CALIFORNIA'S ROLE IN THE MID-TWENTIETH CENTURY CONTROVERSY OVER PAIN AND SUFFERING DAMAGES:

The NACCA, Melvin Belli, and the Crusade for "The Adequate Award"

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INTRODUCTION

During a thirty-year period starting roughly at the end of World War II, California became the nation's most plaintiff-friendly state in personal injury cases. The California Supreme Court used its lawmaking power under the common law to revolutionize tort law. In a series of decisions, the Supreme Court created a strict liability cause of action in products liability cases,[1] replaced contributory negligence with pure comparative fault,[2] abolished the common law classifications for injuries caused by conditions on land,[3] loosened requirements for establishing causation,[4] expanded the application of res ipsa loquitur,[5] abrogated sovereign immunity

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1 Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1962).

2 Li v. Yellow Cab, 532 P.2d 1226 (Cal. 1975).

3 Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

4 Summers v. Tice, 199 P.2d 1 (Cal. 1948).

5 Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

for public entities,[6] created duties of care in new situations,[7] and allowed plaintiffs to recover for purely emotional injuries in new contexts.[8] For injured plaintiffs and their lawyers, this was the golden era of California tort law. The Supreme Court developed a national reputation as the leader in court-instigated changes to tort law.[9]

In the mid-1970s, California again took a leadership role in modifying tort law, but this time the Legislature was the instigator and the change was not plaintiff-friendly. In 1975, the governor called the Legislature into special session to address the problem of rising medical liability insurance costs.[10] Medical professionals and their insurers claimed that large judgments in medical malpractice cases were limiting the availability of liability insurance and driving health care providers from the state. The special session enacted a series of laws in 1975 known collectively as the Medical Injury Comprehensive Reform Act (MICRA). MICRA changed California tort law in medical negligence cases by limiting the contingent fees of plaintiffs' attorneys,[11] abolishing the collateral source rule,[12] and allowing for periodic payment of future damages.[13]

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6 Muskopf v. Corning Hospital District, 359 P.2d 457 (Cal. 1961). The case was overruled by statute.

7 Tarasoff v. Regents, 551 P.2d 334 (Cal. 1976) (duty of psychiatrist to warn potential victim of threat posed by patient); Vesely v. Sager, 486 P.2d 151 (Cal. 1971) (duty owed by dram shop owner to victim of intoxicated patron); Coulter v. Superior Court, 577 P.2d. 669 (Cal. 1978) (duty owed by host to victim of intoxicated guest). Vesely and Coulter were abrogated by legislation.

8 State Rubbish Collectors Association v. Siliznoff, 240 P.2d 282 (Cal. 1952); Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

9 For a discussion of how California Supreme Court justices rationalized making significant changes to the common law during the period, see G. Edward White, The American Judicial Tradition 292-301 (1976). White focuses on the views of Roger Traynor, the Court's most influential member.

10 "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State and threatens the closing of many hospitals. . . . It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums." Proclamation by the Governor, 1975 Cal. Stat. 2d Ex. Sess. 3947.

11 Cal. Bus. & Prof. Code § 6146.

12 Cal. Civ. Code § 3333.1.

13 Cal. Civ. Proc. Code § 667.7.

But the most controversial MICRA provision was one limiting damages for noneconomic injuries in medical negligence cases to $250,000.[14] The principal noneconomic damage in a medical negligence suit is compensation for the plaintiff's physical pain and mental suffering. California's limit or "cap" on noneconomic damages is fixed, as it does not provide for adjustments to reflect increases in the cost of living. The cap has survived constitutional challenge,[15] and the Legislature has never raised the $250,000 limit.

California once again became a national trailblazer in tort law when it limited noneconomic damages. Over the years, numerous state legislatures followed suit by setting their own limits in medical malpractice cases.[16]

This article examines how pain and suffering damages in personal injury cases became controversial, ultimately leading California and other states to limit them. The focus is on the enormous growth in personal injury litigation along with higher jury verdicts during the 1950s and 1960s and the reasons for these phenomena. The article consists of six parts. Part I discusses early California law governing pain and suffering damages. It examines case law from the late nineteenth and early twentieth centuries. The section explains why pain and suffering awards initially were not very large or controversial. Part II describes how tort litigation increased after World War I, mainly due to auto accidents and the availability of liability insurance. It explains how the lure of a collectable judgment encouraged more lawyers to handle personal injury cases. At the same time, developments in the social sciences led the legal community to a new awareness of the debilitating effects of physical pain and, especially, mental suffering. The result was that courts were more sympathetic toward accident victims claiming pain and suffering damages.

Part III reveals how, shortly after World War II, the plaintiffs' bar organized into a group known as the National Association of Claimants' Compensation Attorneys (NACCA), the predecessor to today's American Association for Justice. The goal of the NACCA founders was to unite and

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14 Cal. Civ. Code § 3333.2.

15 Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985).

16 *See generally,* Carol A. Crocca, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 (1995).

professionalize lawyers who handled personal injury cases. The organization grew rapidly in the late 1940s and early 1950s. Its leaders traveled the country to promote interest in personal injury cases and educate lawyers in the latest trial techniques. Part IV recounts how the NACCA and California lawyer Melvin M. Belli — the attorney *Life Magazine* dubbed "the King of Torts" — joined forces. Belli was a key figure in the NACCA's formative years. He served as the group's president, published tort-related books and articles, and spoke before bar associations and law schools. His dynamic personality captured the imagination of a generation of personal injury attorneys. This part includes an overview of Belli's early successes as a personal injury lawyer.

Part V examines Belli's influence in the growth of personal injury recoveries in the 1950s through his crusade for "the Adequate Award." Belli's message was that personal injury victims were not being compensated fairly by defendants and their insurance companies. He put much of the blame for the problem on the victims' lawyers. Belli believed that plaintiffs' lawyers could obtain higher jury verdicts for their clients by using creative trial techniques, especially with regard to pain and suffering damages. His use of one particular trial tactic, known as the "per diem" argument, a mathematical way of computing pain and suffering damages, generated a vigorous debate in legal circles that continued throughout the 1950s and 1960s. Part VI discusses how the widespread use of the per diem argument led to dozens of appellate court cases around the country challenging the tactic. Belli and the NACCA were vindicated when the majority of states, including California, allowed the practice.

The article concludes by showing how, in the short term, the NACCA and Melvin Belli succeeded in dramatically increasing personal injury judgments. In the long term, however, the unpredictability and arbitrariness of pain and suffering awards led to calls for restricting noneconomic damages. Having lost faith in the courts to address the problem, insurance companies and their lawyers turned to the legislatures for help. The result has been the enactment of statutes, like the MICRA, that place limits on pain and suffering damages and calls for other legislation to check jury awards.

I. EARLY CALIFORNIA LAW GOVERNING PAIN AND SUFFERING DAMAGES IN PERSONAL INJURY CASES

In the nineteenth century, the California Supreme Court used its power under the common law to establish the legal rules governing tort cases.[17] Early California law on pain and suffering damages in personal injury cases was not very remarkable, as it mirrored rules followed in many other American jurisdictions.[18] Pain and suffering damages were a part of the compensatory damages award. They were considered to be general damages "because they result naturally and directly from bodily harm."[19] In an early decision, *Fairchild v. California Stage Company* (1859), the Supreme Court affirmed a judgment in favor of a passenger who was injured in a stage coach accident.[20] It held that a jury instruction allowing for the recovery of "mental anguish" was proper, stating, "We cannot see why compensation should not as well be given for pain of mind as pain of body."[21] Other nineteenth-century decisions involving personal injury also mentioned pain and suffering damages, but gave no detailed discussion of these injuries.[22]

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17 The Civil Code of 1872 set the basic parameters for damages in tort cases. "For the breach of any obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." CAL. CIV. CODE § 3333. The courts interpreted the statute to create rules governing compensatory damages.

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

19 Shatto v. Crocker, 25 P. 629, 630 (Cal. 1891). The Court made this statement when affirming a judgment that included damages for "injured feelings" in a malicious prosecution case.

20 13 Cal. 599 (1859).

21 *Id.* at 601.

22 For example, in Aldrich v. Parker, 24 Cal. 513 (1864), the Court upheld a personal injury judgment for $2,500 after the plaintiff lost two toes in a workplace injury. The Court noted that the plaintiff had medical treatment "attended with much suffering and pain . . . ." *Id.* at 516. In Malone v. Hawley, 46 Cal. 409, 414 (1873), *reversed on other grounds*, the Court stated that a jury instruction should include mention of compensation for "the physical and mental suffering he had sustained by reason of the injury . . . ." And in Karr v. Parks, 44 Cal. 46, 50 (1872) *reversed on other grounds*, the Court held that

After the turn of the twentieth century, Supreme Court opinions became more instructive on pain and suffering damages, especially regarding the meaning of mental suffering. One of the most important cases was *Merrill v. Los Angeles Gas and Electric Co.* (1911), where the plaintiff suffered serious injuries caused when leaking natural gas exploded.[23] The plaintiff won at trial, and the defendant challenged several jury instructions on appeal, including one that allowed the jury to compensate plaintiff for the "mental worry" he endured and would suffer in the future. The issue was whether future emotional injuries resulting from a personal injury were recoverable. After reviewing conflicting authorities from other jurisdictions, the Supreme Court held "[t]hat the grief, anxiety, worry, mortification, and humiliation which one suffers by reason of physical injuries are component parts of the 'mental suffering' for which, admittedly, damages may be awarded. . . . If the law contemplated an award of damages solely for physical pain, it is meaningless to say that recovery may also be had for mental suffering."[24] The Court found that mental suffering could take "numerous forms and phases" and could vary based on factors such as the individual's temperament, ability to stand shock, financial condition, whether the injury was temporary or permanent, and whether it was disfiguring and humiliating.[25] Two years later, the Court of Appeal amplified on the meaning of mental suffering in *Ryan v. Oakland Gas, Light, and Heat Co.*,[26] where a worker was left permanently disabled after an accident. The court held the plaintiff could recover as general damages for the mental anguish associated with knowing he could no longer work even after physical pain from the injury had ended.[27]

These decisions illustrated different ways in which a plaintiff could experience pain and suffering, but they also raised a very practical question:

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a girl who was gored by defendant's cow could recover for the discomfort caused by the injury as well as for the immediate pain and suffering caused by the wound.

23 111 P. 534 (Cal. 1910).

24 *Id.* at 540.

25 *Id.*

26 130 P. 693 (Cal.App. 1913).

27 Noting that the plaintiff had not been able to work for over six years, the court stated: "Thus handicapped, his outlook into the world before him could not be otherwise than accompanied by gloomy forebodings and more or less mental anxiety and suffering." *Id.* at 697-698.

How can money compensate for noneconomic injuries? The basic goal of damages in any personal injury case is to compensate the plaintiff for injuries caused by the defendant's tort. Most losses a plaintiff suffers are economic and can be measured by looking to the marketplace for their value. For example, if the victim incurs doctor bills or is hospitalized, she can recover the fair market value of these services. Likewise, if the plaintiff cannot work because of the injury, she can recover wages lost while incapacitated.[28] But it is not possible to objectively quantify noneconomic damages, as there is no marketplace for pain and suffering. Moreover, noneconomic damages are not really "compensatory," because money does not alleviate the pain and suffering.

The California Supreme Court identified this problem in *Zibbell v. Southern Pacific Co.* (1911),[29] a railroad accident case in which the defendant claimed the damages were excessive. The jury awarded the plaintiff $100,000 in damages for lost earning capacity and pain and suffering. The trial court remitted the judgment to $70,000, but the verdict was still one of the largest in state history.[30] In affirming the damages award, the Court first mentioned the claim for lost future earnings. Although these amounts could be difficult to prove, their extent, duration, and the plaintiff's earning capacity "may all be approximated with reasonable exactness."[31] The same was not true, however, for pain and suffering damages. The Court wrote: "But to put a monetary value upon the elements of physical pain and mental suffering, their nature, extent, and continuance, is a much more difficult and delicate matter."[32]

How then did the judicial system assign a money value for pain and suffering? The courts gave this responsibility to the jury, the traditional

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28 Plaintiff must meet her burden of proving pecuniary losses. This can be difficult in cases where a permanently disabled plaintiff seeks future medical expenses or loss of earning capacity, as one cannot prove with scientific certainty what these values will be down the road. California courts address this problem by allowing plaintiff to recover pecuniary damages reasonably certain to occur in the future.

29 116 P. 513 (Cal. 1911).

30 "And herein it is said that the verdict is twice the amount of the largest judgment ever rendered in the State of California in a similar case, and is the largest verdict ever presented to an appellate court for review." *Id.* at 520.

31 *Id.*

32 *Id.*

fact-finding body under the common law. In *Aldrich v. Palmer* (1864), an early personal injury case, the Supreme Court held, "the law does not fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury." [33] The Court acknowledged that determining what is fair compensation is a "judicial problem of difficult, if not impossible, solution," but stated that none "are more competent to its proper solution than the jury."[34] For this reason, jury instructions for pain and suffering damages were not really very instructive.[35]

California appellate courts gave the jury wide latitude to decide pain and suffering damages, but they also recognized that jurors could be biased or unduly swayed by their emotions when rendering verdicts. They created a number of rules to check "runaway" juries. The Supreme Court prohibited plaintiffs' lawyers from making the "golden rule" argument, whereby they asked jurors to award the amount of damages they would want if they were in the injured party's position.[36] Also, if the trial judge who heard the evidence and had the opportunity to assess the credibility of witnesses believed the damages were excessive, the judge could remit them or order a new trial.[37] A later decision referred to the trial judge as "the thirteenth juror."[38] The role of the appellate courts in reviewing verdicts, however, was much more limited. They were not to substitute their judgment for that of the jury and interfere with a verdict unless the evidence showed the

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[33] Aldrich, 24 Cal. at 516.

[34] *Id.*

[35] For example, in Wiley v. Young, 174 P. 316, 318 (Cal. 1918), the Court approved of the following instruction. "You are instructed, however, that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates, and as under all the circumstances may be just and proper."

[36] "It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what the plaintiff has endured, and must endure." Zibbell, 116 P. at 520.

[37] A trial court had the discretion to decide whether to grant a new trial because the damages award was excessive. Appellate courts only overturned these decisions if the trial court abused its discretion. *See, e.g.*, Lee v. Southern Pacific Co., 35 P. 572 (Cal. 1894).

[38] Buswell v. San Francisco, 200 P.2d 115, 117 (Cal.App. 1948)

award "was not the result of the cool and dispassionate consideration of the jury."[39] The Supreme Court held: "We can reverse a judgment for excessive damages only when it appears that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice, or corruption on the part of the jury."[40]

This review of early California law on pain and suffering damages leads to a number of conclusions. First, personal injury judgments generally were not very large and they were not very controversial. That the Supreme Court saw fit to comment on the $70,000 remitted judgment in *Zibbell* illustrates how unusual it was. Lawrence M. Friedman's study of personal injury judgments in Alameda County establishes that low awards were the rule.[41] The reported cases also show that pain and suffering damages were not specially identified by juries but rather were lumped with economic damages in general verdicts. Second, courts recognized that pain and suffering awards were inherently subjective because jurors had no real standard against which to measure them. Jurors were told to act "reasonably" and "without passion or prejudice," but this was of little practical guidance, as pain and suffering damages cannot be computed mathematically. Unlike economic damages which can be assessed objectively by reference to market values, there is no marketplace for pain and suffering. As a result, different jurors hearing the same facts might award wildly different amounts. Moreover, plaintiffs who suffered identical injuries could receive different awards because thresholds for physical pain and mental suffering vary among individuals. Despite these problems, the courts placed great faith in the jury and were confident that their verdicts would be fair. Third, judicial standards for review of pain and suffering awards were also subjective. Whether an award was "unjust" or "oppressive" depended on the viewpoint of the judge applying the standard. The trial judge, acting as the "thirteenth juror," was the major check on excessive verdicts. The appellate

39 "It is not a question of what damages this court would award or whether we would consider them high, but whether this court can say that the damages are so excessive as to suggest passion or prejudice." *Id.*

40 Shaw v. Southern Pacific Railroad Co., 107 P. 108, 111 (1910).

41 *See* Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 Am. B. Found. Res. J. 351. Friedman studied personal injuries filings in Alameda County from 1880–1900. He found that in the cases that went to trial, the average total award was $3,651. *Id.* at 365.

courts counted on them to police excessive verdicts by granting new trials or remitting judgments. The appellate courts saw their reviewing powers as being very limited. They only reversed awards where the award was so "grossly disproportionate" as to "shock" the court's sense of justice.[42]

II. THE POST-WORLD WAR I INCREASE IN PERSONAL INJURY LITIGATION AND A NEW RECOGNITION OF THE DEBILITATING EFFECTS OF PAIN AND SUFFERING[43]

Auto Accidents, the Availability of Liability Insurance, and the Changing World of Personal Injury Litigation

Before World War I, the defendants in most California personal injury lawsuits were corporations.[44] As the appellate cases discussed in Part I reveal, most lawsuits involved claims by persons injured in accidents caused by railroads or public utilities. After the war, this pattern changed. The number of tort cases nationwide rose dramatically, and the defendant was more likely to be an individual than a corporation. The reason for this development was the popularity of the automobile. As more people purchased cars and drove, the number of accidents increased. The carnage on the roads was substantial. In 1930, for example, over 30,000 persons were killed and another one million were injured in auto accidents in the United States.[45] Auto accidents were disturbing because of the personal tragedies they caused to victims and their loved ones, but they also confronted society with a new problem. Very often, careless drivers could not pay for the injuries they caused. Unlike corporations that had liability insurance or substantial assets, many defendants in auto accident suits were not financially responsible. Thus, even if the victim sued and won, the plaintiff might not be able to collect the award.

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42 Johnston v. Long, 181 P.2d 645, 658 (1947).

43 The author presented some of the ideas in this part in an earlier article. *See generally*, Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Capital U. L. Rev. 545 (2006).

44 Friedman, *supra* note 41, at 360.

45 Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 Colum. L. Rev. 785, 786-787 (1932).

The legal community took notice of the growing crisis. In the late 1920s, the Columbia University Council for Research in the Social Sciences created a commission to study and report on legal issues surrounding auto accidents.[46] The commission's report, which was the subject of a 1932 symposium in the *Columbia Law Review*, concluded that the negligence system was failing, as most accident victims received no compensation.[47] It proposed major changes to the tort system for auto accident cases. The report recommended replacing negligence with a no-fault program similar to workmen's compensation.[48] Another proposal was that pain and suffering damages be abolished in auto accident cases. The commission believed that resources should be spent to fully compensate victims for economic losses rather than for noneconomic injuries.[49]

No state followed the Columbia commission's suggestions for a no-fault program and the abolition of pain and suffering damages, but the report led authorities to seriously consider the problem of the insolvent negligent motorist. A number of states enacted laws to encourage or require drivers to obtain liability insurance. The most common was the enactment of "security-responsibility laws," which required motorists involved in accidents causing losses over a certain dollar amount to post security.[50] Their effect was to induce drivers to purchase liability insurance. By 1949, many states had passed these laws,[51] including California which had a security-responsibility law as early as 1929.[52] The laws led to a dramatic rise in the percentage of motorists who were covered by liability insurance. The Columbia report found that only about 27 percent of registered vehicles were

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46 *Id.* at 785.

47 *Id.* at 793-794. The Columbia report findings are summarized in Smith's article. References are to his summary.

48 *Id.* at 786, 787.

49 *Id.* at 800-801.

50 Joseph P. Chamberlain, *Introduction* to Frank P. Grad, *Developments in Automobile Accident Compensation* 50 Colum. L. Rev. 300 (1950).

51 *Id.* at 309 n.30.

52 Note, *New Approach to Problem of Motorist Financial Responsibility Misses Mark*, 1 Stan. L. Rev. 263 (1949). The note criticized California's law because it required that a motorist deposit security only after an accident involving property damage and/or personal injury had occurred.

insured in 1929;[53] by the mid-1940s, some states reported that almost 85 percent were covered.[54]

The growth of liability insurance benefited auto accident victims as they now had a better chance of receiving some compensation for their injuries. This development also had a profound effect on the legal profession, as more lawyers were willing to represent clients in auto accident cases. The prospect of a settlement or collectable judgment provided an economic incentive for lawyers to take them.[55] Because the plaintiff was often unable to pay the attorney an hourly fee, the lawyer was usually retained on a contingent fee basis. This meant that the attorney's compensation was tied to the amount of the recovery; the higher the settlement or judgment, the larger the fee. Therefore, lawyers looked for ways to maximize payments from insurance companies.[56] The plaintiff's actual economic damages for losses such as medical expenses and lost earnings offered little opportunity for manipulation because they were set by marketplace measures. But pain and suffering damages were a different story, as the appellate cases gave the jury wide discretion in valuing them. A high pain and suffering damages award benefited both the client and the attorney. The client had to pay the lawyer's contingent fee if he won or settled, so if the pain and suffering damages were substantial, they could cover the fee and the client would still be left with enough money to compensate for economic losses.[57] It benefited the attorney because the amount of the fee rose with the settlement or award.

The Legal Community's New Recognition of the Debilitating Nature of Pain and Suffering

As the volume of personal injury cases was growing, judges, lawyers, and legal scholars were also learning more about the debilitating effects of physical pain and mental suffering. Law professors at some of the nation's leading schools took the lead in identifying the various ways physical pain

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53 Smith, *supra* note 45, at 787.

54 Grad, *supra* note 50, at 311.

55 Leon Green, Traffic Victims: Tort Law and Insurance 78-79 (1958).

56 Clarence Morris, Morris on Torts 349 (1953).

57 Clarence Morris, *Liability for Pain and Suffering*, 59 Colum. L. Rev. 476, 477 (1959).

can manifest itself and they gave special attention to mental suffering.[58] These developments coincided with the emergence of the Legal Realism movement at American law schools.[59] Some Legal Realists studied the law and legal institutions in light of advances in the behavioral sciences. They were fascinated with human psychology.[60] These scholars believed that mental disorders could be explained scientifically and that emotional injuries could be just as serious as the physical. They criticized the courts' limited knowledge about mental suffering and worked to expand liability in cases involving emotional harm. Until this time, mental suffering damages were available in most states only where the plaintiff suffered a physical impact. In the years following World War I, numerous articles on the topic of emotional injury appeared in the nation's law reviews. The legal academy pushed for the expansion of liability to cover cases where the only injury was mental anguish.[61]

For example, Herbert F. Goodrich relied on physiological studies to prove that fear was a genuine injury by looking at its physical manifestations.[62] He believed that the common law's hesitance to compensate for emotional injury stemmed from the courts' lack of scientific information on the subject. Science recognized the negative effects of emotional injuries, and he thought the law should do likewise.[63] Other scholars argued for the recognition of a "new tort" for the intentional infliction of emotional distress. William L. Prosser, one of the most influential tort scholars of the twentieth century who would later become dean of the University of California,

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58 Many leading torts scholars of the twentieth century participated in these discussions, including Francis H. Bohlen, Leon Green, Calvin Magruder, and William L. Prosser.

59 For a discussion of legal realism, see generally, G. Edward White, Tort Law in America: An Intellectual History 63-113 (expanded ed. 2003).

60 The Legal Realist most famous for viewing law in light of human behavior was Jerome Frank whose book *Law and the Modern Mind* was popular even with a lay audience. Jerome Frank, Law and the Modern Mind (1930).

61 *See, e.g.*, Archibald H. Throckmorton, *Damages for Fright,* 34 Harv. L. Rev. 260 (1921); Lyman P. Wilson, *The New York Rule as to Nervous Shock*, 11 Cornell L. Q. 512 (1926); Leon Green, *Fright Cases*, 27 Ill. L. Rev. 761 (1932); John E. Hallen, *Damages for Physical Injury Resulting from Fright or Shock*, 19 Va. L. Rev. 253 (1933).

62 Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922).

63 *Id.* at 501.

Berkeley, School of Law, was a major proponent. He believed the law had failed to keep pace with science governing mental injury. Prosser wrote: "Medical science has long recognized that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves 'physical' injuries producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye."[64] Calvert Magruder of the Harvard Law School predicted that courts would go beyond protecting persons from intentionally inflicted emotional distress and create tort liability for those who cause mental suffering through negligence.[65]

This concentration on mental distress without physical impact carried over to personal injury cases where the plaintiff had physical injuries. Charles T. McCormick's *Handbook on the Law of Damages* (1935) revealed that appellate courts around the country were becoming more sympathetic to claims for physical pain and mental suffering. McCormick's review of appellate precedents showed that courts had little problem recognizing purely physical pain. It was "the immediate effect upon the nerves and brain of some lesion or injury to a part of the body."[66] This included any pain accompanying treatment of the injury.[67] The author even found a case involving what is now known as "phantom pain," where the court upheld a damages award to a man who lost an arm but still had the sensation of pain where the limb had been.[68] McCormick also found that courts considered mental suffering as the usual accompaniment to physical pain, but noted that they sometimes had trouble distinguishing between the two.[69] He found precedents for mental suffering in personal injury cases covering the victim's fright and terror at the time of injury, fear of how the injury might affect future health, apprehension of a pregnant woman for an injury to her child, anxiety over the inability to earn a living, fear of death

64 William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 876 (1939).

65 Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 Harv. L. Rev. 1033, 1058-1059 (1936).

66 Charles T. Mccormick, Handbook on the Law of Damages 315 (1935).

67 *Id.* at 316.

68 *Id.*

69 *Id.*

or insanity, nervousness around cars after a collision, and the embarrassment, sadness, and humiliation caused by a disfiguring injury.[70]

Young B. Smith and William L. Prosser also noted the heightened attention to pain and suffering damages in the 1952 edition of their casebook, *Cases and Materials on Torts*. They listed various forms of pain and suffering recognized by American appellate courts, including "loss of sense of taste and smell, loss of fecundity, mental pain and suffering from a consciousness that capacity to labor has been diminished for life, mental suffering of a virgin of strict religious faith because her hymen was ruptured by a doctor during a physical examination, acquisition of bad moral habits because of a head injury, permanent incontinence of urine, loss of desire for sexual intercourse and impotency, shock, change of personality . . . fear of death, increased stuttering, nervousness, neurotic condition, insomnia and inability to drive a car, fear of paralysis, and fear of injury to an unborn child."[71]

But not everyone jumped on the band wagon of the movement to liberalize the law governing noneconomic damages, especially for mental suffering. Professor Clarence Morris of the University of Pennsylvania Law School was a leading critic. He believed that pain and suffering damages were arbitrary, could not be measured in dollars, and only led to more litigation and higher verdicts that society could not afford to pay. "Perhaps sufferers deserve special pocket money for books or television sets or other escapes from discomfort," he wrote, but "the wisdom of increasing automobile liability insurance premiums to compensate for the non-economic aspects of pain seems questionable."[72] Prosser's response to critics like Morris was that fear of more lawsuits and the possibility that judges would have to weed out fraudulent claims were not valid reasons for depriving injured parties of having justice: "It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation;" and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."[73]

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70 *Id*. at 316-317.

71 Young B. Smith & William L. Prosser, Cases and Materials on Torts 617 (1952).

72 Morris, Morris On Torts, *supra* note 56, at 348-349.

73 Prosser, *supra* note 64, at 877.

Those who favored compensation for emotional injuries were confident that juries, guided by the usual instructions relating to pain and suffering damages, would be able to recognize genuine mental suffering claims and quantify them. They also believed that trial courts and appellate courts, using the traditional standards of review for pain and suffering damages, could police for excessive verdicts. As Prosser put it, "Just as a substantial verdict for personal injuries or for 'physical' pain will be reversed when the evidence of damage consists of purely subjective testimony on the part of the plaintiff . . . the court may refuse to permit recovery for 'mental' suffering unless there is some sufficient assurance of the genuineness of the claim . . . ."[74]

III. THE NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS AND THE PROFESSIONALIZATION OF THE PERSONAL INJURY BAR

Before World War II, lawyers who worked in the personal injury field by handling tort cases and workmen's compensation claims were on the margins of the legal profession. They had virtually no role in the American Bar Association which was dominated by the large law firms. Unlike their counterparts on the defense side, they had no national organization. Personal injury lawyers also had a major image problem with the general public. Newspapers and magazine often portrayed them as "ambulance chasers" and "shysters" who were more interested in extorting a contingent fee from insurance companies than in helping their clients.[75]

Things began to change in 1946, when a handful of lawyers who represented clients in workmen's compensation cases attended a national conference of state industrial accident commissions in Portland, Oregon. Samuel B. Horovitz, a Boston attorney, law professor, and author of a practitioner's guide to workmen's compensation law, invited ten other lawyers who

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74 *Id.* at 877-878.

75 For a typical article criticizing personal injury lawyers as "ambulance chasers," see, e.g., Robert Monaghan, *The Liability Claim Racket*, 3 Law & Contemp. Probs. 491 (1936).

represented injured workers to meet in his hotel room.[76] Their discussions identified problems facing plaintiffs in workmen's compensation litigation. The main issue was that there was no professional group for lawyers specializing in the field. "There were patent lawyers, trade mark lawyers, lawyers trained in building, unbuilding and remodeling corporations, lawyers spending their lives in reducing the pain that comes from paying taxes, wills and estate lawyers, insurance company lawyers — all organized to the nines — but where was the organization to represent 9,000,000 people injured seriously enough every year to become statistics?"[77] The participants noted that employers and their insurers were represented by competent counsel, but there were not many knowledgeable lawyers for injured workers.[78] In many cases, workers were at an extreme disadvantage as they represented themselves in administrative hearings. Moreover, the insurance companies exerted their influence in the state legislatures to keep workmen's compensation benefits low.[79]

The meeting ended with the decision to create a new professional organization, the National Association of Claimants' Compensation Attorneys (NACCA). Over the years, the group changed names a number of times. Today it is called the American Association for Justice, the nation's largest and most powerful plaintiff-lawyer organization.[80] Initially, the NACCA devoted its attention exclusively to workmen's compensation law. Under Horovitz's leadership, the NACCA pursued an ambitious agenda on

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76 "*Editorial, NACCA — Rumor and Reflections,*" 18 NACCA L.J. 27 (1956).

77 *Id.*

78 For example, the International Association of Insurance Counsel was formed in 1920. It began publishing the *Insurance Counsel Journal* in 1933. 25 Ins. Counsel J. 9 (1958).

79 *Id.*

80 Originally, the group was called the National Association of Compensation Attorneys, but the name was soon changed to National Association of Claimants' Compensation Attorneys in 1948 in recognition that some members handled personal injury cases outside the workmen's compensation field. Thereafter, the organization had a number of name changes. It became the National Association of Claimants' Counsel 1n 1960. In 1964, it was renamed the American Trial Lawyers Association and, a short time later, it became the Association of Trial Lawyers of America. Richard S. Jacobson & Jeffrey R. White, David V. Goliath: ATLA and the Fight for Everyday Justice 163-164 (2004). The organization's current name, the American Association for Justice, was adopted in 2006.

a number of fronts. It developed an education program for lawyers who represented claimants. The goal was to professionalize claimant lawyers in workmen's compensation cases so as to match the expertise of their insurance-company-funded counterparts.[81] One of the first decisions was to create a journal devoted to workmen's compensation law. The *NACCA Law Journal* began publication in 1948. The *Journal* followed legal developments in the field and highlighted notable victories. It soon had an impressive volume of subscribers, including most law school libraries.[82] Within three years after it started publishing, the *Journal* was cited in appellate court decisions and law review articles.[83]

An important part of the education program was reaching workmen's compensation lawyers in their own communities. NACCA members traveled the country and spoke before bar groups about their area of practice and encouraged other lawyers to take worker injury cases.[84] They recommended the establishment of local NACCA branches. The group also urged law schools to offer courses in all facets of personal injury law. The NACCA established lectureships at leading law schools and recruited top professors as presenters.[85] The central office in Boston developed a library of books and briefs and served as a clearinghouse for information for members.[86]

The NACCA also had a legislative program. Because workmen's compensation law was created by statute, only the legislature could make changes. The group claimed that insurance and employer lobbyists had been successful in limiting recoveries to injured workers. The NACCA

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81 "From the discussions it soon became evident that there were yearly tens of thousands of *litigated* cases in workmen's compensation cases; that the insurers were *always* represented by *able* counsel and that about half the workers came unrepresented, to do battle with skilled insurance counsel, doctors and investigators.

"There was an urgent need for *plaintiff* representation in litigated cases, if our American justice was to be maintained." Samuel B. Horovitz, *Early Tribulations (1946–1951),* Trial, 23 (July–Aug. 1971) (emphasis in original).

82 *Editorial, NACCA — Rumor and Reflection* 18 NACCA L.J. 28 (1956).

83 *Editorial*, 8 NACCA L.J. 19 (1951).

84 In 1949, Horovitz traveled through the south and southwest in an Airstream trailer. He spoke before 32 groups about workmen's compensation issues. Jacobson & White, David And Goliath, *supra* note 80, at 16.

85 *Editorial*, 8 NACCA L.J. 17-18 (1951). The professors included Mark DeWolfe Howe at Harvard and Fleming James at Yale. 18 NACCA L.J. 24 (1956).

86 *Editorial,* 8 NACCA L.J. 17-18 (1951).

worked to level the playing field in the legislatures. Finally, the NACCA hoped to improve the image of lawyers who represented injured workers. It wanted the public to realize that plaintiff lawyers were friends of the working class and that the group's goal was justice for the poor as well as the rich.

NACCA membership grew at an impressive rate. Within six years, there were over 2,000 members.[87] Beginning in 1947, the group held annual national conventions.[88] Around the same time, it opened membership to lawyers who represented workers injured in railroad and shipping accidents. The *NACCA Law Journal* also expanded its coverage to include personal injury cases governed by federal railroad and admiralty laws.[89]

IV. "THE KING OF TORTS" AND HIS RELATIONSHIP WITH THE NACCA

Melvin Belli's Background and His Early Work in Personal Injury Cases

By the time the NACCA was formed, San Francisco lawyer Melvin Belli had already built a reputation as a successful personal injury attorney. Belli would go on to be one of the most famous trial lawyers of the twentieth century. His flamboyant behavior in and out of the courtroom made him a national celebrity. His record of success in personal injury cases led a reporter for *Life Magazine* to refer to him as "the King of Torts" in a 1954 article, a title Belli relished.[90] Over the course of a long career, Belli represented and sometimes developed friendships with the famous, including actors Errol Flynn, Lana Turner, and Mae West; boxers Muhammad Ali and George Foreman; comedian Lenny Bruce; televangelists Jim and Tammy Faye Baker; mobster Mickey Cohen; stuntman Evil Knievel; stripper Carol Doda; Washington socialite Martha Mitchell; and the Rolling Stones rock group.[91] Belli represented Jack Ruby at his trial for the murder of President

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87 By 1952, the NACCA had over 2,000 members. *Editorial*, 10 NACCA L.J. 20 (1952).

88 *Id.* at 21.

89 Jacobson & White, David and Goliath, *supra* note 80, at 13-14.

90 Robert Wallace, *The King of Torts*, Life Mag., 71-82 (Oct. 1954).

91 Mark Shaw, Melvin Belli: King of the Courtroom, xiv (2007).

John F. Kennedy's assassin, Lee Harvey Oswald.[92] He thrived in the public spotlight. Belli lived in a mansion, drove expensive cars, and wore the finest clothes. He bragged about his party life and trysts with numerous women.[93] His lifestyle took a toll on his family; he was married six times and his relationships with his children were sometimes rocky.[94] Belli's legal career ended on a tragic note when his law firm filed for bankruptcy in 1995, shortly before he died at age 88.[95] Even today, people have very different opinions of him. To some, he was a brilliant legal innovator and dedicated advocate for his clients, while to others Belli was a shameless self-promoter mainly interested in fame and financial enrichment.

Belli was born in 1907 in Sonora, California, in the western foothills of the Sierras. He attended college at the University of California, Berkeley, and received his law degree from Boalt Hall in 1933. His early practice was criminal law, including the defense of two inmates who were convicted and executed for escaping from prison and taking hostages.[96] Circumstances surrounding the death of his father in 1938 were a factor that drew Belli to have an interest in personal injury cases. His father died after taking a prescription medication. Belli claimed that the pharmacist who filled the prescription gave the wrong dosage or, as he put it, "the goddamned drugstore had made a mistake on the goddamned prescription."[97]

His first personal injury victory came in 1943, when he represented a worker who was hurt in a cable car accident. The trial gave him the opportunity to employ a tactic for which he would become famous: the use of demonstrative evidence. Belli had a craftsman build models of the accident site and the cable car. He also brought a blackboard into court to help the jury compute the damages award. The jury returned a $32,000 verdict, a large award for the time.[98] Belli found that the creative use of

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92 Ruby was convicted, but the conviction was reversed on appeal. He died before he could be retried. Melvin M. Belli, My Life On Trial, ch. 17 (1976).

93 *See generally,* Belli, My Life, *supra* note 92.

94 Shaw, Melvin Belli, *supra* note 91, at xiii, 225.

95 The bankruptcy was filed in December, 1995. Belli died at age 88 on July 9, 1996. *Id*. at 218, 227.

96 Belli, My Life, *supra* note 92, at 76-81.

97 *Id*. at 86-87.

98 *Id*. at 92-93. The judgment was affirmed on appeal. Bryant v. Market Street Railway, 163 P.2d 33 (Cal.App. 1945).

demonstrative evidence produced larger verdicts. In one of his famous cases, where a woman had lost a leg in an accident, he passed her artificial limb among the jurors. The jury returned a verdict of $100,000.[99]

In the late 1940s, Belli won three verdicts of over $100,000 in personal injury cases with significant pain and suffering damages. These awards were the highest in California history. The defendants appealed the judgments, but the appellate courts affirmed them.[100] In all three cases, the courts followed California's traditional rule that appellate courts do not overturn verdicts as excessive except in unusual circumstances. As one of the courts held, "if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for a new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive."[101] The court also cited recent case authority affirming higher awards because the purchasing power of the dollar had declined.[102] In 1950, Belli's string of large awards continued when a jury awarded his client $225,000, the highest verdict ever in the state.[103]

The amount of these awards and Belli's success in defending them on appeal had an important influence on his thinking. He realized that if the victim's lawyer could convince the jury and the trial judge — the thirteenth juror — that a high verdict was justified, California's standard of appellate review made it unlikely that a higher court would reverse the judgment. Belli also understood that the California decisions could have persuasive precedential value elsewhere. Courts in other states could rely on them when upholding high awards. The decisions were also very useful during negotiations with insurance companies, as the fear of high verdicts could motivate them to agree to more generous settlements.

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99 The incident is described in Belli, My Life, *supra* note 92, at 107-109.

100 Gluckstein v. Lipsett, 209 P.2d 98 (Cal.App. 1949) (affirming judgment for $115,000); Sullivan v. San Francisco, 214 P.2d 82 (Cal.App. 1950) (affirming judgment for $125,000); Duvall v. T.W.A., 219 P.2d 463 (Cal.App. 1950) (affirming judgments of $35,000 for husband and $85,000 for wife).

101 Gluckstein, *supra* at 104.

102 "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral." *Id*.

103 The defendant appealed the verdict, and the parties later settled for $187,500. Belli, My Life, *supra* note 92, at 117-123.

Belli Joins the NACCA

A major turning point in NACCA history was when Melvin Belli joined the organization in 1949. According to Belli, he was on vacation in Europe when a law partner contacted him and told him about Samuel Horovitz and the NACCA. After a telephone call to Horovitz, Belli interrupted his vacation, flew to Cleveland, and addressed the NACCA annual convention.[104] Belli wanted the group to expand its membership to include lawyers who took personal injury tort cases. Horovitz, who had never heard of Belli, told him that the group was only concerned with worker injuries. But after Belli spoke for over two hours about the use of demonstrative evidence and the inadequacy of awards for tort victims, he won the group over.[105] The immediate result was that the NACCA decided to admit tort lawyers to membership. The permanent consequence was that the NACCA quickly changed its focus from workmen's compensation law to personal injury tort litigation.[106]

Belli shared Horovitz's vision of making the NACCA a national professional organization for lawyers representing injury victims. He was elected vice-president for 1950 and was president in 1951.[107] He organized the 1951 annual convention in San Francisco. The week-long program included 43 sessions on torts and medical science.[108] For many years, NACCA annual conventions were preceded by the "Belli Seminar," a loosely organized program at which speakers could discuss their notable achievements in personal injury law. Belli acted as moderator for the sessions.[109] The format of the *NACCA Law Journal* was also changed to include a section on recent important tort cases. In 1949, Belli began editing a feature called "Verdicts or Awards Exceeding $50,000." Personal injury attorneys from around the country submitted information about their reported and unreported decisions and settlements. Belli used the feature to show "that juries and judges are taking into consideration the decreased value of the dollar, and the need, in cases of serious and permanent injury due to negligence,

104 *Id.* at 127-128.

105 Horovitz, *supra* note 81, at 44.

106 Jacobson & White, David and Goliath, *supra* note 80, at 21-22, 327.

107 *Id.* at 327.

108 *Id.* at 72.

109 *Id.* at 74-75.

of compensating injured persons for loss of wages, pain and suffering, humiliation, embarrassment, mortification, and for the psychological and psychic aspects, as well as other elements of damages."[110]

NACCA members organized numerous state and local branches during Belli's term. California had local groups in San Francisco, Los Angeles, and San Diego, more than any other state. The branches gave personal injury lawyers a forum for discussing common issues. The NACCA held a Western Regional Conference in Los Angeles in 1952, where Roscoe Pound, former dean of the Harvard Law School, spoke.[111] In the same year, lawyers from San Francisco and Los Angeles submitted an *amicus curiae* brief to the California Supreme Court on behalf of the NACCA in a personal injury case.[112]

Belli also played a major role in the NACCA's effort to reach out to personal injury lawyers in their own communities. In 1951, he did a "barnstorming" tour of the country, making numerous presentations on personal injury law to local bar groups. He wrote that his efforts to raise the caliber of plaintiff-lawyer practice made him feel "as good as a Maryknoller bringing hybrid wheat and hospitals to southeastern Brazil." He also spoke at major universities, including Princeton, Yale, Cornell, Columbia, Boston University, and Harvard.[113]

V. THE CRUSADE FOR "THE ADEQUATE AWARD"

Melvin Belli's missionary zeal was ignited by a belief that personal injury judgments and settlements around the country were too low. As president of the NACCA, he began a national crusade for what he called "the Adequate Award" in personal injury cases. The goal was to increase substantially the amount of personal injury awards. Throughout the 1950s, Belli wrote and lectured extensively about how injury victims were not receiving adequate compensation for their injuries. Belli believed the trial tactics he

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110 9 NACCA L.J. 244 (1952).

111 10 NACCA L.J. 26 nn.35, 39, 104 (1952). By 1971, California was the largest affiliate of the group, known then as the American Trial Lawyers Association. There were 2,225 California members in 21 local and state chapters. Richard S. Jacobson, *Groans, Growth and Maturity*, Trial, 26, 27 (July–Aug. 1971).

112 Lawyers from Belli's firm participated in writing the brief. 9 NACCA L.J. 277 (1952).

113 Belli, My Life, *supra* note 92, at 135.

employed in California to win higher verdicts would work in other states. He suggested techniques plaintiff lawyers could use to convince judges and juries to give higher awards. Among them was an innovative approach for proving pain and suffering damages.

The Problem of Inadequate Personal Injury Judgments

Belli's campaign began in 1951 with publication of an article entitled "The Adequate Award" in the *California Law Review*.[114] To write the article, Belli reviewed hundreds of awards in reported and unreported personal injury cases. The data came from published decisions and information about unreported cases and settlements provided by leading personal injury attorneys around the country.[115] Belli separated the data into two broad groups: cases from California and cases from other jurisdictions. He then divided each group into "reported cases" and "unreported cases." The final organization was a summary of "California Reported Cases Tending to be Adequate," "Reported Cases of Awards from Other Jurisdictions Tending to be Adequate," "Unreported Cases (California) — Awards Approaching Adequacy," and "Unreported Cases (Other Jurisdictions) — Awards Approaching Adequacy." Each entry included the case name, basic facts about the victim's injury, and the amount of the recovery.

Belli's review of the cases led him to conclude that personal injury awards had risen over the last fifty years, but not sufficiently to keep up with the cost of living. He cited recent California appellate court decisions recognizing that inflation had undercut the value of the dollar.[116] Belli's study showed that in some states, including California, awards were on the rise. He referred to these jurisdictions as "adequate verdict" states. But there were still many "low verdict" states where the recoveries were insufficient.[117] Because a personal injury is the most catastrophic event a person can suffer, Belli argued that the legal community "should not be appalled" by the prospect of higher awards. Instead, "[j]udges and lawyers should dignify by new standards with justiciable awards infringements upon man's right to live out his life free from pain and suffering, with his mind

114 39 Calif. L. Rev. 1 (1951).

115 *Id.* at 27.

116 *Id.* at 10 n.30.

117 *Id.* at 37.

and body intact." The only way to do this was with "dollars," the "money judgment."[118]

The article generated huge publicity for the NACCA. The group sold thousands of reprints to lawyers around the country. Belli followed the article with a pamphlet in 1952 titled, *The More Adequate Award*.[119] This publication updated the original article by mentioning over 300 new awards. Belli gave special attention to judgments in "high verdict centers," including San Francisco and Los Angeles.[120] He reported that the highest California jury verdict was for $358,000 in an Orange County case. Belli said the verdict was "the second Most Adequate Award" to be granted in the United States.[121] In subsequent years, Belli provided regular updates on high recoveries in the *NACCA Law Journal's* "Verdicts and Awards Exceeding $50,000" section. He continued editing this feature until 1964.[122] Belli also spotlighted substantial awards in *Modern Trials*, a three-volume practice manual that he published in 1954.[123]

Belli's Use of Demonstrative Evidence to Justify Higher Pain and Suffering Damages Awards

The adequate award was the main topic of Belli's speeches when he toured the country on behalf of the NACCA. Although he criticized trial and appellate courts for overturning jury verdicts, he placed the primary responsibility for low verdicts on the victims' lawyers. They were not using their imaginations when trying cases. Belli emphasized to his audiences the value of demonstrative evidence in swaying jurors.[124] He described how he used photographs and models to recreate accident scenes.[125] He also explained how he used demonstrative evidence to illustrate how personal injuries affected victims' lives. Belli often told the story of the client who received a $100,000 verdict after he passed her artificial leg among the jurors.[126]

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118 *Id.*

119 Melvin M. Belli, Sr., The More Adequate Award (1952).

120 *Id.* at 2.

121 *Id.* at 3-4.

122 The feature last appeared in volume 30 of the NACCA Law Journal.

123 Melvin M. Belli, Modern Trials (1954).

124 Melvin M. Belli, Sr., *Demonstrative Evidence*, 10 Wyo. L.J. 15 (1955).

125 *Id.* at 22-25.

126 *Id.* at 21-22.

But the key piece of demonstrative evidence in any jury trial was a blackboard. Belli called the blackboard "the most important instrument in legal surgery."[127] He said he never tried a case without having blackboards present. The reason was simple: Teachers used blackboards to educate students from grammar school through college. The trial lawyer's mission was to educate jurors about the client's case in a very limited time. The blackboard helped jurors understand and remember important information. It was most useful in proving damages. Belli said that as witnesses testified about a client's past and future economic losses, such as medical bills and lost wages, he listed them on the blackboard.[128] The list remained on the board throughout the trial, and he referred to it in closing argument.

Belli made the most original use of the blackboard in establishing pain and suffering damages. He explained to his audiences that putting a dollar amount on pain and suffering was a difficult but necessary task for the plaintiff's lawyer. The personal injury victim, her family, and acquaintances could explain how the injury had affected her life, and medical experts could testify that the pain and suffering was real and predict how long it was likely to last. But putting a dollar figure on pain and suffering was another story. Belli warned that if the lawyer were to just throw out a high figure without breaking it down, this would "frighten your trier of facts and your reviewer of facts."[129] His solution was to divide noneconomic damages into finite time periods and list them on the blackboard. He created a hypothetical case where the lawyer's goal was to recover $225,000 for pain and suffering expected to last for thirty years. "You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years," he said. "You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result of an award approaching adequacy at $225,000."[130] Belli was instructing his listeners on what came to be known as the "per diem" argument for pain and suffering damages.

127 *Id.* at 28.
128 *Id.*
129 *Id.* at 34.
130 *Id.*

He later claimed that he and a lawyer from Florida "invented" the per diem argument.[131]

Belli's lectures on demonstrative evidence and the per diem argument excited personal injury lawyers around the country. If California juries were giving large verdicts and the state's appellate courts were sustaining them, then Belli must be on to something. Plaintiffs' lawyers in many states adopted his tactics, and won higher awards as a result.

Reactions against the Adequate Award Movement

The crusade for the adequate award energized personal injury lawyers, but it had a very different effect on insurance companies and their lawyers. They were surprised at the NACCA's success in organizing plaintiff lawyers and stunned that personal injury awards were rising so rapidly. They fought against the adequate award movement, claiming that it was enriching personal injury lawyers while raising premium costs for the average insurance purchaser. Insurance defense lawyers were especially concerned about the growing use of the per diem argument around the country. They believed the tactic was a major contributor to high jury verdicts. One of their main goals was to convince courts to ban its use.

Insurance companies and their attorneys did not have to deal with a national plaintiff-lawyers organization before the NACCA. But after Melvin Belli became NACCA president in 1951, they realized they were facing a formidable opponent. At the 1952 meeting of the International Association of Insurance Counsel, the NACCA was a major topic. President Joseph A. Stray presented data from Los Angeles showing that the highest personal injury verdict had risen from $33,000 in 1940 to $185,000 in 1951. He blamed the NACCA for "arousing public interest in what they call 'adequate awards' but what we call excessive awards."[132] He recommended that insurers start a public relations campaign "to educate the public that they are the ones who are paying."[133]

The group devoted a full afternoon of the annual meeting to the NACCA. E.D. Bronson of San Francisco told how he attended the 1951

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131 The other lawyer was Perry Nichols of Miami, Florida. Melvin M. Belli, 2 The Law Revolt, 431 (1968).

132 *Report of the President*, 19 Ins. Couns. J. 250 (1952).

133 *Id.* at 252.

NACCA annual meeting, and he reported to his insurance defense colleagues what he had learned. He gave detailed information about the NACCA's goals, organization, membership, and educational activities.[134] Bronson described Melvin Belli's adequate award theory and how Belli encouraged use of the per diem argument to prove pain and suffering damages. "He argues too for the copious use of colored crayons . . . particularly for visualizing numbers in arguing damages. It is proposed that the factor of pain be reduced to some finite medium, such as the day, hour and minute and to attach a money value to some small unit of time and then to resort to another method of 'blowing up' by multiplication."[135] Another speaker mentioned a presentation on demonstrative evidence that Belli made to the Iowa State Bar Association: "You can well appreciate that the attorneys from rural communities and smaller towns all over the state resolved to use the same means to secure high verdicts in their courts."[136] He suggested that insurance company representatives also tour the country and teach better methods of defense: "We must be ready to meet demonstrative evidence with demonstrative evidence, meet blackboard with blackboard . . . ."[137] The discussion of the NACCA and rising awards was sobering. One speaker quipped that the mood in the room was so downcast "it might be appropriate at the close of this meeting to request the sergeant-at-arms to hang a black wreath from the door of this auditorium."[138]

It was not long, however, before insurance companies and their lawyers launched a counterattack to the adequate award movement. Some of their efforts were directed at plaintiffs' lawyers. Articles in legal publications warned that if awards continued to rise, insurance companies would push for legislation replacing tort cases with no-fault insurance. A 1954 article in the *Insurance Counsel Journal* charged that the NACCA "wants its full pound of flesh and then some without regard to the foundations

134 E.D. Bronson, *Activities and Objectives of Plaintiffs' Attorneys Who Foster the Adequate Award*, 19 Ins. Couns. J. 359-360 (1952).

135 *Id.* at 361.

136 Rupert G. Morse, *The Reinsurance Companies' Viewpoint of the Recent Trend Toward Higher Verdicts*, 19 Ins. Couns. J. 362, 363 (1952).

137 *Id.* at 364.

138 Comment of Gordon M. Snow. *Id.*

that are being undermined."[139] Lawyers who deceived juries into awarding excessive and unreasonable verdicts were laying the groundwork for no-fault insurance. Unreasonable lawyers would destroy their own practices and "kill the goose that lays the golden egg."[140] A new industry-friendly publication called the *Defense Law Journal* appeared in 1957. It mirrored the format of the *NACCA Law Journal* by covering developments in personal injury law, only from the defense perspective. Its editor charged the NACCA with preaching "adequacy" but fomenting "excessiveness." He predicted that "in its relentless straining for ever-mounting verdicts and awards, it is only procreating a Frankenstein which one day will take the form of legislation similar in concept to the Workmen's Compensation statutes."[141]

Many attacks on the adequate award movement and the NACCA were intended to provoke outrage in the general public. Writers in newspapers and popular magazines warned that only lawyers were profiting from higher judgments. For example, a *Reader's Digest* article accused plaintiff attorneys of collecting large fees and leaving their injury victims with little compensation.[142] Other articles described personal injury lawyers as "shysters" and blamed the NACCA for higher insurance premiums.[143] A story in the Pasadena *Independent* compared personal injury lawyers to modern-day highwaymen who rob by bringing fraudulent claims.[144]

Legal scholars also criticized the adequate award movement. Ironically, one of the most biting attacks was made by William L. Prosser who, as we have seen, was a major advocate of expanded liability for emotional injuries. Prosser wrote a review of Belli's *Modern Trials* for the *California Law Review.*[145] Prosser called the book "an exposition in three volumes of how to wring from an impressed and sympathetic jury every last possible

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139 H. Beale Rollins, *The Industry's Answer to "The More Adequate Award,"* 21 Ins. Couns. J. 455 (1954).

140 *Id.* at 459.

141 Welcome D. Pierson, *The True Adequate Award*, 1 Def. L.J. 275, 276 (1957).

142 *The Personal Injury Racket,* Reader's Digest (January, 1955).

143 Belli claimed that the insurance industry sponsored the media campaign against the NACCA. *See generally,* Melvin Belli, Ready for the Plaintiff ch. 27 (1956).

144 *Id.* at 293.

145 William L. Prosser, *Book Review of Modern Trials,* 43 Calif. L. Rev. 556 (1955).

nickel that can be obtained for the plaintiff, and how to build up and magnify whatever case he may have until the recovery reaches or exceeds the absolute maximum which any court can conceivably allow to stand."[146] Prosser called Belli's approach "the Hollywood type of trial" designed to manipulate jurors into making excessive awards.[147]

VI. THE PER DIEM ARGUMENT OVER PAIN AND SUFFERING DAMAGES IN THE APPELLATE COURTS

The controversy over rising personal injury verdicts moved to the nation's appellate courts when a host of cases involving the per diem argument for pain and suffering damages became ripe for decision. In a ten-year period beginning roughly in 1958, appellate courts in over thirty states considered whether to allow the tactic. The NACCA and defense counsel groups tracked the cases closely. They were especially interested in how state courts with reputations for liberalizing tort law would decide. Insurance companies and their lawyers believed that the defeat of the per diem argument would be a major step in checking the rise in jury awards. For the NACCA and plaintiffs' lawyers, vindication of the per diem argument would be a boost to the adequate award movement.

Opponents of the per diem argument presented the appellate courts with a variety of reasons for banning the practice. They claimed that there was no evidentiary basis for converting pain and suffering into monetary terms, so it was inappropriate for a plaintiff's lawyer to suggest a per diem amount. In making a per diem argument, the attorney was really giving testimony and expressing opinions on matters not disclosed by the evidence. This could only mislead juries into giving excessive awards. Moreover, the defendant's lawyer was put in the position of having to rebut an argument with no basis in fact, and if the lawyer responded in kind, he would imply approval of the per diem argument.[148]

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146 *Id.* at 557.

147 *Id.* at 559.

148 The arguments are taken from Ratner v. Arrington, 111 So. 2d 82, 88-89 (Fla. App. 1959), a case often cited for objectively presenting the arguments of both sides of the per diem argument controversy.

Supporters had their own list of reasons why the per diem argument should be allowed. They claimed that the per diem argument assisted juries in making reasonable decisions. Without some guidance, the trier of fact would have to determine pain and suffering damages in the abstract and make a blind guess. The plaintiff's lawyer's suggestion that the evidence justified a certain amount, in total or by per diem, was a way of reaching a reasonable conclusion that the jury could find useful. Per diem arguments were not evidence, but are only used for illustration and suggestion. Any alleged problems with the per diem argument were exaggerated and could be cured by proper jury instructions. Defense counsel also had the opportunity to suggest a proper recovery and could draw inferences from the evidence.[149]

The first state supreme court to decide the issue was New Jersey's, a state Belli listed as an "inadequate verdict" center in *The More Adequate Award*.[150] In *Botta v. Brunner* (1958),[151] the New Jersey Supreme Court rejected the per diem argument. The court held that a plaintiff lawyer's suggestion that pain and suffering could be measured at so many dollars per day had no foundation in the evidence and could lead jurors to rely on "unproven, speculative and fanciful standards of evaluation for evidence."[152] *Botta* was a major victory for insurers and their lawyers. Many expected that other states would follow New Jersey's lead and help bring a halt to large pain and suffering awards. The NACCA was quick to condemn the decision. By prohibiting plaintiff lawyers from using mathematical guides to help the jury compute pain and suffering damages, the jury was left "wrapped in a Grand Banks of fog," forced to use the "by guess and by golly" method of measuring noneconomic damages.[153] By 1966, ten other states had followed *Botta* in banning the per diem argument. Significantly only one, Illinois, was a state with a large urban center.[154]

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149 *Id.*

150 Belli, More Adequate Award, *supra* note 119, at 2.

151 138 A.2d 713 (N.J. 1958).

152 *Id.* at 725.

153 28 NACCA L.J. 280-281 (1961-1962).

154 The other states were Delaware, Hawaii, Kansas, Missouri, New Hampshire, Virginia, West Virginia, Wisconsin, and Wyoming.

Botta and the other decisions that mirrored its reasoning ended up being the high water mark for the insurance industry, as many subsequent state appellate court decisions authorized use of the per diem argument or left it to the trial judge's discretion to permit it in individual cases. By 1966, appellate court decisions in eighteen states followed this plaintiff-friendly trend. While the courts sometimes acknowledged that unit-of-time arguments could lead to larger pain and suffering awards, they found the guidance they provided to the jury outweighed their danger.[155]

While appellate courts in many states were tackling the per diem argument issue, one remained conspicuously silent: the California Supreme Court. Ironically, the state where Melvin Belli first used the per diem argument with great success and the one that topped his list of "most adequate verdict centers" did not play a leadership role. The California Supreme Court passed up an opportunity to examine the issue in *Seffert v. Los Angeles Transit Lines* (1961).[156] In *Seffert,* the defendant appealed a judgment that included a substantial sum for past and future pain and suffering damages. The trial judge had allowed the plaintiff's lawyer to make a per diem argument to the jury. The Court affirmed the judgment but refused to consider the per diem argument issue because the defense attorney failed to preserve it for appeal.[157]

Five years later, the Supreme Court finally addressed whether the per diem argument was permissible in *Beagle v. Vasold* (1966).[158] At the outset of the legal discussion, the Court noted that few issues in tort law had evoked more controversy in the last decade.[159] It tallied the number of jurisdictions permitting the argument and those prohibiting it, finding that the trend was toward allowing it. The Court also examined a large number of law reviews and found that a substantial majority of authors believed it was desirable to permit the per diem argument.[160] The Court sided with these majority positions when it found in favor of the per diem argument. It held

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155 Appellate court decisions on the issue are described in James O. Pearson, *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering,* 3 A.L.R. 4th 940. The annotation includes rules currently followed in the states.

156 364 P.2d 337 (1961).

157 *Id.* at 344.

158 *Id.* 417 P.2d 673 (1966).

159 *Id.* at 676.

160 *Id.* at 677.

that an attorney who suggests pain and suffering damages be computed on a unit-of-time basis was not presenting evidence but rather merely drawing inferences from the testimony of plaintiff, experts, and other witnesses.[161] The Court rejected a suggestion by defendant's counsel that the trial judge be given the discretion to decide whether the per diem argument should be allowed or not in individual cases.[162] The end result was there would be no obstacle to California lawyers using the tactic. The Court acknowledged the argument of critics who claimed that the per diem argument resulted in higher verdicts, but concluded the existing standards of judicial review were adequate to check the problem. The trial judge, sitting as "the thirteenth juror," and appellate courts, using the state's traditional standards for appellate review, could police excessive awards.[163]

Interestingly, the California Supreme Court justice who wrote or joined in many of the plaintiff-friendly tort opinions listed at the beginning of this article opposed the per diem argument. Roger Traynor, the justice whom many saw as the leader of the movement for expanding tort liability, filed a strong dissent in *Seffert*, arguing the pain and suffering damages were excessive and should be reversed. Traynor was very critical of the per diem argument. He agreed with those who claimed it misleads jurors into thinking they can compute pain and suffering damages by a mathematical formula. Traynor wrote that the truth is not served by the use of "sophistic arguments."[164] He then went a step further by questioning whether personal injury plaintiffs should receive any damages for pain and suffering. He cited a number of law review articles criticizing these awards. However, once having raised the issue of abolishing pain and suffering damages, Traynor quickly backed away from it. He wrote, "any change in this regard must await reexamination of the problem by the Legislature."[165] When *Beagle* was decided, Traynor, who by then was chief justice, renewed his criticism of the per diem argument in a concurring opinion, stating, "an argument that damages for pain and suffering should be computed as so much per unit of time is so misleading that it

161 *Id*. at 678.
162 *Id*. at 682.
163 Seffert, *supra* note 156, at 680.
164 *Id*. at 347.
165 *Id*. at 345.

should never be allowed."[166] One observer who was surprised by Traynor's views on the per diem argument was Melvin Belli. He wrote that Traynor "seems to have Frankfurterized, i.e., 'trended conservative' — or at least become more social planning and economically 'cautious.'"[167]

CONCLUSION

The individuals who founded the NACCA in 1946 could not have imagined how successful the group would be in organizing the personal injury bar. When the group, now named the American Trial Lawyers Association, celebrated its twenty-fifth anniversary in 1971, it had more than 25,000 members in affiliates, branches, and chapters around the country.[168] The campaign for the adequate award had also produced stunning results. Writing in 1968, Melvin Belli said that $100,000 was once a "spectacular" verdict; now there were awards exceeding $1 million.[169] Belli's lectures and writings on the use of demonstrative evidence and his techniques for increasing pain and suffering awards helped account for the larger judgments.

But the success of the plaintiffs' lawyers also had a down side. The increase in personal injury litigation in the 1950s and 1960s and the rise in awards raised questions about whether injury costs were getting out of hand. Critics identified pain and suffering damages, which are inherently arbitrary and unpredictable, as a special concern. Many articles focusing on problems with pain and suffering damages appeared in the nation's law reviews.[170] Some authors lost faith in the ability of the courts to address the issue. They believed that judges lacked the will to make meaningful changes in the rules governing noneconomic damages.[171] Judicial standards of

166 Beagle *supra* note 158, at 683.

167 Belli, 2 The Law Revolt, *supra* note 131, at 433. The comment makes reference to U.S. Supreme Court Justice Felix Frankfurter. Proponents of judicial activism criticized Frankfurter for his philosophy of judicial restraint. *See generally,* Philip B. Kurland, Mr. Justice Frankfurter and the Constitution (1971).

168 Richard S. Jacobson, *Groans, Growth and Maturity*, Trial, 26, 27 (July–August 1971). California was the largest affiliate, with 2,225 members.

169 Belli, 2 The Law Revolt, *supra* note 131, at 400-401.

170 *See, e.g.,* Morris, *supra* note 57; Marcus L. Plant, *Damages for Pain and Suffering,* 19 Ohio St. L.J. 200 (1958); William Zelermyer, *Damages for Pain and Suffering*, 6 Syracuse L. Rev. 27 (1955).

171 *See, e.g.,* Morris, *supra* note 57, at 482-484.

review governing excessive verdicts did little to check the dramatic rise in personal injury awards. Indeed, the courts appeared to have exacerbated the problem in states like California by permitting the per diem argument.

Many critics believed that change would only come if the legislatures acted. They suggested different proposals for legislative intervention. One author suggested a law creating a system similar to workmen's compensation where there would be a schedule for pain and suffering awards based on the type and severity of the injury.[172] Another argued for limiting pain and suffering damages to 50 percent of medical expenses.[173] These proposals would retain pain and suffering damages, but lower their amount and make them more predictable. Other writers called for the abolition of pain and suffering damages because society could not afford them. They linked pain and suffering awards to the rising cost of insurance premiums and consumer goods. A debate over no-fault insurance in auto accident cases had already been ongoing since the late 1950s. No-fault schemes often called for the elimination of pain and sufferings damages so that resources could be spent to fully compensate for economic losses.[174] However, the movement for no-fault insurance, which defense attorneys had warned plaintiff lawyers would "kill the goose that lays the golden egg," fizzled out.

Insurance companies and their lawyers ultimately had some success in fighting pain and suffering damages awards in medical malpractice cases where liability policy limits are high and the chances for catastrophic injuries are great. The California Legislature's decision to enact MICRA in 1975 and place a cap on noneconomic damages in medical negligence cases was their first major victory, and they have repeated it elsewhere. Efforts to limit pain and suffering damages are not surprising when viewed in the context of the spectacularly rising jury verdicts described in this article. The question whether pain and suffering damages should be limited or even abolished is still being debated today, and noneconomic damages are a main target of those who would reform personal injury law. ✯

172 Zelermyer, *supra* note 170, at 41.

173 Plant, *supra* note 170, at 211.

174 Leon Green, Traffic Victims: Tort Law and Insurance 88 (1958); Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge,* 59 Colum. L. Rev. 408, 418 (1959).