

## Restitution and Reform

By Barbara Massie Mouly

Much has been spoken and written about “tort reform.” This popular term refers to damage caps and other measures designed to limit the amount of damages in tort cases.<sup>1</sup> Tort compensatory damages typically include payments for lost wages, medical expenses, and pain and suffering. Damages for lost wages and medical expenses, often called “economic damages,” are documented with numerical proof such as wage statements and medical bills. Damages for pain and suffering, often called “non-economic damages,” are typically documented by testimony of the injured person, by testimony of others who have observed the injured person, by physical evidence such as photographs, and sometimes by demonstrative evidence presented in a “per diem” closing argument.<sup>2</sup>

A state legislature should understand the purpose of tort damages if it undertakes to reform tort law with damage caps. The traditional purpose of compensatory damages in tort cases is restitution: to restore the injured person to the position he was in before the injury, to the extent that money damages can do so.

A biblical basis for damages when one person injures another is found in the laws given to the nation of Israel in the Old Testament. There, the law provided that the person who strikes another and injures him “shall . . . pay for the loss of his time, and shall provide for him to be thoroughly healed.”<sup>3</sup> The Hebrew word for “healed” in this scripture is *rapha*, which can be translated variously “to mend, to cure, to cause to heal; physician; repair, repair thoroughly; make whole.”<sup>4</sup> *Rapha* speaks of a complete restoration in that its meaning conveys a thoroughness of the healing, and a result that is “whole.”

The law in this scripture required the person who caused injury to another to pay the injured person for lost wages and for damages such as medical expenses. Whether this law also required payment for physical and emotional pain resulting from the injury is not specifically addressed in this scripture. However, the concept of “thorough healing” arguably encompasses both physical and emotional healing.

The scriptures describe God as a great healer. Because *rapha* can be both a noun and a verb, one of its meanings is that of “physician,” the person who works to heal another.

*Rapha* is found at Exodus 15:26, in the context of God identifying Himself to Israel as “the Lord who heals you.” The scriptures contain numerous other examples of the use of *rapha*, portraying God as a healer. David recognized this aspect of God’s nature when he cried out, “O Lord, heal me, for my bones

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<sup>1</sup> See, for example, Va. Code Ann. 8.01-581.15 (damage cap on medical malpractice verdicts); Md Cts. & Jud. Proc. Code Ann. 11-108 (damage cap on non-economic damages). Other statutes cap punitive damages. See, for example, Va. Code Ann. 8.01-38.1 (damage cap on punitive damages in all types of cases). This article addresses compensatory damages.

<sup>2</sup> A typical “per diem” argument suggests a numerical dollar amount for a day of pain and suffering and then multiplies that amount by the number of days the pain and suffering has lasted and is expected to last.

<sup>3</sup> Exodus 21:19. Scriptural references are to the New King James version of the Bible unless otherwise indicated.

<sup>4</sup> The New Strong’s Exhaustive Concordance of the Bible, Hebrew and Chaldee Dictionary, 110 (1984).

are troubled.”<sup>5</sup> Jeremiah also pleaded with God: “Heal me, O Lord, and I shall be healed.”<sup>6</sup> Jeremiah later conveyed a promise from God to Israel: “For I will restore health to you and heal you of your wounds.”<sup>7</sup> Hosea, speaking of God’s dual roles of judge and healer, said, “For He has torn, and he will heal us.”<sup>8</sup> Isaiah, prophesying of the suffering and death of Jesus, said, “And by His stripes we are healed.”<sup>9</sup>

While Jesus was operating in his earthly ministry, He performed extraordinary works of healing. “He healed many who were sick with various diseases. . . .”<sup>10</sup> He was the great Physician (Rapha) who demonstrated in a miraculous way the manifestation of God’s healing power.

Closely related to God’s work of healing is His work of restoration. Joel, prophesying at a time when Israel had been ravaged by other nations, spoke on God’s behalf this promise to the nation: “I will restore to you the years that the swarming locust has eaten . . . .”<sup>11</sup>

An essential part of God’s nature, then, is to be a healer and restorer. Therefore it stands to reason that he would expect us to heal and restore when we have caused injury to others.<sup>12</sup>

However, the scriptures also speak of fairness in the measure of things. For example, one proverb states that “honest weights and scales are the Lord’s.”<sup>13</sup> The measurement of pain and suffering damages is necessarily quite subjective and susceptible to conjecture. The difficulty in measuring pain and suffering has the potential to produce distortion and dishonesty in presenting evidence of pain and suffering in tort lawsuits.

The command to make restitution for harm caused is certainly not an invitation to injured persons to skew the evidence of their damages so as to gain more than they deserve. And it certainly does not excuse frivolous or fraudulent claims for pain and suffering. Reports of such tactics and claims fuel the fire for “tort reform,” that is, legislative action to curb excessively high damage awards.

In the discussion of possible measures to achieve reform, legislators should not overlook the crucial role that judges play in overseeing evidence at trial and in reducing damage awards. Judges have the responsibility to regulate highly inflammatory evidence of pain and suffering by excluding evidence that is more prejudicial than probative. Judges also have the discretion to refuse to allow the “per diem” argument in closing arguments at trials. Perhaps a more strict exclusion of “per diem” evidence in the

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<sup>5</sup> Psalm 6:2.

<sup>6</sup> Jeremiah 17:14.

<sup>7</sup> Jeremiah 30:17.

<sup>8</sup> Hosea 6:1.

<sup>9</sup> Isaiah 53:5. This verse is part of a set of verses about the Atonement. One result of the Atonement is healing from the wounds caused by sin.

<sup>10</sup> Mark 1:34. In the first eight chapters of Mark, God’s nature as a healer is displayed through numerous miracles of healing.

<sup>11</sup> Joel 2:25.

<sup>12</sup> One verse in the New Testament exhorts believers in Jesus to “be imitators of God, as dear children.” Ephesians 5:1.

<sup>13</sup> Proverbs 16:11.

court room would alleviate the need for legislative action to regulate pain and suffering damages.<sup>14</sup> Furthermore, judges have the power to reduce excessive damage awards in individual cases, using the procedural device of remittitur. Perhaps a more rigorous use of remittitur in specific cases would alleviate the need for damage caps in all cases.

In deciding whether to create damage caps, legislators should carefully consider both the requirement for restitution and the need for fair and honest measures of damages. Legislators should discuss whether judicial methods of controlling unfair damage awards are adequate, before imposing a cap on all awards.

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<sup>14</sup> See Joseph H. King, Jr., "Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages," 71 Tenn. L. Rev. 1 (2003).