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EXAMINING THE SPECTRUM OF NONECONOMIC HARM: AN INTRODUCTION*

M.E. OCCHIALINO**

Welcome to the *New Mexico Law Review's* symposium: Civil Numbers: Examining the Spectrum of Noneconomic Harm. I commend the Law Review staff for recruiting a distinguished group of scholars to join us today.

My task is simply to set the table for the feast of ideas that we will hear from the speakers. I start with two simple propositions. First, the purposes of tort law are to compensate, to deter, and to punish. Second, the primary vehicle for doing that is the transfer of money from Defendant to Plaintiff. One aspect of our topic is to determine what conduct we want to deter. That is accomplished by creating tort causes of action, setting forth the elements of the cause of action and determining affirmative defenses. One speaker will talk about how tinkering with elements and defenses to causes of action may have some impact on the way we measure and think about damages, but that will not be the primary topic today.

A second aspect is to determine the kind of harms we want to compensate through the tort system. For example, do we want to compensate for loss of consortium? Do we want to compensate for emotional distress? This second question assumes a tort cause of action and considers what kinds of losses will be compensable. This will be a major topic today.

The third relevant topic is: Assuming that the tort system will compensate for certain kinds of harms, what amount of damages will be awarded as compensation? The second and the third questions are those that we will focus on today: What kinds of harms should be compensable, and how much monetary compensation should be given when the harms are suffered?

Justice Montgomery, in a 1991 New Mexico Supreme Court opinion, *Lovelace Medical Center v. Mendez*,¹ set out a helpful basic proposition. In thinking about these issues, distinguish three words: harm, injury, and damages.² He stated in *Mendez* that a harm is a wrong in fact,³ that is, the plaintiff has suffered a loss.⁴ Then he noted that the law of torts does not provide compensation for all harms. Harms come in two types: harms that are compensated and harms that are not compensated through the tort system.⁵ The second relevant word is "injury."⁶ An injury is a harm for which the law has decided to provide compensation.⁷ There are lots of harms but fewer injuries. The third concept is damages.⁸ Determining

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1. 111 N.M. 336, 805 P.2d 603 (1991).

2. *Id.* at 342-43, 805 P.2d at 609-10.

3. Harm "is used...to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause." *Id.* at 343, 805 P.2d at 610 (quoting with approval RESTATEMENT (SECOND) OF TORTS § 7(2) (1965)).

4. *Id.*

5. *Id.* at 343, 805 P.2d at 610 (quoting with approval RESTATEMENT (SECOND) OF TORTS § 7 cmts. a, b, d).

6. *Id.* at 342, 805 P.2d at 609 (quoting with approval RESTATEMENT (SECOND) OF TORTS § 7(1)).

7. *Id.* at 343, 805 P.2d at 610 (quoting with approval RESTATEMENT (SECOND) OF TORTS § 7 cmts. a, b, d).

8. *See id.* at 345, 805 P.2d at 612.

damages involves the question of how much money to award for an injury that is suffered and is compensable in the tort system.⁹

This symposium primarily is about the latter two ideas: When should we say, about a particular type of loss suffered, that it is not only a harm but also one that the law should recognize so that it will be deemed a compensable injury? And, once the law recognizes a harm to be an injury, how much money will be awarded in damages?

Because this symposium focuses on noneconomic harm, it might be appropriate to describe noneconomic harm. If I were in a tort class, I would, at this point, take out my wallet, and say, "The tort system provides money to me, the victim, to replace the dollars that the defendant has taken out of my pocket because of the injury I suffered due to defendant's wrongful conduct." Those are economic damages, measurable by dollars lost: lost wages in the past, future wages, lost medical expenses in the past, future medical expenses.¹⁰ But the law has decided that other harms also should be transformed into injuries that call for compensation. Many of these are noneconomic injuries; the damages for these cannot be measured by out-of-pocket loss. Some other measure of damages must be used.

I will quote from a randomly selected Maryland statute describing noneconomic harms that can be deemed compensable injuries:¹¹ "In an action for personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, ...and... [i]n an action for wrongful death, mental anguish, emotional pain and suffering, loss of society companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education."¹² This is a partial list of harms, in addition to those that can be measured in out-of-pocket losses, that are or may be deemed compensable injuries.

New Mexicans know that the list is even longer in their state. New Mexico is often fiftieth in many things. Indeed, it was fiftieth in deciding that loss of consortium for a married couple should be compensable.¹³ Almost immediately thereafter, tired of being last, New Mexico became number one in grandparent consortium, the first in the country to decide that a grandparent's loss of consortium is a compensable injury.¹⁴ Shortly thereafter, New Mexico became the first state to permit recovery for loss of consortium for unmarried couples.¹⁵ The outer limit has not been drawn at consortium for a variety of relationships; New Mexico, some might think, went off the deep end by also allowing recovery for loss of enjoyment

9. *Id.* (holding that once a harm is deemed to be an injury plaintiff is entitled to recover damages).

10. *E.g.*, *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 6, 960 P.2d 834, 836 ("[A]ctual economic damages...included all past and future medical bills, psychological counseling, and lost income.").

11. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(2)(i) (2002).

12. *Id.*

13. *Romero v. Byers*, 117 N.M. 422, 425, 872 P.2d 840, 843 (1994) (adopting spousal consortium, and noting that "New Mexico is [until] now the only state whose common law bars actions for spousal consortium").

14. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, 968 P.2d 774. The court noted that, prior to *Fernandez*, "no jurisdiction in the United States has yet recognized a claim for grand-parental consortium." *Id.* ¶ 24.

15. *Lozoya v. Sanchez*, 2003-NMSC-009, 66 P.3d 948. "At the outset, we note that no other State in the union currently allows unmarried cohabitants to recover for loss of consortium." *Id.* ¶ 17.

of life.¹⁶ Recovery occurs not just for pain and suffering, but also for the diminishment of pleasure.¹⁷ One speaker today, Dr. McDonald, who testifies often as an expert witness, will explain how he provides guidance to juries that are asked to value the loss of enjoyment of life.¹⁸

In New Mexico, therefore, there is an ever-expanding list of noneconomic harms being recognized as injuries requiring monetary compensation. What fascinates me, and what I hope that our speakers will address today, are the rationales for transforming a harm into a compensable injury and the measure of damages for the expanding list of noneconomic injuries. Indeed, I wonder if the difficulty in measuring damages for noneconomic harms is a significant factor discouraging or preventing the recognition of additional compensable noneconomic injuries. If there are no intelligible criteria for measuring damages, is it not less likely that courts and legislatures will listen sympathetically to those who seek to expand the range of compensable noneconomic harms?

Speakers today will surely tell us that there are additional kinds of noneconomic harms that the tort system should protect and provide compensation for. In Justice Montgomery's vocabulary, these speakers will advocate for transforming additional harms into legally-recognized injuries. Perhaps others will respond: "But, wait, if you do that, then you have to figure out how many dollars to give. And if there is no objective measure, how could the law possibly acknowledge such new injuries? What will happen to the fact finding process, the appellate process, and the system as a whole if there are no meaningful criteria for the measurement of these noneconomic injuries?"

My working premises for the symposium are three: First, the harms that ideally should be recognized as injuries are probably broader than those that now exist. Second, recognition of those new injuries raises the problem of determining the measurement of damages for the noneconomic injuries suffered. Third, unless proponents of expansion solve the damage-measurement problem, there will be justifiable resistance to expansion of compensation for noneconomic injuries.

Consider, if you would, the multiple-choice question that you received.¹⁹ It is based on an actual New Mexico case.²⁰ Mr. Sandoval was driving a vehicle with three passengers. Mr. Sandoval was drunk and speeding when the vehicle crashed and burned. He was very lucky. He got out with some relatively minor physical injuries.²¹ Some of his passengers did not. He witnessed the death of two of them

16. "[T]he jury in a wrongful death action [must] determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased would have reaped from life as demonstrated by his or her health and habits." *Romero*, 117 N.M. at 428, 872 P.2d at 846; see also *Sena v. N.M. State Police*, 119 N.M. 471, 892 P.2d 604 (Ct. App. 1995) (allowing for recovery for loss of enjoyment of life in actions for personal injury not resulting in death).

17. *Sena*, 119 N.M. at 477, 892 P.2d at 610 ("In the present case, evidence was presented at trial that Plaintiff is unable to enjoy certain activities in life, including hunting and fishing, as a result of injuries sustained in the accident.").

18. See M. Brian McDonald, *The Value of Life and Loss of Enjoyment of Life Damages from an Economist's Perspective*, 35 N.M. L. REV. 419 (2005).

19. M.E. Occhialino, Please Answer the Following Multiple Choice Questions.

20. *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, 960 P.2d 834.

21. Although he suffered second and third degree burns on his arms and face, they were not severe enough to require hospitalization and were treated with pain medication and creams.

as they tried unsuccessfully to exit the burning car.²² He incurred \$5000 in out-of-pocket expenses.²³ He went to work five weeks after the accident.²⁴ His only continuing expenses were for psychological counseling.

The jury determined that Chrysler failed to make the car crashworthy and thus caused enhanced injuries.²⁵ The plaintiff was found comparatively negligent²⁶ but the question does not involve fault apportionment. Rather it asks the amount of noneconomic damages for mental pain and suffering that a jury should award for a person who has \$5000 of out-of-pocket expenses and is undergoing continued psychological counseling because he witnessed the death of two people whose death he caused by driving drunk and speeding. You have several possible answers: (a) \$5083, which was \$83 more than the out-of-pocket expenses; (b) \$50,000; (c) \$100,000; (d) \$1 million; or (e) \$100 million.

How many people picked a million? Those of you who did must have read the opinion; the jury in this case, returned a general verdict of a million dollars for the plaintiff who had \$5000 of out-of-pocket expenses—for someone who was driving drunk, and whose future out-of-pocket expenses were only for continued psychological counseling.

What happens when one sees such a verdict? One might think, "Something is wrong here. That doesn't sound like the right amount of damages." Then one might ask, "What measure of damages was the jury instructed to use?" The New Mexico mandatory Uniform Jury Instruction 13-1807, which is included with your multiple choice question, is the sole instruction for pain and suffering: "The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiff with fairness to all parties to this action."²⁷ Does such an instruction provide a lay person with meaningful criteria to determine the proper amount of damages for pain and suffering? If not, then this question follows: If we don't know how to measure the appropriate damage award, why are we giving dollars for it?

DR. FELDMAN:²⁸ Just to get us off to a rousing start, first of all, I can see why you're a fabulous teacher. Second of all, this handout,²⁹ you can't do anything with this, because you don't know what evidence the jury actually got.

OCCHIALINO: Fair enough.

FELDMAN: I couldn't pick at all. I could make no connection of how a jury presented with this—I didn't know what they saw. Frankly, I love your New Mexico

Apparently, Plaintiff did not suffer any perceptible scarring or disfigurement from the burns, although the skin on his face now burns more easily in the sun.

Id. ¶ 4, 960 P.2d at 835.

22. *Id.* ¶ 3, 960 P.2d at 835.

23. *Id.* ¶ 6, 960 P.2d at 836.

24. *Id.* ¶ 4, 960 P.2d at 835.

25. *See id.* ¶ 5, 960 P.2d at 835–36.

26. The jury assessed Mr. Sandoval twenty-five percent negligence and attributed two percent negligence to his front seat passenger and three percent to the unknown driver of an oncoming vehicle. *Id.* ¶¶ 2, 5, 960 P.2d at 835.

27. UJI 13-1807 NMRA.

28. Heidi Li Feldman, *Loss*, 35 N.M. L. Rev. 375 (2005).

29. Handout, *supra* note 19.

jury instruction. If the point of tort law is, in part, to deter, and if the car is really, I'm going to assume for the sake of argument, less crashworthy than it was going to be, and Chrysler got lucky, and he only suffered \$5000 in what you're calling economic loss, then with fairness to all parties in the action, I would have no problem following this instruction. I didn't have the little, whoa, something is wrong with a million-dollar injury reaction. So why are you so confident?

OCCHIALINO: Well, that's a wonderful question. It leads to the next thing I'd like to talk about.

FELDMAN: Of course.

OCCHIALINO: Although you and I don't know the facts, because we have only a short multiple choice question rather than an essay question or the trial transcript, the opinion reveals that the following occurred afterwards. The Chrysler Corporation made a motion for a new trial on the grounds that the verdict was excessive. The trial judge, confronted with a million-dollar verdict said—and now I will read his comments, just so we do know from somebody who was there, that the conscience of the court was shocked:³⁰ “there was no evidence, at least in my opinion, there was insufficient evidence to justify a million dollars.”³¹

The judge went on:

But the problem that there is, is that...[as to] pain and suffering and emotional distress, the Supreme Court has not put any guidelines on that. There are no caps....And I don't think this court is in a position where I can say I can...substitute my feelings—my verdict for that of the jury....

....

...[R]ight now with the jury instructions....I think they're pretty much free to do pretty much whatever they want to do.³²

Then, in the conclusion denying the motion for new trial, the trial judge said:

I'm going to let the Appellate Court know that this is a case where this court's conscience is shocked by that amount of money....[I]f they agree, then I think maybe they should come out with some kind of guidelines. Maybe that's a decision they can make [sic], because they can review the evidence just as well as I can....I don't have the slightest idea.³³

Chrysler appealed to the court of appeals, where one of our finest judges wrote an opinion that essentially told the trial judge that he was not playing the game properly. The game is as follows: the instructions go to the jury, the jury determines, you decide if there should be a remittitur, and we decide if you're right. If you follow the process, the decision will be fine. The court reversed and remanded, but gave no further guidelines.³⁴

30. “I'm going to let Chrysler put in its order that the conscience of the Court is shocked....” *Sandoval*, 1998-NMCA-085, ¶ 7, 960 P.2d at 836.

31. *Id.*

32. *Id.*

33. *Id.*

34. [T]he best way to arrive at a reasonable award of damages is for the trial judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case. If the lack of mathematical precision were to cause the trial court to refrain from performing its role as the

I am not urging that damages should not be recovered for harms that result in noneconomic damages. I am stating that those who want to expand the list of noneconomic harms that result in compensable injuries will face resistance unless they solve the measurement-of-damages problem. Something must be done to improve the measurement of damages in order to expand the scope of harms that will be compensable.

What can be done? There are some who want to do three things that most plaintiffs' lawyers would find unacceptable. They all begin with "C." The first is to toughen up common law constraints—specifically remittitur. This movement seeks to get trial and appellate judges to review damage awards more carefully and to reduce verdicts more often,³⁵ possibly by doing de novo review of awards of all noneconomic damages.³⁶ The second "C" is caps. If the courts and lawyers cannot improve the process, legislatures will impose statutory caps on awards, as they have begun to do and will continue to do.³⁷ The third "C" is already here—the constitutionalization of damage awards.³⁸ Jury verdicts that are too high violate the U.S. Constitution, at least for punitive damages,³⁹ but perhaps inevitably for noneconomic compensatory damages as well.⁴⁰

Those who want to expand the list of noneconomic harms recognized as compensable injuries may applaud this movement to cabin damages. Others may

first check on the jury's verdict, then the parties would suffer the injustice of an excessive verdict being allowed to stand.

Id. ¶ 16. This quotation does not reflect all of the more nuanced rationales of the court of appeals. *See id.* ¶¶ 9–17, 960 P.2d at 837–39.

35. For example, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 55–57 (1991) (O'Connor, J., dissenting) (citations omitted), states:

[S]tandardless discretion to juries is not remedied by *post hoc* judicial review. At best, this mechanism tests whether the award is grossly excessive. This is an important substantive due process concern, but our focus here is on the requirements of procedural due process....

....

Even if judicial review of award amounts could potentially minimize the evils of standardless discretion, Alabama's review procedure is not up to the task. For one thing, Alabama courts cannot review whether a jury properly applied permissible factors, because juries are not told which factors are permissible and which are not. Making effective review even more unlikely, the primary component of Alabama's review mechanism is deference.... Reviewing courts are thus required to uphold the jury's exercise of unbridled, unchanneled, standardless discretion unless the amount happened upon by the jury cannot be reconciled with even the most generous application of the [applicable] factors....

....

...Blind adherence to the product of recognized procedural infirmity is not judicial review as I understand it. It is an empty exercise in rationalization that creates only the appearance of evenhanded justice.

36. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (holding that appellate review of punitive damage awards challenged as unconstitutionally excessive should be de novo).

37. *E.g., NMSA 1978, § 41-5-6(A)* (1992) (providing that except for future medical expenses, total recovery for all compensatory damages, both economic and noneconomic is not to exceed \$600,000 in medical malpractice actions governed by the Medical Malpractice Act, NMSA 1978, §§ 41-5-1 to 41-5-29 (1997)).

38. *E.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

39. *Id.* at 416.

40. Because the Supreme Court has rooted the issue in the Due Process Clause, U.S. CONST. amend. XIV, rather than the Excessive Fines Clause, U.S. CONST. amend. VIII, *see Pacific Mut. Life Ins. Co.*, 499 U.S. at 9, there is no assurance that the Court will not extend the constitutionalization of damages beyond punitive damages to noneconomic compensatory damages.

prefer a different solution from the “three Cs,” one that will allow for greater recognition of noneconomic injuries without those constraints on damage awards.

Advocates of expanded recovery for harms have a responsibility to tell us how to meaningfully measure the damages that should be awarded for those harms. I think the answer, in part, is more “Cs”—clarity and comprehensible criteria in jury instructions. I am confident that our speakers will consider some of these issues as they address their specific topics. I look forward to their presentations.

SUMMARIZED QUESTIONS AND ANSWERS

FELDMAN: First of all, I’m loving your appellate court, because, after all, really the trial judge didn’t do his job, and so the system cannot work, and it didn’t. If the real position was that the evidence was insufficient to support an award for pain and suffering damages at all, then he should never have given a jury instruction on the matter at all.

This is my larger point. Whatever your position is on damages of any kind, you can find a poster-child case where the process seems to have worked well or it seems to have worked badly.

Here’s a judge—based on your description of what went on, I don’t think the after story makes me any more disturbed about the million-dollar verdict, because the judge—if the judge isn’t smart enough to tell the jury there’s not evidence sufficient to support the verdict—which apparently was his judgment, right?

OCCHIALINO: The quick answer is there is no doubt that there was pain and suffering. He was in an automobile accident. He suffered cuts on his face. He suffered psychological trauma. He was entitled, under New Mexico law, to pain and suffering damages.

FELDMAN: If he’s entitled to an instruction on pain and suffering—teach me something about New Mexico law. If this instruction must be given, can he not explain the relationship between evidence and injury findings in general?

OCCHIALINO: There are instructions to the effect that you must evaluate this instruction based on the evidence.⁴¹

FELDMAN: Was that instruction given?

OCCHIALINO: Absolutely.

FELDMAN: There’s no excuse for what the trial judge did. And the appellate court—

OCCHIALINO: If the jury verdict had been \$100 million, would your answer be the same?

FELDMAN: Yes, because of the rule of law. The legal system is only as good as the people who operate it, and the jury seems to me to have done its job.

OCCHIALINO: That judge is not in the room.

FELDMAN: I probably would say it anyway. The point is that, to me, your case is a poster child for doing nothing. I shouldn’t say nothing. That’s a hyperbole. Less to do with anything with pain and suffering and more to do with a failure of an

41. “The law of this case is contained in these instructions and it is your duty to follow them.” UJI 13-2002 NMRA. “You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case.” UJI 13-2005 NMRA.

officer of the court, the judge, to exercise powers lawfully accorded to him and which he is, in fact, required to attend to.

Now, that's consistent with your view that if judges don't get with doing their jobs, that motivates legislatures to get involved, and we might have a view of whether that's a good thing or bad thing. If you love the idea of having legislatures involved, you trot this out as a case of criticizing the judge. The only way to fix this is to have a legislature in.

The question—did you ever follow up in subsequent decisions of this judge?

OCCHIALINO: I called the judge and asked, "On remand, when you hold your remittitur hearing, would you kindly tell me so I can come?" The judge assured me he would call. He did, on the day the case settled.

FELDMAN: Which confirms the wisdom of your appellate court, which says, if you do your job, the system will work itself out.

OCCHIALINO: You present a very articulate statement of the position that it is the job of the jury and then the trial judge through remittitur and, finally, the appellate judge to resolve the issues, and that monetary awards that are not based on specific criteria are, nonetheless, good.

MR. ALEXANDER WOLD: I think this raises a bigger question. Why is the opinion of one judge—why does that trump the opinion of twelve laypeople about a value that doesn't have any objective measurement criteria? The judges sit there, and often they see—I think they see, more often, the lower end, where people don't get as much as they deserve. Maybe that affects them one way or the other and biases their ability to see things in the global sense. So I have trouble with the remittitur process from that standpoint, that one judge—if it would have been a different judge, it might be a different value. So we're trumping nine people or ten people with one judge.

OCCHIALINO: You ask a tough question. Why is there a remittitur process? Maybe it should be eliminated. If you eliminate it, though, you lose the check. You leave the jury free to set any damages. You expand the possibility that people opposed to noneconomic harm recovery will be able to make a better case for why they are opposed.

As you suggested, that might actually lead to more people going to the legislature and insisting on caps. Why is there remittitur? Because the Constitution allows it. Why does the Constitution allow it? Because in 1789 in England, it was allowed.⁴² New Mexico takes the same position,⁴³ even though the states are not governed by the Seventh Amendment.⁴⁴ It's a historical anomaly, but some people think it is a valuable check on juries going too far one way or the other, awarding not enough or too much in damages.

MR. BRANCH:⁴⁵ My question was just that, and it seems to me that the argument is always about going too far the one way and no concern about too little

42. *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935) ("[T]here was some practice...in respect of decreasing damages...in England at the time of the adoption of the Constitution....").

43. *E.g.*, *Henderson v. Dreyfus*, 26 N.M. 541, 191 P. 442 (1919).

44. *E.g.*, *Scott v. Woods*, 105 N.M. 177, 182, 730 P.2d 480, 485 (Ct. App. 1986).

45. M.E. Occhialino, James Branch, et al., *Panel Discussion, Translating Theory into Practice: The Valuation of Noneconomic Damages in Real Life*, 35 N.M. L. REV. 449 (2005).

the other way, and nobody ever discusses it in any of these cases or in the rhetoric or political climate in which we live. We talk about caps, but nobody talks about some sort of bottom dollar for the value of any of these things. We constitutionalize damages always on the excess side but never on the inadequacy side. I hope the speakers today will address that issue and why it's only when it's perceived that a jury's giving too much to someone as opposed to not enough that it's ever a problem.

OCCHIALINO: The opposite of remittitur is additur. Additur is where the verdict is too low and the judge believes that more should be given, picks a figure, and grants a new trial unless the defendant agrees to a judgment greater than the jury verdict.⁴⁶ In *Dimick v. Schiedt*,⁴⁷ the U.S. Supreme Court construed the Seventh Amendment and concluded that additur was unconstitutional and remittitur was constitutional. New Mexico is not controlled by the Seventh Amendment.⁴⁸ Dicta in New Mexico cases suggest that additur could be used in New Mexico.⁴⁹ We have no appellate cases where it has been used.

BRANCH: We see remittitur used all the time, but not additur.

OCCHIALINO: Start using it, Mr. Branch, though you wouldn't have to, because your verdicts are always fair.

DR. RUSTAD:⁵⁰ I want to weigh in here and support Professor Feldman. It bothers me that the table that you're setting for us is one that we're supposed to get up and justify. I think the proponents of tort reform have the burden of proof, in fact, and I suppose that'll be one of the things I say when it's my turn.

PROFESSOR FINLEY: One thing that struck me about the review of the *Sandoval* case is that I see it as just another example of waging the battle by anecdote. Everyone can pick out their favorite case that will detail the real evidence, and details either make people go, "Juries are crazy," or, "Oh, my God, the damages are too low."

I've done a lot of legislative testimony for the states and before Congress on various proposals to cap damages and tort reform. I've been there in the middle of the battle of anecdote. I see each side trot out their favorite horror story. I just want to say that through that process I have developed serious qualms about the battle by anecdote. I just want to make a call to sort of—let's stop doing that, and let's have more empirical evidence about what's really going on.

I would agree with Professor Feldman that the tort reformers want to convince us that the system is broke. The burden of proof is on them. The burden of proof should not be done by trotting out their favorite anecdote but should be based on empirical reality.

46. "Additur is defined as the practice of the courts in conditioning a denial of a new trial on consent by the defendant to an increase in the amount of the judgment." *Bishop v. Cummines*, 870 S.W.2d 922, 923 (Mo. Ct. App. 1994).

47. 293 U.S. 474 (1935).

48. *E.g.*, *Scott*, 105 N.M. at 182, 730 P.2d at 485.

49. *E.g.*, *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

50. Michael L. Rustad, *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Towards Nursing Home Practices, Tort Reform, and Noneconomic Damages*, 35 N.M. L. REV. 337 (2005).

OCCHIALINO: My time is up. I would be taking your time if I were to continue. I will just say that anecdotes do not substitute for empirical evidence, but they can create interesting conversations.