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DAMAGES FOR LOSS OF THE ENJOYMENT OF LIFE*

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I. INTRODUCTION

When someone is injured as a result of an interference with a legally protected right, the injured person is entitled to compensation in the form of damages. The purpose of this compensation is to put the injured party in the position in which he[1] would have been had the injury not occurred.[2] In a typical personal injury action, damages can usually be divided into two categories: (a) special damages for monetary losses such as medical expenses and loss of earnings; and (b) general damages, for nonpecuniary losses such as pain and suffering.

Monetary (or economic) losses can be compensated in kind by a monetary award, but "recovery for noneconomic losses such as pain and suffering . . . rests on 'the legal fiction that money damages can compensate for [this aspect of] a victim's injury.' "[3] Courts accept this fiction because it is "as close as the law can come in its effort to right the wrong," and because we hope that "a monetary award may provide a measure of solace."[4]

Many courts allow compensatory damages for loss of the enjoyment of life, either as an element of pain and suffering, or as a separate and independent element of the injured person's loss. Damages awarded for the loss of enjoyment of life compensate a person "for the limitations on the person's life created by the

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* Such damages are often referred to as "hedonic damages," though some people object to that term because it has a pejorative connotation as relating to hedonism - the notion that pleasure is the main goal in life.

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1. Masculine pronouns are used throughout for convenience and simplicity, to avoid the rather awkward "he or she" or the grammatically incorrect "they."

2. Damages are awarded "to compensate the victim, not to punish the wrongdoer." McDougald v. Garber, 73 N.Y.2d 246, 253-54, 536 N.E.2d 372, 374, 538 N.Y.S.2d 937, 939 (1989).

3. *Id.* at 254, 536 N.E.2d at 374-75, 538 N.Y.S.2d at 939.

4. *Id.* at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 939.

injury."[5]

Loss of enjoyment of life seems to fall into two categories. First, there are losses common to most people which result from the injured person's inability to do things which other people can normally do. Included in this category would be such things as participation in sports[6] and recreational activities,[7] loss of senses such as smell or taste,[8] and inability to engage in ordinary family activities.[9] Second, there are losses unique to an individual, resulting from the inability to apply certain skills or perform certain acts that this person was able to perform before the injury. This category would include such things as inability to continue in a particular career (aside from any loss of earnings),[10] participate in organized sports,[11] play a musical instrument,[12] or contribute articles to professional journals.[13]

II. ISSUES INVOLVED

Although there are some old cases to the contrary,[14] it seems to be generally recognized that loss of enjoyment of life is a proper element to include in an award of damages in a personal injury action.[15] What is less certain is whether certain aspects of the enjoyment of life may be included. In some cases the courts have held that, while loss of enjoyment of life is compensable, a specific loss of enjoyment claim, such as inability to play the violin, is "too speculative and conjectural to form a sound basis for the assessment of damages."[16]

There is a clear split of authority as to whether loss of enjoyment of life may be considered and compensated for as a separate and independent element of damages, or whether it should be included as one of the elements recoverable under the broad heading

5. Thompson v. National R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980).

6. Pierce v. New York Cent. R.R., 409 F.2d 1392 (6th Cir. 1969).

7. Downie v. United States Line Co., 359 F.2d 344 (3d Cir. 1966).

8. Daugherty v. Erie R.R. Co., 403 Pa. 334, 169 A.2d 549 (1961).

9. Lebrecht v. Bethlehem Steel Corp, 402 F.2d 585 (2d Cir. 1968).

10. McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964).

11. Locicero v. State Farm Mut. Ins. Co., 399 So. 2d 712 (La. Ct. App. 1981).

12. Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28 (1938).

13. District of Columbia v. Woodbury, 136 U.S. 450 (1890).

14. *See* Annot., 15 A.L.R.3d 511-13 (1967).

15. *See, e.g.*, Powell v. Hegney, 239 So. 2d 599 (Fla. Dist. Ct. App. 1970); Underwood v. Atlanta & W. Point R.R. Co., 105 Ga. App. 340, 124 S.E.2d 758, *aff'd in part and rev'd in part*, 218 Ga. 193, 126 S.E.2d 785 (1962); Mariner v. Marsden, 610 P.2d 6 (Wyo. 1980).

16. Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 729, 85 P.2d 28, 33 (1938); *see also* McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964) (evidence that plaintiff intended to be physical education teacher, but due to accident had to take up more sedentary occupation, held to be too vague and insubstantial).

of "pain and suffering."[17] Some courts have held that the fact-finder may *either* make a separate award for loss of enjoyment of life *or* take it into consideration in arriving at the total general damages. The rationale for this view is that it is only the total award for general damages that an appellate court should look to for excessiveness or insufficiency.[18]

A number of courts have held that loss of enjoyment of life is not a separate element of damages but rather should be included in the award for pain and suffering.[19] The usual rationale for this view is that a separate award for loss of enjoyment of life would result in impermissible duplication.[20] However, other courts have recognized a distinct difference between pain and suffering and loss of enjoyment of life, and have held that each represents a separate loss which the victim incurs.[21] "[P]ain and suffering compensates the victim for the physical and mental discomfort caused by the injury, [while] loss of enjoyment of life compensates the victim for the limitations on the persons's (sic) life created by the injury."[22]

Another question is "whether some degree of cognitive awareness is a prerequisite to recovery for loss of enjoyment of life."[23] And finally, there is difference of opinion as to whether damages for loss of enjoyment of life may be awarded in a wrongful death

17. *See* Annot., 34 A.L.R.4th 293 (1984).

18. Mariner v. Marsden, 610 P.2d 6 (Wyo. 1980).

19. Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A.2d 1188 (1978); *see also* Dugas v. Kansas City S. Ry. Lines, 473 F.2d 821, 827, *cert. denied* 414 U.S. 823 (1973)(normal pursuits and pleasures of life included as part of pain, suffering and inconvenience; not a factor to be separately measured); Underwood v. Atlanta & W. Point R.R. Co., 105 Ga. App. 340, 351, 124 S.E.2d 758, 768 *aff'd. in part and rev'd. in part*, 218 Ga. 193, 126 S.E.2d 785 (1962)("mental distress caused by the impairment of *capacity to enjoy life* . . . is a proper element . . . of pain and suffering"); Missouri Pac. R.R. Co. v. Lane, 720 S.W.2d 830, 834 (Tex. Civ. App. 1986) ("Loss of enjoyment of life may not be claimed as a separate element of damages, but may be treated as a factor in determining the damages in general or those for pain and suffering"); Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216, 1221 (Utah 1980)("Included in mental pain and suffering is the diminished enjoyment of life . . .").

20. Huff v. Tracy, 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551, 553 (1976)(instruction on loss of enjoyment of life "repeats what is effectively communicated by the pain and suffering instruction, opening the possibility of double compensation"); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985)(would be "plainly duplicative").

21. Thompson v. National R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980).

22. *Id.*; *see also* Sweeney v. Car/Puter Int'l Corp., 521 F. Supp. 276 (D.S.C.1981) (applying South Carolina law); Andrews v. Mosley Well Serv., 514 So. 2d 491 (La. Ct. App. 1987)(rejected argument that award for loss of enjoyment of life was duplicitous); Anunti v. Payette, 268 N.W.2d 52 (1978)(jury could consider pain and suffering *and* effect of injuries on enjoyment of amenities of life).

23. McDougald v. Garber, 73 N.Y.2d 246, 251, 536 N.E.2d 372, 373, 538 N.Y.S.2d 937, 938 (1989).

case, since a dead person is unable to enjoy the benefit of such damages.[24]

III. ILLINOIS CASES

In view of the fact that loss of enjoyment of life must be present in a great many personal injury cases, it is surprising that there is virtually no case law on this subject in Illinois. It seems probable that in most cases evidence of loss of enjoyment of life is presented without any objection, as apparently happened in *Budek v. City of Chicago*.[25] In *Budek*, the court stated that deprivation of "the privileges and enjoyments common to people of her class" was a factor to be considered in determining whether a damage award was excessive,[26] and there does not appear to have been any dispute about this being an element of damages. But it is also quite possible that many attorneys do not include this element in their damages claims, and may fail to elicit from their clients the facts which would permit a proper showing of this loss. In view of the lack of Illinois cases in this area, it seems appropriate for Illinois attorneys and courts to give careful and thoughtful consideration to the issues involved, and to develop some clear guidelines.

IV. ARGUMENTS FOR INCLUDING LOSS OF ENJOYMENT OF LIFE IN PAIN AND SUFFERING

The view that a person's "inability to enjoy life to its fullest" should not be "treated as a separate category of damages" but rather should be "considered [as] one type of suffering to be factored into a general award for . . . pain and suffering" is well stated and explained in *McDougald v. Garber*.[27] Noting that the translation of human suffering into a monetary award rests on a legal fiction and is not amenable to any mathematical formula, the court expressed its concern that the monetary figures which emerge are

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24. *Compare* Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A.2d 1188 (1978)(no loss to compensate after death) *with* Kiniry v. Danbury Hosp., 183 Conn. 448, 439 A.2d 408 (1981) (compensation for destruction of life's enjoyment is one of elements of general damages in wrongful death case). Wrongful death cases are beyond the scope of this article.

25. 279 Ill.App. 410 (1935).

26. 279 Ill.App. at 429; *see also* Sherrod v. Berry, 629 F. Supp. 159 (N.D.Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *vacated and reh'g granted*, 835 F.2d 1222 (en banc), *rev'd on other grounds and remanded*, 856 F.2d 802 (7th Cir. 1988)(award in a section 1983 action to decedent's estate for the value of his life should include hedonic value); Long v. Yellow Cab Co., 137 Ill. App. 3d 324, 484 N.E.2d 830 (1985)(jury award held not excessive; evidence included that plaintiff was forced to curtail many of her avocations and other activities).

27. 73 N.Y.2d 246, 255-56, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989); *see also* Nussbaum v. Gibstein, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989)(decided the same day and applying the same rationale).

"unavoidably distorted by the translation," and that this distortion would only "be amplified by repetition," which would be the case if loss of enjoyment of life were separated from pain and suffering.[28] The court also expressed its confidence "that the trial advocate's art is a sufficient guarantee that none of the plaintiff's losses will be ignored by the jury."[29] It is quite apparent that a majority of the court in *McDougald* felt that the fewer variables a jury is allowed to employ, the less opportunity it will have to "go off the reservation."[30] And, as previously indicated, other courts have expressed concern over the possibility of duplicative compensation.[31]

V. Arguments for Treating Loss of Enjoyment of Life as an Element Separate from Pain and Suffering

Some courts have held that it is proper to give an instruction on loss of enjoyment of life in addition to the usual instruction on pain and suffering.[32] Although questionable as precedent, these courts reason that a clear distinction can be drawn between the two, and that a separate award for loss of enjoyment of life will *avoid* the danger of duplicitous awards, since an appellate court will be better able to review the instructions and awards to see if the awards are excessive.[33] As the court noted in *Flannery v. United States*,[34] the loss of the "capacity to enjoy life is not a function of pain and suffering," as exemplified by the fact that "one can lose his eyesight or a limb and be without physical pain," yet still have his capacity to enjoy life impaired by those injuries.[35]

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28. McDougald v. Garber, 73 N.Y.2d 246, 257, 536 N.E.2d 372, 376-77, 538 N.Y.S.2d 937, 941 (1989).

29. *Id.* at 257, 536 N.E.2d at 377, 538 N.Y.S.2d at 941. The court also indicated that, in general, the total award for non-pecuniary damages would increase if a separate award for loss of enjoyment of life was allowed, (noting that "separate awards are advocated by plaintiffs and resisted by defendants . . ."), and that "a larger award does not [necessarily] indicate that the goal of compensation has been better served." *Id.* at 257, 536 N.E.2d at 941, 538 N.Y.2d at 941, 538 N.Y.2d at 941.

30. *Id.* at 255-56, 536 N.E.2d at 375-77, 538 N.Y.2d at 940-41.

31. *See* cases cited *supra* note 20 for courts concerned about duplicative compensation.

32. Flannery v. United States, 297 S.E.2d 433 (W. Va. 1982), *cert. denied*, 467 U.S. 1226 (1984). For a lower court that reasoned similarily, see Nussbaum v. Gibstein, 138 A.D.2d 193, 531 N.Y.S.2d 276 (1988), *rev'd*, 73 N.Y.2d 912, 539 N.Y.S. 2d 289 (1989).

33. *See, e.g.*, Swiler v. Baker's Super Mkt., Inc., 203 Neb. 183, 277 N.W.2d 697 (1979); *Flannery*, 297 S.E.2d 433.

34. 297 S.E.2d 433 (W.Va. 1982), *cert. denied*, 467 U.S. 1226 (1984).

35. *Id.* at 437.

VI. Is Conscious Awareness Required?

Apart from the question whether loss of enjoyment of life is part of, or separate from, pain and suffering, there are other basic issues. One such issue deals with "cognitive awareness." It is generally agreed that there can be no recovery for pain and suffering unless the injured person is conscious of the pain. Some courts also hold that some degree of "cognitive awareness is a prerequisite to recovery for loss of enjoyment of life."[36] The rationale for this view is that "money damages in such circumstances has no meaning or utility to the injured person."[37] A monetary award will provide no consolation; it cannot be spent to improve the injured person's life; he can't even "experience the pleasure of giving it away."[38]

Other courts, however, feel that the injured person's "subjective knowledge of the extent of his loss should [not] be controlling."[39] Here, the rationale is a recognition that in many situations, such as with inexperienced young children, an injured person's ability to comprehend his loss may be minimal, yet there is clearly an objective loss of something which is accepted as an essential characteristic of normal, healthy human life. A child who is blinded very early in life is not aware of what vision would mean in his later life, yet few would question that the quality of his life has been impaired.[40]

VII. The Future of Damages for Loss of the Enjoyment of Life in Illinois

Illinois courts and litigants will have to deal with these questions when claims for damages for loss of the enjoyment of life become more prevalent. The specific items which are encompassed within loss of enjoyment of life constitute an almost endless list. As a starting point, it is important to recognize that the loss results from no longer being able to aspire to and reach one's goals. This includes the joy of striving as well as the satisfaction of attaining. It has been expressed in almost poetic terms:

> [T]he right to enjoy the companionship of loved ones; the right to see the glorious dawn and sunset, to feel the caress of gentle breezes or the invigorating sting of winter winds, to hear the murmur of the idling brook and the music of warbling birds, to smell the sweet fragrance of

36. McDougald v. Garber, 73 N.Y.2d 246, 255, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989).

37. *Id.* at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 940.

38. *Id.* (citing Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983)).

39. Flannery v. United States, 297 S.E.2d 433, 438 (W.Va. 1982), *cert. denied*, 467 U.S. 1226 (1984).

40. *Id.* at 438-39.

nature's flowers, and to taste the diet of life itself.[41]

It includes "watching one's children grow . . . and drinking in the many other pleasures that life has to offer."[42] And in the common experience of most people, the enjoyment of life can include engaging in recreational activities,[43] sports,[44] and hobbies;[45] the senses, such as taste and smell;[46] and the ability to perform customary household chores or engage in the usual family activities.[47]

As indicated above,[48] there does not seem to be any serious question about allowing recovery under proper circumstances for loss of enjoyment of life. In view of our increasing societal emphasis on leisure, hobbies, recreation and so on, it seems unlikely that this will change in the future. While one must admit that it is often difficult to put a monetary price tag on loss of enjoyment of life, that should be no more a deterrent to recovery here than it is in other areas of the law of damages. Courts have repeatedly admitted that "physical pain," "mental suffering" or "mental anguish" cannot be accurately measured in money; those same courts, however, do not hesitate to award damages as approximate compensation for the loss sustained.[49]

Loss of enjoyment of life and pain and suffering are quite different, and it would be best if they were considered independently by the trier of fact. The focus of pain and suffering is the physical injury and accompanying pain. Loss of enjoyment of life, on the

41. Downie v. United States Lines Co., 359 F.2d 344, 350 (3d Cir. 1966) (Kalodner, C.J., dissenting), *cert. denied*, 385 U.S. 897 (1966).

42. McDougald v. Garber, 73 N.Y.2d 246, 258, 536 N.E.2d 372, 377, 538 N.Y.S.2d 937, 942 (1989) (Titone, J., dissenting).

43. Sweeney v. Car/Puter Int'l Corp., 521 F. Supp. 276, 284 (D.S.C.1981) (boating and bicycling); Graling v. Reilly, 214 F. Supp. 234 (D.D.C. 1963) (fishing trips, short motor trips, and movie theater); Andrews v. Mosley Well Serv., 514 So. 2d 491 (La.App. 1987) (fishing, playing ball with sons); McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (App. Ct. 1964) (swimming and horseback riding); Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216 (Utah 1980) (skiing and dancing); Hoffman v. Gamache, 1 Wash.App. 883, 465 P.2d 203 (1970) (boating, fishing and hiking).

44. Locicero v. State Farm Mut. Ins. Co., 399 So. 2d 712 (La.App. 1981) (opportunity to try out for college football team).

45. District of Columbia v. Woodbury, 136 U.S. 450 (1890) (contributing to medical journals); Culley v. Pennsylvania R.R. Co., 244 F. Supp. 710 (D.Del. 1965) (bowling and working in garden); Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28 (1938) (playing violin).

46. Daugherty v. Erie R.R. Co., 403 Pa. 334, 169 A.2d 549 (1961).

47. Downie v. United States Lines Co., 359 F.2d 344, 347 n.3 (3d Cir. 1966), *cert. denied*, 385 U.S. 897 (1966).

48. *See* text accompanying notes 25 and 26 *supra*.

49. Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 731, 85 P.2d 28, 34 (1938) (Wedell, J., concurring in part and dissenting in part); *see also* Leiker v. Gafford, 245 Kan. 325, 337, 778 P.2d 823, 833 (1989) ("the argument that [damages for the loss of enjoyment of life] are too speculative and conjectural could also be asserted as to any area of nonpecuniary damages, such as pain and suffering").

other hand, focuses on the limitations placed on a person's ability to enjoy the pleasures and amenities of life. A simple example will illustrate this. Suppose there are two recreational golfers, each of whom has lost the use of an arm. One had his arm mangled and crushed in a tractor accident. The other had his arm surgically removed in a totally anesthetized procedure when his medical records were negligently interchanged with those of another patient. In both cases, the determination of the loss of enjoyment of life will focus on their inability to play golf in the future and, if their abilities and involvement in golf are the same, their loss of enjoyment of life will be the same. Their respective pain and suffering, however, will be markedly different: the person in the first case will have far greater pain and suffering than the person in the second. Pain and suffering is proved by evidence as to physical sensations, and the mental or emotional response to an injury. On the other hand, loss of enjoyment of life is proven objectively by evidence of the limitations an injury places on a person's participation in activities of various kinds.[50]

Unwillingness to instruct the jury specifically and independently on loss of enjoyment of life might be based on the assumption that the jury will recognize and compensate for such loss on its own, because it is part of the common experience of life. But such an assumption could also be made for any other element of damages, which would mean there would be no need to instruct the jury on damages at all!

If there is concern about duplicative compensation of the plaintiff, the obvious solution is to require that the jury award separate amounts for pain and suffering and for loss of enjoyment of life. This would permit the trial and appellate courts to examine the awards and determine if they are excessive. It would also allow the litigants to know the amount awarded for each element of damages, and would be helpful in determining whether to appeal. It would also provide helpful guidance for the settlement of future cases.

Recovery for loss of enjoyment of life should not depend on whether the injured person has a conscious awareness of the loss. The question is not what the plaintiff was aware of, but what he has lost.[51] To require cognitive awareness would create the paradoxical situation, in a brain damage case for instance, the greater the degree of injury inflicted by the negligent defendant, the smaller the award to the plaintiff. When there is a demonstrable loss of enjoyment of life, its existence in no way depends on the awareness of the injured person.

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50. *See supra* notes 43-45, for cases discussing various recreational activities.

51. McDougald v. Garber, 73 N.Y.2d 246, 253, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 939-40.

VIII. CONCLUSION

It is likely that the issues relating to damages for loss of enjoyment of life will be resolved in Illinois in the future. Hopefully, the attorneys and courts who participate in that resolution will have given wise and thoughtful consideration to these issues.

The enjoyment of life is a very personal and important aspect of a person, and courts should treat it as such. To fully compensate for loss of enjoyment of life, courts should treat it separately from pain and suffering. Further, such an award should not rest on the conscious awareness of the victim, because that does not treat the enjoyment of life as importantly as it should be treated. If courts are uncomfortable because of the possibility of duplicative awards, they should require the trier of fact to separate the awards.