

Scheduled Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Sloan

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In their stimulating and valuable article,¹ Blumstein, Bovbjerg, and Sloan offer two quite distinct proposals. Both schemes seek to increase the predictability and efficiency of tort law outcomes, but they have little else in common. The first is a reporting scheme to facilitate the scheduling of damages. It would apply to all personal injury cases. The second is directed only at cases of serious injury. It would supplant the usual lump sum award covering the costs of future health care, educational, social, and related long-term support services, replacing that award with a series of contracts for these future services to be negotiated by the parties.

In principle, both schemes offer attractive alternatives to the *status quo*, and one hopes that policymakers will give each the most serious consideration. For a variety of political and practical reasons, however, they would be difficult to implement. Moreover, each of them would involve significant costs that might well exceed the social benefits. (This seems especially true of the second.) My brief comment on the Blumstein *et al.* paper is divided into three parts. Part I sounds a note of realpolitik about “tort reform” and Parts II and III appraise the merits of each of the proposals advanced by the authors.

I. A Little Realism About Tort Reformism²

The legislative changes to the tort system adopted during the last fifteen years have given tort reform a bad name. They have been fueled more by defendants’ narrow desires to win their cases than by a balanced analysis of the tort system aimed at serving a more broadly defined public interest. For this reason, many of the measures adopted in the name of tort reform—arbitrary caps on pain and suffering awards, elimination of punitive damages, and limits on contingent fees, for example—are undeniably crude, blunderbuss remedies. They may achieve certain legitimate policy goals such as increasing the availability of liability insurance;³ it could hardly be otherwise given their

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1. Blumstein, Bovbjerg, & Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991) [hereinafter Blumstein].

2. I borrow and adapt this phrase with apologies to Arthur Leff. See Leff, *Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (review of Posner’s *ECONOMIC ANALYSIS OF LAW*).

3. See Blackmon & Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE* (Schuck ed.) (forthcoming 1991).

reflexive, pro-defendant bias. In doing so, however, they almost completely ignore deterrence, victim compensation, and other vital tort system goals.

By entitling their article "Beyond Tort Reform," Blumstein *et al.* presumably hope to launder their proposals ideologically, thereby immunizing them from the pitched battles and protracted warfare that partisans have waged under the rubric of tort reform. Here, as in their earlier article on damages scheduling,⁴ they purport to reject the "radical" changes that some advocates of tort reform propose in favor of two more modest approaches that seek improvements "within the current framework of the tort-law system."⁵

These assurances, however, are unlikely to mollify the ever-vigilant sentinels of the *status quo*, who are largely found among the plaintiffs' personal injury bar and their allies in the consumer movement.⁶ If past is prologue, these battle-hardened combatants will view the authors' proposals not as benign, incremental refinements of the system but rather as a thinly disguised assault on some shibboleths of the traditional tort system: the jury's autonomy and discretion, the victim's right to be made whole, and the law's demand for individualized justice. This assault will be denounced in mammalian metaphors for deceit: a wolf in sheep's clothing, a Trojan horse, a camel's nose under the tent. The authors' careful disclaimer of radical intentions may succeed in winning them a more respectful hearing by the plaintiffs' bar, but one has reason to doubt that it will.

The staunch defender of the existing tort system will point out that Blumstein *et al.* immediately reveal their true colors by disparaging as "wholly ad hoc and discretionary" the traditional mode of determining damages.⁷ In this mode, juries assess the victim's damages under a very general instruction supplying little guidance or constraint, providing no information about damage awards in earlier cases, and confounding both trial court control and appellate court review. This mode, the authors point out, places no value on experience or precedent, violates horizontal equity (the principle that like cases be treated alike), weakens control and accountability, and magnifies uncertainty. This in turn impedes settlements, discourages insurance, and increases litigation costs.

Traditionalists, however, are likely to view these features of the tort system quite differently. Some will deny that these effects exist while others will insist that they are exaggerated. Still others, conceding that these disadvantages are great, will nevertheless maintain that they are necessary to achieve other, more transcendent goals. In this view, ad hoc, discretionary damages determinations protect the jury's independent, constitutionally enshrined fact-finding preroga-

4. Bovbjerg, Sloan & Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1988-89).

5. Blumstein, *supra* note 1, at 172.

6. For one recent pronouncement on behalf of this coalition, see Claybrook, *Products Liability Serving all Americans*, 26 TRIAL 10 (1990).

7. Blumstein, *supra* note 1, at 173.

tives from intrusion by judges and legislatures. Such decisions also safeguard the victim's right to recover all that he has lost, not some fraction or approximation designed to achieve administrative efficiency rather than full compensation of loss. Most importantly, individualized jury determinations of damages promote the law's most noble ambition—to vindicate individual rights by producing exquisitely contextualized judgments tailored to the unique circumstances of each individual rather than mass produced according to crude functional categories created to serve social needs.

The traditionalists will also resist the authors' proposal to substitute contracts for services for lump sum or periodic awards of damages. Here the objection will go to the proposal's paternalism or, in Jules Coleman's terms, to its violation of the victim's autonomy by depriving her of "the right to control her resources in a way that allows her to formulate and act upon life plans."⁸

Like most disputes over tort reform, the reactions to the authors' two proposals will reflect ideological differences at least as much as they reflect disagreements over what the facts are concerning the tort system's actual effects. Even if these proposals produce a kind of normative standoff, they raise fundamental questions of legal policy, questions which should be squarely faced by reformers and traditionalists alike.

II. Damages Scheduling

The authors' first proposal addresses the question of how damages should be assessed. The authors insist that the current process of damage determination is seriously deficient, and they present considerable empirical evidence to support their claim.⁹ A recent New York City case, which was decided after Blumstein *et al.* wrote their paper, tends to buttress their general point—although it surely is an aberration. The plaintiff, employed as a dishwasher, was on a subway platform, apparently in an intoxicated condition.

8. Coleman, *Adding Institutional Insults to Personal Injury*, 8 YALE J. ON REG. 223 (1991). It should be noted that objections based on paternalism and autonomy also apply to governmental programs such as food stamps, Medicaid, and public housing that provide claimants with in-kind rather than cash benefits. A corrective justice theorist like Coleman would surely argue that the offense to autonomy is greater in the tort law context where the benefit is premised on a wrongfully imposed loss to the victim, than in the public program context where the remedy is premised on policy goals such as redistribution to the poor. In the programmatic context, unlike the tort context, no generally accepted principle of justice requires that government create and enforce an entitlement to the benefit. In this context, moreover, political considerations often necessitate an explicitly paternalistic remedial form like an in-kind benefit even at the expense of individual autonomy.

9. Bovbjerg, *supra* note 4, at 919-28. Although the data relied on by Blumstein *et al.* demonstrates that variations in awards are large and difficult to explain on the basis of differences in the circumstances surrounding individual cases, the data can not conclusively establish that those variations are arbitrary and illegitimate. Thus, the authors concede that "it is not possible to fully and objectively adjust for other circumstances that plausibly influence a jury's valuation, such as the subjective nature of how an injury occurred." *Id.* at 923-24.

According to the *New York Times* account of the testimony, the token clerk called the station command center, as required by transit agency rules, and reported that an intoxicated person was on the platform. Fifteen to twenty minutes later, the plaintiff fell on the tracks, was struck by a train, and suffered injuries that resulted in the loss of his left arm. A Bronx jury awarded him \$9.3 million: \$8.6 million for future pain and suffering, \$514,800 for future lost wages, \$16,875 for past lost wages, \$200,000 for pain and suffering, and \$17,055 for medical expenses. The *Times* noted that previous awards against the Transit Authority for negligence resulting in loss of a person's dominant arm had ranged between \$1.25 million and \$1.5 million.¹⁰

It is simply impossible to square such an outcome with any defensible conception of justice. The jury's award appears to deviate wildly from awards to other plaintiffs who have suffered roughly comparable losses, creating the severe problem of "horizontal inequity" that, among other concerns, has prompted the authors' proposals.¹¹ Awards of this size for losses of this kind also invite over-deterrence, encouraging transit systems to engage in elaborate precautions that are not worth their cost. The risk of such accidents becomes uninsurable. Such awards also seem distributionally perverse; if they are financed through subway fares, they ultimately impose the liability costs on subway passengers, who are presumably poorer than the average. The possibility that the trial or appellate court will subsequently reduce an award like this mitigates these problems, but it cannot eliminate them. The defendant's motion for remittitur requires more litigation and entails additional uncertainties.

Blumstein *et al.* propose to rectify this situation through the use of damages schedules.¹² The authors would establish a system designed to generate much more detailed damages findings from tort juries, record and aggregate that information, and inform and instruct future juries concerning the range of damages awarded in prior cases of the same kind. In particular, the information would be used to constrain jury discretion; damages awards that fall within a specified range of prior awards for the injury severity category

10. Sims, *\$9 Million Won for Loss of Arm in Drunken Fall*, N.Y. Times, Sept. 21, 1990, §B, at 3, col. 6.

11. Indeed, the jury's valuation of the lost arm also exceeds, by a factor of two or three, conventional valuations of loss of life in wrongful death cases and in regulatory decisions. See Bovbjerg, *supra* note 4, at 918. Note that I am not suggesting that injuries cannot sometimes properly be valued at more than life, especially when the victim faces many years of expensive medical care, severe disability, and horrible pain. The loss of an arm, terrible as that is, hardly seems like such a case.

12. This general approach is already employed in several closely analogous contexts, notably workers' compensation and Social Security disability awards. See *Heckler v. Campbell*, 461 U.S. 458 (1983). Broad compensation categories are also common in first-party indemnity insurance and in the diagnosis-related groups (DRGs) used to reimburse physicians under the Medicare program. See Altman, *Hospital Cuis Aren't Hurting Care for Elderly, Study Says*, N.Y. Times, Oct. 17, 1990, §A, at 1, col. 5 (recent study of DRGs' effects on the quality of care). In the specific context of tort adjudication, damage scheduling has recently attracted the interest of other commentators. See *e.g.*, Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"*, 22 U. MICH. J.L. REF. 303 (1989); Rosenberg, *Damage Scheduling in Mass Exposure Cases*, in 3 COURTS, HEALTH SCIENCE AND THE LAW 335 (1991).

relevant to the particular accident would enjoy “presumptive validity,” while awards that fall outside that range would have to be justified by the jury.

This scheme is attractive at several levels. Very broad jury discretion may be a virtue in the criminal law context in which the power of nullification is viewed as an important safeguard against the state’s punitive power.¹³ Such discretion is more objectionable, however, in the context of awards of tort damages, where the law is equally concerned about fairness to plaintiffs and to defendants and where there is no independent value in the possibility of nullifying legal norms. Moreover, damages decisions by juries, remittitur and additur decisions by trial courts, and reviewing decisions by appellate courts are more likely to be fair and accurate if they are based on reliable information about awards in prior cases. To the extent that the authors’ system would increase the predictability of awards, it would also encourage settlements, reduce litigation and insurance costs, improve deterrence, and promote insurability of risks. Awards like that in the New York City case described above would have to be either justified explicitly or eliminated altogether. An additional benefit, not mentioned by the authors, is that the damages data generated by their system could be used by administrative regulators who must make policy decisions involving the valuation of life and limb.

The scheduling scheme, however, raises a number of conceptual and practical problems. The value of the data for scheduling purposes depends entirely on the notion of “similar cases.”¹⁴ If this phrase is intended to mean all cases within one of the nine severity-of-injury categories, it is too crude to be very useful. For example, it would not discriminate among cases according to any of the other variables, such as the victim’s age¹⁵ and the precise duration of injury,¹⁶ which contribute to legitimate variations in damages awards. (The authors do envision an adjustment of prior awards for the extent of comparative negligence and inflation.)¹⁷ If the phrase “similar cases” is meant to refer instead to some other criteria of similarity, we are not told what those criteria might be. In principle, at least, this problem need not be insuperable, as more numerous case categories could be constructed pursuant to more

13. See M. KADISH & R. KADISH, *THE DISCRETION TO DISOBEY* (1973).

14. The authors also speak of “similar states” in connection with the pooling of data on damages awards. Blumstein, *supra* note 1, at 180. Like the concept of similar cases, this phrase begs two central questions. First, it does not indicate the respects in which similarity should be judged. Second, regardless of how one proposes to answer that question, it can only be answered as a practical matter after one has compiled state-specific data basis, at which point most of the advantages of multi-state data pooling can no longer be obtained.

15. In their earlier article on damages scheduling, the authors emphasize the importance of this variable. See Bovbjerg, *supra* note 4, at 919-28.

16. The injury severity categories that the scheme would employ use only two very broad durational concepts—“temporary” and “permanent”—and death. Bovbjerg, *supra* note 4, at 921.

17. Blumstein, *supra* note 1, at 180.

refined criteria of similarity. In practice, however, data, cost, and reliability limitations might make this refinement impossible.

The data's value would also seem to depend on the comprehensiveness of the reporting system. This in turn would depend on whether it includes information on out-of-court settlements. It is not just that settlements constitute well over 95% of the cases; it is also that the cases selected for litigation are systematically different than those selected for settlement.¹⁸ The authors fully recognize this fact, yet their brief discussion of the issue¹⁹ reinforces, rather than dispels, one's doubt that the system could generate reliable data of this kind without considerable regulation of settlements, which would raise still other policy problems.

The proposed reporting system would also rely entirely on damages data drawn from earlier cases. Indeed, the authors view this fact as a plus, for it helps to keep their approach "within the framework of the current tort-law system."²⁰ This may well be advantageous to their efforts to win political acceptance of the proposal by the plaintiffs' bar. But by using earlier awards as the foundation for their new system of damages scheduling, they impound and then compound what they themselves characterize as the distortions of the past, thereby projecting those distortions into the future. There may be no way to eliminate this problem entirely; it can probably best be addressed by carefully narrowing the range of prior awards within which new awards will enjoy "presumptive validity."²¹

Another important set of implementation difficulties with the authors' scheduling scheme grows out of the necessity for each jury to make damages-related findings of fact that would be far more detailed than the Delphic, conclusory findings it must make under the existing system. The new findings would include not only the additional breakdowns required by the reporting system, but also the mandated explanations for any awards that lie outside the permissible range prescribed for each severity-of-injury category. The requirement to make such findings raises at least two important problems. First, juries that find it possible to agree upon the general kind of damages assessment called for by current law would often find it harder, perhaps even impossible, to reach agreement on the far more detailed findings demanded by the authors' scheduling scheme. Other things remaining equal, an increase in the level of specificity required of jury findings²² will generate a number of other changes in the system. For example, more lawyering will be conduct-

18. See Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). But see Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990).

19. Blumstein, *supra* note 1, at 181.

20. *Id.* at 172.

21. *Id.* at 178.

22. The level of specificity issue is a significant one not fully addressed by the authors.

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ed around these issues, jury deliberations will become more protracted, and the deliberations will more often result in hung juries, in which event retrial of at least the damages portion of the case might be necessary. The prospect, then, is for more expensive litigation, more court congestion, and more divisiveness on juries.

A second problem is that a special verdict would be required in each case of serious injury. In this connection, it is noteworthy that although special verdicts are permissible under the Federal Rules of Civil Procedure²³ and state law counterparts, and despite their theoretical attractiveness, they are seldom employed in tort cases. Evidently, neither lawyers nor judges like them. Their antipathy presumably reflects the fact that special verdict questions are hard for judges to draft and for juries to answer. The formulation of questions and the provision of answers cause more divisiveness within the jury and, by inviting appeals and reversals, increase the parties' litigation costs.²⁴

III. Contracts for Future Services

Blumstein *et al.* also advocate a system under which the jury in a case of serious injury would be required to determine the actual service outcomes to which the plaintiff will be entitled, rather than placing a monetary value on those services as it does now. Those outcomes would be defined in terms of a specified package of future health care, educational, social, and other related long-term support services provided over a specified period of time. Once the plaintiff's services entitlement was confirmed after post-verdict motions, the defendant would be required to fund a series of contracts that would pay for or provide the necessary services as the need for them arises. These contracts, with detailed implementing provisions, would be negotiated by the parties (through their lawyers), subject to the jury's specifications, arbitration if necessary, and the court's final approval. The authors furnish many ingenious refinements and programmatic details—for example, provision in the contract for termination prices and a species of final-offer arbitration—that will not concern me here.²⁵

Even in principle, the virtues of this proposal are less apparent than those of damages scheduling. In part, they depend on an avowedly paternalistic assumption that contract rights to future services are better than an immediate lump sum payment because the latter might be squandered due to "improvi-

23. FED. R. CIV. P. 49(a).

24. Stevens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 KY. L.J. 81 (1987-88).

25. Without getting into these details, I shall simply point out that some of them seem unnecessarily constraining. For example, the proposal requires all future services to be bundled together, Blumstein, *supra* note 1, at 195, despite the strong possibility that some specialization by insurers is more efficient.

dence, ineffective management, or duplicity.”²⁶ However, the authors fail to explain why paternalism should be viewed as any more justified in the case of personal injury victims deciding how to dispose of their resources than it is in the case of other adults whom society presumes to be better able than the state to decide such matters.²⁷

The other major virtue that Blumstein *et al.* claim for their scheme is that it would replace valuation by expert witnesses, whose testimony the authors deem unreliable, with valuation by insurers, whose pricing should be more accurate.²⁸ What is less clear is why the authors assume that insurers would bid to underwrite the service contracts but that plaintiffs armed with a lump sum payment could not purchase such insurance in the market.²⁹ If moral hazard or adverse selection problems limit such a market, they should do so equally under the authors’ proposed system. It is difficult to see why insurers would enjoy economies of scale in the purchase of such services unless they can group a significant number of prevailing, similarly situated tort plaintiffs together at the time of negotiating the service contract.

A less normative, more practical concern about the scheme relates to the transaction costs that would be entailed in negotiating these contracts. Here, as with the damages scheduling proposal, an important factor in determining how and at what cost the scheme would operate is the level of detail with which the jury prescribes the contract’s specifications for future services. The reason is that those specifications will define the constraints within which the contract will be negotiated by the parties’ lawyers, supplemented out by the arbitrator, and enforced by the court. Greater detail by the jury should reduce the transaction costs surrounding the subsequent negotiations and enforcement, but that same detail will increase the jury’s own transaction costs by making its agreement on contract specifications more difficult.³⁰

26. This is the authors’ own characterization of the proposal. Blumstein, *supra* note 1, at 188.

27. A similar, in some ways even more egregious, instance of paternalism arises in connection with policy decisions to require individuals who reach retirement age to take their pensions in the form of an annuity rather than in the form of cash or some other arrangement that the retiree might prefer. For one modification of this position, see PROVOST’S COMMITTEE ON RETIREMENT ISSUES, YALE UNIVERSITY, THE ANNUITY PLAN AND BENEFITS FOR EARLY AND PHASED RETIREMENT (1990) (interim report).

28. Blumstein, *supra* note, at 194.

29. The authors simply state that “there is no market for such insurance to be purchased from cash payments.” Blumstein, *supra* note 1, at 194. Similarly, the assertion that the risks of “unanticipated inflation” and “unanticipated technological change” are not diversifiable, Blumstein, *supra* note 1, at 202, is unsupported. It is a truism, of course, that risks are not anticipated—that is, not recognized as risks—will not be diversified away. It is not clear why, to the extent that they are recognized as risks, they cannot be diversified away.

30. The authors say that “the jury should state the general nature of services needed,” including the type of institutionalization, attendant services, periodic or continuous care of certain kinds, and anticipated duration of care. Blumstein, *supra* note 1, at 190. Later, they say that “juries can readily specify only broad provisions,” not the “numerous quality-cost tradeoffs.” Blumstein, *supra* note 1, at 197.

Conclusion

Blumstein *et al.* are to be commended for seeking superior alternatives to the existing system of damage awards, one that is largely unconstrained by doctrine and remarkably wasteful of potentially valuable information about outcomes in similar cases. Although I perceive little advantage and much difficulty with their contracts-for-services scheme, their damages scheduling proposal stands on a different footing. The information on damages that they propose to systematically collect, generate, and mobilize could both reduce the costs of jury deliberations on damages and achieve greater horizontal equity.

To a great extent, however, the difficulties that I have identified with their damages scheduling proposal will persist so long as the jury plays the central role in awarding damages. Although the authors have deployed considerable analytical skill and imagination in order to circumvent this obstacle, their goal may simply be unrealizable through this kind of marginal reform. To achieve it, something like the British system, which abolished juries in almost all civil cases, may be necessary. The radically individualistic ethos of American society, together with the remarkable success of the plaintiffs' bar in persuading the public that the institution of the civil jury serves that individualism, make such a change politically infeasible at this time. Whether reforms short of abolition would on balance improve the system or not is a very important policy question, one on which the authors have shed some penetrating light.

