Current and proposed methods of qualifying and quantifying the pain-and-suffering element of damages and resultant awards under Florida law

J. Paul Gill, J.D.

© 2007 J. Paul Gill. All Rights Reserved.

1. Overview of "pain and suffering" as an element of tort damages

a. The limits of remoteness of proximate causation

When a jury determines a threshold issue of whether or not to award medical expenses, it defies logic to award damages for medical expenses but none for the pain and suffering for which the medical expenses were incurred. Thus a jury verdict awarding medical expenses creates a conclusive presumption of pain-and-suffering damages, too.[1] It is therefore long-settled law that pain and suffering are an accepted and perhaps even a required element of an award of tort liability damages.

Dobbs defines pain and suffering as "virtually any form of conscious suffering, both emotional and physical."[2] Dobbs further identifies the element to include proximately-caused pain and suffering, arising from, for example, medical treatment arising from the physical or emotional suffering.[3] The remoteness of proximate causation, however, is not exceeded even as to emotional states produced by the tortious injury.[4] Anguish arising from the occurrence of the physical or emotional injury, and even its consequences, also forms a basis for recovery.[5]

Loss of pleasure[6], so-called hedonic damages, also may be recoverable:

> [i]n some cases a plaintiff without physical pain is nevertheless unable to pursue the normal activities of life or a career for which she has prepared herself. Such a plaintiff is not in pain in the narrow sense that she feels the immediate sensation of physical pain, but the balance of pain and pleasure in life has been drastically altered for the worse. Many of the traditional elements of mental distress in personal injury cases are in this category… to injure a victim so that he can no longer [derive personal satisfaction from]…any of the hundreds of other aspects of normal life is to cause pain and suffering in the legal sense…almost without exception, loss of enjoyment of life is as compensable as any other emotional state.[7]

This Dobbs refers to as the "loss of enjoyment of life."[8] Although the case law among the various U.S. jurisdictions have disagreed as to whether loss of enjoyment of life falls under the rubric of pain-and-suffering damages, Dobbs asserts that loss of enjoyment of life cannot be classified in any other way, reasonably, than within the category of mental distress, long settled to be an element of pain-and-suffering damages.[9]

b. Jury instructions as to what losses constitute pain-and-suffering and should be awarded damages

Dobbs suggests that

> [a]ny particular jury might understand a normal pain and suffering instruction in a much narrower sense, and to avoid such a misunderstanding, some specific mention of loss of enjoyment seems desirable. Perhaps the best solution is not to treat loss of enjoyment as a separate element but to [seek a jury] instruct[ion] that pain and suffering is a recoverable element *and* that pain and suffering includes all forms of mental distress and a sense of lost enjoyment or lost opportunities in life. This approach actually seems consistent with most of the cases, including many of those sometimes listed as supporting a separate claim for loss of enjoyment.[10]

An instruction, Dobbs asserts, separating loss of enjoyment of life elementally from that of pain and suffering, creates the risk of "duplicative recoveries."[11]

c. Future Harm

Dobbs then proceeds to describe three distinct types of recoveries for future harm: plaintiff must prove (1) by a preponderance of the evidence entitlement to recovery for future pain and suffering[12]; (2) the substantiality of the chance that future harm will occur so that plaintiff then becomes entitled to recover for the value of the lost opportunity to live a normal life henceforth[13]; and (3) in the alternative, "fear and anxiety" that pain and

suffering will reasonably occur in the future and that as a matter of law such fear and anxiety is the proximate cause of the liability for the tort[14]. Again, these types of damages come, Dobbs asserts, under the rubric of mental distress.[15]

2. Current academic thought as to pain and suffering damage awards – Avraham

a. Avraham's relevant proposals as to improvements and modifications to existing law as to pain and suffering damage awards

i. The lack of "horizontal equity"

In expounding and taking issue in a collegial manner within his theory Avraham found that "[t]he authors[16]. . .found a high degree of unpredictability within each injury category. They found evidence that the variation of awards per severity is enormous. For example, awards for the most serious permanent injuries range in value from approximately $147,000 to $18,000,000."[17] This, Avraham characterizes, in agreement on this statistic with the authors to whom he refers, as "a lack of horizontal equity."[18]

Further, Avraham comments, "age of plaintiff, typically not considered in studies that explore the variation of pain-and-suffering damages, may matter. The total pain and suffering of a sixty-year-old who is assumed to suffer twenty more years of pain and suffering is different than that of a twenty-year-old who would suffer sixty more years. A study that does not account for plaintiff's age may detect variation which is totally reasonable."[19]

ii. The appropriate nature of jury instructions

Also, "jury instructions[,] in general, and with respect to pain-and-suffering damages in particular, vary significantly among states. . .[s]ome jurisdictions instruct juries that an

award will be reduced in proportion to the plaintiff's contributory negligence, while other jurisdictions do not tell juries about the consequences of assigning fault. Therefore, the categories of pain and loss that juries are instructed to consider as legitimate objects of compensation have obvious effects on the damages they deem appropriate for similar injuries."[20]

iii. A jury's lack of distinction between types of awards

Finally, "not all variance in pain-and-suffering awards is unwarranted. Variance is normatively unwarranted to the extent that it is larger (or smaller) than it should be. Juries' considerations of unlawful factors in determining the magnitude of damages—including plaintiff's attorney's fees, defendant type (individual versus corporate), defendant's insurance coverage, defendant's degree of culpability (once found liable), plaintiff's lawyer's award recommendation, *et cetera*—are problematic because they increase unpredictability. Some juries will disregard proscribed factors and others will not. This strikes us as unfair."[21]

iv. Avraham's innovation: schedules and guidelines

To begin with, Avraham observed that "the [American Law Institute] reporters recommend the development of guidelines. [These are] based on a scale of inflation-adjusted damage amounts attached to a number of disability profiles that range in severity from the relatively moderate to the gravest injuries."[22]

So what Avraham proposes as a modification to this "normative" situation, are "scheduled awards"[23] which Avraham characterizes as "a standardized remedy [to] avoid past variance." Avraham may also be arguing that such schedules are the province of the judiciary: "there is no reason…that a policymaker, aware of the studies claiming that severe injuries are undercompensated, would replicate it."[24], Although at footnote 78, Avraham comments that another researcher observed: "[d]etailed scenarios keyed to recommended (or required) awards would be difficult to construct because of the myriad

of differences in real-world fact patterns[,]" at footnote 79 Avraham also counters that "the mission of producing detailed guidelines is not impossible. The Judicial Studies Board in England has been producing since 1992 and every two years *Guidelines for the Assessment of General Damages in Personal Injury Cases.* The board is comprised of judges and practitioners who deal with injury cases. Based on previous cases and their own experience, they produce nonbinding guidelines, itemized by type and severity of injury. Its fifth edition, from 2000, [is comprised of] fifty-one pages of detailed categories of injuries and the ranges of awards. . . ."[25]

At footnote 35, Avraham recites the National Association of Insurance Commissioners' (NAIC) Injury Severity Scale:

1. Emotional only (fright, no physical damage);
2. Temporary insignificant (lacerations, contusions, minor scars, rash; no recovery delay);
3. Temporary minor (infections, fracture, fall in hospital, recovery delayed);
4. Temporary major (burns, surgical material left, drug side effect, brain damage, recovery delayed);
5. Permanent minor (loss of fingers, loss or damage to organs, includes nondisabling injuries);
6. Permanent significant (deafness, loss of limb, loss of eye, loss of one kidney or lung);
7. Permanent major (paraplegia, blindness, loss of two limbs, brain damage);
8. Permanent grave (quadriplegia, severe brain damage, lifelong care or fatal prognosis);
9. Death.[26]

Finally, in complementing his recital of the NAIC Injury Severity Scale Avraham reasons: "[t]he severity of the injury would be determined based on the nature of the injury, *i.e.*, whether it is permanent or temporary as well as whether it is major or minor. Regarding the age of the victim, the authors argue that just as with bodily injuries, young

people are expected to recover faster from temporary pain-and-suffering losses, whereas for permanent loss they would suffer more[,] as their life span is longer."[27,28] Avraham concludes that "jury dollar-value assessment of pain-and-suffering losses is not only subject to framing effects by lawyers, but to other cognitive bases as well, *and therefore cannot serve as a policy aid because they are totally unreliable.*"[29]

But the core of Avraham's innovative approach is what Avraham calls "[a] system of nonbinding age-adjusted multipliers[,]" or "NBAAMs". A "simple proxy" for "severity of injury" Avraham posits is a simple system of multipliers to arrive and pain-and-suffering damages as a percentage of medical costs.[30]

v. Avraham's proposed multiplier schedule[31]

1	2	3
Medical Costs	**Multiplier**	**Pain-and-Suffering Damages**
$0-$100,000	0.5	$0-$50,000
$100,001-$500,000	0.75	$75,000-$375,000
$500,001-$1,000,000	1	$500,001-$1,000,000
Above $1,000,000	1.25	Above $1,250,000

3. Other States' case law

a. Laycock – the persuasive precedent of *Debus v. Grand Union Stores*

While Dobbs writes broadly and generally in treatise form as regards the element of pain-and-suffering damages, Laycock is quite expeditious in his interpretation of the two main court approaches to presenting calculations of pain-and-suffering damages to juries. According to Laycock, and to both the majority opinion written by Johnson, J., and the dissent in that case written by Allen, C.J.[32], in *Debus*, these are: (1) "per diem"

arguments; and, (2) "lump sum" arguments.[33,34] However, this treatise also examines a third method of quantifying pain-and-suffering damages, *infra*.[35]

"A *per diem* argument," Justice Johnson wrote in *Debus*, is a tool of persuasion used by counsel to suggest to the jury how it can quantify damages based on the evidence of pain and suffering presented."[36] Under a *per diem* theory, plaintiff's closing argument

> [should] suggest[] that the jury think about plaintiff's injury in terms of daily pain and suffering, and then determine what amount of damages would be appropriate compensation for each day of suffering. An average daily figure was suggested to the jury, which it could then multiply by the number of days plaintiff would live, counting from the day of the accident until the end of her life expectancy…[37]

While Justice Johnson himself recognizes the disagreement among jurisdictions as to the appropriateness of *per diem* arguments[38],

> …jurisdictions that have allowed *per diem* arguments counter that sufficient safeguards exist in the adversarial system to overcome the objections to its use. They point out that a plaintiff's hypothesis on damages, even if presented on a *per diem* basis, must be reasonable or suffer serious and possibly fatal attack by opposing counsel; further, the notion that pain is constant and uniform may be easily rebutted by reference to the evidence or the jury's own experience. Most importantly, they note that *juries are entitled to draw inferences from the evidence before them and that the extent of damages attributable to pain and suffering is a permissible inference*.[39]

Chief Justice Allen's dissent contrasted that

> [t]he ultimate objective should be to *aid the jury* in determining what sum of money will reasonably compensate the plaintiff for the pain and suffering endured. The attainment of this goal is not enhanced by counsel [only] arguing the dollar amounts that they desire to have a jury return.[40]

Instead, Chief Justice Allen asserts in his opinion in *Debus*, it is the jury's confidence in the *methodology* as a threshold that should serve as a starting point to the deliberations ultimately to arise from the both the case-in-chief presented to it—and the rebuttal: "[t]he fair and practical solution is to permit the jury to hear about the methodology and to apply its dollar amounts from the *evidence* rather than sums suggested in argument."[41]

Importantly, and additionally, Chief Justice Allen also took issue with the validity therein of the use of "a specific cautionary [jury] instruction."[42] "I disagree with the majority," Chief Justice Allen wrote in his dissent in *Debus*, that it should be "reluctan[t] to require a specific cautionary instruction[.]"

4. Current Florida law as to pain and suffering as an element of damage awards in Florida

a. *Bricker v. Ellender*

Bricker v. Ellender, 2D06-4666 (Fla.App. 2 Dist. 11-14-2007) is a very relevant case for the reasons *infra*. The issue reexamined on appeal by Florida's Second District Court of Appeal in *Ellender* was plaintiff's request for $130,000 as recompense for future pain and suffering. However, the jury differed with plaintiff and instead declined to award any damages for both past and future pain and suffering.[43] The court denied plaintiff's motion for additur, even though the evidence that plaintiff suffered pain—what are known to Florida law as 'noneconomic damages'—was not controverted.[44] Therefore, the appellant argued, the denial by the court below of plaintiff's motion for a new trial or an additur was reversible error.[45] This comports with the recognition, *supra*, of the logical consistency demanding an award of pain-and-suffering damages when damages for other medical costs are awarded.[46]

Although other cases have permitted zero damages for pain and suffering[47,48], a distinction should be made there:

> [h]ere, [appellee] presented evidence, through the testimony of two [medical] doctors, that he suffered pain from the injury caused by the accident. …[An orthopedic specialist physician][] testified that Ellender suffered permanent lower back and neck injuries as a result of the accident. . .a physician specializing in pain management and anesthesiology[] testified that Ellender suffered neck and shoulder pain, headaches, and lower back pain. [The pain management-anesthesiology specialist] testified that [appellee's] '[n]eck was his major problem.' [The appellee] himself testified [as plaintiff in the court below] that he mostly suffers from back pain but that his neck will occasionally [cause him to experience pain and suffering], [specifically] causing headaches.[49]

Appellee also argued that a distinction should be made there because of a causation and certainty issue in the case at bar. The Court recognized "[h]ere, Ellender had preexisting conditions—a lower back injury and a history of migraine headaches—that might have contributed to his injuries and pain."[50] The jury did, however, make only a partial award, instead seeking to award an arbitrary half of the medical expenses, ostensibly based on the preexisting condition: "in making the award for future medical expenses, the jury essentially found that half of Ellender's claimed future medical expenses are related to the accident."[51]

Appellant, as mentioned *supra*, argue[d] "that such undisputed evidence concerning future pain and suffering makes this case distinguishable from other cases approving zero awards for future noneconomic damages."[52] Appellee countered that appellant's "pain [and suffering] is [wholly] caused by his preexisting back injury and his history of migraine headaches and that his future medication and treatments would obviate any future pain."[53,54,55]

Supporting its argument, appellee argued[56] that the issue appellant should have taken with the verdict in the court below was not a lack of consistency with the award of medical-cost damages, but simply that the zero pain-and-suffering damages verdict actually, as a matter of Florida procedural law, was "inadequate" rather than inconsistent: "[u]nder such circumstances, the issue is the adequacy of the award, not its consistency with any other award by the verdict."[57]

Florida's Second District Court of Appeals, speaking through Judge Canady, opined:

> [w]hile evidence was presented by Bricker that Ellender had suffered a prior lower back injury that could have contributed to his present pain, Ellender did not have any preexisting neck problems and the undisputed testimony established that after this accident, he suffered pain in his neck, requiring treatment and pain management.
> Bricker also presented the testimony of [another expert-witness physician] who testified that Ellender's injuries were permanent and that he believed Ellender's complaints of pain. The physician testified that Ellender suffered a neck injury and pain caused by the accident. 'I felt that he has continued neck problems, and there was no—again, in this case, there really was no indication that he had had them before, so I would have to relate them to this [*i.e.*, the automobile accident with Bricker].[58]

The Court then proceeded through an analysis of Fla.Stat. §768.043[59]. The Court found and applied to the jury's findings three criteria embodied in the statute: (1) that the jury ignored the evidence "or misconceived the merits of the case relating to the amount of past noneconomic damages recoverable"[60]; and, (2) that the zero damages award for pain and suffering did not constitute a "reasonable relation to the amount of damages proven and the injury suffered"[61]; and (3) the evidence did not support the zero damages award.[62]

Appellee countered "[where] the evidence is undisputed or substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero award for pain and suffering is inadequate as a matter of [Florida] law."[63] Appellee also countered "awards of zero damages for future noneconomic damages are

unreasonable when there is undisputed evidence of permanent injury and a need for treatment in the future."[64]

Appellee also countered "[s]ince the jury found that [Ellender] suffered injuries that required treatment by medical care providers as evidenced by the award of past medical costs, the jury's failure to award even nominal past noneconomic damages was not supported by the weight of the evidence and [therefore] must be reversed."[65]

Appellee continued, to counter:

> [f]uture damages are, by nature, less certain than past damages. [Where] a jury knows for a fact that a plaintiff has incurred past medical expenses, and, when it finds those expenses to have been caused by the accident, there is generally something wrong when it awards nothing for past pain and suffering. The need for future medical expenses is often in dispute, however, as it was here. It does not necessarily therefore follow . . . that an award of future medical expenses requires an award of noneconomic damages.[66,67,68]

5. Conclusion

Thus, the Florida Second District Court of Appeals concluded: "[i]n light of the above evidence regarding the probability of Ellender's future pain and the jury's award of future medical expenses, the jury should have awarded Ellender some future noneconomic damages[,]"[69] and reversed and remanded to the court below.[70,71,72]

---

[1] Dan B. Dobbs, *Law of Remedies: Damages – Equity –Restitution.* §8.1(4), (2d ed. 1993).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* §8.1(4) at 653.

[8] *Id.*

[9] *Id.*, §8.1(4) at 654.

[10] *Id.*

[11] *Id.*

[12] *Id* at 656.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Randall Bovbjerg, Frank Sloan, and James Blumstein, whose theses Ronen Avraham takes issue with in *Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change.* Nw. U. L. Rev. Vol. 100 (2006).

[17] *Id.*, at 93.

[18] *Id.*, at 94.

[19] *Id.*, at 95.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Although at footnote 81 Avraham ponders which branch of government ought to set forth such guidelines, this author suggests there is already persuasive precedent that such decisionmaking should reside with the judiciary. *See Mistretta v. United States*, 488 U.S. 361 (1989) for authority authorizing courts to promulgate Sentencing Guidelines. This may be authority that may be deemed persuasive as to damage awards, too. Then, however, at footnote 82, Avraham concludes "[t]he development of a damages scheduling system with the rigor and precision of the federal sentencing guidelines likely will require substantial conceptual and empirical research with data and measures that are significantly better than those which are presently available."

[25] Ronen Avraham, *Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, Nw. U. L. Rev. Vol. 100 (2006), at 103.

[26] *Id.*, at 94.

[27] *Id.*, at 102.

[28] Avraham then pursues in what would be an excursus herein a Posnerian inquiry into 'market valuation' and trial investigations into the elasticity of the supply of insurance coverage (i.e. premium levels) that juries would find reasonable based upon various qualitative analyses as to their perception of the severity of the plaintiff's physical loss, and what they or the hypothetical juror would pay for appropriate insurance coverage at market. This, Avraham asserts, constitutes "[t]he ideal approach[] [wherein] a jury assesses how much pain-and-suffering coverage [their perception of what] a rational individual would have purchased in the market[.]"

[29] *Id.*, at 107, emphasis added.

[30] Avraham, at 110.

[31] *Id*., *verbatim*, at 111.

[32] That is, to be inferred, given Laycock's choice to include the *Debus* case in his textbook.

[33] *Debus v. Grand Union Stores*, 621 A. 2d 1288 (Vermont 1993).

[34] Douglas Laycock, *Modern American Remedies: Cases and Materials* 146 (3d ed., Aspen Publishers 2002).

[35] The method described *infra* has been derived from *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change.* Nw. U. L. Rev. Vol.100 (2006).

[36] *Id*., at 147.

[37] *Id*.

[38] *Id*.

[39] *Id*., emphasis added.

[40] *Id*., at 149, Allen, C.J., dissenting (emphasis added).

[41] *Id*., emphasis added.

[42] *Id*.

[43] *Ellender v. Bricker*, No. 2D06-4666 (Fla.App. 2 Dist. November 14, 2007).

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] Appellant, on appeal, *id est*, Bricker, also argued a procedural issue as to appellee's failure to preserve the issue for appeal.

[49] *Id*.

[50] *Ellender*, at 10.

[51] *Id*.

[52] *Id*.

[53] "Our review of the record as a whole demonstrates the zero damages award for future medical expenses and for future pain and suffering is not reasonable in light of the undisputed evidence of permanent injury; continuing, and perhaps, increasing pain; and a continuing need for treatment." *Ramey v. Winn Dixie Montgomery, Inc.*, 710 So. 2d 191, 194 (Fla. 1st DCA 1998),

[54] *See also Deklyen*, 867 So. 2d at 1268.

[55] *See also Dolphin*, 731 So. 2d at 710.

[56] *Avakian v. Burger King Corp.*, 719 So. 2d 342, 344 (Fla. 4th DCA 1998).

[57] *Avakian,* 720 So. 2d at 344.

[58] *Id*.

[59] "(1) In any action for the recovery of damages based on personal injury or wrongful death arising out of the operation of a motor vehicle, whether in tort or in contract, wherein the trier of fact determines that liability exists on the part of the

defendant and a verdict is rendered which awards money damages to the plaintiff, it *shall* be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is clearly excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact. If the court finds that the amount awarded is clearly excessive or inadequate, it shall order a remittitur or additur, as the case may be. If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

(2) In determining whether an award is clearly excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court *shall* consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.

(b) Whether it clearly appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amounts of damages recoverable.

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation or conjecture.

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

(3) It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact, in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified only with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of Florida. Fla. Stat. §768.043. (emphasis added to suggest potentially unconstitutional wording of the statute).

[60]"Whether it clearly appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amounts of damages recoverable." Fla. Stat. §768.043(2)(b).

[61] "Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered." Fla. Stat. §768.043(2)(d).

[62] "Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons." Fla. Stat. §768.043(2)(e).

[63] *Dolphin Cruise Line, Inc. v. Stassinopoulos*, 731 So. 2d 708, 710 (Fla. 3d DCA 1999) (holding that trial court erred in denying motion for additur or new trial on issue of zero noneconomic damages.)

[64] "Holding that the 'jury's failure to award future non-economic damages was unreasonable' where the jury awarded a significant amount for future medical expenses and where the evidence was undisputed that the accident caused

plaintiff's injuries and that he would need future treatment, "indicating future pain.") *Garrett v. Miami Transfer Co*., 964 So. 2d 286, 291 (Fla. 4th DCA 2007).

[65] *Allstate Ins. Co. v. Campbell*, 842 So. 2d 1031, 1034-35 (Fla. 2d DCA 2003).

[66] *quoting Allstate Ins. Co. v. Manasse*, 681 So. 2d 779, 784-85 (Fla. 4th DCA 1996) (Klein, J., dissenting).

[67] "[A]s in *Manasse*, the need for future economic damages was disputed and the jury awarded only minimal future economic damages. Therefore, the jury's failure to award future noneconomic damages was supported by the evidence. . . ." *Campbell*, 842 So. 2d at 1035.

[68] "Due to the somewhat speculative nature of what may occur in the future, it is perhaps not unwise to afford great latitude to the jury in its determinations as to [future] damages."). *Dyes v. Spick*, 606 So. 2d 700, 704 (Fla. 1st DCA 1992).

[69] *See Dolphin*, 731 So. 2d at 710-11. (reversing zero award for noneconomic damages and remanding for additur or new trial on past and future noneconomic damages where the evidence was undisputed that the plaintiff experienced and will experience pain and suffering as a result of the accident).

[70] The Court in *Ellender* held "[w]e reverse the circuit court's final judgment and remand for further proceedings on Ellender's motion for additur or new trial consistent with this opinion. *Ellender*, at 11.

[71] The Court in *Ellender*, recognized [i]f the party adversely affected by such. . . additur does not agree, the court shall order a new trial in the cause on the issue of damages only." Fla. Stat. § 768.043(1).

[72] *citing Truelove v. Blount*, 954 So. 2d 1284, 1289-90 (Fla. 2d DCA 2007).