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Hedonic Damages: The Rapidly Bubbling Cauldron

Victor E. Schwarz

Cary Silverman

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THE RAPIDLY BUBBLING CAULDRON*

Victor E. Schwartz† & *Cary Silverman*††

I. INTRODUCTION

In the last days of its 2002 session, the Mississippi legislature overruled a series of state supreme court decisions[1] expanding the availability of damages for loss of enjoyment of life, in one fell swoop restoring traditional principles to the state's tort law. The comprehensive tort reform bill covered such issues as joint and several liability, products liability, and

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† Senior partner, Shook Hardy & Bacon L.L.P. (Washington, D.C.). Co-author of PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000); author of COMPARATIVE NEGLIGENCE (4th ed. 2002). Former member of the Advisory Committees to the Restatement of the Law of Torts Projects on Products Liability and Apportionment of Liability; member of the Advisory Committee to the Restatement of the Law of Torts: General Principles. B.A., Boston University (1962); J.D., Columbia University (1965).

†† Associate, Shook Hardy & Bacon L.L.P. (Washington, D.C.). B.S., State University of New York College at Geneseo (1997); M.P.A., George Washington University (2000); J.D., George Washington University (2000).

[1] Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911 (Miss. 2002) (en banc) (permitting the testimony of several character witnesses on the decedent's enjoyment of life in a wrongful death action and allowing recovery of hedonic damages where death was instantaneous); Dorrough v. Wilkes, 817 So. 2d 567 (Miss. 2002) (permitting hedonic damages in a wrongful death action where the decedent was aware and conscious of her injury for 29 hours before death); Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374 (Miss. 2001) (allowing hedonic damages separate and apart from pain and suffering and permitting expert testimony regarding the calculation of damages for lost enjoyment of life).

punitive damages.[2] While this reform package received significant media coverage,[3] a damages provision that significantly alters Mississippi jurisprudence went unnoticed. That section provided:

> In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering.[4]

It further provided that expert testimony is not admissible on the issue of the "monetary value" of damages for "pain and suffering and the loss of enjoyment of life," and it prohibited damages for loss of enjoyment of life in wrongful death actions.[5]

Damages for loss of enjoyment of life, which have also become known as "hedonic damages," purportedly compensate an injured person for the loss of quality of life or the value of life itself. Courts have defined these damages as compensating for "the inability to perform activities which had given pleasure to this particular plaintiff, which are distinguished from basic losses, which are, disabilities that include the basic mechanical body functions of walking, climbing, feeding oneself and so on."[6] The United States Court of Appeals for the Tenth Circuit, applying New Mexico law, found such factors as "the ability to enjoy the occupation of your choice, activities of daily living, social leisure activities, and internal well-being" as appropriate for consideration.[7] Prior to Mississippi's 2002 tort reform, that state's supreme court considered hedonic damages appropriate

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[2] *See* H.B. 19, 3d Extraordinary Sess. (Miss. 2002) (enacted November 26, 2002 and signed into law by the Governor on December 3, 2002).

[3] *See, e.g.*, Lynne W. Jeter, *Business Liability Legislation an Early Gift?*, MISS. BUS. J., Dec. 9, 2002, at 1; *Governor Signs Tort Reform Bill*, CHI. TRIB., Dec. 4, 2002, at 21; Tim Lemke, *Mississippi Restricts Lawsuit Damages*, WASH. TIMES, Nov. 27, 2002, at A1.

[4] H.B. 19, 3d Ex. Sess., § 10 (Miss. 2002) (effective January 1, 2003, and codified at MISS. CODE ANN. § 11-1-69 (2003)).

[5] *See id.*

[6] *See* McGarry v. Horlacher, 775 N.E.2d 865, 877-78 (Ohio Ct. App. 2002) (internal quotations omitted) (quoting with approval the trial court's definition of hedonic damages and ruling that the trial court properly excluded expert testimony on hedonic damages).

[7] Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1245-46 (10th Cir. 2000) (internal quotations omitted) (finding that while expert testimony on the calculation of hedonic damages was impermissible, expert testimony on the definition of hedonic damages included "four broad areas of human experience" that the jury could consider in determining an award).

to remedy the lost enjoyment of "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities."[8] Applying this reasoning, a person injured in a car accident might recover – in addition to separate awards for past and future pain and suffering and disability – for being "deprived of the simple enjoyments of a father with a young child" and the enjoyment of outdoor recreational activities.[9]

Despite the retrenchment of Mississippi law, a growing minority of state courts are gradually expanding the availability of hedonic damages.[10] The Ohio Supreme Court recognized the beginning of this trend in 1992. As the court observed:

> [R]ecently in Ohio, as elsewhere, plaintiffs' attorneys have more frequently included an additional element of damage, which they generally term "loss of enjoyment of life," in complaints in personal injury actions. . . . [T]he question remains for our consideration whether such damage, be it known as loss of enjoyment of life or by another name, may be allowed in other types of negligence actions, and may be considered as a separate element of damages in the jury instructions, interrogatories submitted to the jury, and in a special verdict form.[11]

As the Supreme Court of Texas recently recognized, "Courts across the country have struggled with whether loss of

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[8] *See* Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374, 381 (Miss. 2001).

[9] *See* Matos v. Clarendon Nat'l Ins. Co., 808 So. 2d 841, 848 (La. Ct. App. 2002); *see also* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 486 (Ohio 1992) ("Such damages include loss of ability to play golf, dance, bowl, play musical instruments, engage in specific outdoor sports, along with other activities.").

[10] *See infra* note 39 and accompanying text. State legislators have also demonstrated a recent interest in hedonic damages. Rhode Island Governor Lincoln Almond recently vetoed legislation that would have permitted recovery of hedonic damages in wrongful death actions. *See, e.g.*, Press Release, Office of the Governor, State of Rhode Island and Providence Plantations, Almond Vetoes Bills Concerning Jury Selection, Wrongful Death Actions (July 12, 2001), available at http://www.uri.edu/library/special_collections/almond/press/documents/july1201c.html. The Governor stated:

> I have three principle objections to awarding damages for the loss of enjoyment of life. . . . The intangible, emotional, and highly subjective nature of hedonic damages may lead to disproportionate awards. And, the social burden of providing such speculative damages will ultimately be borne by the public through increased insurance premiums. Second, hedonic damages can create double recovery (for the same loss) for survivors. Third, some advocates view hedonic damages as a way of punishing the wrongdoer. I do not share this view.

Id. (quoting Governor Almond).

[11] *See Fantozzi*, 597 N.E.2d at 483. The Ohio Supreme Court ruled that loss of enjoyment of life as a separate element of damages would be redundant with damages for the "inability to perform the usual activities of life," but was distinct from pain and suffering. *See id.* at 485-86.

enjoyment of life is compensable at all, and if so, whether it is part of pain and suffering, mental anguish, or physical impairment, or is a separate, independent category of damages."[12] This Article aims to provide guidance to courts and legislatures considering these questions. Part II examines the development of hedonic damages, places them in the broader context of tort law, and briefly discusses their calculation. Part III outlines the numerous problems with hedonic damages. First, counting hedonic loss separate and apart from pain and suffering creates a significant risk of double compensation. Second, hedonic damages threaten legislative and judicial limits on the size of punitive or non-economic damages, potentially leading to windfall awards. Moreover, hedonic damage awards challenge important, time-tested principles underlying wrongful death statutes and survivorship actions, which usually and wisely limit recovery to pecuniary loss. Not only is the idea of hedonic damages conceptually lacking, but the measure suffers from evidentiary problems. Because purported experts can offer no real economic baseline in quantifying the incalculable value of life, the testimony often prejudices by leading jurors to an arbitrary and inflated award. Finally, there is no reliable systemic check at the end of the process, as the highly subjective nature of hedonic damages makes meaningful appellate review quite difficult. After concluding that hedonic damages are fraught with problems, this Article suggests that courts and state legislatures act to stop their development as a new, separate category of damages.

II. THE ORIGIN AND THEORY OF HEDONIC DAMAGES

A. *The Rise of Hedonic Damages*

Hedonic damages are not a new idea. As a Louisiana appellate court recognized, "[w]hile this term is new to our jurisprudence, the concept is not."[13] Prior to the mid- to late-1980s, courts did not refer to hedonic damages, but instead awarded damages for "loss of enjoyment of life." These damages were usually part of damages for pain and suffering or a

[12] Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 768 (Tex. 2003) (compiling cases).

[13] Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 285 (La. Ct. App. 1992).

general damage award.[14] Today, however, with increasing frequency in personal injury and wrongful death actions, plaintiffs' lawyers are attempting to introduce expert testimony on hedonic damages and requesting that courts provide juries with a separate instruction and verdict form for lost enjoyment of life.

The term "hedonic damages" made its debut in the 1980s when economists began using the term to explain the non-pecuniary damages available in any given case. "Hedonic," derives from the Greek "hēdon(ē)" or "hēdonikós," meaning "pleasure" or "pleasurable."[15] Dr. Stanley V. Smith, an economist and financial consultant, is given credit as coining the phrase in a § 1983 federal civil rights lawsuit, *Sherrod v. Berry*.[16] In that case, the decedent, an innocent African-American male who unknowingly offered a ride to a man who had just robbed a florist, was shot by police after being pulled over in a white Illinois suburb.[17] Subsequently, the decedent's

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[14] *See id.*

[15] *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 657 (1994). Hedonism can be traced back to the writings of the ancient philosophers, Aristippus (c. 435-366 BC) and Epicurus (c. 341-271 BC). Aristippus, the founder of the Cyrenaic school of hedonism and a disciple of Socrates, believed that the good life rests upon the belief that pleasure is the highest and pain is the lowest human value – and one that should be avoided. Epicurus later expanded on this thinking and suggested that people act for the sake of ultimately gaining pleasure.

Hedonic thinking continued in modern times with Jeremy Bentham (1748-1832). Bentham, a lawyer by trade, believed that the goal of all human conduct is to obtain happiness, and that consequently actions that are "right" provide pleasure and those that are "wrong" result in pain. As Bentham wrote:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. I, § 1 (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789). It is on the basis of pleasures and pains that Bentham thought one could construct a "calculus of value," including "Hedons," units of pleasure, and "Dolors," units of pain. Bentham did not advocate selfishness. Rather, Bentham's "hedonic utilitarianism" proposed that *legislators* determine the interests of the community on the basis of the interests of the individual, and strive to achieve the greatest happiness for the greatest number. *See id.* ch. IV, § 5. Bentham could not have anticipated that a similar calculus would be used to arrive at a monetary award for the lost enjoyment of life in a private lawsuit, as they are today.

[16] *See* Marcia Coyle, *Updating 'Hedonic' Damages*, NAT'L L.J., Apr. 9, 2001, at A1 (most likely referring to Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *reh'g granted and opinion vacated on other grounds*, 835 F.2d 1222 (7th Cir. 1988), *on reh'g en banc*, 856 F.2d 802 (7th Cir. 1988)).

[17] *See Sherrod*, 629 F. Supp. at 160-62.

father, as administrator of his son's estate, brought a wrongful death action under 42 U.S.C. § 1983 against the city, its police chief, and the police officer.[18] The court found that "the loss of life means more than being deprived of the right to exist, or of the ability to earn a living; it includes deprivation of the pleasures of life."[19] It then permitted the testimony of Dr. Smith, who explained that "hedonic value" refers to "the larger value of life . . . including economic, including moral, including philosophical, including all the value with which you might hold life."[20] The trial resulted in a jury verdict for $300,000 in compensatory damages and $850,000 in hedonic damages.[21] The United States Court of Appeals for the Seventh Circuit upheld the admission of Dr. Smith's expert testimony, found that the award did not violate the rule against "speculative damages," and did not require remittitur.[22]

Due to variations in application between individual courts and because many state supreme courts have not ruled on the issue, it is difficult to precisely gauge the extent to which states allow juries to separately award hedonic damages. Most jurisdictions appear to regard hedonic damages as an element of pain and suffering or disability.[23] The highest courts of Kansas, Nebraska, New York, Ohio, Pennsylvania, and appellate-level decisions in California, Minnesota, and Texas, support this position.[24] Other states, including Maryland, New Mexico, South Carolina, and Wyoming, allow recovery of hedonic damages as a separate element of damages.[25] Some courts appear to allow recovery of hedonic damages in some situations, such as to compensate for the loss of a specific skill, but not in other situations, such as wrongful death and survival actions.[26] In some states, such as Louisiana, appellate

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[18] *See id.* at 162-63.

[19] *Id.* at 163.

[20] *Id.*

[21] *See Sherrod*, 827 F.2d at 208 (awarding $300,000 for "pecuniary loss to the estate" and $850,000 for "the value of [the decedant's] life").

[22] *Id.* at 205-09.

[23] *See infra* Part III.A.

[24] *See id.*

[25] *See id.*

[26] *Compare* Kirk v. Wash. State Univ., 746 P.2d 285, 292-93 (Wash. 1987) (allowing injured cheerleader to recover for "loss opportunity or loss of a chance to become a professional dance performer"), *with* Wooldridge v. Woolet, 638 P.2d 566, 570 (Wash. 1981) (en banc) (finding that "lost pleasures . . . essentially represent pain and suffering" and were not available in a survival action where the decedent was killed in a car accident).

courts split on the issue and the law is largely in flux.[27] Hedonic damages remain unknown in a few states.[28] Most courts do agree, however, that "expert" testimony on hedonic damages has no place in the courtroom[29] and that hedonic damages are not available in wrongful death or survival actions.[30]

B. Calculating Hedonic Damages: Priceless

In 1997, MasterCard launched a successful advertising campaign that pointed out the "priceless" moments in life. MasterCard's "Priceless" ads proclaimed, "There are some things money can't buy. For everything else, there's MasterCard." The ads emphasized the personal relationships and sentimental, special moments that make life good. It is priceless, for example, for a preschooler to spill most of the milk from her cereal bowl down her shirt, for a mother to take her adult daughter to the place where she first met her husband, or for a child to come home after a night of camping in the neighbor's backyard. The notion of hedonic damages, however, takes the opposite approach. It implies that every positive life experience can and should be converted into a cash equivalent, and asks the jury to do so.

Juries have two ways of arriving at an economic value for the lost enjoyment of life or the loss of life itself. The first

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[27] Several courts in Louisiana permit a separate award for hedonic damages. *See, e.g.*, Bruce v. State Farm Ins. Co., 859 So. 2d 296, 300, 306 (La. Ct. App. 2003) (ruling that "[a] plaintiff is entitled to recover damages for loss of enjoyment of life if he proves that his lifestyle was detrimentally altered or if he was forced to give up activities because of his injury" and therefore upholding a $7,500 award for loss of enjoyment of life on top of a $20,000 pain and suffering award); Matos v. Clarendon Nat'l Ins. Co., 808 So. 2d 841, 847-48 (La. Ct. App. 2002) (ruling that separate damage award of $45,000 for loss of enjoyment of life to motorist injured in rear-end collision was not duplicative of damages awarded for pain and suffering and disability); Day v. Ouachita Parish Sch. Bd., 823 So. 2d 1039 (La. Ct. App. 2002) (upholding separate awards for pain and suffering and loss of enjoyment of life to a high school athlete who injured his back in weight training class and could no longer participate in sports at the varsity level). Some Louisiana courts have taken the opposite approach. *See, e.g.*, Mistich v. Volkswagen of Germany, Inc., 698 So. 2d 47, 51 (La. Ct. App. 1997) (ruling that hedonic damages are included in pain and suffering "because, like pain and suffering, they cannot be quantified with any degree of 'pecuniary exactitude' or measured definitely in terms of money") (quoting Foster v. Trafalgar House Oil & Gas Co., 603 So. 2d 284, 285 (La. Ct. App. 1992).

[28] *See* Anderson v. Hale, No. CIV-02-0113-F, 2002 WL 32026151, at *7 (W.D. Okla. Nov. 4, 2002) (noting that "[h]edonic damages, as a subject of recovery separate from (or even to be expressed separately from) those elements of damages [contained in Oklahoma's Uniform Jury Instructions], are unknown to Oklahoma law").

[29] *See infra* Part III.C.

[30] *See infra* Part III.B.3.

method involves a measure similar to the one used for pain and suffering. This method asks jurors to use their own life experience and judgment to arrive at an award based on how much enjoyment of life they feel the injured party has lost. The jury may rely on testimony from people who knew the injured party, combined with their own values, to determine the plaintiff's lost enjoyment of life. For example, in a recent Mississippi wrongful death case, the court permitted five character witnesses – out of roughly sixteen proposed by the plaintiff's lawyer – to testify about the decedent, his family, and the loss of enjoyment of life he suffered through his death.[31]

The second approach calculates hedonic damages according to a supposedly scientific formula, derived from government studies and models of consumer behavior and worker risk avoidance. This formula, which incorporates expert testimony, including that of economists and psychologists, is more fully described in Part III.C below. As the next Part shows, each of these methods for valuating hedonic damages is flawed because it is highly subjective and incapable of meaningful judicial review.

III. PROBLEMS WITH HEDONIC DAMAGES

A. *The Danger of Redundancy*

Among the gravest risks hedonic damages pose is the risk of double counting. Cognizant of this risk, most states permit the jury to consider hedonic damages, but only as a component of general damages, pain and suffering, or disability.[32] For instance, in one of the first cases to face the

[31] *See* Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 921-22 (Miss. 2002). On appeal, the court found that if any error was committed by the trial court in permitting the cumulative testimony, it was harmless. *See id.* at 922. Surely, repeated testimony about how much a person loved his family and enjoyed his life just before being instantly killed in a collision with a truck has real potential for invoking passion and prejudice with the jury.

[32] *See, e.g.*, Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 763-72 (Tex. 2003) (recognizing that "Texas courts of appeal have uniformly held that loss of enjoyment of life is not a separate category of damage" and holding that "in the proper case, when the evidence supports such a submission, loss of enjoyment of life fits best among the factors a factfinder may consider in assessing damages for physical impairment . . . . but the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury."); Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990); McAlister v. Carl, 197 A.2d 140, 142 (Md. 1964) ("Under the usual form of instructions in Maryland relating to damages in

issue, *Huff v. Tracy*, a California appellate court found that a trial court erred in an automobile accident case when it instructed the jury on both general damages and loss of enjoyment of life.[33] The court explained:

> The standard pain-and-suffering instruction . . . describes a unitary concept of recovery not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. A separate enjoyment-of-life instruction only repeats what is effectively communicated by the pain-and-suffering instruction. Commentators have pointed out that the enjoyment-of-life instruction opens the possibility of double compensation. A trial court errs when it follows the pain-and-suffering instruction by another which tells the jurors that they may also, that is, additionally, award damages for injury to the enjoyment of life.[34]

In 1995, the Nebraska Supreme Court addressed the availability of hedonic damages in two cases involving the

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negligence cases involving personal injuries, recovery of damages for non-pecuniary harm is allowed as compensation for pain and suffering.); Leonard v. Parrish, 420 N.W.2d 629, 634 (Minn. App. 1988) (ruling that the trial court properly rejected a request for a separate instruction for loss of enjoyment of life and that such injury was adequately covered as a general element of damages); Anderson/Couvillon v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 739-41 (Neb. 1995); McDougald v. Garber, 73 N.Y.2d 246, 256-58, 536 N.E.2d 372, 376-77 (N.Y. 1989); Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484-87 (Ohio 1992); Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1191 (Pa. 1978) ("Even where the victim survives a compensable injury, this Court has never held that loss of life's pleasures could be compensated other than as a component of pain and suffering."); Wooldridge v. Woolett, 638 P.2d 566, 570 (Wash. 1981) (en banc) (finding *Willinger* persuasive authority and finding that "lost pleasures . . . essentially represent pain and suffering"); *see also* Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943-44 (Tenn. 1994) (ruling that hedonic damages were inappropriate in a wrongful death case and criticizing the reasoning of *Sherrod*); *but cf.* Lawrence v. Town of Brighton, No. 02A01-9801-CV-00020, 1998 WL 749418, at *4-5 (Tenn. Ct. App. Oct. 28, 1998) (limiting *Spencer* to wrongful death cases and recognizing loss of enjoyment of life as a distinct category of damages in personal injury cases).

[33] 129 Cal. Rptr. 551, 553 (Cal. App. 1976). The court gave the following two instructions:

> (1) Reasonable compensation for any pain, discomfort, fears, anxiety, and mental and emotional distress suffered by the plaintiff and of which his injury was a proximate cause and for similar suffering reasonably certain to be experienced in the future from the same cause.
>
> (2) You may also award plaintiff reasonable compensation for the physical and mental effects of the injury on his ability to engage in those activities which normally constitutes (sic) the enjoyment of life.

Id. at 553 n.1 & n.2.

[34] *Id.* at 553 (internal quotations and citations omitted). The court found that that the error was harmless, however, because of the relatively small jury award and because the jury did not receive written instructions but rather as "part of an oral flow of instructions." *Id.* at 554.

negligent placement of children in foster homes.[35] The court reaffirmed that "[l]oss of enjoyment of life may, in a particular case, flow from a disability and be simply part thereof, and where the evidence supports it, may be argued to the jury. A separate instruction therein may be redundant."[36] It further explained that "while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages."[37] Likewise, after considering the various approaches taken by courts with respect to awarding hedonic damages, the Supreme Court of Kansas:

> took the more realistic approach that, as a general rule, the loss of enjoyment of the pleasurable things in life is inextricably included within the more traditional areas of damages for disability and pain and suffering. While it is true that a person may recover from the physical pain of a permanent injury, the resultant inability to carry on one's normal activities would appear to fall within the broad category of disability. In the majority of cases, loss of enjoyment of life as a separate category of damages would result in a duplication or overlapping of damages.[38]

A growing minority of courts, however, permit hedonic damages as a separate and distinct award. This trend is exemplified by recent decisions in Mississippi (now superceded by statute) and South Carolina, and follows similar rulings by the highest courts of Maryland, New Mexico, Washington, and Wyoming, as well as the United States Court of Appeals for the Sixth Circuit as it interpreted Tennessee law.[39]

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[35] *See* Talle v. Neb. Dep't of Soc. Servs., 541 N.W.2d 30 (Neb. 1995), *appeal after remand*, 572 N.W.2d 790 (Neb. 1998); *Anderson*, 538 N.W.2d at 739.

[36] *Anderson*, 538 N.W.2d at 739 (quoting Swiler v. Baker's Super Mkt., Inc., 277 N.W.2d 697, 700 (Neb. 1979)); *see also* Westcott v. Crinklaw, 133 F.3d 658, 660-61 (8th Cir. 1998) (ruling that Nebraska law does not permit a separate jury instruction for hedonic damages).

[37] *Anderson*, 538 N.W.2d at 741. Hawaii law specifically provides that loss of enjoyment of life is recoverable as a component of noneconomic damages. *See* HAW. REV. STAT. § 663-8.5(a) (2002) ("Noneconomic damages which are recoverable in tort actions include damages for pain and suffering, mental anguish, disfigurement, *loss of enjoyment of life*, loss of consortium, and all other nonpecuniary losses or claims.") (emphasis added).

[38] *See Gregory*, 791 P.2d 1329, 1336 (Kan. 1990).

[39] *See* Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824-25 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980); McAlister v. Carl, 197 A.2d 140 (Md. 1964) (may be awarded in certain cases, but later precedent says not available in wrongful death cases); Kansas City S. Ry. v. Johnson, 798 So. 2d 374 (Miss. 2001) (superceded by statute); Romero v. Byers, 872 P.2d 840 (N.M. 1994); Boan v. Blackwell, 541 S.E.2d 242 (S.C. 2001); Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987) (en banc) (but not in

Courts permitting recovery for hedonic loss as a separate element of damages attempt to draw technical distinctions between the concepts of pain and suffering, disability, and lost enjoyment of life. For instance, in *Kirk v. Washington State University*, a twenty-year-old cheerleader who permanently injured her elbow during practice sued the university, claiming damages to compensate for the inability to become a professional dancer.[40] The Washington Supreme Court rejected the defendant's argument that damages for pain and suffering and for disability and disfigurement already encompassed hedonic damages.[41] In that case, the court distinguished pain and suffering as compensating for "physical and mental discomfort," disability as compensating for the "inability to lead a normal life," and recovery for lost wages or earning capacity as compensating for economic loss.[42] In the court's analysis, such measures did not reach the noneconomic rewards of being a dancer.[43] It would appear, however, that if the cheerleader was able to continue to lead a normal life, her loss stemmed from the heartache caused by accepting that she is unlikely to achieve her personal and professional goal of becoming a dancer. This emotion is properly considered by a jury as a part of pain and suffering.

The United States Court of Appeals for the Sixth Circuit, interpreting Tennessee law, has made a similar distinction. In *Thompson v. National R.R. Passenger Corp.*, the trial court awarded passengers who sustained injuries in an Amtrak derailment separate damages for "1) expenses, 2) pain, suffering, and fright, 3) permanent injuries, 4) impairment of earning capacity, and 5) impairment of enjoyment of life."[44] The Sixth Circuit distinguished and upheld the multiple awards:

> Permanent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the

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survival actions); Mariner v. Marsden, 610 P.2d 6 (Wyo. 1980); *see also* Ogden v. J.M. Steel Erecting, Inc., 31 P.3d 806, 812-13 (Ariz. App. 2002) (ruling in a case of first impression in Arizona that hedonic damages may be awarded separately from pain and suffering and disability).

[40] *See* Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987).

[41] *See id.* at 292.

[42] *Id.* at 292-93.

[43] *See id.* The Court limited its holding to cases in which the injured party experiences a "loss of a specific unusual activity," such as artistic or athletic skills, rather than a general loss of enjoyment of life. *See id.*

[44] Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 823 (6th Cir. 1980).

> physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury.[45]

Most recently, in an automobile negligence case in which the only issue for the jury was the amount of damages to be awarded, the Supreme Court of South Carolina made a similar distinction:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself [with separate damages for mental anguish where warranted by the evidence]. . . . On the other hand, damages for "loss of enjoyment of life" compensate[s] for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies or avocations.[46]

Based on this distinction, the court ruled that "'loss of enjoyment of life' and 'pain and suffering' are separately compensable elements of damages."[47]

Regardless of whether a technical distinction can be drawn between the concepts, in practice, allowing a separate award for hedonic damages poses an extraordinary risk of duplicative damage awards. In *McDougald v. Garber,* the New York Court of Appeals answered the technical distinctions described above.[48] In that case, the jury awarded a plaintiff, who was rendered comatose through the negligence of her physician, a total of $9.6 million in damages, including $1 million for pain and suffering and a separate $3.5 million award for the "loss of the pleasures and pursuits of life."[49] The Court of Appeals vacated the $3.5 million hedonic damages award, rejecting separate awards for pain and suffering and lost enjoyment of life:

> The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of

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[45] *Id.* at 824.

[46] Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001).

[47] *Id.* at 243.

[48] *See* 536 N.E.2d 372, 73 N.Y.2d 246 (1989).

[49] *See* 536 N.E.2d at 373, 73 N.Y.2d at 251-52.

> nonpecuniary damages is not amendable to such analytical precision and may, in fact, suffer from its application. Translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction. The figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, *the distortion will be amplified by repetition.*[50]

The court recognized that if it were to allow separate awards, it had "no doubt that, in general, the total award for nonpecuniary damages would increase" and emphasized that "a larger award does not by itself indicate that the goal of compensation has been better served."[51]

Prior to the rise of hedonic damages, courts addressed a similar question with respect to damages for "pain" and damages for "suffering."[52] Although the two concepts are analytically distinguishable, courts recognized pain and suffering to be a single element of damages because of the potential for duplicative awards. As the California Supreme Court explained,

> In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal.[53]

As an analytical matter, "pleasure" and "pain" are related words of opposite meaning.[54] Awarding damages both for "lost pleasure" and "pain and suffering" appears entirely redundant. Furthermore, to the extent that hedonic damages compensate a victim for the lost ability to undertake a physical activity, those damages are already provided for as disability. For instance, the Supreme Court of Pennsylvania explained the interrelatedness of pain and suffering and loss of enjoyment of life in *Corcoran v. McNeal*:

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[50] *See* 536 N.E.2d at 376-77, 73 N.Y.2d at 257 (emphasis added).

[51] *Id.* at 376.

[52] *See, e.g.*, Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co., 23 Ohio St. 10, 18-19 (1872).

[53] Capelouto v. Kaiser Found. Hosps., 500 P.2d 880, 883 (Cal. 1972) (footnote omitted); *see also* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484 (Ohio 1992) ("Generally, pain and suffering has been viewed as a unitary concept.").

[54] ROGET'S II: THE NEW THESAURUS 740 (3rd ed. 1995).

> The loss of well-being is as much a loss as an amputation. The inability to enjoy what one has heretofore keenly appreciated is a pain which can be equated with the infliction of a positive hurt. The conscious loss of a benefit to which one is entitled hurts as much as a festering wound.[55]

Apart from the analytical murkiness, there is a problem of application. The subjective nature of lost enjoyment of life enhances the potential for excessive awards in personal injury cases. This is especially so because alongside pain and suffering damages, juries are asked to decide a second subjective award. As early as 1938, the Kansas Supreme Court did not permit an accomplished sixty-three-year-old violinist to recover for her loss of enjoyment of life when an injury prevented her from playing the violin.[56] In that case, the majority held that "loss of enjoyment . . . is too speculative and conjectural to form a sound basis for the assessment of damages."[57] Juries must perform an even more subjective determination of hedonic damages when the case does not involve the lost enjoyment of some specific and valuable skill, but rather the loss of a general enjoyment of life or the loss of life itself, as in a wrongful death case.

In sum, hedonic damages pose the risk of double counting for two major reasons. First, the standard is quite conceptually similar to both pain and suffering and disability, especially when one considers that pain and suffering may continue after its physical dimension passes, and that disability necessarily must continue into the future. But even if there is an analytical distinction, the problem of application remains. Given that hedonic damages, like pain and suffering, cannot be measured against a concrete economic baseline, there is no way for a jury to keep the categories distinct in their calculations.

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[55] 161 A.2d 367, 372-73 (Pa. 1960) (ruling that loss of enjoyment of life is recoverable only as an element of pain and suffering).

[56] *See* Hogan v. Santa Fe Trail Trans. Co., 85 P.2d 28, 33 (Kan. 1938).

[57] *Id.* at 32; *see also* McAlister v. Carl, 197 A.2d 140 (Md. 1964) (holding that the trial court properly did not submit to the jury a student's claim for hedonic damages when she was unable to pursue her chosen profession as a physical education teacher due to an injury sustained in a car accident). In a more recent case demonstrating the trend toward greater availability of hedonic damages, the Supreme Court of Washington permitted a twenty-year-old college cheerleader who sustained a permanent injury to her elbow to recover for the "the reasonable value of the lost opportunity or loss of a chance to become a professional dance performer." *See* Kirk v. Wash. State Univ., 746 P.2d 285, 292 (Wash. 1987).

B. *Hedonic Damages as an End-Run Around Liability Rules*

This section addresses how hedonic damages pose additional risks different in kind from double counting but with the similar effect of inappropriately aggravating jury awards. Apart from the danger described above, hedonic damages provide opportunities for escaping various liability limits, namely, caps on punitive damages, the cognitive awareness requirement for compensatory, non-economic damages, and the scope of remedies for wrongful death. Each limit, and the effect hedonic damages has upon it, is discussed in turn.

1. Avoiding Limits on Punitive Damages

In the late 1970s and early 1980s, the size and number of punitive damage awards "increased dramatically"[58] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[59] In light of the rampant nature of excessive punitive awards, a number of states enacted legislation to address the problem.[60] At least fifteen states placed limits on the amount of such awards.[61] The

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[58] George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

[59] John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); *see also* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991). Until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded. *See* Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages); Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (Cal. Ct. App. 1967) ($175,000 compensatory, $250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. Ct. 1969) ($920,000 compensatory damages, $10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

[60] *See, e.g.*, Leo M. Stepanian, II, *The Feasibility of Full State Extraction of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 302-03 (1994) (describing various statutory curbs on punitive damages).

[61] A few states have simply abolished punitive damage awards. For example, the Louisiana Civil Code permits award of punitive damages only when authorized:

> (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
>
> (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

LA. CIV. CODE ANN. art. 3546 (West 2003); *see also* N.H. REV. STAT. ANN. § 507:16 (2003) (permitting punitive damages awards only when expressly provided for by statute); Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982); Fisher Props., Inc. v.

most common statutory limit on punitive damage awards is the greater of three times compensatory damages or an amount set by law.[62] Other popular approaches to limiting the size and frequency of punitive damage awards include increasing the burden of proof for punitive damages claims to "clear and convincing" evidence,[63] and requiring bifurcated trials to keep potentially prejudicial evidence relevant to punitive damages out of the liability and compensatory phase of the trial.[64]

Unlike punitive damages, which are meant to punish bad conduct and deter the defendant and others from taking similar actions, pain and suffering awards are intended to reasonably *compensate* an injured party for past and future pain and suffering caused by the defendant.[65] Because pain and suffering awards are inherently subjective, courts generally will not second-guess the jury's decision making. "Juries are left with nothing but their consciences to guide them."[66]

Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986) (holding that punitive damages are not allowed unless expressly authorized by statute). Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. *See* Yamaha Motor Corp. v. Tri-City Motors, 429 N.W.2d 871, 881 (Mich. Ct. App. 1988).

[62] *See, e.g.*, FLA. STAT. ANN. § 768.73 (West 2003); IND. CODE ANN. §§ 34-51-3-2, -4 (West 2003); NEV. REV. STAT. ANN. § 42.005 (Michie 2003); N.C. GEN. STAT. § 1D-25(b) (2003).

[63] The United States Supreme Court specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991) (stating that "[t]here is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). More than half of the states and the District of Columbia now require a claimant to meet this higher evidentiary standard before a jury can award punitive damages. *See* PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 562-63 (Victor E. Schwartz et al. eds., 10th ed. 2000) [hereinafter PROSSER, WADE & SCHWARTZ]. Colorado has adopted an even higher standard of "proof beyond a reasonable doubt" for an award of punitive damages. COLO. REV. STAT. ANN. § 13-25-127(2) (West 2003).

[64] *See* PROSSER, WADE & SCHWARTZ, *supra* note 63, at 562 (citing cases and statutes providing for bifurcation of trials when the plaintiff seeks punitive damages).

[65] *See* RESTATEMENT (SECOND) OF TORTS § 903 (compensatory damages) [hereinafter RESTATEMENT].

[66] Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778 (1985). In order to control the potential for arbitrary and excessive pain and suffering awards, several state legislatures have placed limits on noneconomic damages. *See, e.g.*, HAW. REV. STAT. ANN. § 663-8.7 (Michie 2003) (limiting "recoverable pain and suffering" to $375,000); IDAHO CODE § 6-1603 (Michie 2003) (limiting noneconomic damages in cases of "personal injury, including death" excluding those arising out of willful or reckless conduct or acts constituting a felony to $250,000, adjusted for inflation); KAN. STAT. ANN. § 60-19a02(a)-(b) (2002) (limiting noneconomic damages to $250,000 in "any action seeking damages for personal injury or death."); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (2003) (limiting noneconomic damages to $500,000 "in any action for damages for personal injury or

As plaintiffs find themselves constrained in their recovery of punitive damage awards, ostensibly compensatory pain and suffering awards have reached hundred-million-dollar levels.[67] The rise in hedonic damages compounds this improper new use of pain and suffering awards because, as with pain and suffering awards, they have the potential to be used for punitive, rather than compensatory, purposes.[68] As the New York Court of Appeals recognized in *McDougald*, "recovery for

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wrongful death"). In most cases, state legislatures apply these limits only to medical malpractice claims, which show great potential for excessive awards and may effectively render health insurance unaffordable for the average consumer. *See, e.g.*, COLO. REV. STAT. ANN. § 13-64-302 (West 2003) (placing a $250,000 limit on noneconomic damages in lawsuits against a "health care professional"); MASS. GEN. LAWS. ch. 231 § 60H (2003) (limiting damages for pain and suffering in medical malpractice cases "against a provider of health care" to $500,000 in most circumstances); MICH. COMP. LAWS ANN. § 600.1483(1) (West 2003) (placing a $280,000 cap on noneconomic damages, and a $500,000 cap in certain special circumstances, in actions "for damages alleging medical malpractice by or against a person or party"); MO. ANN. STAT. § 538.210 (West 2003) (limiting noneconomic damages to $350,000, adjusted annually for inflation, in medical malpractice cases); MT. CODE ANN. § 25-9-411(1)(a) (2002) (limiting recovery for noneconomic damages in malpractice lawsuits to $250,000); UTAH CODE ANN. § 78-14-7.1 (2003) (placing a $400,000 cap, to be adjusted for inflation, on noneconomic damages in lawsuits against a "health care provider"); W. VA. CODE ANN. 55-7B-2(c) (Michie 2003) (placing a $250,000 cap on noneconomic damages in medical malpractice cases per occurrence and placing a $1,000,000 cap in the event that the statute's $250,000 cap is found unconstitutional); WISC. STAT. § 893.55(4) (2002) (placing a $350,000 general cap, adjusted annually for inflation, on recovery in medical malpractice cases); *see also* Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N.Y. TIMES, May 28, 2003, at A6 (reporting recent legislative activity to limit noneconomic damages in medical malpractice lawsuits). Most states have not enacted general limits on pain and suffering awards.

[67] *See, e.g.*, Brown v. AC&S Corp., No. 12658-00 (N.Y. Sup. Ct. 2002) (awarding the family of a deceased brake mechanic $53 million in compensatory damages, including $17 million in pain and suffering, for his asbestos-related injuries), *reported in New York Jury Awards Meso Victim, Family $53 Million for Brake Lining Exposure*, 1-12 MEALEY'S PROD. LIAB. & RISK 12 (2002); Miss. *Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp.*, 16-19 MEALEY'S LITIG. REP.: ASBESTOS 1 (2001) (reporting award of $150 million in compensatory damages to six plaintiffs who alleged they were merely exposed to asbestos but did not have actual injuries – $25 million each); Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20 (Miss. Ct. App. Sept. 28, 2001) (awarding $100 million in compensatory damages to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid), *reported in Nation's First Rezulin Trial Ends in Settlement*, 6-22 MEALEY'S EMERGING DRUGS & DEVICES 15 (2001); Raimondi v. Ford Motor Co., No. H197262-5 (Cal. Ct. App. May 31, 2001) (unpublished) (awarding $38.1 million in compensatory damages to a driver in a SUV stability case and $13 million for loss of consortium to his wife, which was cut in half due to the plaintiff's contributory negligence), *reported in Calif. Appeals Court Upholds $25.88M Rollover Verdict*, VERDICTS & SETTLEMENTS, July 9, 2001, at A13.

[68] *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47 (2002); *see also* Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. TIMES, Oct. 28, 2002, at A14 (reporting how plaintiffs' lawyers are repackaging punitive damages claims as pain-and-suffering damages due to state laws limiting on the amount of punitive damage awards).

noneconomic losses such as pain and suffering and loss of enjoyment of life rests on 'the legal fiction that money damages can compensate for a victim's injury.'"[69] The court noted that its "willingness to indulge this fiction comes to an end, however, when it ceases to serve the compensatory goals of tort recovery [and] . . . can only result in assessing damages that are punitive."[70] Because hedonic damages provide another basis upon which a jury may award subjective damages outside the limits on punitive damages, hedonic damages provide another opportunity for awards to slip legislatively-imposed controls designed to harmonize injury compensation with what a socially useful industry or activity can bear before it is litigated out of existence.

2. Escaping the Cognitive Awareness Requirement of Non-Economic Damages

Apart from providing a backdoor through which to skirt the limits on punitive damages, hedonic damages also provide an opportunity to shortcut an important check on non-economic damages generally: the cognitive awareness requirement. "A predicate for noneconomic damages has always been a showing that the plaintiff has actually or will actually experience that item of damages in the future."[71] Traditional tort law requires that the plaintiff have a "cognitive awareness" of his or her loss to ensure that he or she receives compensation only for the injuries actually suffered.[72]

Plaintiffs' lawyers have argued that the cognitive awareness requirement does not apply to hedonic damages, seeking to recover essentially compensatory damages when such damages would otherwise not be available. Importantly, this decoupling can occur both in states that permit consideration of hedonic damages as an element of pain and suffering or disability, and those that allow recovery for lost enjoyment of life as a separate element of damages. Damages resulting in such cases can only be described as compensating

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[69] *McDougald*, 536 N.E.2d 372, 374-75, 73 N.Y.2d 246, 254 (N.Y. 1989) (quoting Howard v. Letcher, 366 N.E.2d 64, 65, 42 N.Y.2d 109, 111 (N.Y. 1977)).

[70] 536 N.E.2d at 375, 73 N.Y.2d at 254.

[71] Keene v. Brigham & Women's Hosp., Inc., 775 N.E.2d 725, 739 (Mass. App. Ct.) (ruling that award of damages for loss of enjoyment of life should not be made where an injured plaintiff lacks cognitive awareness of his loss), *modified on other grounds*, 786 N.E.2d 824 (Mass. 2003).

[72] *See* PROSSER, WADE & SCHWARTZ, *supra* note 63, at 535.

for either the loss of life in the total abstract or punishing the defendant for its actions, but serving no real compensatory purpose.

For example, in *Gregory v. Carey*, a plaintiff who had suffered catastrophic brain damage while being prepared for knee surgery brought a medical malpractice action against his doctor and the hospital.[73] The trial court did not allow the plaintiff's attorney to argue that the decedent suffered mental anguish or disfigurement, finding the evidence insufficient to show that the patient was ever aware of his injury.[74] Over the defendant's objections, however, the trial court permitted the plaintiff to argue that he suffered a loss of enjoyment of life as an element of pain, suffering, and disability, because the court found that such damages did not require cognitive awareness.[75] The jury returned a verdict of $6.3 million, including seventy thousand dollars for past pain and suffering, $930,000 for future pain and suffering, forty-five thousand for past disability, and $900,000 for future disability, plus lost income and medical expenses.[76] The Supreme Court of Kansas upheld the award, holding that the court properly permitted the jury to consider loss of enjoyment of life as an element of pain and suffering and disability, and properly refused to require cognitive awareness of the loss of enjoyment of life.[77]

The Supreme Court of Appeals of West Virginia reached a similar conclusion in response to a certified question from the United States Court of Appeals. In *Flannery v. United States*, the West Virginia court was asked whether "a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life."[78] The court answered in the affirmative:

> [T]he loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state the matter in a slightly different manner, the degree of permanent injury is measured by ascertaining how the injury has deprived the

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[73] *See* Gregory v. Carey, 791 P.2d 1329 (Kan. 1990).

[74] *See id.* at 1334.

[75] *See id.*

[76] *Id.* at 1331.

[77] *Id.* at 1337; *see also* Leiker v. Gafford, 778 P.2d 823 (Kan. 1989) (finding that loss of enjoyment of life damages is valid subcomponent of pain and suffering and disability damages). *But see* Hogan v. Santa Fe Trail Transp. Co., 85 P.2d 28 (Kan. 1934) (finding that loss of enjoyment of life damages are too speculative).

[78] 297 S.E.2d 433, 434 (W. Va. 1982).

> plaintiff of his customary activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life.[79]

The West Virginia court then concluded that an award for disability was not subject to a cognitive awareness requirement and permitted the plaintiff to recover for loss of enjoyment of life even though he was unaware of the loss. The Supreme Court of Ohio has also permitted recovery of hedonic damages even when the plaintiff is not aware of his lost enjoyment of life by permitting such recovery as an element of "the inability to perform usual activities," rather than as a component of pain and suffering.[80]

Other courts, however, have come to a very different conclusion and required that a plaintiff actually experience a loss of enjoyment of life to obtain such recovery, a result that is consistent with general principals of tort law. For example, in *McDougald,* the New York Court of Appeals recognized that the temptation to achieve a balance between injury and damages has nothing to do with meaningful compensation for the victim:[81]

> Instead, the temptation is rooted in a desire to punish the defendant in proportion to the harm inflicted. However relevant such retributive symmetry may be in the criminal law, it has no place in the law of civil damages, at least in the absence of culpability beyond mere negligence.[82]

In order to promote consistency and the general goals of compensation in tort law, the court held that cognitive awareness is a prerequisite to recovery of any aspect of non-pecuniary loss.[83]

A California appellate court recently reached the same conclusion in a medical malpractice action in which the plaintiff, a newborn baby, experienced profound brain damage shortly after birth. In that case, the appellate court ruled that the trial judge properly denied a request to instruct the jury on loss of enjoyment of life as a separate element of damages.[84] In addition to expressing concern about the potential for

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[79] *Id.* at 436.

[80] *See* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 486 (Ohio 1992).

[81] *See* McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989).

[82] *Id.* at 375.

[83] *See id.*

[84] *See* Keene v. Brigham & Women's Hosp., Inc., 775 N.E.2d 725 (Mass. App. Ct.), *review granted*, 777 N.E.2d 1263 (Mass. 2002).

duplicative damages, the court found that an award for injuries for which the plaintiff is unaware "is not compensatory but punitive in nature, requiring Legislative authority."[85]

A cognitive awareness requirement for the recovery of pain and suffering is a necessary prerequisite if noneconomic damage awards are to serve some compensatory function. In sum, unless the plaintiff shows that he actually felt the claimed pain and suffering, such an award becomes not only a "legal fiction," but can only be understood as a means of punishment or as reallocation of wealth without regard to actual harm. Hedonic damages, as an element of pain and suffering, should be subject to this same threshold requirement.

3. Thwarting Wrongful Death and Survival Statutes

Wrongful death and survival actions generally permit the survivors of the deceased to recover only pecuniary loss. Since the applicable law typically permits neither pain and suffering damages nor punitive awards, plaintiffs have turned to hedonic damages to dramatically increase their recovery. The historical public policy background on both wrongful death and survivorship actions shows why its is both sound and fair to limit awards to true pecuniary damages.

In the 1808 case of *Baker v. Bolton*, Lord Ellenborough declared that "[i]n a civil Court, the death of a human being could not be complained of as an injury."[86] This case, which ruled that a husband had no action for the loss of his wife's services through her death, has been credited with originating the English common law rule that a person had no cause of action against a tortfeasor for causing the death of another.[87] In essence, the cause of action died with the victim and the common law provided no compensation for the victim's dependents or heirs.[88] Under this harsh rule, tortfeasors, who otherwise would have been liable if a victim survived, escaped

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[85] *Id.* at 739; *see also* Ramos v. Kuzas, 600 N.E.2d 241 (Ohio 1992) (ruling that a newborn who was injured either in utero or at birth was not entitled to hedonic damages because he or she does not have adequate time to develop an understanding of pleasurable activities). *But see* Cepeda v. New York City Health & Hosps. Corp., 303 A.D. 173, 756 N.Y.S.2d 189 (App. Div. 1st Dept. 2003) (ruling that the mother of a deceased child could recover $750,000 for her infant's conscious lost enjoyment of life and pain and suffering during twelve days of life between birth and death).

[86] Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

[87] *See, e.g.*, PROSSER & KEETON ON TORTS § 127, at 945 (W. PAGE KEETON et al. ed., 5th ed. 1984) [hereinafter PROSSER & KEETON].

[88] *See id.*

all liability if the victim died before issuance of a judgment. A spouse or parent could not even recover for expenses incurred due to the death of a loved one, such as funeral expenses or the loss of financial support.[89] The odd result was that "it was cheaper for the defendant to kill the plaintiff than to injure him."[90]

The English Parliament corrected this situation in 1846 with adoption of the Fatal Accidents Act, commonly known as "Lord Campbell's Act."[91] This statute allowed the personal representative of a victim to recover for the benefit of close relatives for their pecuniary loss, so long as the victim would have had a cause of action had he or she survived.[92] The amount recoverable was based upon proof of the likely contribution the deceased would have provided to the beneficiaries during his or her lifetime.[93] It did not take long for the English law to spread across the Atlantic. New York adopted the first "wrongful death act" in 1847.[94] Currently, every state has enacted a similar law.

Wrongful death statutes compensate the close family of the victim for expenses and lost income and services *after* the victim's death.[95] Wrongful death actions are intended to compensate the individual beneficiaries for the present value of the lost economic benefit that they might reasonably have expected to receive from the decedent in the form of support, services, or contributions during the remainder of his lifetime.[96]

Like wrongful death statutes, survival statutes generally abrogate the common law rule that once a person dies, his or her cause of action dies as well.[97] Thus, under a

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[89] *See* RESTATEMENT, *supra* note 65, § 925.

[90] PROSSER & KEETON, *supra* note 87, § 127, at 945.

[91] *See id.*

[92] RESTATEMENT, *supra* note 65, § 925.

[93] *Id.*

[94] *See* McDavid v. United States, 584 S.E.2d 226 (W. Va. 2003) (discussing the history of wrongful death acts and ruling that, under West Virginia's expansive law, a court may award pain and suffering endured between the time of injury and the time of death, even when the decedent did not institute an action for personal injury prior to his or her death, so long as there is evidence of conscious pain and suffering of the decedent prior to death).

[95] *See* RESTATEMENT, *supra* note 65, § 925, cmt. a.

[96] PROSSER & KEETON, *supra* note 87, § 127, at 949. A handful of states have enacted more liberal statutes that compute damages based on the loss to the estate, rather than the loss to the beneficiaries. Under these laws, damages are determined based on the decedent's expected lifetime earnings, less his living expenses or contributions, or some variation of that formula. *Id.* § 127, at 950 & n.69.

[97] *See* RESTATEMENT, *supra* note 65, § 926, cmt. a.

survival action, once a cause of action vests in the victim of a tort, it is not extinguished at death.[98] The executor or administrator of the victim's estate may sue to recover that which the victim would have recovered, and is subject to the same defenses that would have applied had the victim lived. This means that under a survival action, the estate may recover for pain and suffering, loss of earnings, and any other injury the victim incurred, *up until the date of his or her death*.[99]

Some state codes provide for both a wrongful death and survival statute.[100] Other states provide for wrongful death and survival actions within a single statute.[101] Most states do not permit recovery for the grief or mental suffering of the decedent's beneficiaries or survivors through a wrongful death or survival action.[102] Likewise, few states allow recovery of punitive damages in such actions.[103] In deciding to limit recovery in death actions to pecuniary loss and sometimes non-economic harm incurred prior to death, the states followed the strict construction originally given to Lord Campbell's Act. The English courts restricted damages to pecuniary losses because they were "alarmed at the difficulty of evaluating the impalpable injuries to sentiments and affections because of death."[104] American courts also feared that death actions could lead to excessive verdicts and provide a windfall to the estate.[105]

An extreme minority of jurisdictions permit recovery of damages for lost enjoyment of life in wrongful death or survival actions. In 1976, the Connecticut Supreme Court became what appears to be the first court to permit the recovery of hedonic

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[98] *See generally* Payne v. Eighth Judicial District Ct., 60 P.3d 469, 472-73 (Mont. 2002) (explaining the distinction between wrongful death and survival actions).

[99] *See id.* (noting that "loss or impairment of earning capacity, pain, emotional disturbances and other harms are limited to those occurring before death").

[100] *See* RESTATEMENT, *supra* note 65, §§ 925, 926.

[101] See *id.* § 925, cmt. b.3.

[102] A few states, however, provide an expansive definition of pecuniary loss and permit recovery for items such as "loss of guidance and counseling" for a minor child who loses a parent or guardian. *See, e.g.*, Romero v. Byers, 872 P.2d 840, 846 (N.M. 1994).

[103] *But see* Bond v. City of Huntington, 276 S.E.2d 539, 545 (W. Va. 1981) (interpreting W. VA. CODE § 55-7-6 to allow a decedent's beneficiaries to recover punitive damages for the wrongful act of the defendant).

[104] PROSSER & KEETON, *supra* note 87, at 951 (citing Blake v. Midland R. Co., 18 Q.B. 93, 118 Eng. Rep. 42 (1852)).

[105] *Id.*

damages in such actions.[106] Since then, four other states have construed their wrongful death statutes to permit such recovery, including Hawaii, New Hampshire, New Mexico, and, most recently, Mississippi (until superceded by statute).[107]

At least twenty jurisdictions have either expressly or impliedly rejected the availability of hedonic damages in wrongful death actions.[108] The courts have done so either by limiting hedonic damages to the period between injury and death, or by concluding that hedonic damages were a subset of pain and suffering, which necessarily requires conscious awareness. Among these are state courts or federal courts interpreting state law in Arkansas, California, Delaware, Florida, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Nebraska, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin.[109] As the Supreme Court of Pennsylvania explained,

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[106] *See* Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 931 (Miss. 2002) (Cobb, J., concurring in part and dissenting in part) (citing Katsetos v. Nolan, 368 A.2d 172 (Conn. 1976)).

[107] *See Choctaw Maid Farms*, 822 So. 2d at 922-23 (interpreting MISS. CODE ANN. § 11-7-13 to allow recovery of damages of "every kind and nature"); Marcotte v. Timberlane/Hampstead Sch. Dist., 733 A.2d 394, 399 (N.H. 1999) (permitting recovery under N.H. REV. STAT. § 556:12, which allows for consideration of the "probable duration of his life but for the injury"); Romero v. Byers, 872 P.2d 840, 847 (N.M. 1994) (construing language of N.M. STAT. ANN. § 41-2-1 to not limit recovery to pecuniary damages); Kiniry v. Danbury Hosp., 439 A.2d 408, 414-15 (Conn. 1981) (construing "just damages" under CONN. GEN. STAT. § 52-555 to include compensation for the "destruction of life's enjoyment"); Ozaki v. Ass'n of Apartment Owners by Discovery Bay, 954 P.2d 652, 668 (Haw. Ct. App. 1998), *aff'd in part and vacated in part on other grounds*, 954 P.2d 644 (Haw. 1998) (construing HAW. REV. STAT. § 663-7 to allow recovery for the diminished joy of living).

[108] *See Choctaw Maid Farms*, 822 So. 2d at 931 (citing Bailey v. Rose Ctr., 817 S.W.2d 412, 415 (Ark. 1991).

[109] *See Choctaw Maid Farms*, 822 So. 2d at 931; Garcia v. Superior Court, 49 Cal. Rpt. 2d 580, 581 (Cal. Ct. App. 1996); Sterner v. Wesley Coll., Inc., 747 F. Supp. 263, 273 (D. Del. 1990); Brown v. Seebach, 763 F. Supp. 574, 583 (S.D. Fla. 1991); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677, 680 (Ind. App. 1991); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985); Leiker v. Gafford, 778 P.2d 823, 835, 838 (Kan. 1989), *overruled on other grounds by* Martindale v. Tenny, 829 P.2d 561, 566 (Kan. 1992); Phillips v. Eastern Me. Med. Ctr., 565 A.2d 306, 309 (Me. 1989); Smallwood v. Bradford, 720 A.2d 586 (Md. 1998); Brereton v. United States, 973 F. Supp. 752, 757 (E.D. Mich. 1997); Anderson/Couvillon v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 739 (Neb. 1995); Smith v. Whitaker, 734 A.2d 243, 246 (N.J. 1999); Nussbaum v. Gibstein, 73 N.Y.2d 912, 536 N.E.2d 618 (1989); Pitman v. Thorndike, 762 F. Supp. 870, 872 (D. Nev. 1991); Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993); First Trust Co. v. Scheels Hardware & Sports Shop, Inc., 429 N.W.2d 5, 13 (N.D. 1988); Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1190-91 (Pa. 1978); Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943 (Tenn. 1994); Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990); Tait v. Wahl, 987, P.2d 127, 131 (Wash. Ct. App. 1999); Prunty v. Schwantes, 162 N.W.2d 34, 38 (Wis. 1968); Kemp v. Pfizer, Inc., 947 F. Supp. 1139 (E.D. Mich. 1996).

> Unlike one who is permanently injured, one who dies as a result of injuries is not condemned to watch life's amenities pass by. Unless we are to equate loss of life's pleasures with the loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss. It follows that . . . damages for the pain and suffering that may flow from the loss of life's pleasures should only be recovered for the period of time between the accident and the decedent's death.[110]

A Washington appellate court put it somewhat differently: "Our survival statutes preserve claims that a living person could have brought; that is, they govern only 'predeath damages.' They do not create claims on behalf of dead persons for the loss of life itself."[111] In sum, the overly subjective and unwieldy aspect of hedonic damages that would arise if they were given to a living person are geometrically magnified if awarded in either survival or wrongful death claims, where the injured party cannot even attempt to describe the injury, and jurors cannot measure the difference between the life before and after the injury in order to come to their own conclusions. The overwhelming majority of courts and legislatures has recognized these facts and rejected such claims.

C. *Expert Testimony on Hedonic Damages Promotes Large, Arbitrary Awards and is Scientifically Unsound*

What is the total value of the pleasure of life or of life itself? Many purported hedonic experts, including Dr. Stanley Smith, who literally wrote the book on hedonic damages, use what is called the "willingness to pay" (WTP) approach.[112] The WTP approach measures the value of a human life by examining "what we pay to prevent the loss of life, [or] what we pay for life-saving measures."[113] This approach considers three models to quantify the value of life for the jury: (1) consumer willingness to purchase safety devices; (2) worker willingness to accept higher compensation for a greater risk of death; and (3) the government's willingness to impose safety regulations

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[110] Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1191 (Pa. 1978).

[111] Otani v. Broudy, 59 P.3d 126, 130 (Wash. App. 2002) (citations omitted).

[112] *See* MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS 167 (1990 & 1992-1993 cum. supp.) [hereinafter BROOKSHIRE & SMITH].

[113] Scharrrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 92 (Colo. Ct. App. 1997) (alteration in original) (quoting an economist introduced as an expert witness on hedonic damages); *see also* BROOKSHIRE & SMITH, *supra* note 112, at 166-75.

on private industry and the cost of such regulation.[114] Each of these models attempts to quantify how much a person would be willing to pay to avoid death. While these models may have theoretic or academic value, they have little applicability when used in a courtroom to determine the value a particular individual placed on life for compensatory purposes.

The first model evaluates consumer behavior. This model attempts to determine the additional price a person is willing to pay for a safer product or a safety device, such as an airbag or smoke detector, and the reduction of the risk of death resulting from such purchases.[115] It then uses this information to estimate a monetary value people place on life. Basically, this method calculates the value of life by multiplying the probability of saving a single life by the cost of the safety device. For instance, assume that an optional driver's side air bag costs $500, and that this air bag reduces the chance of death in an accident from six in 10,000 down to two in 10,000. Reducing the chance of dying by four in 10,000, or one chance in 2,500, at a cost of $500 suggests, according to this theory, that the consumers place a value of $1,250,000 (2,500 x $500) on their lives. Another way of looking at this figure is that consumers have spent $1,250,000 on 2,500 devices that, probability shows, are likely to save a single statistical life.[116]

The second model, sometimes referred to as the "individual avoidance" approach, is based on the theory that workers will demand higher wages in jobs with a greater risk of death.[117] This estimate "would be exclusively linked to earnings potential in wages, salary, and other direct forms of compensation."[118] For example, consider a twenty-five-year-old college graduate earning forty thousand dollars a year who works as a salesperson – an occupation with a negligible work-related risk of death. Suppose that he is now offered a different job, with a one in 10,000 annual risk of death, so that if 10,000

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[114] *See* BROOKSHIRE & SMITH, *supra* note 112, at 166-70; *see also* Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 742 (Neb. 1995).

[115] *See* BROOKSHIRE & SMITH, *supra* note 112, at 167.

[116] Consumer purchases of smoke detectors provide another example. Assume that consumers make an aggregate expenditure of $150 million dollars on smoke detectors, and that these smoke detectors are estimated to save fifty lives each year. This represents an aggregate safety expenditure of $150 million divided by fifty lives, or $3 million per statistical life saved.

[117] *See* BROOKSHIRE & SMITH, *supra* note 112, at 167.

[118] *See* Edward P. Berlá et al., *Hedonic Damages and Personal Injury: A Conceptual Approach*, J. FORENSIC ECON., DEC. 1989, at 1, 4, *available at* http://www.vocecon.com/pdffiles/articles/hedonic.pdf.

people work at this job for a year, then it is probable that a work-related accident will claim the life of one. If the individual is willing to accept a job with a one in 10,000 chance of death for an additional $5,000 in salary, then it would stand to reason, according to this theory, that he or she would accept certain death for 10,000 times this amount, or $50,000,000 dollars. Under the individual avoidance approach, this dollar amount is the value the college student places on his life.

The third model is based on the cost-benefit analysis conducted by government agencies in deciding whether to adopt a safety regulation.[119] In the early 1980s, President Ronald Reagan issued an executive order requiring federal agencies to do cost-benefit studies to justify their regulations.[120] As a result, agencies such as the Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency began using a dollar value of human lives saved to support their regulations.[121] According to Dr. Smith, most of these government studies "show [a] willingness to implement legislation at a cost of approximately two million dollars per life saved; very little legislation beyond three million."[122]

After determining the total value of life, experts who subscribe to the WTP approach subject this amount to a "loss of the pleasure of life" (LPL) scale to determine hedonic damages.[123] Under the LPL scale, an injury resulting in missed work and disruption of family life for a few days is rated "minimal" with a one to seventeen percent loss of the pleasure of life.[124] On the far end of the scale, a person who is bedridden and requires daily nursing care has suffered a "catastrophic" loss eliminating eighty-three to one hundred percent of the pleasure of life.[125] Thus, a mental health professional would rate "an individual's degree of diminution of life that has been experienced from the date of injury to the date of the

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[119] *See* BROOKSHIRE & SMITH, *supra* note 112, at 167-68.

[120] *See* Paul R. Bjorklund, *Basics of Hedonic Damages*, CPA J. ONLINE, Nov. 1993, *available at* http://www.nysscpa.org/cpajournal/old/14628736.htm (last visited Mar. 13, 2004) (concluding that "hedonic damages have no valid foundation for use in personal injury or wrongful death cases").

[121] *See id.*

[122] Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 743 (Neb. 1995).

[123] *See* Berlá et al., *supra* note 118, at 2; *see also* BROOKSHIRE & SMITH, *supra* note 112, at 168-74.

[124] *See* Berlá et al., *supra* note 118, at 3.

[125] *See id.*

evaluation and then estimates the degree of diminution of life over the individual's remaining life span."[126] An expert can then apply the percentage, which may vary over the course of a person's lifetime, to the total dollar value of life to determine hedonic damages. According to Dr. Smith and his colleagues, writing over a decade ago, "[m]ost estimates [of the value of life] range from high six-figure amounts to high seven-figure amounts."[127] Other "experts" on hedonic damages employ similar approaches to determining the value of life.[128]

Although a few courts permit the introduction of expert testimony on hedonic damages,[129] the "willingness-to-pay model . . . is a troubled science in the courtroom, with the vast majority of published opinions rejecting the evidence."[130] Most

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[126] *Id.*

[127] *See id.* at 4; *see also* BROOKSHIRE & SMITH, *supra* note 112, at 168-69. In most cases, Dr. Smith and other economists advocate a value of life of between $1.9 and $3.3 million. *See* Saia v. Sears Roebuck & Co., 47 F. Supp. 2d 141, 145 (D. Mass. 1999) ($3.3 million); Estate of Sinthasomphone v. City of Milwaukee, 878 F. Supp. 147, 151 (E.D. Wisc. 1995) ($2.3 million); Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 575 (Cal. Ct. App. 1998) ($2.3 million); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677, 679 (Ind. Ct. App. 1991) ($1.9 million); Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426, 429-30 (Ohio Ct. App. 1998) ($2.6 million). These figures are net of expected lifetime earnings.

[128] *See, e.g.*, Anderson v. Hale, No. CIV-02-0113-F, 2002 WL 32026151, at *7 (W.D. Okla. Nov. 4, 2002) (rejecting the testimony of the plaintiff's expert witness that the pre-injury value of the plaintiff's life was $3 million and that he had suffered a 20% loss of this value).

[129] *See* BROOKSHIRE & SMITH, *supra* note 112, at 174-75; *see, e.g.*, Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195, 205-06 (7th Cir. 1987) (finding Dr. Stanley Smith's testimony "invaluable" to the jury), *vacated*, 835 F.2d 1222 (7th Cir. 1988); Kansas City S. R.R. Co. v. Johnson, 798 So. 2d 374, 382-83 (Miss. 2001) (superceded by statute) (finding that "[a]lthough there is some honest dispute as to whether Dr. Smith's testimony was generally accepted in his field, the question of whether the proffered witness had obtained the required degree of specialized knowledge within a particular field is a matter within the sound discretion of the trial court" and that it was the jury's duty to determine if the expert's conclusions were "unreliable, invalid, or speculative"); Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426 (Ohio Ct. App. 1998) (permitting the testimony of economist Dr. Michael Brookshire, who co-authored *Economic/Hedonic Damages; The Practice Book for Plaintiff and Defense Attorneys*, *supra* note 112, with Dr. Smith); *see also* Hunt v. K-Mart Corp., 981 P.2d 275 (Mont. 1999) (finding that the defendant failed to make a timely and specific objection to the admission of expert testimony from a psychologist and economist on hedonic damages at trial).

[130] Kurnz v. Honda N. Am., Inc., 166 F.R.D. 386, 388 (W.D. Mich, 1996). For a sampling of cases rejecting expert testimony on hedonic damages, see, for example, Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992); Sterner v. Wesley Coll., Inc., 747 F. Supp. 263, 274 (D. Del. 1990); Sullivan v. U.S. Gypsum Co., 862 F. Supp. 317, 320-22 (D. Kan. 1994); Saia v. Sears Roebuck & Co., 47 F. Supp. 2d 141 (D. Mass. 1999); Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993); Ayers v. Robinson, 887 F. Supp. 1049 (N.D. Ill. 1995); Hein v. Merck & Co., 868 F. Supp. 230 (M.D. Tenn. 1994); Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 577-78 (Cal. Ct. App. 1998); Scharrrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 91-93 (Colo. Ct. App. 1997); Montalvo

courts find for various reasons that "economic theories which attempt to extrapolate the 'value' of human life from various studies of wages, costs, etc., have no place in the calculation of general damages,"[131] or as a separate element of damages. Courts have rejected expert testimony on hedonic damages under both the *Frye* "general acceptance" test[132] and the *Daubert* standard for relevancy and reliability of scientific evidence.[133] In fact, one commentator who noted this trend observed that "[w]e may be on the way to a kind of judicial notice of the unreliability of [expert testimony of valuation of hedonic damages]."[134] One trial court judge went so far as to rule that "any attempted *Daubert/Kumho* analysis of [a WTP] theory is undertaken only at the risk of according it undue dignity. . . . Merely to pose the question of whether [the proposed expert's] proffered approach to hedonic damages demonstrates 'intellectual rigor,' is to answer the question."[135]

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v. Lapez, 884 P.2d 345, 364-67 (Haw. 1994); Fetzer v. Wood, 569 N.E.2d 1237 (Ill. App. Ct. 1991); Southlake Limousine v. Brock, 578 N.E.2d 677 (Ind. Ct. App. 1991); Foster v. Trafalger House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992); Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 741-45 (Neb. 1995); McGarry v. Horlacher, 775 N.E.2d 865, 877-78 (Ohio Ct. App. 2002); Wilt v. Buracker, 443 S.E.2d 196, 205 (W. Va.), *cert. denied*, 511 U.S. 1129 (1993); Liston v. Univ. of W. Va. Bd. Of Trustees, 438 S.E.2d 590 (W.Va. 1993); *see also* Schumann v. Mo. H'way & Trans. Comm'n, 912 S.W.2d 548, 554-55 (Mo. Ct. App. 1996) (in case of first impression regarding admissibility of expert testimony on hedonic damages, court opted not to decide the issue because it found no prejudice to the defendant, but noted that most states have rejected such testimony); McGuire v. City of Sante Fe, 954 F. Supp. 230 (D.N.M. 1996) (harshly criticizing the use of expert testimony to quantify hedonic damages and ruling that hedonic damages are inappropriate in the employment discrimination context).

[131] Foster v. Trafalger House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992).

[132] *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Frye's "general acceptance" test for the admission of scientific evidence was explained as follows: "Just when a scientific principle or discovery crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" *Id.* at 1014 (emphasis added).

[133] *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). Under *Daubert*, the court serves in a "gatekeeping role" and considers such factors as (1) whether the theory has been tested; (2) whether the theory has been subject to peer review; (3) the known or potential rate of error; (4) whether there is general acceptance of the theory within the scientific community. *See id.*

[134] Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 811 (1995).

[135] *See* Anderson v. Hale, No. CIV-02-0113-F, 2002 WL 32026151, at *7 (W.D. Okla. Nov. 2, 2002).

These courts recognize that the purpose of tort law is to compensate for the actual harm to an individual, not to a hypothetical person. The use of workforce statistics and "risk avoidance" neither considers the plaintiff's actual lost enjoyment of life, nor do the studies involve persons suffering a permanent injury.[136] As a California appellate court observed,

> The figures [Dr. Stanley] Smith included in his baseline calculation have nothing to do with this particular plaintiff's injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life. . . . By urging the jury to rely upon a baseline value supported by factors having nothing to do with this plaintiff's individual condition, Smith's testimony created the possibility of a runaway jury verdict.[137]

Moreover, the testimony of an economist does not aid the jury in determining a person's lost enjoyment of life because "an economist is no more expert at valuing the pleasure of life than the average juror."[138]

Courts also reject expert testimony using the WTP approach because "the calculations are based on assumptions that appear to controvert logic and good sense."[139] Each model has various flaws. Regarding the consumer behavior model, the United States Court of Appeals for the Seventh Circuit reasoned:

> We have serious doubts about [the] assertion that the studies [relied] upon actually measure how much Americans value life . . . . [S]pending on safety items reflects a consumer's willingness to pay to reduce *risk*, perhaps more a measure of how cautious a person is than how much he or she values life. Few of us when confronted with the threat, "Your money or your life!" would, like Jack Benny, pause and respond, "I'm thinking, I'm thinking." Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an airbag is not immediately obvious.[140]

Nor does the theory of individual avoidance work in practice. For instance, those who choose to work in risky professions, such as firemen or police officers, or as mining or construction workers, get relatively low pay compared to those in professions with a lower risk of death, such as bankers,

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[136] *See* Wilt v. Buracker, 443 S.E.2d 196, 204 (W. Va. 1993).

[137] Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 578 (Cal. Ct. App. 1998).

[138] Montalvo v. Lapez, 884 P.2d 345, 366 (Haw. 1994).

[139] *Wilt*, 443 S.E.2d at 205.

[140] Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992) (emphasis in original).

accountants, and nurses. If the risk avoidance theory held true, people in high-risk professions would receive substantially higher salary than those in professions with little risk of injury or death. In reality, however, people do not have complete free choice as to the professions they enter and may do so as a matter of economic necessity. They also may choose to enter a profession because of their personal interests or for altruistic purposes, rather than for risk avoidance or purely monetary reasons. Moreover, the proposition that a twenty-year-old who takes a slightly higher salary due to a slightly higher risk of death, would accept certain death for fifty million dollars, or any amount of money, is laughable. Most people would not accept certain death for any amount of money.

Specifically regarding the third model, the costs and benefits of government safety laws and regulations have little to do with the value that society places on life. A decision to regulate is far more complex. It involves legislative compromises, budgetary constraints, and political pressures, among a host of other factors. One court noted that "federal agencies have set the value of life as low as $70,000 and as high as $132 million per life."[141]

None of the models discussed above provides a defensible estimate of the value of loss of the pleasure of life. Furthermore, even if they did, the high estimates of hedonic loss could cause jurors to depart from rational damages calculations. Some courts have noted that even if the WTP approach is scientifically sound, such evidence might be excluded under the state equivalent of Federal Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice.[142] In the final analysis, then, valuation problems in and of themselves should lead states to disallow hedonic damage awards.

D. The Subjective Nature of Hedonic Damage Awards Provides Little Basis for Meaningful Appellate Review

It has taken many years for the United States Supreme Court to develop constitutional standards to curb excessive

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[141] Ayers v. Robinson, 887 F. Supp. 1049, 1061 n.4 (N.D. Ill. 1995).

[142] *See, e.g.*, Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 744 (Neb. 1995); Ayers v. Robinson, 887 F. Supp. 1049, 1058-64 (N.D. Ill. 1995); Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992).

punitive damage awards.[143] Because punitive damages are a form of state-imposed punishment, such awards are subject to a due process analysis for excessiveness. The analysis considers the reprehensibility of the defendant's conduct, the ratio of actual damages to punitive damages, and "civil or criminal penalties that could be imposed for comparable misconduct."[144] Most recently, Justice Kennedy, writing for the Court in *State Farm Mutual Insurance Co. v. Campbell* reaffirmed that "[s]ingle-digit multipliers [of compensatory to punitive damages] are more likely to comport with due process" than larger ratios.[145] Higher ratios, Kennedy wrote, may be upheld where "a particularly egregious act has resulted in only a small amount of economic damages."[146] On the other hand, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[147]

Pain and suffering awards, unlike punitive damages, are not subject to such constitutional standards. The only guide for appellate review in most states is whether the jury's award is so large as to "shock the conscious of the court"[148] or whether

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[143] *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (constitutionality of punitive damages award is to be reviewed *de novo* rather than under abuse of discretion standard); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (establishing substantive limits on the amount of punitive awards and setting up a three-pronged constitutional test which considers the reprehensibility of the misconduct, the relationship between the penalty and the harm to the plaintiff, and the civil and criminal penalties for comparable misbehavior); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (prohibiting judicial review in most cases of the amount of punitive damages awarded by jury violates the Due Process Clause of the Fourteenth Amendment); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993) (holding that the Due Process Clause of Fourteenth Amendment prevents imposition of "grossly excessive" award on tortfeasor); Pac. Mut. Ins. Co. v. Haslip, 4991 U.S. 1 (1991) (ruling that punitive damages awards are subject to constitutional due process analysis).

[144] *See Gore*, 517 U.S. at 583.

[145] *See* State Farm Mut. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003).

[146] *Id.*

[147] *Id.* The Court also ruled that neither a defendant's wealth nor its out-of-state conduct could be a factor in calculating punitive damages, and that a punitive damage award must be limited to the reprehensibility of the act involving the particular individual in the case. *See id.* at 421-22, 427-28.

[148] *See, e.g.*, Shepard v. Capitol Foundry of Va., Inc., 554 S.E.2d 72, 75 (Va. 2001) (quoting Edmiston v. Kupsenel, 135 S.E.2d 777, 780 (Va. 1964)); *see also* Wells Fargo Armored Serv. Corp. v. Turner, 543 So. 2d 154, 158 (Miss. 1989).

> The damages . . . must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the Jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, where they have no standard by which to ascertain the excess.

the award resulted from a clear abuse of the trial court's discretion.[149] Appellate courts express great reluctance to reduce the amounts of pain and suffering awards post-trial both because of their subjective nature and because "jurors' judgment on these issues is believed to represent the very sense of the community that justifies the jury system in the first place."[150] This can lead to extreme variability between awards in similar cases, which "undermines the legal system's claim that like cases will be treated alike."[151]

Hedonic damages provide a new prospect for out-of-control awards. Whether a hedonic damage award is excessive is evaluated according to the same vague, deferential standard as a pain and suffering award. As the dissenting opinion in *Choctow Maid Farms* recognized:

> Appellate courts would be without adequate basis for meaningful review. Would defendants, under the rule proposed by the majority, be entitled to put on evidence that the decedent's life was worth very little – because he was a habitual criminal or a drug user, a member of some disfavored social, political or religious group, or physically or mentally handicapped, or just unhappy? Or would such evidence be excluded as prejudicial, leaving defendants no meaningful way to rebut?[152]

In the case of hedonic damages, appellate judges would not even have the benefit of a substantial number of verdicts in similar cases in order to take an objective, comparative

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Id. (citations omitted). *See also* Crewdson v. Burlington N. R. Co., 452 N.W.2d 270 (Neb. 1990). In *Crewdson*, the court noted that a number of jurisdictions have adopted a rule that:

> a verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record.

Id.

[149] *See, e.g.*, Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 9 (1st Cir. 2002); Reck v. Stevens, 373 So. 2d 498, 501 (La. 1979).

[150] Schwartz & Lorber, *supra* note 68, at 63.

[151] *See* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFTRA L. REV. 763, 769 (1995).

[152] Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 934 (Miss. 2002) (Cobb, J., dissenting). Justice Cobb's dissent continued, "I had hoped this Court would learn from fifty years of experience of our brethren in England, and not wander down this less traveled road, as they did, before realizing that awarding hedonic damages in wrongful death actions only risks speculative, arbitrary awards and windfalls to plaintiffs. This is a pandora's box we should not open." *Id.*

approach to determining whether a hedonic damage award is excessive.[153]

When juries award damages that are so subjective and so closely related to already-existing forms of compensation, serious questions arise as to whether punitive damages have been improperly, even unconsciously, misplaced on the compensatory side of the ledger. If so, then those damage awards are freed from the outer-limit constitutional constraints that the Supreme Court has recently affirmed and applied with some vigor. Not only do defendants face the possibility of unforeseeable damage awards and the inability to tailor their actions and businesses according to liability, but reviewing courts lack the power to apply recent Supreme Court jurisprudence designed to correct that problem, leaving it unchecked.

IV. CONCLUSION

Hedonic damages, particularly when considered a separate element of an award, are fraught with problems. They are duplicative of awards for pain and suffering and disability. Their subjectivity enhances the potential for excessive awards that lack a compensatory purpose. They are supported by dubious scientific measures proffered by experts who seek to influence the jury to reach a multi-million dollar verdict. They provide an attractive opportunity for plaintiffs' lawyers to channel a jury's sympathy for an injured person or anger toward a defendant into an award that is neither subject to statutory limits nor to thorough judicial review.

Courts should recognize that adding unnecessary and unwieldy hedonic damages to existing tort claims is unsound public policy.[154] Assets need to be preserved to compensate

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[153] This is an approach used successfully by some courts to evaluate the size of pain and suffering awards. *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1134-35 (1995) (noting that a comparative analysis of pain and suffering awards is widely used to determine excessiveness in New York).

[154] The problems of hedonic damages are not unique to American courts. Between 1935 and 1982, English courts permitted the award of hedonic damages, first in personal injury cases, then in wrongful death cases. *See generally* Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 106-09 (1990) (providing an in depth discussion for the evolution and abolition of hedonic damages in England). Unlike hedonic damages in American courts, English courts awarded relatively small sums for loss of enjoyment of life and eventually adopted a standard £1,250 in wrongful death cases to be raised

people for actual losses, and the lottery aspect of American tort law needs to be shut down. If courts will not do it, then state legislatures, like that in Mississippi, as the principle policy makers of the state, should do so.

with inflation, as proper for a decedent's lost expectation of life. *See* Benham v. Gambling, 1941 A.C. 157 (ruling that £1,200 was an excessive award for a child's lost expectation of life and reduced the award to £200); Gammell v. Wilson, 2 All E.R. 557 (C.A. 1980) (awarding a standardized hedonic award for the lost expectation of life in wrongful death cases to encourage uniformity). Despite the low value of these awards, the House of Lords expressed dissatisfaction with hedonic damages, *see* Gammell v. Wilson, 1982 A.C. 27, 74, and Parliament abolished such awards in all cases in 1982. *See* Administration of Justice Act of 1982, c. 53, § 1(1), (2) (Eng.). The Administration of Justice Act of 1982 did not completely eliminate consideration of the lost enjoyment of life in determining an award, but, as it should, provided that courts could consider such loss when assessing damages in respect to pain and suffering. *See id.*