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Loss of Enjoyment of Life as an Element of Damages

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Comment

LOSS OF ENJOYMENT OF LIFE AS AN ELEMENT OF DAMAGES

The measure of damages in a personal injury action for injuries proximately caused by defendant's wrongful action[1] is that amount which will adequately compensate plaintiff. "Adequate compensation" is traditionally defined in terms of four essential elements: (1) mental pain and suffering;[2] (2) loss of salary or earnings;[3] (3) the impairment of earning capacity;[4] and (4) the reasonable cost of medical care.[5] Impairment of the capacity to enjoy life, or its absolute elimination, forms a very real injury which may be said to flow proximately from the conduct of the defendant. The subject of this Comment is whether loss of enjoyment of life should be included or excluded as an element of damages.

This element has been considered by courts in both a gen-

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1. *See, e.g.*, Lane v. Southern R.R., 192 N.C. 287, 134 S.E. 855 (1926); Denco Bus Lines v. Hargis, 204 Okla. 339, 299 P.2d 560 (1951).

2. *See, e.g.*, Mendoza v. Rudolf, 140 Cal. App. 2d 633, 295 P.2d 445 (1956); Sager v. Sisters of Mercy, 81 Colo. 498, 256 P. 8 (1927); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960).

3. *See, e.g.*, Smith v. Corsat, 260 N.C. 92, 131 S.E.2d 894 (1963); Brody v. Cooper, 45 R.I. 453, 124 A.2d (1924); Stubbs v. Molbergert, 108 Wash. 89, 182 P. 936 (1919).

4. *See, e.g.*, Connolly v. Pre-Mixed Concrete Co., 49 Cal. 2d 483, 319 P.2d 343 (1957); Schiele v. Motor Feight Express, 348 Pa. 525, 36 A.2d 467 (1943); McIver v. Gloria, 140 Tex. 566, 169 S.W.2d 710 (1943).

5. *See, e.g.*, Fitzgerald v. United States Lines, 314 U.S. 16 (1941); McCall v. Pitcarin, 232 Iowa 867, 6 N.W.2d 415 (1942); Grinnel v. Carbide & Carbon Chemicals Corp., 282 Mich. 509, 276 N.W. 535 (1937).

eral[6] and a special or unique form.[7] Loss of enjoyment of the general form has been identified as that loss which is common to men of the plaintiff's class or common experience. Taste,[8] smell[9] and numerous recreational activities[10] are examples of such common losses. The unique form has not been as readily compensable as the common. Although courts do recognize the compensability of unique elements of life in some instances,[11] certain qualities have not been recognized as elements of loss of enjoyment.[12]

There are three views regarding loss of enjoyment of life as an element of damages: (1) that loss of enjoyment of life is not a proper element of damages;[13] (2) that loss of enjoyment of life is only an integrated factor in compensatory damages;[14] and (3) that loss of enjoyment of life is a separate and proper element of damages.[15]

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6. *See, e.g.*, Bodek v. Chicago, 279 Ill. App. 410 (1935); Daugherty v. Erie R.R., 403 Pa. 334, 169 A.2d 549 (1961); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960).

7. *See, e.g.*, Hogan v. Santa Fe Trail Trans. Co., 148 Kan. 720, 85 P.2d 28 (1938); McAlliser v. Carl, 233 Md. 446, 197 A.2d 140 (1964).

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

9. Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960).

10. Downie v. United States Lines Co., 359 F.2d 344, n.3 (3rd Cir. 1966) (dictum) (abilities such as dancing, bowling, swimming, or engaging in similar recreational activities; performing of household chores; and engaging in usual family activities have been recognized subject to proof of their existence and loss); Kasiski v. Central Jersey Power & Light Co., 4 N.J. Misc. 130, 132 A. 201 (Sup. Ct. 1926) (ability to enjoy boyhood games).

11. District of Columbia v. Woodbury, 136 U.S. 450 (1890) (inability to contribute articles to a medical journal even though previous contribution to the journal was done without compensation); Greenwalt v. Nyhius, 335 Mich. 76, 55 N.W.2d 736 (1952) (right to have one's hair dyed).

12. Hogan v. Santa Fe Trail Trans. Co., 148 Kan. 720, 85 P.2d 28 (1938) (loss of ability to play a violin); McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964) (loss of pleasure from being unable to enter a chosen and intended profession).

13. *See, e.g.*, Winter v. Pennsylvania R.R., 45 Del. 108, 68 A.2d 513 (1949); Columbus v. Strassner, 124 Ind. 482, 25 N.E. 65 (1890); Belleview v. England, 118 S.W. 944 (Ky. 1909); Louisville & N. R.R. v. Logsdon, 114 Ky. 746, 71 S.W. 905 (1903); Locke v. International & G.N. R.R., 25 Tex. Civ. App. 145, 60 S.W. 314 (1901). *Contra*, Power v. Augusta, 191 F. 647 (C.C.E.D. Ky. 1911). This case was decided when the federal courts were applying the general federal law rather than following the substantive state law as later dictated in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *But cf.* Missouri Pacific R.R. v. Handley, 341 S.W.2d 203 (Tex. Civ. App. 1960); Galveston Electric Co. v. Briggs, 14 S.W.2d 307 (Tex. Civ. App. 1929).

14. *See, e.g.*, Purdy v. Swift & Co., 34 Cal. App. 656, 94 P.2d 389 (1939); Bodek v. Chicago, 279 Ill. App. 410 (1935); Daugherty v. Erie R.R., 403 Pa. 334, 169 A.2d 549 (1961); Paul v. Kirkendall, 1 Utah 2d 1, 261 P.2d 670 (1935); *cf.* Prettyman v. Topkis, 39 Del. 568, 3 A.2d 708 (1938).

15. *See, e.g.*, Reed v. Jamieson Inv. Co., 168 Wash. 111, 10 P.2d 977 (1932), *adhered on reh.*, 168 Wash. 119, 15 P.2d 1119 (1932); Warth v. County Court, 71 W. Va. 184, 76 S.E. 420 (1912); Bassett v. Milwaukee Northern Ry., 169 Wis. 152, 170 N.W. 944 (1919); Benson v. Superior Mfg. Co., 147 Wis. 20, 132 N.W. 633 (1911); *see* McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964).

NOT A PROPER ELEMENT OF DAMAGES

There are a few jurisdictions which have not recognized loss of enjoyment of life as an element of damages.[16] The primary reason for this view has been fear of speculation or conjecture by the jury.[17] Courts have manifested this fear by excluding evidence proving loss of enjoyment of life,[18] and by refusing to give jury instructions requiring consideration of the various elements of loss of enjoyment of life.[19]

The speculative or conjectural theory for a court's refusal to give jury instructions is based upon fear of double recovery by the plaintiff. Plaintiff may recover for pain and suffering in addition to loss of enjoyment, that is, recoveries may overlap and result in double compensation. One court stated that if loss of enjoyment meant diminution of plaintiff's power to earn then it was properly included; any other connotation was not a proper element of damages.[20]

The leading case denying compensation for loss of enjoyment is *Hogan v. Santa Fe Trail Transportation Co.*[21] In *Hogan* the plaintiff lost her ability to play a violin due to injuries caused by the defendant's negligence. The special verdict of the jury included the following: "If you find for the plaintiff, how much do you allow . . . (6) for loss of enjoyment from being unable to play the violin? A.: $4,000.00."[22] Relying upon speculation and remoteness as the cornerstone of its argument, the court ruled that there was no sound basis for the assessment of damages.[23]

Another argument for exclusion of loss of enjoyment from instructions to the jury is that such instruction invades the jury's

16. See cases cited and discussion in note 13 *supra*.
17. Columbus v. Strassner, 124 Ind. at 484, 25 N.E. at 67 (1890). The court evidenced this fear by suggesting the following queries: "What is personal enjoyment? How are we to ascertain to what extent it is possessed by a human being? How can its absence and the cause thereof be demonstrated? If a person for any cause has been deprived of 'personal enjoyment' how are we to go about adjusting his loss on a money basis?"
18. Locke v. International & G.N. R.R., 25 Tex. Civ. App. 145, 60 S.W. 314 (1901).
19. Columbus v. Strassner, 124 Ind. 482, 25 N.E. 65 (1890) (lack of personal enjoyment); Belleview v. England, 118 S.W. 994 (Ky. 1909) (diminution of his power to pursue the course of life he might have otherwise done); Louisville & N. R.R. v. Logsdon, 114 Ky. 746, 71 S.W. 905 (1903) (disability to move about and enjoy life).
20. Belleview v. England, 118 S.W. 994, 995 (Ky. 1909).
21. 148 Kan. 720, 85 P.2d 28 (1938).
22. *Id.* at 722, 85 P.2d at 30.
23. *Id.*

province.[24] In *Pittsburgh C.C. & St. L. R.R. v. O'Conner*, an instruction was given to the jury, "that 'the fact that the plaintiff is deprived of the pleasure and satisfaction in life that those only who are possessed of a sound body and full use of all its members' might be considered by them in assessing damages. . . ."[25] The court, in holding the instruction to be erroneous, reasoned that the requested instruction was not law but only a declaration of experience and observation.[26] The court reasoned that an instruction containing a conclusion of fact, as requested by the plaintiff, constituted an invasion of the province of the jury. Implicit in their decision is that loss of enjoyment of life is not includible as a matter of law. This reasoning, however, has not been accepted in any other jurisdiction as applicable to loss of enjoyment instructions.

Integrated View

Loss of enjoyment of life has been recognized as an integrated element of pain and suffering in many jurisdictions.[27] Because loss of enjoyment is not separately considered, it is often difficult to determine whether the court means to compensate loss of enjoyment of life or pain and suffering.[28]

Lack of clarity regarding the inclusion of loss of enjoyment as a separate element of pain and suffering or its addition to pain and suffering is the core of criticism of the integrated view. Different terminology has been employed by courts within different jurisdictions, and even within the same jurisdiction. *Corcoran v. McNeal*[29] illustrates the problem of lack of clarity in terminology. The Pennsylvania Supreme Court recognized the common characteristics of loss of enjoyment of life.[30] The Court, however, reasoned ". . . that 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 a positive hurt*. . . ."[31] The equation with pain and suffering provides a rationale by which skeptical courts could accept loss of enjoyment of life as an element of damages. Yet, reconciliation of *Corcoran* with *Scott Township v. Montgomery*,[32] which held that the jury should allow for privation and inconvenience as well as pain and

24. Pittsburgh C.C. & St. L. R.R. v. O'Conner, 171 Ind. 686, 85 N.E. 969 (1908).
25. *Id.* at 694, 85 N.E. at 974.
26. *Id.*
27. See cases cites in note 14 *supra*.
28. Rice v. Council Bluffs, 124 Iowa 639, 100 N.W. 506 (1904) (apparent equation of pain and suffering and inconvenience or loss or burden).
29. 400 Pa. 14, 161 A.2d 367 (1960).
30. *Id.* (senses of taste and smell were recognized in loss of enjoyment).
31. *Id.* at 23, 161 A.2d at 372 (emphasis added).
32. 95 Pa. 444 (1880).

suffering, may be difficult. Reconciliation depends on the meaning of "inconvenience." Since inconvenience is considered apart from pain and suffering in *Scott*, it would appear that the cases are irreconciliable if not confusing.[33]

The integrated view is unique because all the decisions have arisen in the review of excess damage verdicts and not in review of jury instructions.[34] In reviewing a case concerning an alleged excess verdict, it is the duty of the appellate court to consider the evidence most favorable to the plaintiff.[35] The measure of damages, however, is for the jury to determine. Most jurisdictions avoid the issue of whether loss of enjoyment should be considered and merely hold that the verdict is not excessive. Since the jury may have considered loss of enjoyment in making its award, the court is reluctant to alter their decision.[36] In very few instances

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33. Indiana has considered the "loss of enjoyment of life" issue more times than any other jurisdiction. The result leads in two different directions. In its first impression, the court found erroneous an instruction to the jury in which they might consider any "lack of personal enjoyment" due to the injury on the basis of its being too speculative. Columbus v. Strassner, 124 Ind. 482, 25 N.E. 65 (1890). In 1894 and 1906 the appellate court seemed to disregard the earlier ruling of the supreme court and held permissible instructions which would allow for consideration of the fact "that he is deprived of pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body, and a free use of all its members." American Strawbroad v. Foust, 12 Ind. App. 421, 39 N.E. 891 (1894); *see* Pittsburgh C.C. & St. L. R.R. v. Cozatt, 39 Ind. App. 682, 79 N.E. 534 (1906). The supreme court later disapproved similar instructions without referring to earlier contrary appellate cases. Pittsburgh C.C. & St. L. R.R. v. O'Conner, 171 Ind. 686, 85 N.E. 969 (1908).

A few years later these previous appellate court cases were expressly overruled by the appellate court itself in following the *Columbus* reasoning. South Bend Brick Co. v. Goller, 46 Ind. App. 531, 93 N.E. 37 (1910). The law appeared settled but in review of an excess damages award the court held that the jury could take into consideration personal suffering and the fact that he had been deprived of most of the privileges and enjoyments common to men of his class. Chicago I. & L. Ry. v. Stierwalt, 87 Ind. App. 478, 153 N.E. 807 (1926); *cert. denied*, 278 U.S. 633.

This position was later reiterated in Samuel E. Pentecost Const. Co. v. O'Donnell, 112 Ind. App. 47, 39 N.E.2d 812 (1942). This view has apparently continued in similar cases for loss of enjoyment common to a class. King's Indiana Billiard Co. v. Winters, 123 Ind. App. 110, 106 N.E.2d 713 (1952); *see* Dallas & Mavis Forwarding Co. v. Liddell, 126 Ind. App. 113, 126 N.E.2d 18 (1955); *trans. den.*, 234 Ind. 652, 130 N.E.2d 459 (court said in dictum the jury may consider the disability to perform ordinary pursuits of life).

Thus two dichotomous positions are maintained: Loss of enjoyment common to a class may be considered by the jury, but an instruction including loss of enjoyment would be clearly erroneous.

34. See cases cited note 14 *supra*.

35. Honeycutt v. Wabash R.R., 337 S.W.2d 50 (Mo. 1960).

36. See cases cited note 14 *supra*.

have verdicts been sent back for remittitur or a new trial when loss of enjoyment *might* have been considered.[37] The situation is, therefore, unfortunately onesided. If the jury appears to have compensated plaintiff for loss of enjoyment of life together with pain and suffering, an unexcessive amount will be permitted to stand. However, if the jury apparently has not considered loss of enjoyment, plaintiff's only recourse would be either additur or a new trial. If the jury cannot be given thorough instructions to consider loss of enjoyment of life as an element of damages, then any favorable effect of a new trial is questionable. To say that loss of enjoyment might have been considered is not assurance that it was considered by the jury in making their award.

Separate and Proper Element

A third view considers loss of enjoyment of life as a separate and proper element of damages. This theory has been adopted in a few jurisdictions.[38] In expressly authorizing loss of capacity to enjoy life as an element of damages, the West Virginia Supreme Court in *Nees v. Julian Goldman Stores, Inc.*[39] stated that their chief concern was that the instruction did not inform the jury of the elements to be considered.

In *McAlister v. Carl*,[40] the Maryland Court of Appeals held instructions allowing the jury to compensate the plaintiff for relinquishment of her chosen and intended occupation to be erroneous. Evidence of definite plans and commitments for the teaching of physical education was lacking. Although plaintiff had graduated from a recognized college, she had not instituted contract negotiations by September, three months after the accident and before she had knowledge that the accident would force her into a more sedentary occupation. The decision does not appear to be repugnant to the issue of whether loss of enjoyment of life is a separate element of damages. In fact, the case appears to support recognition of the element subject to a standard of adequate proof. In the absence of such evidence the court found the plaintiff's claim to be insufficient. There was, however, dicta to the effect that had there been adequate proof the claim would have been compensable.

Loss of enjoyment of life has also been allowed apart from pain and suffering in appellate review of alleged excess damage verdicts.[41] At least one court has allowed "impairment of ability

37. Ironically, there is a dearth of cases on the question of whether loss of enjoyment of life would be includible as a compensable element in review of a verdict for alleged inadequate damages.

38. See cases cited note 15 *supra*.

39. 109 W. Va. at 336, 154 S.E. at 774 (1930).

40. 233 Md. 446, 197 A.2d 140 (1964).

41. Kasiski v. Central Jersey Power & Light Co., 4 N.J. Misc. 130, 132 A. 201 (Sup. Ct. 1926).

to enter and enjoy those boyhood games and pastimes" as an element.[42] The case affords, however, no assurance that the jury will be informed that they should consider this element. Where the jurisdiction allows loss of enjoyment as a separate element there is little reason why an instruction should be disallowed.

Conclusion

Of the three views on loss of enjoyment of life, the theory which does not consider it to be a proper element is the least acceptable in justice and logic. Generally, refusal to allow compensation for loss of enjoyment is based upon either of two premises: (1) that loss of enjoyment has no basic value; or (2) that value for this element is so uncertain and indefinite that it is immeasurable without conjecture.

The first premise is weak because the value of loss of life and the enjoyment of it have been generally recognized. However, lack of a proper standard to measure loss of enjoyment or speculation poses a more formidable objection. Nevertheless, mere difficulty in achieving accurate measurement of damages to be awarded should not preclude it as an element of damages.[43] Fears of conjecture, speculation, and double recovery were present in the early considerations of whether there should be recovery for mental pain, fright, and humiliation.[44] Where there is no legal measure of damages, the law leaves the function of allocating an amount to the discretion of the jury.[45] The effect of a rule which would disallow damages for loss of enjoyment of life would seem repugnant to the basic value of life itself. Evaluation of loss of enjoyment of life should be a jury question determined in a manner similar to the evaluation of mental pain. The jury should be instructed as to which elements to consider; the weight of the evidence proving loss of such elements is for their consideration in determining the amount.

The integrated theory of loss of enjoyment is a less objectionable view. Nevertheless, its equation with or inclusion as part of pain and suffering has presented at least one objectionable problem—lack of clarity as to which element is being compensated. Moreover, as an integrated factor, loss of enjoyment may not be considered by the jury. If value is given to the enjoyment of life,

42. *Id.*
43. Hogan v. Santa Fe Trail Trans. Co., 148 Kan. at 728, 85 P.2d at 34 (1938) (dissenting opinion).
44. *Id.* at 729, 85 P.2d at 35.
45. Gibbard v. Evans, 87 W. Va. 650, 106 S.E. 37 (1921).

its loss recognized, and evidence is received in proof thereof, then an instruction to the jury concerning the elements they might consider is in order.

The best view appears to be that which supports loss of enjoyment of life as a separate element of damages. The trier of fact could employ a method similar to that presently utilized in the measurement of mental pain to arrive at a reasonable measure of damages for loss of enjoyment. By allowing instructions regarding the loss of enjoyment, confusion could be avoided. The award would then represent an amount reflecting the jury's consideration. An appellate court's later justification of an amount by resorting to an unsubstantiated assumption that the jury *may* have considered the loss is not an acceptable result. The argument that this process would lead to an undue and unreasonable classification of elements of damages is weak. The only classification required to aid the court is the general-special dichotomy. Both general and special forms should be subject to proof regarding their former presence and subsequent absence. Of course, the verdict of the jury and the decision of the court must rest upon substantial evidence and not mere allegation.

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