personal injury damages.¹⁹⁴ Plant devoted most of the article to exposing inequities surrounding pain and suffering damages,¹⁹⁵ but concluded with a basic reform proposal.¹⁹⁶ His idea was to set a "fair maximum limit" on pain and suffering damages.¹⁹⁷ As "a point of departure for discussion," Plant suggested a limit on pain and suffering damages at 50% of "medical, nursing and hospital expenses."¹⁹⁸ He acknowledged that there was "nothing magical" about the percentage selected.¹⁹⁹ Nevertheless, the change would bring predictability to pain and suffering awards.²⁰⁰ The percentage chosen was arbitrary, but "the arbitrariness would at least be uniform."²⁰¹

The Zelermeyer and Plant proposals were also novel because they would have diminished the jury's role in setting pain and suffering damages.²⁰² Plant did not address possible constitutional problems over

¹⁹⁰ Zelermeyer, *supra* note 44, at 40–42.

¹⁹¹ *Id.* at 41–42.

¹⁹² *Id.* at 41.

¹⁹³ *Id.* at 42.

¹⁹⁴ Plant, *supra* note 32.

¹⁹⁵ *See id.* at 200–02, 204–10.

¹⁹⁶ *Id.* at 210–11.

¹⁹⁷ *Id.* at 210.

¹⁹⁸ *Id.* at 211.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 210–11.

²⁰¹ *Id.* at 211.

²⁰² *See id.* at 210; Zelermeyer, *supra* note 44, at 41–42. Others wanted to completely eliminate jury trials in accident cases. *See, e.g.,* Harold F. McNiece & John V. Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 274–75 (1952). They
(continued)

the right to a jury trial. Zelermyer raised the issue, but concluded the change would not violate the New York Constitution.²⁰³ Because the legislature had already abolished some common law remedies altogether, he thought it had the power to modify others.²⁰⁴

2. *Calls to Eliminate Pain and Suffering Damages while Broadening Compensation for Economic Loss*

In a 1953 article in *Law and Contemporary Problems*, Louis L. Jaffe of the Harvard Law School explored the relationship between expanded liability insurance and the costs of personal injury awards.²⁰⁵ In this provocative, widely-cited article, Jaffe suggested that the “crucial controversy in personal injury [law was] not in the area of liability but of damages.”²⁰⁶ His most interesting insights centered on damages awards and the movement toward the “security state,”²⁰⁷ where compensation would be given for injuries in the absence of fault.²⁰⁸ Because there was a finite number of dollars to pay personal injury claims, he challenged the wisdom of spending them on noneconomic injuries.²⁰⁹ “It seems likely that, as the goal becomes universal coverage of injury and disease, protection must tend to shrink toward the minimum level of economic loss.”²¹⁰ Jaffe acknowledged that pain and suffering damages could wipe out the victim’s sense of outrage for “violation of his bodily integrity” and

believed that the jury trial was the main cause of delay in the administration of negligence law. *Id.* at 274. They proposed that judges decide accident cases. *Id.* at 275.

²⁰³ Zelermyer, *supra* note 44, at 42–43.

²⁰⁴ *Id.* at 43–44.

²⁰⁵ Jaffe, *supra* note 31.

²⁰⁶ *Id.* at 221.

²⁰⁷ *Id.* at 239.

²⁰⁸ *See id.* at 221. “When liability rests on insurability rather than on notions of fault, there arise, as it seems to me, questions as to the rationalization of certain principles of compensation which are at present taken for granted.” *Id.*

²⁰⁹ *See id.* at 224–25.

And insurance present, it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function. This consideration becomes the stronger as year after year the amounts set aside for the security account become a larger proportion of the national income.

Id. at 225.

²¹⁰ *Id.* at 235.

serve as “a consolation, a solatium,”²¹¹ but he questioned why the negligent defendant should suffer an economic penalty “to do honor to [the] plaintiff’s experience of pain.”²¹² The same issue had been considered in workers’ compensation cases, where pain and suffering awards were eliminated.²¹³ Jaffe suggested “experimentation” in the area of personal injury law, keeping in mind that there were limits on what society could afford to pay.²¹⁴

Authors who favored replacing negligence with no-fault insurance or strict liability for certain types of cases endorsed Jaffe’s ideas on pain and suffering damages. Leon Green, who authored a book on no-fault auto insurance, argued against any recovery for pain and suffering.²¹⁵ Fleming James stated that any no-fault insurance reform plan must first meet the economic losses of all accident victims.²¹⁶ If other resources remain, only then should consideration be given to compensating for pain and suffering.²¹⁷

In an article in the *Louisiana Law Review*, James questioned the award of pain and suffering damages where liability was strict. If there was no wrongdoer, he wrote, “allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons.”²¹⁸ Warren A. Seavey agreed that pain and suffering damages should not be given when liability is strict.²¹⁹ His article in the *California Law Review* proposed federal legislation making operators of nuclear power plants strictly liable for nuclear accidents.²²⁰ Like James, he did not oppose these damages when the defendant’s conduct was “wrongful,” but he believed there should only be compensation for economic loss, because

²¹¹ *Id.* at 224.

²¹² *Id.* at 224–25.

²¹³ *See id.* at 240.

²¹⁴ *See id.* Jaffe concluded, “[W]e should reduce the problem to its essential terms which are (a) the prevention of injury and (b) compensation for such harms and in such measure as the common insurance fund can be fairly asked to provide.” *Id.*

²¹⁵ GREEN, *supra* note 115, at 88.

²¹⁶ James, Jr., *supra* note 94, at 418.

²¹⁷ *Id.*

²¹⁸ Fleming James, Jr., *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 297 (1958).

²¹⁹ Warren A. Seavey, *Torts and Atoms*, 46 CAL. L. REV. 3, 11 (1958).

²²⁰ *Id.* at 9–10.

“the defendant has done no wrongful act and the activity is justified by public necessity.”²²¹

Jaffe’s discussion of pain and suffering damages and their cost to society was also mirrored in the scholarship of Clarence Morris, who called for the elimination of pain and suffering damages.²²² Morris claimed that most collectible judgments were against defendants with liability insurance.²²³ Personal injury awards were paid from insurance funds, and insurers spread these costs to their customers.²²⁴ “[T]he costs of reparation are widely dispersed and are reflected in insurance premiums, transportation fares, freight rates, and (less strikingly) in the prices of consumer goods.”²²⁵ Because rising pain and suffering awards lead to higher liability insurance premiums, there was the danger that customers could be priced out of the market.²²⁶ Conversely, if pain and suffering damages were eliminated, everyone would benefit.²²⁷ Insurance companies and big business would be obvious gainers, but consumers could also expect both insurance costs and the price of consumer goods to drop.²²⁸ Morris believed that insurance companies should take the lead in curbing awards for pain and suffering.²²⁹ In his treatise on torts, Morris singled out pain and suffering damages in auto accident cases, stating,

²²¹ *Id.* at 11.

²²² *See* Morris, *supra* note 118, at 476–77. Morris believed that economic losses traceable to pain should be compensated because, for example, “[a] brain surgeon writhing in agony cannot operate.” *Id.* He also believed that money was “a clumsy substitute” for pain not resulting in economic loss. *Id.* at 477. He failed to understand why persons injured by insured parties should recover pain and suffering damages while others received nothing. *Id.* at 481.

But most of the stricken, old, and those injured at home or at play must be satisfied with the medical benefits of insurers such as Blue Cross or of workmen’s compensation In a society that offers limited social security, the wisdom of special generosity to a class of sufferers whose claims happen to be *in consimili casu* to assault and battery seems doubtful.

Id.

²²³ *Id.* at 479.

²²⁴ *See id.*

²²⁵ *Id.*

²²⁶ *Id.* at 485.

²²⁷ *See id.* at 481–82.

²²⁸ *Id.*

²²⁹ *See id.* at 485.

“[T]he wisdom of increasing automobile liability insurance premiums to compensate for the non-economic aspects of pain seems questionable.”²³⁰

Morris acknowledged an argument of personal injury lawyers that pain and suffering damages were used to pay the contingent fee of the plaintiff’s attorney, but he called the damages “a clumsy substitute.”²³¹ Still, he recognized that the average person did not have the resources to hire an attorney.²³² He suggested that the legal system would be more rational if plaintiffs received nothing for noneconomic damages but were allowed reasonable attorney fees.²³³

CONCLUSION: THE LEGAL ACADEMY’S FIRST RESPONSES IN RETROSPECT

A half-century has passed since legal scholars began a critical assessment of pain and suffering damages. Although the issue is not yet resolved, the legal scholarship of the 1950s on the subject has historical significance for a number of reasons. First, the mid-twentieth century torts scholars recognized pain and suffering damages as a discrete problem in personal injury law and they opened the earliest debates on the subject. Second, they predicted that the courts would not reform the law of pain and suffering damage and that any changes would come from the legislatures. This prediction has proved to be correct. The appellate courts have not been active in changing the law.²³⁴ Their major role has

²³⁰ MORRIS, *supra* note 116, at 348–49.

²³¹ Morris, *supra* note 118, at 477.

²³² *See id.*

²³³ MORRIS, *supra* note 116, at 351.

²³⁴ As Justice Roger Traynor of the California Supreme Court noted,

There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization.

Nonetheless, this state has long recognized pain and suffering as elements of damages in negligence cases; any change in this regard must await reexamination of the problem by the Legislature.

(continued)

been in reviewing legislation limiting noneconomic damages, and upholding²³⁵ or striking down²³⁶ statutory provisions. Third, and perhaps most important, the torts scholars of the 1950s identified the relationship between pain and suffering awards and social cost. The authors who wanted to retain these damages looked for ways to limit the cost and to make awards uniform and predictable. Others concluded that society could no longer afford to pay for pain and suffering. At a time when broader insurance coverage for losses through no-fault insurance and strict liability seemed promising, they thought it a wise trade-off to eliminate noneconomic damages in return for paying a greater part of the accident victim's economic losses.

The mid-twentieth century scholarship on pain and suffering damages has also influenced subsequent academic discussions. Like James and Morris, some contemporary scholars who have called for the elimination of noneconomic damages also recognize the need to improve compensation for economic losses and to address the attorney's fee issue.²³⁷ Those who wish to retain pain and suffering awards within limits but make them more uniform and predictable are refining the work of Plant and Zelermyer.²³⁸ Although recent discussions are sometimes more

Seffert v. L.A. Transit Lines, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) (citations omitted).

²³⁵ See, e.g., Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985) (upholding a trial court decision to reduce noneconomic damages to comply with civil code).

²³⁶ See, e.g., Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (holding that statutory cap of \$400,000 on noneconomic damages violated state constitutional right to trial by jury); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (holding that statutory cap of \$450,000 for noneconomic tort damages violated state constitutional right of access to courts).

²³⁷ King, *supra* note 7, at 165; O'Connell, *supra* note 7, at 351–53.

²³⁸ See, e.g., Bovbjerg et al., *supra* note 8, at 938–39 (proposing three alternative ways of valuing noneconomic damages: by a matrix based on victim's age and severity or injury, guiding the jury with descriptions of prototypical injuries and corresponding award value, or flexible ranges of award floors and caps based on injury severity); Chase, *supra* note 8, at 786–90 (advocating the creation of a grid based on previous awards to guide jurors); Geistfeld, *supra* note 8, at 822–25 (relating noneconomic damages to the amount a reasonable person would pay to avoid injury); Sugarman, *supra* note 8, at 807, 825 (eliminating pain and suffering damages for disabilities lasting less than six months except in cases of serious disfigurement or impairment, with a \$150,000 ceiling in cases where damages would still be available); Levin, *supra* note 8, at 303 (proposing the creation of pain and suffering guidelines similar to criminal sentencing guidelines).

theoretical and the suggestions for computing pain and suffering damages are more complex, they rest on the mid-twentieth century foundation.²³⁹

It is more difficult to assess the practical effects the early scholarship has had on recent legislative changes in pain and suffering damages law. The articles discussed in this study appeared over fifty years ago, when automobile accident lawsuits precipitated the first crisis in personal injury law.²⁴⁰ No one then could have predicted today's medical malpractice and products liability litigation and awards for noneconomic damages in the millions of dollars. Nor could they have anticipated how interest groups—with health care providers, manufacturers, and insurance companies on one side and consumer groups and trial attorneys on the other—would make pain and suffering damages a political issue of national magnitude.

None of the specific solutions proposed by the scholars of the mid-twentieth century have been adopted. This may be evidence of a general disconnect between the legal academy and lawmakers over pain and suffering damages, a gap that appears to have widened since the 1950s.²⁴¹ Although some states tried no-fault automobile insurance in the 1960s and 1970s, the movement stalled.²⁴² No state has eliminated pain and suffering damages. In the area of products liability, negligence has been surprisingly resilient.²⁴³ Thus, proposals to abolish pain and suffering damages in favor of broader compensation for the economic losses of accident victims, regardless of fault, have not made much headway. The legislatures have borrowed from the ideas of Plant and Zelermyer by

²³⁹ The first studies of jury behavior in personal injury cases are also traceable to the 1950s, after some scholars observed that data on how juries award damages were thin. See, e.g., Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958) (commenting on how juries decide cases, including preliminary findings of the Jury Project at the University of Chicago Law School).

²⁴⁰ See James, Jr., *supra* note 218, at 296–97.

²⁴¹ As law review discussions have become more theory-laden and proposals for reform more complicated, legislators have tended to disregard them. Law professors may be writing for their peers, not the decisionmakers. For a criticism of this trend in torts scholarship, see generally Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59 (1999).

²⁴² For an examination of no-fault automobile insurance plans, see ABRAHAM, *supra* note 160, at 242–50.

²⁴³ For a discussion of the persistence of negligence in products liability cases, see WHITE, *supra* note 60, at 244–49. Although liability is strict for manufacturing defects, negligence remains important in design defect and inadequate warning cases. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

placing limits on pain and suffering damages,²⁴⁴ but where those authors wanted to link the pain and suffering award with the severity of the injury, with some minor exceptions,²⁴⁵ the trend in the legislation has been to set rigid, across-the-board dollar limits on noneconomic damages, regardless of the nature of the injury.²⁴⁶ This perpetuates an inequity that the Columbia report already identified in the 1930s: plaintiffs with minor injuries are likely to be overcompensated, while those with serious permanent injuries will not receive enough.²⁴⁷

Ultimately, the difference between the reform proposals of the 1950s and today's trend toward rigid caps on pain and suffering damages may reflect a shift in national attitude. The mid-twentieth century discussions were more optimistic. The hope was that by changing some rules, American law could better serve accident victims. Although pain and suffering damages would be limited or even abolished, greater numbers of personal injury victims would receive more compensation for economic losses. In contrast, the motivating force behind current discussions of pain and suffering damages is reducing costs and conserving resources. Lowering costs without giving much attention to the victim's interest has been the inspiration for the legislation limiting pain and suffering damages law over the past three decades.

²⁴⁴ For example, Alaska generally caps noneconomic damages in personal injury and wrongful death cases at \$400,000 or \$8,000 multiplied by the victim's life expectancy, whichever is greater. ALASKA STAT. § 09.17.010(b) (2004). In cases of severe permanent physical impairment or severe disfigurement, the cap is raised to \$1 million or \$25,000 times the life expectancy, whichever is greater. *Id.* § 09.17.010(c). See also sources cited *supra* notes 3–6.

²⁴⁵ See *supra* Part IV.D.1.

²⁴⁶ See sources cited *supra* notes 3–6.

²⁴⁷ See *supra* notes 90–100 and accompanying text.