

# **CHARGING THE JURY ON DAMAGES IN PERSONAL-INJURY CASES: HOW NEW YORK CAN BENEFIT FROM THE ENGLISH PRACTICE**

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## I. INTRODUCTION

The trial of a personal-injury case to a jury is fraught with uncertainty. Uncertainty stems from whether the plaintiff will prevail (and whether the jury will find the defendant at fault) and the amount of damages. Personal injuries, such as a broken ankle or a busted knee, do not translate well into specific dollar awards. Awarding a sum of money for a personal injury is firmly rooted in the law and is the only means available to compensate the plaintiff for a loss. These means are entrusted to the jury beginning at jury selection and continuing throughout the trial.

Several consequences stem from the inability to translate a personal injury into a specific dollar award. The first consequence is that plaintiffs with roughly comparable injuries may receive less or more damages than others who are similarly situated due to the propensity of juries in one region to make either less or more generous awards. But there is little justification to support awarding either less or more compensation for an injury just because the claim is brought in one part of the state instead of another.

Further, awarding unequal compensation for what is essentially the same injury does not make sense from an institutional viewpoint. Indeed, any significant variability in the award of damages may make the settlement of claims more difficult, especially when dealing with plaintiffs (and their lawyers) willing to run the risk of an adverse verdict for the chance at a generous damage award. Moreover, a system in which the prospect of an award of damages that is disproportionate to the injury sustained does not promote the fair and efficient resolution of

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claims.

Currently, trial lawyers may address the jury on the amount of damages that it should award. These submissions provide the jury with some guidance on what is fair and just compensation for the injuries claimed in the case. But these submissions are not enough. The trial judge also should suggest to the jury what is reasonable compensation for the plaintiff's injury, albeit by giving the jury a band or range within which awards would be fair and just compensation.

The range method is currently used by English courts in defamation and other civil cases tried to a jury. As applied in England, the process results in juries making like awards for like injuries in like cases and thus smoothes out the variability inherent in different juries' making awards in different cases involving what is essentially the same injury. New York trial judges should apply the English approach to the trial of personal-injury cases and give the jury a bracket within which it may make an award of damages.

## II. NEW YORK PRACTICE IN CIVIL CASES

The right to a trial by jury in a civil case is governed by the New York Constitution, which provides that "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."<sup>1</sup> The New York Civil Practice Law and Rules also governs and provides that the "issues of fact shall be tried by a jury" in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only."<sup>2</sup> These provisions cover the trial of almost all personal-injury negligence claims in which equitable relief is not requested because they inevitably seek a "sum of money only."<sup>3</sup>

The vast majority of personal-injury cases in New York are decided by a jury. But they are not tried in such a way that the jury receives any meaningful guidance on what the plaintiff's personal injury is worth. Instead, it receives direction on the plaintiff's lost earnings, medical expenses, or other financial losses.

### *Instructing a Jury on Damages in a Typical Personal-Injury Case*

The trial judge's instructions to the jury, in a typical personal-injury case, provide the jury with no real guidance on the amount of

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1. N.Y. CONST. art. I, § 2; N.Y. C.P.L.R. 4101[1] (McKinney 1992).

2. *Id.*

3. N.Y. C.P.L.R. 4101 (McKinney 1992).

damages that should be awarded solely for the plaintiff's injury. Typically, a charge on damages begins with the admonition that the instructions on "damages must not be taken as a suggestion that [the jury] should find for the plaintiff."<sup>4</sup> The trial judge then tells the jury, "If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries [he] sustained."<sup>5</sup>

In the usual case, the injury claimed by the plaintiff will have caused pain and suffering. The judge will instruct the jury as follows:

If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate [him] for any injury and conscience pain and suffering to date caused by defendant. Conscience pain and suffering means pain and suffering of which there was some level of awareness by plaintiff.<sup>6</sup>

If the plaintiff has testified to a loss of enjoyment of life, the trial judge will supplement the charge with further instructions.<sup>7</sup>

The jury will not be told what the plaintiff's injury is worth. In closing arguments to the jury, attorneys may suggest what amount of damages should be awarded.<sup>8</sup> But the suggested amount of damages must fall within the amount demanded in the complaint and must not misrepresent the way in which the jury should arrive at its award.<sup>9</sup> This is the extent of instruction the jurors will receive on the value of an injury.

Absent guidance on what an injury is worth, it is not surprising that part of a civil case is devoted to whether the jury's award is either inadequate or excessive.<sup>10</sup> This examination of fair and just compensation for the claimed injuries occurs only after the jury has returned its verdict. By instructing the jury on a permissible range of awards, jurors are able to make an informed decision that more

4. Pattern Jury Instructions 2:277 [hereinafter P.J.I.].

5. *Id.*

6. P.J.I. 2:280.

7. P.J.I. 2:280.1.

8. *Tate v. Colabello*, 445 N.E.2d 1101, 1103 (N.Y. 1983); *Baker v. Shepard*, 715 N.Y.S.2d 83, 86–87 (App. Div. 2000).

9. *Acunto v. Conklin*, 687 N.Y.S.2d 779, 781 (App. Div. 1999). See *Stangl v. Compass Transp.*, 635 N.Y.S.2d 376, 378 (App. Div. 1995) (stating that trial counsel may not suggest "that the measure of damages should be based on the jurors' experience and financial status"); *DeCicco v. Methodist Hosp.*, 424 N.Y.S.2d 524 (App. Div. 1980) (asserting that counsel may not use time-unit argument).

10. See David D. Siegel, *New York Civil Practice* § 407 (3d. ed. 1999).

accurately corresponds to the injury sustained by the plaintiff.

*Review of Jury Awards under Section 5501(c) of the Civil Practice Law and Rules*

Judicial review of the inadequacy or excessiveness of a jury's verdict in New York is conducted indirectly. The right to a jury trial in actions at law is guaranteed by the New York State Constitution.<sup>11</sup> To protect the right to a jury trial, a court reviewing a jury's award of damages for inadequacy or excessiveness may not alter the amount.<sup>12</sup> Instead, the court's sole power is to grant a new trial unless, as the case may be, the defendant stipulates to an increased award or the plaintiff stipulates to a decreased award.<sup>13</sup> Absent such a stipulation, the court is limited to granting a retrial.

Requiring consent to either an increase or a reduction in a jury's award of damages as a means of preserving the right to a trial by jury is close to a legal fiction. Were a party to refuse to consent to the increase of an award against it (or the decrease of an award in its favor), the party would be forced to retry its claim. If the second jury were to make the same award, the court would grant another trial, absent a stipulation to the greater or lesser amount already set by the court. If the second jury returned a different award, the court likely would grant a new trial if the award was less (or more) than the amount previously stipulated by the court.

A defendant, or plaintiff, faced with an order granting a new trial, unless it stipulates to an increased (or reduced) award of damages, has every incentive to agree to the stipulation. Moreover, a party that is dissatisfied with the trial judge's conditional order granting a new trial runs a risk by taking an appeal. In the event that either party appeals, the appellate division may reinstate the jury's award or decrease the award to an amount not less than that in the verdict.<sup>14</sup> The traditional rule in New York was that a court could not set aside a jury's verdict on damages unless the jury's award was so inadequate or excessive as to

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11. See N.Y. CONST. art. I, § 2.

12. Siegel, *supra* note 10, at 658. ("[T]he court cannot raise or lower the sum directly, at least not in personal injury and like cases involving unliquidated damages, because the setting of damages is strictly a jury function").

13. *Id.* ("[T]he court can grant a new trial 'unless' the defendant stipulates to a higher sum ('additur') or the plaintiff stipulates to a lower one ('remittitur').").

14. N.Y. C.P.L.R. 5501(a)[5] (McKinney Supp. 2003) ("[W]hen the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict").

“shock the conscience of the court.”<sup>15</sup> The practical effect of this standard was that a jury’s award of damages would not result in granting of a new trial unless the award greatly exceeded (or fell below) any award that a reasonable jury might return. Court-ordered changes to juries’ verdicts did occur, however seldom.

Recognition in the early 1980s that juries were awarding damages out of proportion to the injuries sustained in personal-injury and similar tort actions led the New York Legislature to alter the standard under which a court determined whether an award was either inadequate or excessive.<sup>16</sup> The former shocks-the-conscience-of-the-court” standard was replaced in 1986 by a statutory command that in personal-injury (and some other) actions “the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.”<sup>17</sup> The statute as drafted only empowered the appellate division to test the inadequacy or excessiveness of an award by asking whether it deviated materially from reasonable compensation.<sup>18</sup> Courts soon construed the new statutory standard to apply to trial courts to avoid the anomalous situation in which the trial judge would apply a different standard from the appellate court in reviewing the adequacy of a jury’s award.<sup>19</sup>

The legislative change in the standard of review did not affect the procedure that the court used to review the adequacy of the jury’s award. The court could not substitute what it thought was a proper award for the jury’s verdict. The court was limited to granting a new trial unless, in the case of an inadequate award, the defendant stipulated to an increased sum; or, in the case of an excessive award, the plaintiff stipulated to a reduced award.<sup>20</sup>

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15. See *Christopher v. Great Atl. & Pac. Tea Co.*, 565 N.E.2d 1266 (N.Y. 1990).

16. See Memorandum of Governor Cuomo on Approving L. 1986, ch. 682, reprinted in 1986 N.Y. Laws at 3182, 3184; see also Memorandum of Office of Court Administration on Law 1986, Toxic Torts Statute of Limitations, ch. 682, reprinted in 1986 N.Y. Laws 3392.

17. N.Y. C.P.L.R. 5501 (McKinney Supp. 2003). Strictly speaking, the legislation applied to cases “in which an itemized verdict is required by rule forty-one hundred eleven” of the C.P.L.R. *Id.* Rule 4111, in turn, requires an itemized verdict in medical, dental, and podiatric malpractice actions, in actions against public employers, and in actions to recover damages for personal injuries, property damage, and wrongful death. *Id.* at 4111(d)–(f). So review of damages awards by juries in those actions is subject to the deviates-materially-from-reasonable-compensation standard. *Id.*

18. C.P.L.R. 5501(c).

19. See, e.g., *Ashton v. Brobruitsky*, 625 N.Y.S.2d 585, 586 (App. Div. 1995); *Ramos v. New York*, 565 N.Y.S.2d 68, 69 (App. Div.), *appeal dismissed*, 577 N.E.2d 1060 (N.Y. 1991).

20. See, e.g., *Ashton*, 625 N.Y.S.2d at 587.

The legislative change in the standard of review for jury awards in personal-injury actions resulted in less reluctance by the courts to determine the reasonableness of a jury's award of damages. *Baker v. Shepard* is typical of hundreds of cases.<sup>21</sup> In that action, the plaintiff, a passenger in a car, sued to recover damages for personal injuries sustained in a motor-vehicle accident.<sup>22</sup> The plaintiff claimed that she "sustained a left humerus fracture that was slow to heal, cervical strain of the neck, impingement syndrome of the shoulder causing pain and a deformity that prevented her from fully extending her arm."<sup>23</sup> The jury found the defendant at fault and awarded the plaintiff \$7500 for her past pain and suffering but made no award for future pain and suffering.<sup>24</sup> The plaintiff moved to set aside the verdict, and the trial judge ordered a new trial to determine the plaintiff's future pain and suffering.<sup>25</sup>

On appeal, the Third Department rejected the defendant's contention that the trial judge improperly set aside the jury's verdict for future pain and suffering.<sup>26</sup> It reviewed the unopposed medical testimony presented by the plaintiff's physician and concluded that the jury's failure to award damages for future pain and suffering deviated materially from what would be reasonable compensation.<sup>27</sup> Though the court could have substituted an award for the jury's failure to make one, it did not.<sup>28</sup> The Third Department also held "that the jury's award of \$7,500 for past pain and suffering did not deviate materially from what would be reasonable compensation."<sup>29</sup>

### *The Body of Judicial Evaluations of Personal-Injury Awards*

Since the legislature's amendment of the Civil Practice Law and Rules to provide for closer judicial scrutiny of awards by juries in personal-injury cases, the courts have decided many cases involving the inadequacy or excessiveness of monetary awards. Several publishers collect these decisions and make them available by subscription.<sup>30</sup> By reviewing the decisions of the appellate divisions, it is not difficult to

21. *Baker v. Shepard*, 715 N.Y.S.2d 83 (App. Div. 2000).

22. *Id.* at 84–85.

23. *Id.* at 86.

24. *Id.* at 85.

25. *Id.*

26. *Baker*, 715 N.Y.S.2d at 86.

27. *Id.*

28. C.P.L.R. 5501(c).

29. *Baker*, 715 N.Y.S.2d at 86.

30. See New York Jury Verdict Reporter (Moran Publ'g Co.) (published weekly) and New York Judicial Review of Damages (Moran Publ'g Co.) (published monthly).

place an upper and lower limit on the damages that might be awarded for any personal injury.

For example, the First Department ordered a new trial in a case involving a torn meniscus followed by two surgeries unless the defendant stipulated to increase the jury's award from \$68,000 to \$200,000.<sup>31</sup> In another case involving a torn meniscus followed by two surgeries, the same court reversed a trial judge's granting a new trial unless the plaintiff stipulated to reduce the jury's award of damages from \$600,000 to \$225,000.<sup>32</sup> These decisions support a reasonable-compensation bracket of between \$200,000 and \$600,000 for a case involving a torn medial meniscus followed by two surgeries.

This analysis of appellate-court decisions to set a reasonable-compensation bracket consisting of an upper and lower limit for any injury can be performed for just about any injury. Indeed, lawyers in personal-injury cases devote much effort, both in the trial court and on appeal, contesting whether the jury's award of damages is either inadequate or excessive under the materially-deviates-from-reasonable-compensation standard.

The legal argument over reasonable compensation should take place before the trial judge instructs the jury so that the jury can be given guidance in the court's charge on what is reasonable compensation for the claimed injuries. The current English practice in jury trials is illustrative. How the English courts developed their approach is instructive.

### III. ENGLISH PRACTICE IN CIVIL CASES

Before 1854, all cases tried in England in the common-law courts were heard by a judge sitting with a jury.<sup>33</sup> In that year, Parliament provided that a common-law action could be tried without a jury with the parties' consent.<sup>34</sup> The reorganization of the courts during the 1870s to accommodate the merger of law and equity led to a decline in using juries in civil actions.<sup>35</sup>

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31. See *Juliano v. Prudential Sec.*, 731 N.Y.S.2d 142, 144 (App. Div. 2001).

32. See *Garcia v. Queens Surface Corp.*, 707 N.Y.S.2d 53, 54 (App. Div. 2000).

33. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 210 (Butterworth 5th ed. 1956) (The common law courts were Queen's Bench, Exchequer, and Common Pleas.); TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS*, ¶ 7.6.1, at 219 (Oxford U. Press 8th ed. 2000).

34. Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 1 (Eng.); INGMAN, *supra* note 33, ¶ 7.6.1, at 219.

35. INGMAN, *supra* note 33, ¶ 7.6.1, at 219. Specifically, section 57 of the Supreme Court of Judicature Act 1873 allowed the court to deny a trial by jury in civil cases that

The modern practice of restricting jury trials to claims for libel, slander, malicious prosecution, false imprisonment, and fraud may be traced to a shortage of jurors at the end of World War I.<sup>36</sup> The Rules of the Supreme Court had provided since 1883 that “except in a case of slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise” a jury trial would be held only if ordered by the court.<sup>37</sup> The Juries Act 1918 then restricted jury trials to that class of cases, though the act allowed the court to order a jury trial if necessary.<sup>38</sup> After a handful of other enactments that extended and then restricted civil jury trials, in 1933 Parliament, “as part of a more general drive for cheaper litigation,” limited jury trials in the High Court to cases based on either “a charge of fraud against that party” or “a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.”<sup>39</sup> The Supreme Court Act 1981 currently governs a party’s right to a jury trial and carries this scheme forward with the notable exception of claims for seduction and breach of promise, which have been abolished.<sup>40</sup>

The Supreme Court Act 1981 permits a judge in the Queen’s Bench Division to order a jury trial in other cases, such as personal-injury negligence actions.<sup>41</sup> The Court of Appeal has so restricted the High Court’s discretion to empanel a jury in negligence cases that, as a practical matter, jury trials are not held.<sup>42</sup> Moreover, the overriding objective of the Civil Procedure Rules is to take up an appropriate share of the court’s resources and deal with a case in a way that is

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required prolonged examination of accounts, documents, or scientific or local examination. See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 57 (Eng.).

36. GEOFFREY WILSON, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 181 (1973).

37. *Id.*

38. See Juries Act, 1918, 8 & 9 Geo. 5, c. 23, § 1 (Eng.).

39. WILSON, *supra* note 36, at 181; see Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 6 (Eng.).

40. See Supreme Court Act 1981, c. 54, § 69(1) (Eng.); see Law Reform (Miscellaneous Provisions) Act, 1970, c. 33, §§ 1, 6 (Eng.).

41. See Supreme Court Act 1981, c. 54, § 69(3). Section 69(3) of the act provides that “[a]n action to be tried in the Queen’s Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.”

42. See INGMAN, *supra* note 33, ¶ 7.6.3, at 221–23. Indeed, in the most recent judgment to deal with the trial judge’s discretion to order a jury trial in a personal-injury action, the Court of Appeal commented that “no jury trial of a claim for personal injuries appears to have taken place for over 25 years.” See *H. v. Ministry of Defence*, [1991] 2 Q.B. 103, 112 (Eng. C.A. 1991). The Court of Appeal allowed an appeal against the trial judge’s order directing a trial by jury and ordered a “trial by judge alone.” *Id.* at 111–12.

proportionate to the amount involved and to the case's importance.<sup>43</sup>

In England, one consequence of trying personal-injury claims before a judge and not a jury has been the development of a body of decisional authority that discusses the value of various personal injuries. The courts have attempted to make similar awards of damages for similar injuries. The leading decision of the Court of Appeal on the right to a jury trial on a personal-injury claim turned on the premise that this scheme of like awards for like injuries should be maintained through judge trials.<sup>44</sup> The court reasoned that this well-developed body of case law on the value of injuries would be upset were juries to make awards of damages in personal-injury cases.<sup>45</sup>

At common law, neither the trial court nor the appellate court could review an issue of fact decided by a jury.<sup>46</sup> But the court could order a new trial by setting aside the jury's verdict.<sup>47</sup> In time, this indirect review of a jury's verdict led to the court's "fix[ing] its own figure. . . without ordering a new trial" when the damages "awarded by the jury were manifestly too high or too low."<sup>48</sup> The court's power to set aside a jury's award of damages was very limited. If the trial judge had properly instructed the jury, "it [was] not for the members of the Court of Appeal to seek to substitute their assessment and their judgment for that of the jury."<sup>49</sup> "The Court of Appeal [could] not interfere if the figure [was] one which a jury, acting properly, might award."<sup>50</sup> Only if the verdict was "so excessive or so inadequate that no twelve reasonable jurors could reasonably have awarded it; or, stated otherwise. . . [so] out of all proportion to the circumstances of the case" could the Court of Appeal set it aside.<sup>51</sup>

The Court of Appeal's power to set aside a verdict and order a new trial continued to disallow the court to reassess an irrational award of

43. Civ. P.R. 1.1(2) (2001) (Eng.); BLACKSTONE'S CIVIL PRACTICE, ¶ 58.4 at 723 (Charles Plant et al. eds., Oxford U. Press 2003).

44. See *Ward v. James*, [1966] 1 Q.B. 273, 303 (Eng. C.A. 1965).

45. *Id.* The court reasoned that the assessment of damages in personal-injury cases had been developed such that the courts awarded like sums for like injuries. See *id.* at 296. To continue this scheme of like awards for like injuries, the trial judge would be required to give the jury upper and lower limits for compensation such that "you might as well let the judge assess the figures himself." *Id.* at 303. Under the circumstances, "there is little point in having a jury at all." *Id.*

46. See PLUCKNETT, *supra* note 33, at 131.

47. *Id.* at 135.

48. *Id.*

49. *Scott v. Musial*, [1959] 2 Q.B. 429, 437 (Eng. C.A. 1959).

50. *Id.* at 438.

51. *Id.*

damages.<sup>52</sup> The Court of Appeal could reduce or increase a jury's award in lieu of granting a new trial with the consent of the parties.<sup>53</sup>

*Section 8 of the Courts and Legal Services Act 1990*

By the 1980s, concern emerged that juries' awards in defamation actions "appear[ed] to have got completely out of hand."<sup>54</sup> The Court of Appeal had very limited authority to set aside a jury's award of damages and almost no power to order a reasonable award of damages in place of a new trial. Parliament responded by including in the Courts and Legal Services Act 1990 a section providing for the Court of Appeal "to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper."<sup>55</sup> This section applied to those cases "where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate."<sup>56</sup> The rules of court were amended to provide the following:

In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the court may, instead of ordering a new trial, substitute for the sum awarded by the jury such sum as appears to the court to be proper.<sup>57</sup>

The Court of Appeal's power to substitute an award of damages for the amount awarded in the jury's verdict was novel. But ramifications of this change were yet to be felt.

*Rantzen v Mirror Group Newspapers Ltd.* was the first case to explore the significance of the change enacted by Parliament. *Rantzen* was a libel action brought by a television personality against a newspaper.<sup>58</sup> *Rantzen* had been tried like other libel cases before it. In his instructions to the jury, the trial judge stated that neither he nor counsel could suggest to the jury what measure of damages would be appropriate.<sup>59</sup> He also explained "that he was not permitted to tell them

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52. INGMAN, *supra* note 33, ¶ 7.9.2, at 232.

53. *Id.*

54. *Id.* ¶ 7.9.2, at 228-29.

55. Courts and Legal Services Act 1990, c. 41, § 8(2) (Eng.).

56. *Id.* § 8(1).

57. R.S.C. Order 59, Rule 11(4) (2000) (Eng.). The new Civil Procedure Rules provide: "In an appeal from a claim tried with a jury the Court of Appeal may, instead of ordering a new trial, (a) make an order for damages; or (b) vary an award of damages made by the jury." Civ. P.R. 52.10(3) (2001) (Eng.).

58. *Rantzen v. Mirror Group Newspapers Ltd.*, [1994] Q.B. 670 (Eng. C.A. 1993).

59. *Id.* at 681.

by way of comparison what awards are received by a plaintiff who has been totally or partially paralysed. . .or who has lost a limb.”<sup>60</sup> The trial judge’s charge on damages continued:

The figure you come up with, if you get to that point, must be a fair and reasonable one. It must not be miserly otherwise suspicion will linger. On the other hand, the figure must not be wildly excessive. Be reasonable. Keep your feet on the ground. In so arriving at a figure you are entitled to take into account the value of money, what it can cost to buy a house, a car, or a holiday. . .You will arrive at a reasonable figure having balanced out the factors which you think may aggravate and so increase the figure and mitigate and so reduce the figure.<sup>61</sup>

Despite this admonition, the jury awarded £250,000 in damages, a considerable award.<sup>62</sup> The newspaper appealed and argued that the jury’s award of damages was excessive.<sup>63</sup> The newspaper contended that the jury made an excessive award because the trial judge had not provided the jury with any guidance on what amount of damages to award.<sup>64</sup>

The Court of Appeal first recognized the almost limitless discretion accorded to a jury’s verdict was no longer satisfactory in light of the court’s power to substitute its award of damages for that of the jury.<sup>65</sup> Instead, the Court of Appeal then decided to analyze the jury’s award of damages by asking, “Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?”<sup>66</sup> The court then asked whether a trial judge, in summing up, should provide the jury with further guidance on what sum of damages to award.<sup>67</sup> It noted that a juror in another case had written about his misgivings over the absence of any real guidance in awarding damages:

It is no betrayal of the secrets of the jury room to confess that, with other jurors, I entered the Royal Courts of Justice on 14 June with not the remotest idea of what compensation is paid for anything except perhaps a dented boot and wing; haloes are outside the normal terms of reference. Apparently that is why we were asked. If that is so, the

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60. Rantzen, [1994] Q.B. at 681.

61. *Id.* at 681–82.

62. *Id.* at 675.

63. *Id.* at 673.

64. *Id.* at 673.

65. Rantzen, [1994] Q.B. at 692.

66. *Id.*

67. *Id.* at 692–93.

court had the outcome it deserved from the appointed procedure.<sup>68</sup>

The Court of Appeal saw three possible sources of guidance for the jury: (1) other awards of juries in defamation cases, (2) awards made by a court in personal-injury cases, and (3) awards made by the Court of Appeal in defamation cases when it substituted its award of damages for that of the jury.<sup>69</sup> It rejected out of hand the argument that the trial judge should refer the jury to awards made by other juries.<sup>70</sup> The Court of Appeal also concluded “that there is no satisfactory way in which the conventional awards in actions for damages for personal injuries can be used to provide guidance for an award in an action for defamation.”<sup>71</sup>

The court found that awards of the Court of Appeal, presumably in defamation cases, “stand on a different footing.”<sup>72</sup> The court foresaw a time when a sufficient body of law would develop from its review of jury verdicts in defamation cases so that the trial judge could instruct the jury on awards in like cases.<sup>73</sup> The Court of Appeal reasoned “that it must have been the intention of the framers of the 1990 Act that over a period of time the awards made by the Court of Appeal would provide a corpus to which reference could be made in subsequent cases.”<sup>74</sup> The decisions of the Court of Appeal could then be relied on by the trial judge as establishing reasonable awards in summing up to the jury.<sup>75</sup>

Meanwhile, the process of instructing the jury on damages was left in place.<sup>76</sup> The jury could be told to consider the purchasing power of any award that it might make.<sup>77</sup> Moreover, the trial judge could remind the jury “that any award they make [should be] proportionate to the damage which the plaintiff has suffered and is a sum which it is necessary to award him to provide adequate compensation and to re-establish his reputation.”<sup>78</sup>

*John v. MGN Ltd.*

The Court of Appeal’s approach in the *Rantzen* case left “judges

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68. *Rantzen*, [1994] Q.B. at 693 (quoting THE TIMES, June 15, 1976).

69. *Id.* at 693–94.

70. *Id.* at 694.

71. *Id.* at 695.

72. *Id.* at 694.

73. *Rantzen*, [1994] Q.B. at 694.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 696.

78. *Rantzen*, [1994] Q.B. at 696.

presiding over defamation trials with juries to confine their jury directions to a statement of general principles, eschewing any specific guidance on the appropriate level of general damages in the particular case.” But within two years time, the Court of Appeal recognized “its practical disadvantages ha[d] become ever more manifest.”<sup>79</sup>

A series of jury awards disproportionate to any damage conceivably suffered by the plaintiff had given rise to serious and justified criticism of the procedures leading to such awards.<sup>80</sup> Judges were limited to giving the jury broad directions of general principle coupled with instructions to be “reasonable.”<sup>81</sup> Yet, judges gave no guidance on what might be thought reasonable or unreasonable; and it is not altogether surprising that juries lacked an instinctive sense of where to pitch their awards. They were, in the words of the Court of Appeal, in the position of sheep let loose on an unfenced common with no shepherd.<sup>82</sup>

*John v. MGN Ltd.* was a libel action brought by the well-known performer, Elton John, stemming from an article published in the Sunday Mirror.<sup>83</sup> The jury awarded £350,000 in damages.<sup>84</sup> On appeal, the newspaper’s counsel, the same lawyer who had appeared for the newspaper on the *Rantzen* appeal, again suggested that trial judges and counsel should be allowed to tell juries about awards of general damages in personal-injury cases.<sup>85</sup>

The Court of Appeal was persuaded that the guidance being given to juries in defamation actions deserved reconsideration.<sup>86</sup> The starting point was the court’s recognizing that a trial, whether by judge or by jury, should give a successful claimant “appropriate compensation, that is, compensation which is neither too much nor too little.”<sup>87</sup> That said, nothing justified the stream “of libel awards in sums which appear so large as to bear no relation to the ordinary values of life.”<sup>88</sup> Overgenerous awards were unjust to defendants, encouraged claimants to regard a successful libel claim “as a road to untaxed riches,” and

79. *John v. MGN Ltd.*, [1997] Q.B. 586, 608 (Eng. C.A. 1995).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 597.

84. *John*, [1997] Q.B. at 597.

85. *Id.* at 594.

86. *Id.* at 611.

87. *Id.*

88. *Id.*

failed to command respect.<sup>89</sup>

Four possible reforms were explored: (1) referring to jury awards in comparable actions for defamation; (2) referring to awards either approved by or substituted by the Court of Appeal in defamation cases; (3) referring to awards of damages in personal-injury actions; and (4) allowing counsel to suggest the appropriate award, when coupled with the trial judge's guidance on the appropriate bracket.<sup>90</sup>

The Court of Appeal reaffirmed that juries should not be instructed on previous defamation awards by other juries because "[t]hose awards will have been made in the absence of specific guidance by the judge and may themselves be very unreliable markers."<sup>91</sup> The Court also repeated its holding in *Rantzen*: the trial judge could refer to awards in defamation cases either made by or approved by the Court of Appeal.<sup>92</sup> The court was quick to point out that a body of such awards had not been, and would not be, quickly established.<sup>93</sup> Meanwhile, another approach had to be found.

The Court of Appeal took a second look at the only other alternative: awards of damages in personal-injury cases. It held that "judges and counsel, should be free to draw the attention of juries to these comparisons."<sup>94</sup> These awards would not be relied on as any exact guide, and, of course, there could be no precise correlation between loss of a limb, or of sight, or quadriplegia, and damage to reputation.<sup>95</sup>

[T]hese personal injuries. . . command conventional awards of, at most, about £52,000, £90,000 and £125,000 for pain and suffering and loss of amenity. . . , juries may properly be asked to consider whether the injury to his reputation of which the plaintiff complains should fairly justify any greater compensation. . . . It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if the same plaintiff had been rendered a helpless cripple or an insensate vegetable.<sup>96</sup>

In summing up to the jury, both the trial judge and counsel would

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89. John, [1997] Q.B. at 611.

90. *Id.*

91. *Id.* at 611–12. The Court of Appeal left open the possibility that it could reconsider a trial judge's ability to mention jury awards in comparable cases in the future. *Id.* at 612.

92. *Id.*

93. *Id.*

94. John, [1997] Q.B. at 614.

95. *Id.*

96. *Id.*

be able to indicate to the jury the amount that it should consider in reaching the verdict.<sup>97</sup> Despite these suggestions, jurors should be reminded that the final decision on the amount of damages is theirs alone to make.<sup>98</sup>

*Thompson v. Commissioner of Police of the Metropolis*

The scheme set out by the Court of Appeal in the *John* case—that the trial judge should instruct the jury on awards in personal-injury cases during the summing up in a defamation case—soon was extended to claims for false imprisonment and malicious prosecution. In *Thompson v. Commissioner of Police of the Metropolis*, the Court of Appeal had before it appeals in two cases involving claims for false imprisonment and malicious prosecution.<sup>99</sup> In each case, the trial judge gave the jury only general instructions on the amount of damages that it might award. The issue on appeal was whether the approach taken in the *John* case, referring the jury to awards in personal-injury cases should be applied in jury trials of false-imprisonment and malicious-prosecution claims.<sup>100</sup> The claimants' counsel argued that referring a jury to personal-injury awards, which arise out of negligence rather than deliberate acts, does not assist a jury in deciding a police-abuse case.<sup>101</sup>

In its judgment, the Court of Appeal agreed that, because the *Rantzen* and *John* cases were defamation actions, it did not follow that the approach taken in those cases could be applied directly to other actions.<sup>102</sup> Nonetheless, the court held that the approach set out in the *John* case for instructing the jury on the damages recoverable by the claimant would apply to false-imprisonment, malicious-prosecution, and other civil actions tried to a jury.<sup>103</sup> “Once section 8 of the Act has been given one interpretation as to one category of cases that interpretation must apply across the board. It is difficult to see how the same words can have different meanings depending upon the type of action to which they are being applied.”<sup>104</sup>

The Court of Appeal set forth the approach that the trial judge was

97. *John*, [1997] Q.B. at 615.

98. *Id.* at 616.

99. *Thompson v. Comm'r of Police of the Metropolis*, [1998] Q.B. 498 (Eng. C.A. 1996).

100. *Id.* at 502.

101. *Id.* at 503.

102. *Id.* at 511.

103. *Id.* at 511–512.

104. *Thompson*, [1998] Q.B. at 511–12.

to take in instructing the jury at the close of arguments.<sup>105</sup> First, the trial judge should explain to the jury that the only relief, it may grant is an award of damages intended to compensate the plaintiff for injuries, and not to punish the defendant.<sup>106</sup> Next, the trial judge should give the jury “an appropriate bracket to use as a starting point.”<sup>107</sup> The trial judge should decide on the bracket after considering the submissions of counsel.<sup>108</sup> The trial judge also should give the jury an appropriate upper limit for its award of damages.<sup>109</sup> Finally, the jury should be told that these figures “are no more than guideline figures based on the judge’s experience and on the awards in other cases and the actual figure is one on which they must decide.”<sup>110</sup>

The *John* and *Thompson* judgments have allowed English trial judges to provide guidance to juries in civil cases on the amount of damages that may constitute an appropriate award. A typical instruction may present the jury with a wide range within which to grant the award. An example of such an instruction is as follows:

At the top end in a case of this kind you might think that an award of £150,000, something of that order, might be justified. At the lower end—but it all depends, really, on your view of the evidence. If you were to conclude that this is a case where a significant part of the defence of justification has been made good even if the defence does not succeed, then you might want to come up with a very small award indeed, I do not know. So the lower end of the bracket comes quite low if you feel that to a significant extent the case has not been proved.<sup>111</sup>

In other instances, such as police-abuse cases in which the injuries are typically slight, the ranges might be as narrow as only a few hundred pounds.<sup>112</sup>

*Kiam v. MGN Ltd.*

In the *John* appeal, the Court of Appeal recognized that the jury

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105. *Thompson*, [1998] Q.B. at 514–17.

106. *Id.* at 514.

107. *Id.* at 515.

108. *Id.*

109. *Id.*

110. *Thompson*, [1998] Q.B. at 515.

111. *Grobbelaar v. New Group Newspapers Ltd.*, [2002] 1 W.L.R. 3024, 3028 (U.K. H.L. 2002).

112. *See, e.g., Watson v. Chief Constable of Cleveland Police*, [2001] EWCA Civ. 1547, at ¶ 36 (Eng. C.A.); *Hill v. Comm’r of Police for the Metropolis*, unreported, Transcript Nov. 4, 1998 at ¶¶ 10 & 13 (Eng. C.A. 1998).

was not bound by the trial judge's upper and lower limits in making an award of damages.<sup>113</sup> The court suggested that, if the jury were to return an award outside the suggested bracket, "real weight must be given to the possibility that their judgment is to be preferred to that of the trial judge."<sup>114</sup>

In *Kiam v. MGN, Ltd.*, Victor Kiam, the purchaser of Remington, sued the publisher of *The Mirror* for defamation.<sup>115</sup> In the instructions to the jury, the trial judge mentioned that general damages for a personal-injury claim would rarely exceed £150,000, that £100,000 was the norm for the loss of both arms, and that £45,000 was typical for the loss of a hand.<sup>116</sup> In *Kiam*, the judge instructed the jury as follows:

Now although, as I seek to emphasise, the decision on damages is yours and yours alone, much may depend on the meanings which you find that this article bore. But I would suggest that, if you find that the article bears the more serious defamatory meanings of the kind suggested by Mr. Kiam, you may think that an award of much less than £40,000 would not properly reflect the seriousness of the slur on him, and the subsequent aggravation of the injury to this feelings. You might also think that an award of more than £75–80,000 might be considered excessive, given the scale of damages generally. I have to stress that the decision is yours and yours alone.<sup>117</sup>

The jury, nonetheless, awarded £105,000.<sup>118</sup>

On appeal, the Court of Appeal held that the jury's award could be interfered with only if excessive or inadequate.<sup>119</sup> The proper inquiry was "whether a reasonable jury could have thought the award necessary to compensate the claimant and to re-establish his reputation."<sup>120</sup> In other words, the Court of Appeal "should not interfere with the jury's award unless it regards it as substantially exceeding the most that any jury could reasonably have thought appropriate."<sup>121</sup> The bracket suggested by the trial judge was not irrelevant.<sup>122</sup> The jury's role in assessing libel damages was such that an award outside the bracket should not be condemned as "'unreasonable' unless it is out of all

113. John, [1997] Q.B. at 616.

114. *Id.*

115. *Kiam v. MGN, Ltd.*, [2003] Q.B. 281 (Eng. C.A. 2002).

116. *Id.* at 288.

117. *Id.*

118. *Id.* at 287.

119. *Id.* at 298.

120. *Kiam*, [2003] Q.B. at 298.

121. *Id.*

122. *Id.* at 298–99.

proportion to what could sensibly have been thought appropriate.”<sup>123</sup>

#### IV. APPLYING THE ENGLISH PRACTICE IN NEW YORK

The preceding review of the law governing the instruction of juries and the review of jury awards in civil actions illustrates the magnitude of the changes made by the Court of Appeal. In the 10 years after Parliament's enacting the Courts and Legal Services Act, 1990, the Court of Appeal replaced a system in which juries were given practically no help in placing a value on an injury. The Court of Appeal's new procedure allowed trial counsel to suggest an award of damages in their closing speeches. The trial judge then provided the jury with a bracket that included both a floor and ceiling for reasonable compensation. This system, if employed in New York personal-injury trials, would be effective.

There are similarities between the practices followed in England and New York in personal-injury jury trials. The principal similarity is the power of an appellate court to effectively substitute its award of damages for that made by the jury. In England, that power is direct. The “Court of Appeal may, instead of ordering a new trial[,] . . . vary an award of damages made by the jury.”<sup>124</sup> But in New York, the court must order a new trial unless the party affected by the court's decision to vary the verdict stipulates to either the increase or the decrease in the jury's award. Another similarity shared by England and New York is the reviewing court's effective power to substitute its award of damages for that made by the jury. This practice has led to the development of a body of decisional authority from which general damages for specific injuries may be estimated in any case.

The obvious difference between English and New York jury practice is that in England the use of a civil jury is limited to a handful of cases and does not include negligence claims, which are the largest source of personal-injury awards, a difference of degree and not of kind. A jury trial in New York proceeds much like a jury trial in England. But an exception is that New York does not follow the English practice of the trial judges' suggesting (to the jury) a range of damages for injuries. No rule prohibits a New York trial judge from so instructing the jury in a civil case. The advantages to such an approach suggest that it should be adopted.

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123. Kiam, [2003] Q.B. at 299.

124. Civ. P.R. 52.10(3) (Eng.); *see also* Courts and Legal Services Act 1990, c. 41, § 8(2) (Eng.) (“the Court of Appeal . . . to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper”).

*Comparing Section 5501(c) of the Civil Practice Law and Rules with Section 8 of the Courts and Legal Services Act 1990*

The similarities between New York and English practice are most easily seen in the legislation authorizing an appellate court to substitute its judgment on damages for that of the jury. Section 5501(c) of New York's Civil Practice Law and Rules provides that the appellate division shall review questions of fact and that:

[i]n reviewing a money judgment in [a personal-injury action] in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that the award is excessive or inadequate if it deviates materially from what would be reasonable compensation.<sup>125</sup>

Section 8 of England's Courts and Legal Services Act 1990 empowers the Court of Appeal "to substitute for the sum awarded by the jury such sum as appears to the court to be proper."<sup>126</sup> England's Civil Procedure Rules provide that the "Court of Appeal may, instead of ordering a new trial—(a) make an order for damages; or (b) vary an award of damages made by the jury."<sup>127</sup>

The differences between the English and New York statutes are insignificant. In both jurisdictions, an appellate court has the power to set aside the jury's award. Moreover, the standard under which the court does so in New York, when an award "deviates materially from what would be reasonable compensation" is not much different from that applied in England, whether "a reasonable jury [could] have thought that this award was necessary."<sup>128</sup> Each standard uses reasonableness as a guide.

The principal difference is that a New York court must substitute its award of damages for that of the jury under the guise of directing a new trial. This legal fiction disguises what really is happening: the court is substituting its award for that made by the jury. No difference in practice exists between the New York and the English statutory framework. Therefore, no difference should exist in the way in which the courts apply their powers to control awards made by juries.

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125. N.Y. C.P.L.R. 5501(c) (McKinney Supp. 2003).

126. Courts and Legal Services Act 1990, c. 41, § 8(2) (Eng.).

127. Civ. P.R. 52.10(3)(a)–(b) (Eng.).

128. N.Y. C.P.L.R. 5501(c) (McKinney Supp. 2003); Rantzen, [1994] Q.B. at 692.

*Judicial Authority Supporting the Trial Court's Charging the Jury on the Amount of Damages (How John v. MGN Ltd. Would Be Applied in New York)*

Two strains of authority suggest that the English practice of charging the jury on fair and just compensation by giving the jury a reasonable compensation bracket for a personal injury is consistent with the judge's and jury's role in New York. The first line of authority is the trial judge's common-law power to comment on the evidence. The traditional rule provided that a trial judge, as a matter of discretion, could comment on the evidence in the charge to the jury.<sup>129</sup> The judge's comments must be proper to guide the jury to a just verdict without leading the jury or controlling its verdict.<sup>130</sup> The trial judge could suggest that one version of the evidence would prove negligence while another version of the events would not.<sup>131</sup> The power to comment on the evidence is generally no longer used, although trial judges continue to marshal the evidence for the jury in criminal cases.<sup>132</sup>

The second and more modern line of authority allows trial counsel to suggest to the jury the amount of damages that may be awarded. Lawyers in New York may include an amount of damages in their closing arguments if it falls within the damages sought in the action and if the method for arriving at those damages is consistent with the court's charge.<sup>133</sup> It is consistent with this authority to implement the English practice of charging a jury on damages in New York personal-injury cases.

The trial judge's historical power to comment on the evidence is broad enough to support instructing the jury on what range of damages is appropriate for a specific injury, should the jury find that injury as a matter of fact. In addition, New York attorneys are currently allowed to instruct the jury on the amount of their award. The judge is uniquely positioned to provide the jury with meaningful and unbiased guidance based on judicially approved awards in other cases. Therefore, judges should follow the English practice of instructing the jury on reasonable

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129. See *Poler v. New York Cent. R.R.*, 16 N.Y. 476, 483 (1857).

130. *Booth v. Cleveland Rolling Mill Co.*, 74 N.Y. 15, 27 (1878).

131. See *Drew v. Sixth Ave. R.R.*, 26 N.Y. 49, 52 (1862).

132. See, e.g., *People v. Sargent*, 601 N.Y.S.2d 736, 737 (App. Div.), *appeal denied*, 624 N.E.2d 1039 (1993); *People v. Cross*, 570 N.Y.S.2d 292, 293 (App. Div.), *appeal denied*, 580 N.E.2d 416 (1991).

133. See *supra* text accompanying notes 7–9.

damages.

Were New York to adopt the English system of a reasonable-compensation bracket, the trial judge's charge on damages in a case involving a torn medial meniscus followed by two surgeries may include the following:

If you find that defendant is liable, plaintiff is entitled to recover that sum of money that will justly and fairly compensate [him] for any injury and conscience pain and suffering to date caused by defendant.

The decision on damages is yours and yours alone. You should, however, be aware that the usual compensation for the injury claim by the plaintiff—a torn medial meniscus followed by two surgical repairs—falls between \$200,000 at a minimum and \$600,000 (or perhaps slightly more) at a maximum. I give you those figures as a guide. You are not bound by them and may award either a lesser or greater sum of damages should you find such lesser or greater sum supported by the evidence. The decision on damages is, I repeat, yours and yours alone.

Before this charge, the attorneys would have submitted suggested brackets to the trial judge along with their requests as to the content of the charge.<sup>134</sup> Attorneys would know before the closing arguments the bracket that the judge intended to use in the charge. This is opposed to the current rule under which the lawyers can suggest to the jury, during the closing of arguments, awards of damages they think are appropriate for the facts of the particular case.

### *The Advantages of Adopting the English Practice*

Adopting the English practice in New York presents several advantages. Were the jury to make an award within the bracket suggested by the court, it is unlikely that trial counsel would move to set aside the verdict as either inadequate or excessive. The court would have set the bracket only after having heard the lawyers on the range of permissible jury awards. In the usual case, the trial judge would not examine a verdict within the bracket for either inadequacy or excessiveness, which would reduce the grounds for a postverdict motion.

The bracket suggested by trial judge would be based on the decisions of the appellate divisions in cases presenting similar injuries; therefore, reducing the probability that an appellate court would increase or reduce an award within the bracket (absent the trial judge's

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134. See N.Y. C.P.L.R. 4110-b (McKinney 1992).

assigning an incorrect bracket). The appellate division would also have the rationale of trial judge on the permissible range of awards in any appeal. The result of these changes would be fewer appeals contesting the inadequacy or excessiveness of the verdict.

Moreover, even in those cases in which the jury returned a verdict on damages outside the bracket, the procedural advantages of the system are apparent. The appellate division would have counsel's submissions to the trial judge on the proposed bracket, which gives a clear picture of the permissible range of damages awards.

The principal advantage of the English approach is substantive: providing like awards for like injuries. In New York, juries are drawn from different political subdivisions throughout the state.<sup>135</sup> In some areas, juries are known for generous awards, while, in others, jury awards are low. Using the English approach and providing the jury with a suggested range of permissible damages will not change the tendency of a jury in a particular area to be either more or less generous. It is suggested that a bracket of permissible damages for an injury should reduce the disparity in awards for like injuries in different parts of the state. While a jury must judge each claim on its own merits, scant justification exists for a jury (which operates as a part of the state court system) to award different sums for the same injuries.

#### *Adopting the English Practice in State-Law Claims Tried in Federal Court*

The English practice of providing the jury with a suggested range of verdicts for an injury should be permitted (and applied) in a state-law based personal-injury claim filed in a court of the United States. Two possible obstacles exist. First, the right to a jury trial in a common-law claim is guaranteed by the Seventh Amendment to the Constitution.<sup>136</sup> Second, the procedure for instructing a jury at the close of evidence is governed by federal law.<sup>137</sup>

Surprisingly, the constitutional issue is easily overcome. The Supreme Court has recognized that the purpose of the Seventh Amendment is to preserve the "right [to a jury trial] which existed under the English common law when the Amendment was adopted."<sup>138</sup> Thus, it "preserve[s] the substance of the common-law right of trial by jury. . .and . . .retain[s] the common-law distinction between the

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135. N.Y. JUD. L. §§ 500, 510[1], 520 (McKinney Supp. 2003).

136. See U.S. CONST. amend. VII.

137. See Fed. R. Civ. P. 51.

138. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

province of the court and that of the jury, whereby. . . issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.”<sup>139</sup> The Seventh Amendment does not preserve a particular form of trial or procedure so long as the judge decides the issues of law and the jury resolves the questions of fact.<sup>140</sup> Under this construction of the Seventh Amendment, a trial judge’s suggesting a range of damages awards to a jury would not infringe a litigant’s Constitutional right to a jury trial. The jury would still decide the factual issue of damages, albeit guided by the trial judge.<sup>141</sup>

The more difficult question is whether federal law allows the trial judge to suggest the range of damages to the jury in the instructions on damages. Well-established authority suggests that “[i]n charging the jury, the trial judge may not suggest a proper award by way of allusion to a particular sum.”<sup>142</sup> The power of a federal trial judge to comment on the evidence is more firmly rooted than is the power of a New York judge to do so.<sup>143</sup> In this view, the federal trial judge “an active participant in the trial” whose role is to guide and lead the jury.<sup>144</sup> While a federal trial judge is should not be permitted to mention a “particular sum” of damages as appropriate, the judge should be permitted to suggest a range of permissible damages so long as the jury is reminded that it is the sole trier of fact and is free to disregard the bracket suggested by the court.<sup>145</sup>

139. *Baltimore & Carolina Line*, 295 U.S. at 657.

140. *Id.*

141. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (requiring a federal court to apply C.P.L.R. 5501(c) in the trial and the appeal of a state-law claim because the section is a substantive rule designed to achieve predictability in awards of damages in actions tried to a jury).

142. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2556, at 446 (2d ed. 1995).

143. *Id.* § 2557, at 451; 1 KEVIN F. O’MALLEY ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 7.05, at 498–99 (5th ed. 2000); *see, e.g., United States v. Philadelphia & Reading R.R.*, 123 U.S. 113, 114 (1887) (“Trial by jury in the courts of the United States is a trial presided over by a judge, with authority . . . to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only that he submits those questions to their determination.”); *Vicksburg & Meridian R.R. v. Putnam*, 118 U.S. 545, 553 (1886) (“In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinions upon the facts”).

144. O’MALLEY, *supra* note 142, § 7.05, at 499.

145. *See id.* § 7.05, at 500–01.

## V. CONCLUSION

If properly applied, the English system of providing the jury with a reasonable-compensation bracket does not eliminate the jury's role in awarding damages, a necessarily nuanced and highly individualized determination in every case. Rather, the trial judge's giving the jury a bracket with an upper and lower end indicating what is fair and reasonable compensation in a case should provide the jury with valuable guidance on what amount of damages is reasonable under the circumstances of the case. The jury would be free to make a higher or lower award than that indicated by the bracket, just as it now may make an award that is higher or lower than that suggested by trial counsel.

If the English practice were properly applied in New York, the court's suggesting a reasonable-compensation bracket to a jury in a personal-injury case should lead to the eventual evening out of jury awards for like injuries throughout the state. In turn, these equitable awards will be perceived as increasing fairness in the courts by granting like awards for like injuries. Moreover, litigants and their attorneys will be better able to assess the jury's likely award in a case because parties should assume that a jury's award of damages will fall inside the bracket in most cases. Because the jury's award is apt to fall inside the bracket, the number of postverdict motions to set aside the verdict for inadequacy or excessiveness (and appeals from orders on those motions) would be reduced. In other words, much would be gained by the adoption of the English practice of providing the jury with a reasonable-compensation bracket in New York in personal-injury cases.