Scheduling Damage Awards

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A schedule is one among possible solutions to the problems associated with the monetary valuation of personal injury. In using schedules to determine an adequate amount of compensation for particular damage claims, we have to assume some degree of error because not all damage awards will fall on the schedule's average value. Nevertheless, the larger deviations make up for the smaller ones if the tables are accurate. Our position is that a schedule makes sense only when compensation may not both objectively and accurately be assessed on an individual basis. This is what actually happens to pain & suffering awards. For those, a schedule based both on previous cases and the value of life literature offers a good solution, but no other levels of harm should be subject to it. Contrary to this, Spain has introduced a mandatory schedule in its liability system for automobile accidents since 1995 which includes not only pain & suffering, but also lost earnings. The lack of analysis prior to legislation has led to substantial mistakes that finally brought it to the Constitutional Court, jeopardizing a step backwards to previous variability and uncertainty problems.

• *The Basic Problem*

Seeking generality. In Spain today, the term «schedule» is almost exclusively associated with the system for valuing damages introduced by Law 30/1995 in the Law of *Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor* (automobile insurance & liability). Thus considered, the issue lacks any interest abroad, and even within our borders, it is only of some with regard to automobile accidents. However, if approached more generally as to include other types of accidents and general aspects of liability, the question becomes a much more relevant one, with a much wider scope in Tort Law.

A serious social problem. In Spain, one out of every four persons is injured in an accident and one out of 2,300 dies each year as a result –approximately 17,400 total-. Automobile accidents are a major cause of these fatalities and injuries. So in the European Union, where automobile accidents are the primary cause of fatal accidents. They account for 35% of fatal accidents (approx. 50,000) and more than 1.5 million injuries each year.

However, we should not take a part for the whole. Some social activities may result in accidents

with similarly negative consequences: labor (in particular), transportation (by sea, air or land), defective products, professional negligence (mainly of doctors and architects), inadequate functioning of public services, domestic accidents, sport injuries, public events, etc.

The same problem arises in all of these categories: how should the damage award be determined in each case? It is in the intend to answer to this question that a thorough study of the scope of schedules finds its real dimension. Besides, the answer given to it should apply to all cases that involve bodily injury.

The traditional (lack of) a solution: open evaluation. Schedules are intended to provide a solution to calculate monetary compensation for damages that cannot be fully repaired *in natura*. Full compensation may be achieved for pecuniary damages, such as medical costs and lost profit, but pain suffering is difficult to compensate with a monetary payment since there's no straightforward reference for it in a market. Money only offers an adequate compensation for pecuniary harm, namely, in accidents that cause a movement along the victim's utility curve, but not in those involving a shift displacing the victim to a curve situated at a lower level. As we know, a victim who suffers a serious personal injury with permanent impairment and other adverse effects on her health loses capacity to enjoy the goods and services that money provides. One can, to be sure, think of a teenager crippled as a result of an accident and think compare his ability to derive «utility» spending money on goods and services, and above all, to enjoy doing so before and after the accident. In other words, the accident displaces the victim from his/her previous utility function to a lower one, with less marginal utility. Given the assumption of risk-aversion, not even this last assumption of decreased marginal utility is necessary in order to cause money to loose its full restorative function.

The goal of full compensation and an open system of determining it seem to belong together in traditional liability systems. Far from solving the problem, such combination generate a paradox. At first, a generic legal principle of full compensation pass on to Judges the task of finding the amount of money to restore the victim to her pre–accident status. But then those Judges and Courts are left with no guidelines to appropriately measure monetary compensation. The paradox consists on entrusting to the Judiciary an errand they cannot perform. At least, this is how things happen in Spanish positive law as interpreted by the Supreme Court.

> In fact, Spanish tort law is built upon a principle of full compensation: arts. 1.106 and 1902 of the Civil code of 1889; 100 of the Law of Criminal Prosecution of 1882; 109 of the Criminal Code of 1995. Even the principle is hesitantly stated by the seventh general rule of the valuation system introduced in 1995 for automobile liability and insurance: "The amount of pain & suffering compensation is the same for all victims. The purpose of compensation for psychophysical harm is understood as to completely restore the victim's right to health..."
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> The Spanish Supreme Court (hereinafter, SSC) decisions provide clear examples of the necessary union between open evaluation and full compensation, based on the erroneous view of the first as a prerequisite for the second. Take, for instance, the SSC First Chamber's Decision, of March 26, 1997. The case involved an automobile accident damage claim of 10,428,000 pesetas against the City Council of Palma del Condado. The claim was rejected on April 20, 1992. The Court of Appeals of Huelva, on March 1, 1993, partially reversed the decision that sentenced the defendant to provide a damage award of 2,250,000 pesetas plus interest (without directly including litigation costs). The SSC rejected the defendant's appeal and stated the following:

> "[T]he valuation of damages, in presence of serious personal injury or death, is not subject to statutory provisions of any kind, but left entirely to the Court's own discretion... the *ad hoc* calculation of compensatory damage in every particular case belongs to the core of jurisdiction. Judges shall determine damage awards case by case on an *ad hoc* basis, freely taking into account all the evidence brought to them and without being subject to any legal provision whatsoever."
>
> Consequent to it, in order to avoid the immediate increase in litigation arising from the lack of objective criteria in this field, the system voids this cases access to the Supreme Courts, and even limits the Court of Appeal's –Audiencias Provinciales– chance to revise the amount set in First Instance. After all it is consistent with landing judges with the task of compensating pain & suffering, to assure total conceal. That is the way to preclude appeals, no matter what's been done. Reasonable and founded appeal is not possible in absence of any accepted tools for calculating damages but the Judge's own intuition.

Side effects. Resulting problems of Variability. Arbitrariness results from this combination of full compensation assigned to the Judiciary with no other tools but open and unlimited discretion: damage awards vary unpredictably, producing the following problematic effects:

1. Inadequate compensation arising from either underestimation or overestimation of damages.
2. A distorted deterrence signal sent to potential injurers.
3. An increase of the liability system's costs, particularly litigation costs aimed to search for a liable party.
4. Payments take longer and in the end, fewer victims finally receive any sort of compensation.
5. An increased malfunctioning of the insurance market with resulting problems of cost and availability of insurance coverage.

- ***An Attempt to Systematize Possible Solutions***

Unlike some of its proponents hold, scheduling damages is just one among the broader menu of possible solutions to the problem described above.

The compensation system initially reacted to its problems of variability and increasing awards by setting quantitative limits –caps– and qualitative limits for compensatory damage –excluding non–pecuniary, etc-. A well-known example is of the professional liability of doctors in the seventies (PRIEST, 1987). The current schedule is in fact a refinement of those caps and ceilings. A single compensatory cap quickly proved to be way too limited if applied horizontally to all levels of harm, especially considering the variety of possible circumstances surrounding the victim's state after the accident occurred. Therefore, different caps were developed for each major type of damage. A fatal accident is not the same as one that seriously injures the victim; just as one in which the victim is the father of a large family, is not the same as one in which the victim is a newborn. The factors used to determine an appropriate damage award were gradually differentiated by everyday case–law. With the arrival of more sophisticated data analysis techniques to this field, models became capable of identifying

categorizing variables directly related to the amount of a damage award for each group of similar cases.

James F. BLUMSTEIN, Randall R. BOVBJERG and Frank A. SLOAN (1989) made one of the most important contributions in this direction. They apply standard methods of regression to a broad database and determine the relevance of the two following variables: seriousness of injury and victim's age. The amount of pain & suffering damage awards can be systematized on grounds of these two variables either by using mean values or intervals for each significant level. The results are reasonably satisfactory –the model accounts for 62% of the variation in pain & suffering damage awards–:

Seriousness of injury	**Victim's Age**					
	0–10 years	**10–17years**	**17–35 years**	**35–50 years**	**50–65 years**	**Over 65 years**
1,2	2	4	5	3	6	2
3	4	9	10	7	12	5
4	5	9	11	7	13	5
5	7	14	16	11	20	8
6	30	61	68	48	88	35
7,8	199	401	448	317	574	228
9*	87	176	197	139	252	100

**See the cited reference for an explanation of the nine levels of damages.*

Schedules are not a panacea nor they exhaust the menu of remedies. There are other possible solutions to the problem of calculating damage for personal injuries. For example, some countries have taken a more drastic measure of replacing the former liability system instead of reforming it.

This has led to the development of new alternative systems to the one of liability that seem to perform faster and less costly than traditional compensation under Tort Law. The new systems concentrate in efficiently providing the victim with fast compensation, whereas deterrence objectives lose profile. In addition, they relocate the deterrence function of Tort law to a broader area of Accident law. The savings generated from the new system's ability to compensate victims more quickly and efficiently could serve to finance alternative forms of regulation and investment in infrastructure, or "public remedies," in the terminology of Prof. SHAVELL. The alternatives to the liability system differ significantly from one each other but are all included under the term «no–fault plans» in the literature. The common element among these systems is the substitution of the central role casted the tortfeasor as liable, and therefore subject to provide the victim a monetary relief. In no–fault plans whether or not the injurer is liable becomes secondary in favor of either insurance coverage, or in the purest, a wider «area of

risk». In other words, a large group of people and organizations jointly absorb the likely harmful effects of accidents that occur in their area of influence, assuming the duty of compensating the victim for her losses.

The extent of distribution of the anticipated cost of accidents and the secondary role left to the tortfeasor are themselves good criteria on which to draw a classification of such no-fault alternatives.

1. Pure no-fault systems of compensation (New Zealand, since 1974; Quebec, since 1978; or Northern Territory of Australia) have the most direct compensation mechanisms. Awards are calculated based on lost profit and medical costs, while excluding awards for pain & suffering is usual. In exchange for it, the victim may not file liability claims for recovery against the injurer except in cases of gross negligence or malice.

2. Threshold systems fall in the gap between traditional liability and no–fault, yet with greater resemblance of the latter. At a level below the established minimum threshold of harm, one may only receive direct payments from the no-fault scheme. If, and only if harm is above the threshold, may the victim be entitled to recover a damage award from the injurer. Those thresholds may be qualitative (Ontario, Canada; Michigan, U.S.A.) or quantitative (Connecticut, Utah or Minnesota, U.S.A.).

3. Add–on systems (Saskatchewan, Canada, since 1946; most of the U.S.; Victoria and Tasmania, Australia) fall closer to liability schemes, since the victim is allowed to receive a combination of direct payments and pursue a liability claim against the injurer. This is the most modest among direct or no-fault systems given the coexistence of these two options and the small legal payments.

4. Elective systems (Kentucky, New Jersey or Pennsylvania, U.S.A.) grant the victim a choice between liability and no-fault remedies. Within the no-fault system, one may also choose between an additive or threshold scheme, and between a monetary or qualitative threshold.

Tort Law as a continuum of alternative legal policies. The actual name given to a policy alternative is obviously less important than its content and performance. What is really crucial is to have a reasonably clear idea of the possible compensation alternatives, and in some cases, of their relative ability to deter potential injurers. This is the main advantage in referring to «Tort Law» instead of «liability system» with a broader perspective, it becomes clear that although the second term –*«responsabilidad civil»*– is the one broadly used in the Spanish legal system, it does not account for all of the legal alternatives to compensate and deter the social costs derived from accidents.

SYSTEMS	Liability		No-fault Compensation	Pure Subsidy
	Negligence	Strict		
REQUIREMENTS	Negligence – inadequate level of care– Causal Link Harm	Causal Link Harm	Area of Risk or Type of Occurrence Harm	Necessity, scarcity or adverse situation
EXAMPLES	General Rule of 1.902 Civil Code	Defective Products, traffic, aviation, nuclear energy, hunting, 106.2 of Spanish Constitution	Work-related accidents. Similar to subsidy systems: Compensation Funds	Non-contributive payments: public services, such as, poverty, educational and health.
Who pays (or accepts the risk)	Injurer´s assets		Group members or all taxpayers	

- ***The Importance of Empirical Data in a Normative Analysis***

Therefore, when it comes to choosing a policy or a set of policies to control the risk of accidents, the legislator enjoys a significant amount of leeway. A number of very different Tort law reforms have been proposed during the last five decades. Some proposals have been adopted and applied during the last several years, if not decades. Additionally, given that New Zealand and a large part of the U.S. abandoned their former liability systems, scholars have had ideal conditions to measure and evaluate the new scheme's effects compared with the former liability system. New studies should take advantage of this information in order to improve social welfare. The studies by Rose Anne DEVLIN (1990 and 1992) and James KAKALIK and N. PACE (1986) are key references in this direction for their conscientious effort on measuring reality. Data becomes essential if we are to investigate and compare the alternatives in order to determine which one most successfully fulfills our objectives, whatever those are - compensation, deterrence and justice –in the sense of corrective justice mentioned by DEWEES *et al.* (1998).

The frame of evaluation. Therefore, the question of whether schedules are the best solution is answered by matching their performance against alternative systems. This task requires to come down to the ground and deal with available data, as well generating new sets of informatione where there's none. Then one can assess previous effects and predict future ones comparing the available regulatory alternatives. The comparison should consider the following among other dimensions for each alternative that would likely be affected by the change –think of the most common case, an abandonment of a liability system bound for a no–fault scheme–:

1. Loss of Deterrence: How many accidents did liability avoid?

2. The system's administrative: To what extent can such costs be reduced?

3. Delay: How long does it take for a victim to receive actual compensation?

4. Scope of compensation: How many and which victims are reached by the system?

5. Insurance cost savings: is the cheapest insurer the one subscribing an insurance policy?

Gathering the necessary data on this topic with sufficient desegregation is not easy. But assesing the overall effect of each dimension is an mostly an empirical question. Therefore, where data are not already available an effort must be done to set about gathering or generating new data on the subject. There is a considerable amount of related published information. The RAND Corporation's publications are noteworthy compared to the general lack of awareness on the subject:

a) We must determine whether the savings accumulated in points 2 to 5 above compensate the loss incurred in point 1.

b) In addition, we need to investigate whether regulation and building on infrastructures may be alternatives for risk control. If they are superior and have a comparative advantage, then the savings generated from abandoning the current liability system should be addressed to finance them.

We will not reproduce the abundance of available information on the topic. As a starting point, let us refer to a more in depth study recently published by the author (PINTOS 2000).

- ***Conclusion and Scope***

Full compensation is a good **partial** criterion in Tort law but is not its primary objective, either for its deterrence or compensatory function. It is a good criterion for the compensation of pecuniary damage but is not applicable on the same basis to pain & suffering. There are well developed economic and actuarial techniques that are capable of applying the criterion to some levels of damage –namely «economic» or «pecuniary» losses.

In a whole, schedules are a good solution indicated for situations with high variability. Therefore, Courts should calculate pain & suffering damage awards based on a schedule's guidelines, since the Legislative has comparative advantage over the Judiciary in doing so. In a first stage of reform, Courts should at least be responsible for the consequences of their own approach and previous assesment of damages in similar cases. This may be achieved with simple calculation techniques –of regression– and by always requiring the judge to fulfill the following two relatively simple obligations:

a) The part corresponding to pain & suffering should be specified separately from the rest of the damage award.

b) Identify the most relevant factors in the determination of a pain & suffering damage

awards, namely those regarding age, victim's and defendant's personal, labor and family circumstances, type and seriousness of injury, after-effects...

This first step would be a significant improvement compared to the actual chaotic situation because the judge's valuation would not be made dependent on any exogenous, but the Judges previous own criteria. Therefore, it should not raise critical constitutional problems because Courts essentially are bond to rely on their own precedent. Lastly, the Spanish Supreme Court would have the right to modify its prior decisions.

The former suggestion would also serve to minimize errors caused while assessing lost profits in the most difficult cases –children, redundant– which are less clear and involve the germ of increased variability. The determination of the lost income of a victim who was unemployed, for example, of a student, requires a more structured approach that schedules can easily provide without undercutting the accurate adjustments to partially available information, say as a *iuris tantum* rule, and without high processing costs. Specifically, the formulas and parameters used to discount for the net value of lost income are general enough to be easily included in statutory provisions. The most precise solution would be to determine the appropriate level of lost income based on each victim's particular circumstances. However, since this is not always possible, the system should have parameters for integrating victims who were not previously employed. The commonly accepted analysis is based on objective reference criteria. For example, the *per capita* income in a region, which can easily be incorporated into legal provisions, which by large exceeds a Judge's own personal estimation.

Free will, or contract arrangements can *ex* ante solve for some of the aforementioned problems, particularly in accidents arisen within the scope of a previous contractual relationship. Those involved may have incentives to decide on their preferences for insurance coverage levels and on who should accept the risk in exchange for a price adjustment of the risky good or service –Paul H. RUBIN (1993)–; because there is room for improvement in a hypothetical «market of compensations» or «back-insurance» –David FRIEDMAN (1982)–. This market would allow anyone exposed to risk to place his/her money according to individual preferences between the «prior» and «after» suffering accident states of the world.

On the other hand, the legal system plays a much more determinant role allocating rights and costs on behalf of higher transaction costs of accident cases involving victims and tortfeasors who do not have previous contractual arrangements, that is, who have not had the chance to negotiate *ex ante*. Particularly relevant in this situation is the amount awarded for pain & suffering, with a body of literature proposing it not to be compensated.

As stated before, BLUMSTEIN, BOVBJERG and SLOAN'S (1989) contribution tells us "what judges have done until now." And to that extent, their study beats an open-evaluation system of pain & suffering, but it comes short when it comes to answering the question fundamental questions placed at the very start of this paper. Further foray in that direction might come from the literature on the monetary value of life.

Does this mean that a life or one's physical well being cannot be calculated in euros or that it is infinite? The problem is probably related not so much to the object to be measured, as to the measurement method we use for it. Cost-benefit analysis deals with the valuation of goods

lacking a direct reference point in the price system, and therefore is a starting point. The willingness to pay method (WTP, hereinafter) has a key advantage in the calculation of pain & suffering. Its adoption of an *ex ante* evaluation criterion precedes the harmful event, thus avoiding the problems derived from the victim's decreasing marginal utility of income and risk-aversion. The abandonment of the *ex post* approach suggests that what is really being valued is the exposure to risk. This therefore supports the idea that the focus of compensation should be set on expected damages rather than damage actually caused. However, this leads to the question of whether a damage award could also be anticipated.

From a theoretical standpoint the issue may be easily solved. If the criteria used to value damages was the answer to ***«how much is a victim willing to pay to avoid risk?»***, then the potential injurer should pay and be considered liable from the moment that he/she exposes the victim to risk, though actual harm has not yet been actually caused. That underlies the idea that being exposed to a certain risk of suffering an accident is, in its own terms a damage itself. This solution should also allow potential victims to distribute their income through the insurance market before and after the accident, may it occur, and eliminates the problem of discounting for risk-aversion for both the victim and injurer.

Nevertheless, the *ex ante* application of a similar compensatory system involves so many problems related to the prediction and valuation of risk that it results impossible in practice. David FRIEDMAN (1982) proposes a variation in pages 81 to 93, in which the compensation is paid after the damage is caused but the money has been collected beforehand.

Leaving further refinements aside for now, the core idea remains simple: it stems from our assignment of a monetary value to small differentials on the risk of death involved in situations we encounter in our daily lives. Furthermore, two types of such scenarios may be distinguished. In the first, one buys security, that is to say he pays a certain amount of money in exchange for reducing a risk. For example, whenever one installs a smoke detector in a house, puts an airbag in a car, or buys a more expensive plane ticket with a new and modern fleet. In the second, one accepts money (mainly as wages in the employment market) in exchange for agreeing to take part in more dangerous activities. For example, a professional soldier who joins a unit of immediate intervention, a test pilot, a transporter of dangerous materials, a miner, a trapeze artist, or a bullfighter. These approaches are each referred to in published materials as WTP – willingness to pay– and WTA –willingness to accept.

All of these situations lead one to believe that the value of life is not infinite or "priceless." If this were the case, nobody would voluntarily risk his/her life in exchange for money, which is something that routinely and more important, knowingly happens. The method artificially reconstructs, through a linear extrapolation, the total value implicitly assigned to life each time that we take a small risk and *vice versa.* This is simple because one only needs to know how much the activity in question increases or decreases the risk of death and how much was paid or accepted in exchange. For example, if an airbag costs 1,300 euros and prevents one in every thousand deaths, then the estimate implicitly places the value of such an airbag purchaser's life at a minimum of 1,300,000 euros. For a general presentation, see: *"The Price of Life,"* The Economist, *December 4, 1993, pg. 76.*

The problem is one of compatibility of the results thus reached to case law in torts. This kind of analysis was proposed by some researchers focused on the method's use as a valuation of social

cost or benefit, primarily for security regulation –see, Michael W. JONES–LEE and Graham LOOMES (1994). However, its use in the individual legal valuation of damages in Torts is objectionable because its current stage of development involves a high risk of uncertainty. Until the debate on this issue subsides, the courts will likely continue to consider it too speculative as a foundation for legal compensation. Most of the objections on the method's global feasibility are found in a debate in the *Journal of Public Economics* provoked after the publication in 1978 –a period when many works on the value of life were published–, from an article by Professor John BROOME (1978). Answers to the objections can also be found in: James M. BUCHANAN and Roger L. FAITH (1979), Michael W. JONES–LEE (1979) and Alan WILLIAMS (1979); and his reply in John BROOME (1979). The most disputed aspects of the propensity to pay method are the following:

1. The group whose preferences are observed by the method is not representative of the average citizen –buyers of high levels of insurance (in other words, with a high aversion to risk) or workers with high-risk jobs–. This is undoubtedly the case. However, an adequate consideration of both extremes may balance the flaws by generating a mean value representative of an average citizen. The individualization may also be desirable for potential victims that belong to well-defined risk groups; in these cases, a group survey may be used to establish common preferences. For example, see JONES–LEE AND LOOMES, on a study of the London subway's security measures.

2. The propensity to pay criterion is very sensible to the level of a victim's wealth. It does not pose a problem when assessing the social cost and benefit of a measurement because if there are many people affected and the sample is well designed, the sum of all the preferences may be used as a mean. On the other hand, if one needs an *ad hoc* estimate of the value of harm caused to a particular accident victim, then the estimate has to be adjusted according to the case's circumstances. Under these conditions, the propensity to pay method rather depends on the capacity to pay. This leads to new problems because according to our study –and as the spanish legal system explicitly precludes–, pain & suffering should not be dependent on income level, as opposed to lost profit.

3. The method used to derive the whole value of a life out of the valuation of small risk differentials is a linear extrapolation. This is based on a very restricted and not unanimous hypothesis: that of preferences being linear. Many authors argue that an individual's utility in terms of risk is not linear. Simply stated, nobody is willing to pay the same amount of money to reduce his/her risk of death from 100% to 75%, as to reduce it from 35% to 10%. The reasoning is clear: as the likelihood of a risk increases, so does one's WTP in order to reduce it, because money is worthless in the most probable case of death –Jennifer H. ARLEN (1985) and LINNEROOTH (1979)–. This problem was discussed at length in the debate held in a mailing list on the Internet in June 1995, with suggestions proposed by the professors KATZ, COOTER and RASMUSEN, among others.

The primary issue is whether the liability system should identify individual preferences of each victim in order to appropriately assess pain & suffering damages. COOTER points out that the construction of preferences is an expensive activity, at least in terms of time. Therefore, it may not be worthwhile to assess a victim's preferences concerning goods, such as his/her life or the lives of loved ones, which simply do not carry a preference. Also, according to KAPLOW AND

SHAVELL (1994), it is not always socially desirable to individualize the harm in each case. For example, that is the case when the parties involved do not know *ex ante* the extent of harm when they identify the circumstances that caused the risk. The conclusion strays from the common premise in the economic analysis of «classic» Tort law, although not as well accepted with regard to other areas, that deterrence is a fundamental objective of the liability system. Why spend more to individualize damage awards if a well calculated mean is just as effective as a deterrent?

What appears to be clear is that ***use has to be made of schedules in order to apply the literature on the value of life to tort cases and to push the valuation of pain & suffering damages a step ahead***. If it is not reasonable to individualize the harm suffered by each victim, and is not even desirable, we find ourselves under all of the circumstances in which the use of a schedule –a collection of mean damage awards representative of the most important factors used to determine a damage award– makes sense. A schedule does not eliminate the possibility of making mistakes in the legal valuation of damage suffered by a particular victim but when appropriately calculated it does compensate for the errors made in all cases. Initially, it fulfills some of a damage award's objectives – equality, legal certainty– and almost any advantage imaginable concerning liability's deterrence effect. A victim receives the mean amount of a pain & suffering damage award, which is a great improvement on the current arbitrary valuation process.

In general, the use of schedules involves an acceptance of the following type of error: some damage awards fall on either side of the schedule's central value (whether it is the mean, median, or mode). However, the damage awards that fall on one side of the value compensate those that fall to the opposite side if the schedule is well designed and unbiased. This loss is only acceptable when it is not possible to objectively individualize damage awards. For example, this occurs if one attempts to award a full compensation for pain & suffering without considering additional reference criteria.

Spanish Schedules: What is New and What Should be Studied

Schedules are broadly used in many areas of risk all over the world but the Spanish system is the only one I know of that where is binding as associated with a traditional liability system.

	LIABILITY	**NO-FAULT COMPENSATION**
BINDING SCHEDULE	Spain	Sweden, Denmark, United States, Canada, New Zealand, Australia
GUIDING SCHEDULE	Belgium, Germany, France, Italy, Greece, Great Britain, Luxembourg, Portugal and Holland	
NO SCHEDULE	Austria, Ireland	

Sources: MCINTOSH and HOLMES; DE ÁNGEL YAGÜEZ; STOLL, REGLERO; and HUGUES and TOMADINI.

The *Disposición Adicional Octava* of Law 30/1995, November 8, on Private Insurance Regulation, named the currently applicable Law of Liability and Insurance for car accidents, and included a valuation system for harm caused to car accident victims.

The most important feature of this new system is its binding character for the Judiciary regardless of the presence of liability insurance and of voluntary or minimum legal coverage. The judge only decides on the degree of bodily harm and uses the schedule as a guide according to the schedule's own relevance criteria. This includes information on the victim's seriousness of injury, age, and personal and family circumstances. The system is applied regardless of insurance status (compulsory or voluntary) except in the case of malice; and includes together as a whole both pain & suffering damage and lost profit, but not material damage or medical costs (which are awarded independently). Three types of damage awards are used in Spanish schedules –death, permanent injury or temporary incapacity- with three schemes of basic compensation, to which practically identical factors of adjustment are applied.

DAMAGE AWARDS IN THE SPANISH SYSTEM, 1995

	Death	**Permanent incapacity**	**Temporary incapacity**
BASIC COMPENSATION	CAP I: Number of victims, relationship to the deceased, age of deceased	CAP VI: Seriousness of injury, CAP III: Age	CAP V A): Hospital stay, with or without lost working days
ADJUSTMENT FACTORS	CAP II, IV and V B): Annual income and individual circumstances (preexisting handicap, only child, death of parents, pregnant mother and comparative negligence)		

This reform is the last step in the process begun in 1984 of creating tables for personal injury, in which a series of continually improved schedules only served as non–binding guidance criteria.

1984	Valuation of personal injury manual (applicable to permanent incapacity) derived from the damage awards of victims with war-related injuries
1987	Order of March 16, *Ministerio de Economía y Hacienda* for mandatory liability insurance.
1989	Regulation of the Mandatory Insurance –*Seguro Obligatorio* (R. D. 2641/89)–: Schedules with categories derived from those in Labor law. As guidance in the area of mandatory insurance.
1991	Order of March 5, of the Ministry of Economics, practically the same content as the current one. Effect: guidance for a «recommended use» and COMPULSORY only for the calculation of technical provisions for insurance companies.

The Spanish legal system's incentive to carry out the process of tabulation and the House of Commons incentive to give it a legal status is missing in 1995 Law, we simply ignore its motivations. Those have to be found in the cited Governmental Order of 1991. The schedule was initially presented by the *Exposición de Motivos* (Preamble) as a solution demanded by the "compensatory lottery" that was supposedly part of the Spanish system and was causing problems of excessive uncertainty and costs, and compromising the solvency of insurance companies.

Not enough emphasis, if some, was placed on an analysis of reality, known alternatives and possible consequences when schedules were created. Most of these tasks are still

unaccomplished, though still of social value after the law has been passed. This value relies on the possibility of making an objective comparison *vis a vis against* other possible solutions to the problem.

The situation reached in Spain that culminated in the eighties is comparable to that experienced by other countries in various areas of risk. It should not be surprising that damage awards have varied considerably, especially for automobile accidents. The problem of excessive variability was a product of the conditions prevailing in the Spanish legal system, which tried to obtain full compensation through a system of open evaluation. However, we have argued that this combination leaves Courts without criteria to assess compensatory damage and this results in a high level of variability in legal decisions.

Until now, the lack of data has kept us from completing this study with conclusive results. However, the information available points to the following conclusions:

- Damage awards do not seem to have risen disproportionately. Rather, most of its increase can be accounted for by the summation together of the historically reduced compensations combined with the convergence with the amounts set from the European Union.

- Insurance companies claim to have faced a judicial «compensatory lottery» though it has never been thoroughly measured or even empirically verified. The ratios confirm that variability existed but also suggest that it was not as unjustified or excessive as claimed. A simple comparison of variation coefficients does not yield significantly higher data than that computed by authors outside Spain.

- In the strong desire to place an upper limit on compensatory damages, schedule proponents took advantage of the confusion between variability and tendency to rise. However, these are separate problems that require separate solutions. Schedules are a good solution for variability but are too broad and excesive to control the rise of awards. Setting caps and ceilings as an upper limit would more effectively control this factor without side effects.

- The valuation system underestimates the harm caused to victims when assessing awards, which weakens the deterrence role of liability, as well as it undermines the goals of justice and compensation. Since the amounts set by the schedule for lost profit plus pain & suffering do not fully cover the former, more accidents can be expected in the future.

- The insurance industry continues to have the option of freely using contracts to adjust coverage levels or premiums. It's the car driver who's is required to be insured in Spain but companies are not forced to offer insurance, can choose their premiums and certainly do not have a must on unlimited coverage. The 1995 reform in Spain makes the unlimited coverage option a tricky one: no matter how much you pay in excess of you premium to assure unlimited coverage, this will irremediably be limited by law. This effect also isolates the Spanish insurance market from the rise of maximum limits set by the European Union.

- Based on preliminary data, the sector's variability and equilibrium levels have not improved significantly, nor have premium levels decreased since 1995. Spaniards may face a political stance of "bread for today and hunger for tomorrow." Demand will also decrease as the market begins to internalize the decrease on the magnitude of risk effectivle insured,

mainly of the system's upper limit and minimal uncertainty, respectively. The final result will be less business in a market whose demand depends on risk and uncertainty.

- We do not have data to adequately assess the reform's effect on legal costs but indexes show that the reduction of costs occurred before schedules were used in 1995. And though we have no concluding evidence of its relation to this reform, accident rates are beginning to raise importantly.

However, we do confirm that there are aspects of the reform that could and should be improved:

1. Lost earnings is subject to the corrective and indirect factors –Tables II, IV and V– even when information is available on its magnitude. This voids a precise and quick calculation of such damages against common sense, social desirability and tort law's basic principles and goals.

2. Pain & suffering should be separated from lost profit as different problems demanding so different sets of solutions. We cannot already distinguish between the part of compensation according to the schedule that corresponds to pain & suffering and that which corresponds to lost profit. Additionally, we do not know the source of the system's amounts, which are the same as those of the Spanish government order of 1991 and the «Informe Seaida». This legally consecrates a common and highly criticized Court practice that contradicts the resolution 75/7, March 14, of the European Counsel's Committee Members.

3. The legislative strategy is inadequate for the following two reasons. First, for encapsuling a reform that is such an central part of our liability system in the inside pockets of a regulation of the insurance market. Second, for including every detail on the use of schedules in the restrictive format of a Statute. The texture of the norm is inadequate. Precisely this mistake has brought the debate on the desirability of schedules at the doors of the Constitutional Court. As explained in PINTOS (1998), this generates the risk of a decision bringing us back to the variability existing prior to compelling pain & suffering awards to the rigidity of the schedulle.

The current focus for improvement should be a timely reform because a decision declaring schedules unconstitutional will force us back to where we started and would damage the advances made in the use of schedules for pain & suffering damages. On the other hand, an acceptance of the current system would perpetuate its serious errors and possibly extend them to other areas of risk, where both potential tortfeasors and their insurers are willing to benefit from cuts in their liability. Presently, the ingenious interpretations of the system threaten to reproduce the problem of variability that should be eradicated.

With all of this in mind, there's little doubt that a reform was clearly needed, but not this particular reform which was to great extend unjustified. Although the prior situation was bad –we have observed, however, that it had been exaggerated– the legislator should not assume that the numerous different types of compensatory damages should be grouped together under the conditions of a single schedule (which only some types of harm require).

More definite advances will be made if they are based, for example, on taking advantage of the skills developed to assess pain & suffering damages within a schedule. If a full compensation of lost earnings is also granted when possible, and statutory provisions only include the governing principles, these advances would be consolidated and others introduced, without a prohibitive cost. The achievements in the area of automobile accidents should be applied to harm caused in an accident of any type regardless of the scenario. In this way, once we overcome the errors currently caused by schedules, they will be good tools for the valuation, in general, of pain & suffering.

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