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DOING AWAY WITH INEQUALITY IN LOSS OF ENJOYMENT OF LIFE

by

Giovanni Comandé♦

Abstract

The aim of this paper is to show the benefits and viability for the US of experimenting in awarding methods for non-pecuniary losses in light of European experiences. A comparison of innovative methods illustrates that the use of "European style" guidelines would help the review process while safeguarding the jury's independence and enabling the court to consider the legitimate evidential factors that evoked the specific jury verdict. A better understanding of non-US solutions would at least bring more consistency in striving for individual justice and retaining judicial "discretion".

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I. Introduction

The United States and European countries have for a long time affirmed non-pecuniary loss as a proper title of damages. On both sides of the Atlantic in the preceding decades we have witnessed an escalation in the monetary amounts awarded for the non-pecuniary component of damages in cases of personal injury.[1] As a result of this escalation, the countries referred to have embarked on a shrill debate in trying to decipher a definition of their concrete notions of non-pecuniary damages[2] and on their awarding methods.[3]

In the US, the expression "pain and suffering" often subsumes all damages for non-pecuniary loss,[4] even though its technical meaning involves itself more with the restricted

1. In this sense, see Giovanni Comandé, *Risarcimento del Danno alla Persona e Alternative Istituzionali*, Torino, Giappichelli, 1999, 3-45; DAMAGES FOR PERSONAL INJURIES: A EUROPEAN PERSPECTIVE 1 (Frederick J. Holding & Peter Kaye eds., 1993); A. GEERTS ET AL., COMPENSATION FOR BODILY HARM: A COMPARATIVE STUDY 95-98 (1977); WERNER PFENNINGTORF & DONALD G. GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES 9-14, 77, 155-57 (1991); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 64 (2002). *But see* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 775, 777 (1995). Of course, recognition of non-pecuniary damages as a proper title of damages does not preclude this expansive trend from having experienced both misuses and abuses or, at least, misunderstandings. *See generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); WALTER K.OLSON, THE LITIGATION EXPLOSION (1991).

2. For a much more detailed clarification, see Giovanni Comandé, *Risarcimento del Danno alla Persona e Alternative Istituzionali*, Torino, Giappichelli, 1999, at 3ff; ID. *Le non pecuniary losses in common law*, in *Rivista di diritto Civile*, 1993, I, p. 453. *See also* N.K. Komesar, *Toward a General Theory of Personal Injury Loss*, 3 J. LEGAL STUD. 457, 459 (1974). For further commentary on these same issues, see P.S. Atiyah, *Personal Injuries in the Twenty-First Century: Thinking the Unthinkable*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY, (Peter Birks ed., 1996); P. S. ATIYAH, THE DAMAGES LOTTERY (1997) at 138 (criticizing the U.K. tort system sharply). For a survey of different theories and policies on non economic damages, see Bruce Chapman, *Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 409 (David G. Owen ed., 1995).

3 For a wider account of the state of the art and of the debate see Stephen D.Sugarman, *Pain and Suffering: Comparative Law Perspective*, 55 DePaul Law Review, 399 (2005 Clifford Symposium); Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff. For a critical perspective on awarding pain and suffering, see Paul V. Niemeyer, *Awards For Pain And Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1401 (2004), who argues that awarding damages for pain and suffering "without rational criteria for measuring [them undermines] the tort law's rationality and predictability," and advocates legislative intervention.

4. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, DAMAGES FOR PERSONAL INJURY (2d ed. 1993), § 8.1; RESTATEMENT (SECOND) OF TORTS § 924 (1977). For further commentary on pain and

connotation of moral and physical suffering. On the contrary, loss of enjoyment of life could be defined as a material modification of the capacity to enjoy life as distinguished both from the loss of earning capacity, as well as from pain and suffering.[5]

Broadly speaking, in our view,[6] non-economic damages for personal injury are essentially an attempt to offer compensation for "limitations on the person's life created by the injury."[7] However, this attempt at pinpointing the role of non-economic damages has resulted in a distinction within the domain of traditional non-pecuniary loss, that is, between loss of enjoyment of life[8] and pain and suffering. These two types of damage redress diverse, intangible losses[9] in personal injury cases. The latter (pain and suffering) attempts to restore entirely subjective non-economic damages for intangible loss, while the former (loss of enjoyment of life) relies upon an "objective"[10] basis for evaluation: the existence of an ascertainable medical condition.[11] In several jurisdictions –especially the European ones- this outlined distinction echoes the constitutional choice of protecting health and bodily integrity as a reaffirmed social value (e.g. in Italy or Germany) which

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suffering awards and notions, see Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,* 36 U. FLA. L. REV. 333 (1984); Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims,* 22 LAW & SOC'Y REV. 537 (1988); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy,* 73 CAL. L. REV. 772 (1985); Peter N. Kalionzes, Case Notes*, Infant Pain and Suffering: The Valuation Dilemma,* 1 PEPP. L. REV. 102 (1973); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989); Jeffrey O'Connell & Rita J. Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. LEGAL F. 1; Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence,* 72 MICH. L. REV. 1355 (1974); Margaret A. Somerville, *Pain and Suffering at Interfaces of Medicine and Law,* 36 U. TORONTO L.J. 286 (1986); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals,* 78 IOWA L. REV. 883 (1993); William Zelermyer, *Damages for Pain and Suffering,* 6 SYRACUSE L. REV. 27, 31 (1954) (suggesting that the only jury guide-posts in its task of assessing damages for these matters are common sense and sound judgment).

5 Sometimes the expression hedonic damages is used to signify the compensation for limitations "on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." *See* Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001).

6 Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff

7. McDougald v. Garber, 536 N.E.2d 372, 379 (N.Y. 1989) (Titone, J., dissenting) (citing Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980)).

8. For commentary on the problem of awarding damages for loss of enjoyment of life, also known as "hedonic" damages, see, among others, R. Cramer, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages,* 12 PAC. L.J. 965, 972 (1981); Stephen J. Fearon, *Hedonic Damages: A Separate Element in Tort Recoveries?*, 56 DEF. COUNS. J. 436 (1989); Eric L. Kriftcher, Comment*, Establishing Recovery for Loss of Enjoyment of Life Apart From Conscious Pain and Suffering:* McDougald v. Garber, 62 ST. JOHN'S L. REV. 332 (1988); Paul E. Marth, Comment*, Loss of Enjoyment of Life: Should It Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459 (1975); Ronald J. Mishkin, Comment*, Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639 (1969); Carel J.J.M. Stolker, *The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-Pecuniary Loss*, 39 INT'L & COMP. L.Q. 82 (1990).

9. Such a distinction in the American tort system has already been acknowledged. *See, e.g.*, Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4TH 293 (1984); R. Cramer, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981), at 972.

10. As already distinguished, "objective" means "existing independently of perception or an individual's conceptions" as opposed to "distorted by emotion or personal bias."

11. As per Lord Justice O'Connor in Housecroft v. Burnett, 1 All E.R. 332, 337 (1986), "The human condition is so infinitely variable that it is impossible to set a tariff, but some injuries are more susceptible to some uniformity in compensation than others."

deserves tort damages compensation in order to grant a minimum level of protection.[12]

No such clear reference to the constitutional protection of health exists in the US in awarding damages for non-pecuniary loss. What is clearly evident however, is a distinct trend to identify and distinguish between pain and suffering (as subjectively perceived *pretium doloris*) and loss of enjoyment of life as an "objective" component in non-pecuniary damages; damages Europeans would probably qualify as compensation for lost health and bodily integrity as such.[13] Indeed, European jurisdictions have more openly opted for a clear differentiation between pain and suffering (with the sole purpose of compensating mental-moral suffering) and loss of enjoyment of life (as a means to redress health and bodily integrity accompanying physical injury or indeed purely emotional harm generating an illness). This trend is indeed discernable (albeit faintly) in the US, however it is certainly far from uniform across the American jurisdictions.[14]

With the doubtless existence and increasing role of non pecuniary damages, both in Europe and the US, set out, we now turn to the main objective of this article, that is, to offer a quick overview of the awarding systems for non pecuniary loss in Europe. Alongside this, it is intended to highlight the potential benefits an adoption (or adaption) of one of the various European systems by the US would realize, in particular for the assessment of loss of enjoyment of life. It is important to stress from the outset that such a maneuver would not subtract from the traditional tort feature of individualized justice but alternatively would serve better both horizontal and vertical equality.[15]

In part II we will briefly discuss the evolution and actual state of the art of the awarding methods for loss of enjoyment of life in four European countries, thereby obtaining some challenging suggestions for the American experience. Finally, in part III we will discuss how the European solutions can be adapted to fit the American system while simultaneously promoting individualized justice and more predictability in the awarding system for loss of enjoyment of life.

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12 See for instance Corte di Cassazione 8827 8828\2003 in *Danno e responsabilità,* 2003, 816, con note di F.D. BUSNELLI, *Chiaroscuri d'estate. La Corte di Cassazione e il danno alla persona,* 826; G. PONZANELLI, *Ricomposizione dell'universo non patrimoniale: le scelte della Corte di Cassazione,* 829.

13Giovanni Comandé, *Le non pecuniary losses in common law*, in *Rivista di diritto Civile*, 1993, I, p. 453.

14 Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff.

15 For further references on the actual distinction and its perfect fit in the American system see Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff.

II. Awarding non-pecuniary loss in Europe

A study of non pecuniary loss in Europe unfolds an assortment of names and definitions for non-pecuniary damages: *smartengeld*, pain and suffering, *préjudice corporel, préjudice d'agrément*, *daño corporal, daño moral, danno alla salute, Schmerzensgeld, danno morale.*[16] In European jurisdictions, they stem from the same inspiring principles which guide legal protection in general.[17] In all jurisdictions we discover a quest to avoid unjustified variations within levels of injury seriousness, fulfilling the principle of horizontal justice. Equally, a will to avert divergences in the amounts awarded for the duration of the injury can be discerned, effectuating the principles of vertical justice. The equality principle is therefore the point of convergence and goes hand in hand with the search for individual justice in the courtroom. As mentioned, several European countries distinguish — at least *de facto* — between damage to health and bodily integrity and mere psychological alterations or subjective predispositions resulting form a personal injury. The first, damage to health and bodily integrity, amounting to documented illnesses and disabilities assessable by medical experts, is awarded under notions similar to loss of enjoyment of life. Mere psychological alterations, amounting to transient sufferings such as anger or temporary stress are awarded under titles easily incorporated into in the notion of pain and suffering as moral suffering. Yet often European systems award a global sum encompassing both losses.[18]

Considering the above, all European awarding systems[19] depend on medical description or evidence in evaluating objective non-economic damages.[20] Medical evaluation is critical in offering an "objective" description and a uniform estimation of loss of enjoyment of life. In general terms, in Europe, once obtained, the medical description is affiliated to a monetary *barème* (that is, a system of standardization using scheduling) based upon age and confirmed permanent disability expressed either in percentage permanent

16.For information on several European Community member States, see generally W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001), at 245-96; Bernard A. Koch & Helmut Koziol, *Comparative Analysis*, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE 407, 419-34 (Bernard A. Koch & Helmut Koziol eds., 2003); and Giovanni Comandé, *Risarcimento del Danno alla Persona e Alternative Istituzionali*, Torino, Giappichelli, 1999, at 17-45.

17 Busnelli, Francesco D., *Il danno alla salute; un'esperienza italiana; un modello per l' Europa?*, *Responsabilità civile e previdenza*, 2000, fasc. 4-5, pagg. 851-867.

18 Indeed the recent decisions of the Italian Supreme Court today requires a global sum awards. See. Cass., S.U. civ., 11 novembre 2008 n. 26972-26973-26974-26975, in *Guida al diritto*, n. 47, 2008 with comment of di G. Comandé, *Un'autentica estensione di tutela che cancella solo "diritti immaginari"*, at, 34

19 From now on we will be referring exclusively to methods of evaluating loss of enjoyment of life as damages to health as such as opposed to pain and suffering in the sense of *pretium doloris*.

20. *See generally*, W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001), at 268-75 (stressing the different systemic impact of medical evidence in several European Countries).

impairment (in France and Italy) or by descriptive tables (in UK and Germany). These aids offer to judges the basic parameters within which respect of the equality principle should be obtained..

With this bedrock of commonalities laid out, we must turn to the differences that exist between the examined jurisdictions of which insight is essential in relation to their applicability in the US.

A. *The English common law approach to Intangible Loss*

A useful starting point for our comparative analysis is the English experience. This system has dramatically changed since the Court of Appeal began the process of monitoring awards[21] and setting standardized compensation amounts according to their findings. These efforts have produced brackets of values to be utilized by the courts in computing damages. This method simplifies the calculation process, attains consistency in the outcome of cases and also aids predictability, useful both in promoting settlements and in maintaining insurability.

In practice, in assessing pain and suffering and loss of amenity of life, this approach permits trial judges and the Court of Appeal to consider the severity of the injury and to equate it with an amount within the brackets. These amounts (within the brackets) are deduced form precedents on quantum and are currently produced and periodically published by the Judicial Studies Board[22]. Amounts are updated in accordance with both inflation and new increasing/decreasing trends.[23]

It is rather intuitive that standardization ensued leading to reliable tables of values based on the relative seriousness of different injuries. The guidelines and the cases referred

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[21] Roughly after World War II. *See, e.g.*, Ward v. James, [1966] 1 Q.B. 273, 299-300 (U.K.). The background idea in this assessment of evolution is clearly summarized in Wright v. British Rys. Bd., [1983] 2 A.C. 773, 784-85 (H.L.) (U.K.)

[22].The Civil and Family Committee of the Judicial Studies Board is in charge of the guidelines. *See generally* Judicial Studies Board, http://www.jsboard.co.uk. For the guidelines, see JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (6th ed. 2002). These Guidelines are not in themselves law, but are regarded with the respect accorded to the writings of any specialist legal author. *See* Arafa v Potter [1994] P.I.Q.R. 73, 79. See also DAVID A. KEMP ET AL., THE QUANTUM OF DAMAGES IN PERSONAL INJURY AND FATAL ACCIDENT CLAIMS (4th ed. 2000) (using a thirteen category classification system based on both the area and severity of the injury, with subcategories for more specific parts of the body); JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURY AND DEATH 130 (10th ed. 1996) (18-category classification system based on both the area and severity of the injury, with subcategories for specific parts of the body and more specific types of injuries).

[23]For instance, after a consultation paper in 1996, the English Law Reform Commission issued a report in 1999 urging the "Court of Appeal and/or the House of Lords, using their existing powers to lay down guidelines as to quantum in the course of personal injury litigation" and to adopt recommendations for increasing non-pecuniary loss awards.THE LAW COMM'N, DAMAGES FOR PERSONAL INJURY: NON-PECUNIARY LOSS 5 (1999), HTTP://WWW.LAWCOM.GOV.UK/DOCS/LC257.PDF, at 7. The invitation was answered by in Heil v. Rankin, [2000] 3 All E.R. 138 (C.A.) (Eng.); *see* Richard Lewis, *Increasing the Price of Pain: Damages, the Law Commission and* Heil v Rankin, 64 MOD. L. REV., 100 (2001).

to in them, offer at least a starting point for any case.[24] Yet, these guidelines are not a fixed tariff nor are they binding even where injuries are comparatively uniform and physically very similar. Indeed, the court will have to assess damages with regard to the actual claimant, meaning that it will have to consider her injury and its impact on her life according to her age (though decisions rarely mention age expressly) the severity and permanence of her injury. The key to the evolution of the system lies in the fact that an explanation as regards the actual amount awarded is required. Thus, only where insufficient reasoning is supplied can the court of appeal intervene.[25]

The described system necessitates a significant body of case law detailing the facts of and the reasons for the decision, a sustained policy decision, easy accessibility to the information for all the stakeholders and a sufficient degree of itemization of the awarded damages.[26] All the elements required to borrow from the experience of UK are present in the US: the only requirement is that juries are given access to information on previous awards. Note, also, that itemization has been introduced in the Great Britain tradition and indeed in some American jurisdictions as well.[27]

B. *German Tables and Descriptions*

Germany, being a civil law country, strikingly enough has developed a system, comparable to the British one, to assist in awarding loss of enjoyment of life accompanying damage to health and bodily integrity. However, contrary to English lawyers, German jurists may only refer to private compilations reciting cases and amounts awarded for non-economic damages (so-called *Schmerzensgeldtabellen).*

Accordingly, German practice created an indicative system of scheduling to assess non-pecuniary damages (*Schmerzensgeld*) in personal injury cases. As in the UK, Trial courts' discretionary decisions on compensation are reviewed on appeal for their reasonableness according to the relevant circumstances of the case.[28] Indeed, the individual circumstances of each case remain decisive but they are pigeonholed in uniform patterns emerging from

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24. *See* W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001).

25 For an updated description L. Di Bona De Sarzana, L'evoluzione del modello inglese: il ruolo della Court of Appeal nel controllo dei valori liquidati e le Guidelines dello Judicial Studies Board., in LA VALUTAZIONE DELLE MACROPERMANENTI: PROFILI PRATICI E DI COMPARAZIONE (Giovanni Comandé & Ranieri Domenici eds.) ETS, 2005, 97.

26.*See* W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001), at 276.

27. See also James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 179-80 (1991).

28. *See, e.g.*, Ulrich Magnus, *Schadensersatz für Körperverletzung in Deutschland*, COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE (Bernard A. Koch & Helmut Koziol eds., 2003), at 148-76.

practice. Indeed, the *Schmerzensgeldtabellen* [29] describe the injury suffered by the victim and the amounts awarded according to claimant's request in an ever growing set of actual cases decided by courts.

Overall, the German model offers information more structured and complex than the English one.[30] It is perhaps more functional in relation to practitioner use. In fact, there are diverse publications of *Schmerzensgeldtabellen* which offer collections indexed in different ways (e.g. according to the kind of impairment suffered or on the global sum awarded) and offering both a description of the case and the specific arguments used by the parties and the judges.

C. *The Franco-Italian Approach to Scheduling*

The use of "objective" factors in the evaluation of loss of enjoyment of life is common to other jurisdiction. In the Franco-Italian model, medical *baremes* in conjunction with monetary schedules are used by courts. Often monetary scheduling and models are elaborated on by courts or by scholars but always with reliance upon previous decisions.[31] This is important to note since Italy and France are civil law countries but in relation to tort law, the evolution of their legal systems and especially for the awarding of damages, case law has always played a significant role comparable to that of a judge made law legal system.

The French equivalent[32] of loss of enjoyment of life is named *préjudice physiologique (ou déficit physiologique ou déficit fonctionnel)*. *Préjudice physiologique* compensates the victim for the permanent reduction of physical, psychological or intellectual functions. The medical expert describes and subsequently expresses, in percentage points, the loss suffered by the victim. The percentage is decided by reference to authoritative disability scorings.[33] As in some German *Schmerzensgeldtabellen* the disability scorings group decisions by disabilities.

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29. There are several publications available on the market. *See, e.g.*, SUSANNE HACKS, AMELI RING & PETER BÖHM, SCHMERZENSGELDBETRÄGE (2004); LOTHAR JAEGER & JAN LUCKEY, SCHMERZENGELD (2003); WALTER HAMPFING & ÄRZTLICHE FEHLER, SCHMERZENSGELDTABELLEN (1989).

30 See S. Wünsch , *Il modello tedesco delle Schmerzensgeldtabellen*, in LA VALUTAZIONE DELLE MACROPERMANENTI: PROFILI PRATICI E DI COMPARAZIONE (Giovanni Comandé & Ranieri Domenici eds.) ETS, 2005, 85.

31 Note that in several European jurisdictions courts usually appoint their own impartial experts.

32. For information on the French experience of awarding damages for personal injuries, see Christophe Radé & Laurent Bloch, *La Réparation du Dommage Corporel en France*, COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE (Bernard A. Koch & Helmut Koziol eds., 2003), at 101-04.

33. This list of medical scoring points sets a rate for disabilities, by recommending either a specific rate or a scale of rates for each of them *See* in general S. Galand-Carval, *France*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE (W. V. Horton Rogers ed., 2001), at 90. Galand-Carval also argues that along with objective parameters, medical experts have an important role in measuring the so-called "personal temporary incapacity" (*l'incapacité traumatique temporaire à caractère personnel*). *Id.* at 89.

As in the other experiences considered in this article, none of the medical scoring tables have official character, though they are, so to speak, "appreciated" by the French Supreme court. Indeed, in all examined countries, medical scorings tables have gained their authoritative role in the judicial arena by their scientific reputation.

Usually parties to a case and the court itself appoint their own medical expert and the judges then assign a percentage value to the plaintiff's disability according to the evaluation provided by the medical experts. This percentage value is then multiplied by the monetary value currently assigned by the court itself for claimants in similar circumstances. Courts create their own tables of monetary values, which decrease according to age and increasing according to the disability rate. In summary, courts, by multiplying the victim's disability rate expressed in percentage points, by the corresponding monetary value obtain the monetary damages award.[34]

Another important factor to note is that in France, courts update the monetary value assigned to a particular disability to reflect both inflation and different perceptions of the complained non-pecuniary loss.[35] Subsequently, any alterations find acceptance at the court of appeal level.

D. *A Search for a Synthesis: the Italian Evolution*

The French model has been adopted and developed by Italian judiciary and scholars. The system is used for awarding the so-called *danno alla salute* or *danno biologico*, which we assimilate with loss of enjoyment of life. Indeed, the Italian judiciary by way of judicial interpretation has distinguished loss of enjoyment of life (*danno alla salute*) from pain and suffering (*danno morale*). Compensation for the former should ensue even though damage to health and bodily integrity neither reduced the ability to generate earnings nor caused pain and suffering[36] because *danno alla salute* is "a first, essential, priority compensation that

34. it is noteworthy to remark that the uniform descriptions of health impairments developed by medical scientists and monetary value tables based upon precedent decisions were developed by judges and scholars intending them as not binding. Indeed they should not be binding according to the French Supreme Court. *See* Cass., 2e civ., Feb. 1, 1995, Bull. civ. II, No. 42.

35. *See.* Suzanne S. Galand-Carval, *France*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE (W. V. Horton Rogers ed., 2001), at 101. Note also, that damages for disfigurement and physical pain are assessed according to schedules calculated with reference to previous awards, and judges indicate the lowest, highest and dominant awards of the past year for each of the several scale degrees.

36. *See* Cass., 6 june 1981, n.3675, *in* LA VALUTAZIONE DEL DANNO ALLA SALUTE 398 (M. Bargagna & F. D. Busnelli eds., 1995). In this work, most of the leading decisions on personal injury damages can be found as an appendix, in addition to other materials and commentary from members of the Research Group on *Danno Alla Salute* of Pisa under the auspices of the Italian National Research Council. *See also* RAPPORTO SULLO STATO DELLA GIURISPRUDENZA IN MATERIA DI DANNO ALLA SALUTE (M. Bargagna & F. D. Busnelli, eds., 1996) (analyzing over 1,000 decisions)

conditions every other one."[37] According to the Italian Constitutional court damages for *danno alla salute* are compensatory and health "cannot suffer limits to the compensation for damage done to it."[38]

It is important to stress this last consideration because it emphasizes the compensatory nature of awards for loss of enjoyment of life/*danno alla salute*. It is undeniable that a lost limb cannot literally be fully restored by any amount of money. However, social perception visualizes the award of damages as capable of making the victim whole.[39] Consequently the use of indicative scheduling must be seen as an instrument used to obtain equal treatment, not as means to reduce compensation or individual justice.

Similarly to France, the Italian awarding method finds its uniformity by carrying out a medical evaluation of the psychophysical disability and with reference to consistent monetary guidelines, developed once more, from an examination of prior awards. Again, corresponding to the French system, a medical evaluation, based upon reputed scientific and practitioners' publications, assigns to the permanent disability a percentage point. The court thereupon allocates a monetary value to this percentage point and multiplies the value by the percentage point. Needless to say, the Courts discretion remains absolute in defining the final monetary value of each point according to its previous awards. The judial assessment of the disability is the responsibility of the court in any given case, its correspondence to a severity percentage, medical evidence being the leading guide.[40]

In summary, courts in the European countries examined, developed local tables of monetary values from their previous case evaluations and now use them together with scientific medical scorings to award objective non-economic damages (*danno alla salute* and *préjudice physiologique*, loss of enjoyment of life). Local tables enable a reflection of the "local" social perception of the amount of money required to consider the victim whole. Strange as it might seem, those amounts might vary, and indeed vary significantly, from one Italian (or

37. Corte cost., 14 July 1986, n.184, Foro It. I 1986, I, 2053 with commentary by Giulio. Ponzanelli, *La Corte Costituzionale, il Danno Non Patrimoniale e il Danno Alla Salute.*

38. Corte cost., 14 July 1986, n.184, Foro It. 1986, I, 2053 with commentary by Giulio Ponzanelli, *La Corte Costituzionale, il Danno Non Patrimoniale e il Danno Alla Salute.*

39. *Wright*, [1983] 2 A.C. at 777: "Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor . . . the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases." (per Lord Diplock); see also Rushton v. Nat'l Coal Bd. [1953] 1 Q.B. 495, 502 (U.K.), stating:

> The only way . . . in which one can achieve anything approaching a uniform standard is by considering cases which have come before the courts in the pasts and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.

40. Indeed, the Italian Constitutional Court expressly fostered: "a criterion fulfilling both the need for basic monetary uniformity and [the need] for elasticity and flexibility to adjust awards to reflect the actual effects of the ascertained disablement on activities of daily life." See Corte cost., 14 July 1986, n.184, Foro It. 1986, I, 2067.

French) Region to another, as is probably the case in various American court districts. This, somewhat awkward result, illustrates once again that the European scheduling mechanisms are not a way of curtailing victims rights but rather a means to improve and govern the awarding of non pecuniary loss. Indeed, medical scoring tables and monetary values used in Europe at the very least grant the sharing and distribution of information among all the stakeholders in personal injury cases.

In principle, it would be possible to develop a single scheduling system capable of serving horizontal and vertical justice. This notion could be realized by projecting the monetary value of the permanent impairment, defined by each court, into a conceptual uniform grid[41] which would reflect the actual perception of the relationship between different types of loss of enjoyment of life as awarded in case law and as described by medical expertise. Indeed, Italian judges developed a curve describing percentage points of permanent impairment and after assigned to those percentage points an indicative monetary value, translating the points on the curve into the final monetary amounts they use to reflect (it is assumed) the local socially accepted valuation of loss of enjoyment of life. Of course, a perfect system would require a methodology uniform to all courts[42]. Nevertheless, even a disparate approach is capable of affording predictability to the system and higher levels of horizontal and vertical equality in a given jurisdiction. Indeed, the monetary scheduling tables developed in France and Italy, function simply by multiplying the value of the relevant point for each age/degree of disability combination, by the *basic monetary award* decided by each court. This system of calculating damages is utilized only if an amount has not already been established by averaging previous awards. Every different amount of the basic monetary award decided in a given jurisdiction respects principles of vertical and horizontal equality.

E. *Judicial Scheduling the European way*

The awarding methods we have briefly described improved vertical justice (among lesser and greater injuries) and horizontal justice (among similar personal injuries). Moreover, these awarding systems do not transform the personal injury victim into a faceless number but instead permit, along with a uniform base of monetary parameters, the

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41 further information and references available in Giovanni Comandé, *Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States*, 19 Temple International & Comparative Law Journal N. 2, 2005, 241ff

42 As proposed in G. Turchetti, *Gli sviluppi dello studio sulla determinazione del valore monetario base del punto di invalidità*, *in* RAPPORTO SULLO STATO DELLA GIURISPRUDENZA IN MATERIA DI DANNO ALLA SALUTE (M. Bargagna & F. D. Busnelli, eds., 1996).

delivery of better horizontal justice. This can be said with confidence, since the monetary values are indicative and susceptible to equitable adjustment, according to the specific case before the court. These awarding methods allow different injuries to be treated in different ways and similar injuries to be treated alike, always taking into consideration their individual and distinctive aspects. These results are mainly achieved by legal systems on a jurisdictional level. A vision of achievement of the same on a National level would indeed be ideal.

Where tables of monetary values have been developed, evidence of the personalization of awards is clear. The first avenue of personalization is offered by the combination of age and disability in the schedule. The second one allows for the adaption of these results depending on the facts of the case.

Medical-legal evaluations of psycho-physical disabilities provide the basis for uniformity in the awarding process. These evaluations offer objective parameters and measurability while establishing homogeneous grounds for the evaluation of damages based on an examination of disabilities from past case law. The equitable power of each judge is safeguarded. She can adjust the objective measurement to the peculiarities of the case and the creation\selection of the scheduling and scoring tables for the objective evaluation is her choice.

The joint effort of the judiciary and of experts (legal, medical and economic) has produced descriptive\orientation tables. This long process of judicial experimentation has made objective non-pecuniary damages easier to ascertain and assess.

With the European situation outlined, we now turn to the question whether or not a similar process of assessing damages could be initiated in the US.

III. Empowering the American Judiciary System Using European Insights

Italy, France, Germany and the United Kingdom, by their processes of systemization, tend to reach similar results. Within the civil law and common law traditions considered, the basis for the assessment of damages for non-pecuniary loss relies on preceding cases on quantum, which set out the sum of money awarded and a description of the medically ascertainable condition suffered.[43] The two European models briefly described have been

43.See generally David Baldus, John C. MacQueen, M.D. & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995); Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*, 83 NW. U. L. REV. 908 (1989).

coined the "disability schedule and value table" model and the "precedent model."[44] A process of hybridization of the diverse models could result in an array of variations, useful for different American jurisdictions. In practice however, the two models have diverse functionalities "The French or Italian lawyer, having obtained medical evidence which places the injury at the relevant level of disability in terms of points, then turns to the relevant 'value' table to convert that into a sum of money. The English lawyer, having obtained evidence on the nature and effects of the injury, then tends to regard it in 'descriptive' terms and goes to the standard sources of specialist material reporting court awards, to look for something similar."[45]

When considering application in the US, each model presents hurdles. Though the disability schedule and value table approach would appear the simplest to implement, it would most probably result in competing expert views. This would most certainly arise in deciphering where on the matrix a particular disability should be allotted. Indeed, problems may also arise in relation to the accuracy of the scoring.

With this said, we suggest that these methods can easily function in every country in evaluating those non-economic damages for which an objective criterion for establishing and measuring them is possible. Indeed, through medical expertise, we can objectively ascertain and score non-economic damages for bodily and health impairment that we have compared to loss of enjoyment of life.

Drawing on the Anglo-German (use of descriptive tables)[46] and on the Franco-Italian (adoption of scoring percentages), the American system can achieve standardization and a more equalitarian use of resources for calculating, simply by profiting more from available information. Indeed, when information is collected and shared, it becomes a theoretical starting point for evaluation both in and out of the courtroom. The information sharing process does not threaten the individualized justice which tort law promises. In fact, the search for clear guidelines reduces vertical and horizontal inequality since it enables judges to justify their departure from the guidelines.[47]

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44. *See* W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001), at 274.
45. *See* W. V. Horton Rogers, *Comparative Report*, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W. V. Horton Rogers ed., 2001), at 274-75.
46. Moreover, the Charter of Fundamental Rights of the European Union now strongly supports health, although this document has political value only. *See* Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.
47. The argument is not novel. *See* James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991), at 179, "An unexplained outlier should constitute a prima facie case for either remittitur or additur by the trial judge or an appellate holding of inadequacy or excessiveness of the judgment.".

A. *Learning the Lesson and …*

It is absolutely clear that the combination of reasonable predictability with the tailored assessment of damages is possible, tackling simultaneously the problem of uncertainty and justice (both vertical and horizontal). European legal systems, as shown, attain this either by using leading cases on *quantum* or building upon scientific tables. Both options contribute information about past evaluations relative to both the litigating parties and the courts. Moreover, each system conserves ample discretion for decision makers (judges, juries, claim adjusters) in determining the amount of damages. Also important to note is that both systems allow for the adaption of the collated information (in the descriptive tables or in the scoring ones) to the case at hand. Every mentioned method requires rational justifications if departure from the previous decisions occurs. The case has to be actually distinguished to avoid review on appeal.[48] Except for the UK, the European systems discussed in this article are not based on fully binding precedents, but, once elaborated in a meaningful way, they offer a preliminary informative framework that can be used repeatedly leading to higher certainty in predicting the possible award of a given case.

No statutory intervention was required in Europe nor is it called for if implementation of any of the European insights were to occur in the United States. Special verdicts, for example, can be used to supply juries with the required information on values[49] without subtracting from the essence of case-by-case assessment of trial by jury. Simultaneously, every judicial discretion would be circumscribed by the requirement to justify awards which depart from the precedents on quantum. We understand this is a significative departure from routine practice in American courts. Clearly the describing or scheduling guidelines can not be binding for the jury in situations where they arrive at a contrasting evaluation based on the evidence presented to it. Nevertheless, a review process is already in force, and although the jury would *not* justify the award explicitly, no attorney would appeal a decision that was actually based on clear evidence and obviously well-founded. After all

48. Similar standards do exist in the United States. See, e.g., Steinke v. Beach Bungee, Inc., 105 F.3d 192, 198 (4th Cir. 1997), stating:

> In determining on remand whether the jury's verdict was rendered in accordance with South Carolina law, the district court should look to South Carolina cases to determine the range of damages in cases analogous to the one at hand . . . . If the court believes a departure from the range is justified, it should provide the reasoning behind its view. If the court determines that there are no other comparable cases under South Carolina law, it should explain this determination as well. Such a decision in the district court will reduce the risk of caprice in large jury awards and will assure a reviewing court that the trial court exercised its considered discretion under the applicable state law.

49. *See, e.g.*, Stephen A. Salzburg, *Improving the Quality of Jury Decisionmaking,* in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341, 349-71 (Robert E. Litan ed., 1994). See Giovanni Comandé, *Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States*, 19 Temple International & Comparative Law Journal N. 2, 2005, 241ff

additur and *remittitur* are based on the evidence of the case at trial.

The European experiences certainly demonstrate that rationalizing the awarding system for loss of enjoyment of life without taking away victims' right and judicial powers is not a mythical chimera. In fact it introduces rationality by supplying information and also has the potential to increase the possibilities for settlement which would correspondingly reduce litigation.

European examples suggest that no limit to the discretion of the judicial system is required to foster these goals. The only requirement is the transformation of the judicial process into a better informed process.

The American legal system can reach results similar to the European ones by relying on the presence of a capable objective basis for loss of enjoyment of life (a description in medical terms) and its assessability in personal injury cases using medical scoring or descriptive tables. This is indeed feasible and evidence suggests that the wheels for its implementation have already been set in motion.[50]

B. *…Doing it the American Way*

Our basic assumption here is that 1) informing juries and judges about previous verdicts and 2) letting them use disability scheduling as they occasionally do at present,[51] would serve vertical and horizontal justice at least within the specific jurisdictions. Moreover, it would continue the permittance of determining the value of damages either according to previous decisions or by their own evaluation.

Drawing from Europe, courts could create a reference scale for the case at hand, defining both their scheduling and monetary values by relying on factors such as age and severity of the injury.[52] It would not require statutory intervention and could be both adopted and adapted without necessarily imposing monetary scheduling on judges and juries.

Indeed, § 905 of the Restatement (Second) of Torts, already indicates the severity of the injury, its permanence, and the age of the plaintiff as predictors of award size,[53] similar

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[50] Giovanni Comandé, *Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States*, 19 Temple International & Comparative Law Journal N. 2, 2005, 241ff

51.Sometimes courts already make express reference to a percentage of disability. *See, e.g.*, Quantum Study, *Louisiana Personal Injury Awards*, 46 LOY. L. REV. 651, (2000).

52. The suggestion of emphasizing the diversity among injuries and providing this information is not entirely new. *See*, *e.g.*, Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 757 (1999), at 817.

53. Also, the importance of age as a factor for differentiating awards for non-economic damages, is again stressed in § 905 of the Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 905 cmt. i (1979) (discussing ramifications of the age of the injured may have on the measure of recovery). See also Giovanni Comandé,

to jury instructions which often stipulate the severity of injury as a crucial element in awarding non-economic damages.[54] Moreover, 'severity of injury scales' are already readily available to litigants and courts.[55]

Another aid to the adoption or adaption process of European experiences is that itemized verdict forms are used in several States[56] making it easier to introduce the itemization of damages, which in any case is useful in reviewing awards on appeal.

Reference to previous monetary awards could receive legitimization again by precedents;[57] and data on awards from a specific date onward can be collected on a court-by-court level if the goal is to offer equal treatment within a single jurisdiction.

The critique that previous awards could restate non-economic damages that are hardly deemed as correct can be refuted based on the fact that, even if previous awards are absolutely incorrect, a minimum level of credibility in the judicial system must be accepted to confer on the American system a basic adhesion to principles of justice.[58]

All sorts of criticisms can be poised against the European insights we have described so far. Indeed, they are not perfect – perfection is unattainable while something is evolving. European databases and reporting systems have not developed simultaneously nor without

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Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff on reasons suggesting the use of age as an objective factor to be taken into account.

54. *See, e.g.*, Eleventh Circuit Pattern Jury Instructions, Civil Cases: Damages Instruction § 2.1 (West 2000); Fifth Circuit Pattern Jury Instructions, Civil Cases: Compensatory Damages §§ 15.2, 15.4 (West 1999); Louisiana Civil Law Treatise, Civil Jury Instructions § 18.01 (H. Alston Johnson 2000); New York Pattern Jury Instructions, Civil Cases § 2:280 (West 1998). Some other jurisdictions "disability" should be considered in determining damages. *See, e.g.*, ALABAMA PATTERN JURY INSTRUCTIONS, CIVIL § 11.04 (Ala. Pattern Jury Instructions Comm. 2005); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: DAMAGES INSTRUCTION § 2.1 (West 2000); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES: COMPENSATORY DAMAGES § 15.4 (West 1999); HAWAI'I JURY INSTRUCTIONS, CIVIL §§ 8.3, 8.60 (Hawai'i State Judiciary 1999); ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL § 30.04 (Ill. Sup. Ct. Comm. on Jury Instructions in Civil Cases 1995); LOUISIANA CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 18.01 (H. Alston Johnson 2000); NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 7.2 (West 1997); WASHINGTON PATTERN JURY INSTRUCTIONS, CIVIL § 30.05 (Wash. Sup. Ct. Comm. on Jury Instructions, 5th ed. 1992); WISCONSIN JURY INSTRUCTIONS, CIVIL § 1766 (Wisc. Civil Jury Instructions Comm. 2004); WYOMING CIVIL PATTERN JURY INSTRUCTIONS § 4.01 (Wyoming Bar 2003).

55. *See, e.g.*, Randall Bovbjerg, Frank A. Sloan, Avi Dor, Chee Ruey Hsieh, *Juries and Justice: Are Malpractice and Other Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5 (1991) (discussing a study using a six point scale); PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 74-75 (1985). *See* Nat'l Ass'n of Ins. Comm'rs (1980) Severity of Injury Scale (ranging from 1 for emotional injury only to 9 for death). *See generally* Nat'l Ass'n of Ins. Comm'rs, www.naic.org (last visited Nov. 23, 2005). For a criticism of the use of this last scale *see* Gary T. Schwartz, *Proposals for Reforming Pain and Suffering Awards*, in REFORMING THE CIVIL JUSTICE SYSTEM, 416, 419 (Larry Kramer ed., 1996).

56. In this direction *See, e.g.*, COLORADO JURY INSTRUCTIONS, CIVIL § 6:1A (Colo. Sup. Ct. Comm. on Civil Jury Instructions, 4th ed. 2002); TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS § 7.2 (State Bar of Tx. Pattern Jury Charges Comm. 1998).

57. "[T]he use of the aggregate wisdom of past practice is quite reasonable — certainly more so than reinventing dollar values in each case . . . Linkage to past awards, in short, provides a helpful empirical foundation upon which to base — and justify — policy judgment." *See* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*, 83 NW. U. L. REV. 908 (1989) (discussing various advantages and concerns of scheduling damages), at 961.

58. After all, several studies conclude juries' vertical variability is no greater than judicial one. *See generally* Steven. P. Croley & Jon D. Hanson, *The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995), at 1906-14.

biases or errors. Nevertheless, it seems undeniable that building upon the European approaches can bring invaluable stability and predictability to the legal system in the US. Initial discrepancies regarding costs of implementation and errors would be ironed out through the lengthy process of incremental steps made of trial and errors which would undoubtedly play a part in the integration process in the American system.

IV. As a Conclusion: Doing Individual Justice and Retaining Judicial "Discretion"

In the course of adapting European insights to the American specifications, courts and scholars can develop several modifications to their original prototypes. Indeed, each described European experience is more nuanced than it appears in this article. For instance almost every Italian or French court has developed its own schedule of monetary values for the percentage of permanent impairment medically assessed. Similarly, to offer one more example, each American court can easily develop its own monetary schedule by searching its own records and drawing from its own awarding experiences. Indeed, every jury could establish, before hearing the case (*ex ante*), the monetary values to be allocated to the permanent impairment causing loss of enjoyment of life based on medical description. This approach would also diminish the risk of repeating erroneous decisions at scales larger than a single jurisdiction\decision. Each court could incorporate in its instruction to the jury a description of the methodology which charters the main attributes of a case or the proposed awarding methods might become a presentation tool for lawyers, already permissible in some jurisdictions.[59] After hearing the case the jury still have the opportunity to adapt the monetary value (which is has selected ex ante or from a national, State or local schedule) to the facts of the case. In any case, all parties would have debated the case according to shared rules and information, framing the evidence brought by the parties in a clear structure.

While safeguarding jury's independence, the use of guidelines "European style" would help the review process, conducted by the appellate courts or the trial judge, perhaps even better than the usual *remittitur/additur* standards, enabling the court to consider the legitimate evidential factors that evoked the specific jury verdict.

[59] see Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 Temple International & Comparative Law Journal n. 2, 2005, 241ff for examples. *See* also 75A AM. JUR. 2D TRIAL § 554 (1991) (stating that counsel is permitted to suggest to the jurors all reasonable inferences that they may draw from the evidence so long as they understand that the argument of counsel is not evidence).

The more the elaboration and application of the awarding technique is suited to a particular court, the easier will be the periodical revision of them to reflect the changes in social perception[60] and in the justified departures from the guidelines because it would closely reflect the jury sentiment as an expression of the community perception of the appropriate award for loss of enjoyment of life. Nevertheless, to serve, on a larger scale, horizontal and vertical equality it would be advisable to reach a State or, at least, multiple jurisdiction uniform approach. Yet, European jurisdictions as well are struggling in search of more uniform monetary evaluations even if at national level the awarding methodology is sufficiently shared and agreed upon.

In short, what the European insight suggests is the development of a shared methodology aiming at guaranteeing that similar loss of enjoyment of life, medically ascertainable, receives more similar treatment, even if the monetary value attached to each case would still be relatively different.

Trying to use European experiences would at least bring more consistency in striving for individual justice and retaining judicial "discretion". Consistency and equality would result along with several beneficial "side effects"[61] that make it worth trying to pursue it. One must bear in mind the proverb, change hurts, but stagnation kills.[62]

60. *See*, *e.g.*, Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 158 ("It is appropriate for the jury to assess the harm allegedly inflicted on the plaintiff in light of the values of the community in which it occurred. Jurors do just that.").

61. It reduces inefficiency (by reducing over-investment in liability avoidance that results in higher insurance costs). Consistency reduces lottery-like results that are often criticized in non-economic assessment and may also increase the incentives to settle. *See* Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1994), at 316 (suggesting that in certain circumstances uncertainty may increase the likelihood of settlement).

62 As a great Irish student tought me.