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**Touro Law Review**

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Volume 6 | Number 2

Article 9

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1990

## Construction on the Road to Recovery: New York Limits Loss of Enjoyment of Life

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### Recommended Citation

Goodman, Bonnie Sue (1990) "Construction on the Road to Recovery: New York Limits Loss of Enjoyment of Life," *Touro Law Review*. Vol. 6: No. 2, Article 9.

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## CONSTRUCTION ON THE ROAD TO RECOVERY: NEW YORK LIMITS LOSS OF ENJOYMENT OF LIFE

### INTRODUCTION

The prime purpose of awarding money damages in a tort action is to compensate the injured party for his loss.<sup>1</sup> In personal injury actions, loss may involve time, expense, or some form of pain and suffering,<sup>2</sup> in combinations that vary with circumstance.

In New York, personal injury actions dominate state court dockets.<sup>3</sup> To facilitate resolution of these actions, New York law requires, upon proper demand, that plaintiffs particularize the injuries for which relief is sought.<sup>4</sup> Correspondingly, when a jury awards damages for personal injury in New York, it also must specify the elements of damages upon which the award is based.<sup>5</sup>

Since 1857, New York courts have recognized loss of enjoyment of life as a component of damages that factors into an award.<sup>6</sup> Some New York courts recently articulated loss of enjoyment of life as a separately compensable element of damage that is distinguishable from, and independent of, a claim for pain and suffering.<sup>7</sup> One court, upholding simultaneous awards

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1. RESTATEMENT (SECOND) OF TORTS § 901 comment a (1979); see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 136 (1973).

2. D. DOBBS, *supra* note 1, at 540.

3. See N.Y. CIV. PRAC. L. & R. 3043 comment 3043:1 (McKinney 1986).

4. N.Y. CIV. PRAC. L. & R. 3043(a)(6) (McKinney 1986) (requiring a "[s]tatement of the injuries and description of those claimed to be permanent").

5. *Id.* Rule 4111(d)-(f) (McKinney 1986 & Supp. 1989).

6. See *Ransom v. New York & Erie R.R.*, 15 N.Y. 415, 416 (1857); *McDougald v. Garber*, 135 A.D.2d 80, 88, 524 N.Y.S.2d 192, 197 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989) (modified and remanded for new trial on issue of nonpecuniary damages).

7. *McDougald*, 135 A.D.2d at 82, 524 N.Y.S.2d at 193; *Nussbaum v. Gibstein*, 138 A.D.2d 193, 531 N.Y.S.2d 276 *passim*, *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

to a plaintiff for pain and suffering and loss of enjoyment of life, characterized the conceptual difference between them when it determined that the former compensates for conscious physical and mental discomfort, while the latter compensates for limitation on activities that constitute a normal life.<sup>8</sup>

The most significant distinction between the two claims may be that, although a plaintiff must be at least partially conscious to realize pain and suffering, cognitive awareness is not a prerequisite to a claim for loss of enjoyment of life.<sup>9</sup> In other words, although a loss of enjoyment of life claim may be made by a conscious plaintiff whose normal pursuit of life's enjoyment has been impaired, it also may be made on behalf of a plaintiff who is comatose or in a "persistent vegetative state."<sup>10</sup>

Refuting the compensatory value of this latter possibility, however, New York's highest court recently concluded that cognitive awareness *is* a prerequisite to recovery for a loss of enjoyment of life claim.<sup>11</sup> Accordingly, it rejected loss of enjoyment of life as a separately compensable damage.<sup>12</sup>

This Comment explores the definitional and conceptual distinctions between claims for loss of enjoyment of life and claims for pain and suffering. It also examines arguments that

8. *McDougald v. Garber*, 132 Misc. 2d 457, 462, 504 N.Y.S.2d 383, 387 (N.Y. Sup. Ct. N.Y. County 1986), *aff'd*, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

9. *McDougald*, 135 A.D.2d at 94, 524 N.Y.S.2d at 200.

10. *See id.* (stating that "cognitive awareness or the ability to spend the award of damages is irrelevant to the claim"). For an in depth medical explanation of "persistent vegetative state," see *In re Quinlan*, 70 N.J. 10, 24, 355 A.2d 647, 654-55 (1976). In *Quinlan*, someone in a "chronic persistent vegetative state" was defined "as a subject who remains with the capacity to maintain the vegetative parts of neurological function but who . . . no longer has any cognitive function." *Id.* (quoting the testimony of expert medical witness Donald Plum). The vegetative parts of neurological function include body temperature, breathing, blood pressure, heart rate, chewing, swallowing, sleeping, and waking. *Id.* The phrase "persistent vegetative state" has been used in New York to characterize comatose patients. *See In re Storar*, 102 Misc. 2d 184, 194, 423 N.Y.S.2d 580, 587 (1979).

11. *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988). The New York Court of Appeals concluded that nonpecuniary awards to plaintiffs who lacked cognitive awareness exceeded the compensatory goals of tort recovery. *Id.* at 254, 536 N.E.2d at 374, 538 N.Y.S.2d at 939.

12. *Id.*

have been advanced both for and against loss of enjoyment of life as a separately compensable claim. Finally, after hypothesizing potential consequences of adopting loss of enjoyment of life as a separate claim, the Comment concludes that, although the New York Court of Appeals was correct to reject loss of enjoyment of life as a separate claim, the narrow focus of its decision left ambiguities for lower courts to resolve.

## I. DEFINITIONS AND CONCEPTS

Absent a single, clearly articulated definition, courts and commentators have generated multiple interpretations of what constitutes a loss of enjoyment of life claim. One New York court determined that the claim involves the "loss of the pleasures and the pursuits of life"<sup>13</sup> and that it "relates not to what is perceived by the injured plaintiff but to the objective total or partial limitations on an individual's activities imposed by an injury."<sup>14</sup> Refining this definition, another New York court stated that "[l]oss of enjoyment of life . . . involves the impairment of a person's ability to perform those functions or engage in activities which were part of one's life prior to the injury-causing event."<sup>15</sup>

Examination of these definitions reveals that the latter narrows the applicability of the claim since loss is measured only against the plaintiff's pre-injury status. Thus, under the first interpretation, an injured plaintiff who intended to play a musical instrument, but never did, could be compensated for loss of enjoyment of life. Under the second interpretation, however, the injured plaintiff could not be compensated since he had not engaged in playing an instrument prior to the injury.

Moreover, interpretations by commentators compound this confusion. Professors Harper, James, and Gray found that courts awarded damages for loss of enjoyment of life when the plaintiff's "ability to pursue avocations and other pleasures

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13. *McDougald v. Garber*, 132 Misc. 2d 457, 460, 504 N.Y.S.2d 383, 386 (N.Y. Sup. Ct. N.Y. County 1986), *aff'd*, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

14. *Id.*

15. *Nussbaum v. Gibstein*, 138 A.D.2d 193, 206, 531 N.Y.S.2d 276, 283-84, *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

that would have enriched plaintiff's life . . . [were] impaired or destroyed" by injury.<sup>16</sup> These may include physical activities as well as sensory perceptions.<sup>17</sup>

Another interpretation suggests that loss of enjoyment of life claims may take two different forms.<sup>18</sup> One form compares the injured plaintiff to non-injured people; the other form compares the injured plaintiff to his pre-injury status.<sup>19</sup> Again, application of these different interpretations yields diverse results. While all plaintiffs who successfully could maintain loss of enjoyment of life claims under the Harper, James, and Gray interpretation also could maintain claims successfully under the latter interpretation, the reverse is not necessarily true. Arguably, an injury that restricts a plaintiff's ability to do all that non-injured people do may not meet the higher test of impairing plaintiff's ability to engage in activities that enrich his life. Thus, at present, the absence of a concise definition of loss of enjoyment of life impedes clear delineation of the claim's parameters.

Undefined scope, however, does not bar the claim entirely since a claim for pain and suffering also is plagued by undefined scope, yet survives as an element of damages.<sup>20</sup> Noting that "[t]here is no clear legal or even medical conception of pain,"<sup>21</sup> one author points out that courts, nonetheless, award damages for it.<sup>22</sup>

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16. 4 F. HARPER, F. JAMES, JR., O. GRAY, *THE LAW OF TORTS* 573 (2d ed. 1986) [hereinafter HARPER AND JAMES].

17. *Id.* at 577-78; see also Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 971 (1981).

18. Comment, *Loss of Enjoyment of Life—Should It Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459, 459 (1975).

19. *Id.* at 459-60.

20. See RESTATEMENT (SECOND) OF TORTS §§ 905 comments c-h, 912 comment b (1979).

21. D. DOBBS, *supra* note 1, at 545 (citing Olender, *Proof and Evaluation of Pain and Suffering*, 3 DUKE L.J. 344 (1962), reprinted in SCHREIBER, *DAMAGES* 231 (1965)).

22. *Id.* Dobbs points out that courts label these damages as "compensatory in nature." *Id.* (citation omitted).

Admitting to the "amorphous" nature of pain,<sup>23</sup> one New York court stated that an "award of damages for pain and suffering compensates the victim for physical discomfort and anguish."<sup>24</sup> A second New York court embellished this definition by characterizing "pain as the physiological response to the corporeal injury [and] suffering . . . [as] the emotional or psychological reaction to these sensations."<sup>25</sup>

However, perhaps the strongest support for awarding damages for pain is found in the Restatement (Second) of Torts, which explicitly states that physical pain is compensable since bodily harm is compensable, and bodily harm includes physical pain.<sup>26</sup>

Similarly, the Restatement also supports claims for suffering under the rubric of emotional distress.<sup>27</sup> Here, provisions recognize compensation for humiliation, fear, anxiety, loss of companionship, and loss of freedom when accompanied by bodily harm.<sup>28</sup> Significantly, each of these elements presupposes conscious emotive response.<sup>29</sup> Thus, the Restatement view facilitates claims for suffering, as courts define suffering<sup>30</sup> but disen-

23. *McDougald v. Garber*, 135 A.D.2d 80, 91, 524 N.Y.S.2d 192, 198 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

24. *Id.*

25. *Nussbaum v. Gibstein*, 138 A.D.2d 193, 206, 531 N.Y.S.2d 276, 283 (2d Dep't 1988), *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

26. RESTATEMENT (SECOND) OF TORTS § 905 comment b (1979). "Bodily harm is any impairment of the physical condition of the body, including . . . physical pain. . . . [D]amages can be awarded although there is no impairment of a bodily function . . . ." *Id.*

27. *Id.* § 905(b) and comments c-h.

28. *Id.*

29. Emotional distress requires some capacity to emote or perceive feelings. Speaking generally on emotional distress, the Restatement focuses on "disagreeable emotions experienced by the plaintiff." *Id.* § 905 comment c. Similarly, the Restatement defines humiliation as "a feeling of degradation or inferiority or a feeling that other people will regard [the claimant] with aversion or dislike." *Id.* § 905 comment d. Likewise, fear, anxiety, loss of companionship, and loss of freedom each involve harm to feelings.

30. In *McDougald*, the trial court defined suffering as "relat[ing] primarily to the emotional reaction of the injured person to the injury." *McDougald v. Garber*, 132 Misc. 2d 457, 461, 504 N.Y.S.2d 383, 386 (N.Y. Sup. Ct. N.Y. County 1986), *aff'd*, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

franchises those loss of enjoyment of life claimants who are comatose or in a persistent vegetative state.

This salient definitional distinction is crucial to understanding the relationship between claims for loss of enjoyment of life and those for pain and suffering, and deciding the issue of their separateness. Courts cite cognitive awareness as a justification for separating the claims.<sup>31</sup> This consideration, however, is as much a justification for barring, entirely, a separate claim for loss of enjoyment of life. If the decision to permit a separate claim turns on cognitive awareness, and awards for damages can find legal support only when cognitive awareness exists, then awarding damages absent cognitive awareness is more than an extension of present law. It is an independent creation of a new and separate claim. This raises the question of whether courts should be creating new causes of action or whether such work is best left to the legislature.<sup>32</sup>

Finally, some judges who have reviewed this issue have concluded that "the manner in which the loss of enjoyment of life is compensated is clearly a semantical problem."<sup>33</sup> Absent the issue of cognitive awareness, this may be essentially true. In consideration of the issue of cognitive awareness, however, this perspective evinces the judicial confusion against which opponents of a separate claim warn.

## II. ARGUMENTS FOR AND AGAINST A SEPARATE CLAIM

Much of the current debate surrounding loss of enjoyment of life focuses on the effect that a separate claim would have on damages awards. Arguments include the ease of appellate review, jury confusion, and excessive verdicts.<sup>34</sup> However, because these arguments cut both ways, none is persuasive.

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31. See *Rufino v. United States*, 829 F.2d 354, 360 (2d Cir. 1987); see also *McDougald v. Garber*, 135 A.D.2d 80, 94, 524 N.Y.S.2d 192, 200 (1st Dep't 1988), modified, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

32. See *infra* notes 68-77 and accompanying text.

33. *Nussbaum v. Gibstein*, 138 A.D.2d 193, 209, 531 N.Y.S.2d 276, 286, *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

34. See *infra* text this section.

Moreover, although courts commonly cite to them,<sup>35</sup> these arguments merely reflect a general discomfort with, and skepticism towards, the capability of a jury to levy damages;<sup>36</sup> they do not, however, enlighten the court's decision.

For example, one court, which upheld a separate claim for loss of enjoyment of life, argued that it "further remove[s] an element of speculation from the appellate process and thereby facilitate[s] the appellate court's understanding of the various elements of the damages award."<sup>37</sup> While this is a meritorious goal, it is difficult to see why the same goal could not be reached without sanctioning a separate loss of enjoyment of life claim. Given New York's requirements to specify the injuries for which relief is sought,<sup>38</sup> and to specify the elements that form the basis of a damages award,<sup>39</sup> it is apparent that speculation easily is removed from the appellate process without sanctioning a separate claim.<sup>40</sup>

Related to this, one commentator has argued that a separate claim "enables the jury to separate the two elements of damage, and if carefully instructed, [it] prevents either inadequate awards or double compensation."<sup>41</sup> Again, this may be accomplished as easily without separating the claims. The United States Court of Appeals for the Second Circuit recently demonstrated this when it upheld that portion of a damages award that accurately reflected a loss of enjoyment of life component.<sup>42</sup> Although in that instance no jury was involved, it is

35. See *Nussbaum*, 138 A.D.2d at 208-09, 531 N.Y.S.2d at 285; see also *McDougald*, 135 A.D.2d at 90, 524 N.Y.S.2d at 198.

36. *McDougald v. Garber*, 73 N.Y.2d 246, 262, 536 N.E.2d 372, 379, 538 N.Y.S.2d 937, 944 (1989) (Titone, J., dissenting) (rejecting "the majority's reliance on vague concerns about potential distortion owing to the inherently difficult task of computing the value of intangible loss"), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

37. *Nussbaum*, 138 A.D.2d at 208, 531 N.Y.S.2d at 289.

38. N.Y. CIV. PRAC. L. & R. 3043 (McKinney 1986).

39. *Id.* Rule 4111(f) (McKinney 1986 & Supp. 1989).

40. Arguably, whether the column for loss of enjoyment of life is positioned within pain and suffering or alongside pain and suffering, the jury's award would be itemized identically.

41. Comment, *supra* note 18, at 470.

42. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1083 (2d Cir. 1988). In *Ulrich*, the court relied on *McDougald* when it stated that "plaintiff is not entitled

reasonable to assume that a jury could itemize damages by component as readily as could a judge.<sup>43</sup>

In fact, this same "jury confusion" argument often has been advanced *against* a separate claim for loss of enjoyment of life.<sup>44</sup> Again, this argument is vitiated by the capable jury theory: with proper instruction, a jury is capable of apportioning damages awards among multiple components.<sup>45</sup> Thus, no argument concerning a jury's ability to apportion, in fact, bears on whether loss of enjoyment of life should be separate from, or a component of, pain and suffering.

Arguments closely related to apportionment concerns also have been advanced, bilaterally, on the effect that a loss of enjoyment of life claim may have on excessive verdicts. Professors Harper, James, and Gray point out that some courts cite a separate award for loss of enjoyment of life as duplicative of an award for pain and suffering.<sup>46</sup> Following this reasoning, New

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to an additional award for loss of enjoyment of life since the trial judge permissibly took into account Ulrich's loss of enjoyment of life in assessing his damages for pain and suffering." *Id.*

Ironically, however, the *Ulrich* court misconstrued *McDougald* to confer upon courts the discretion to measure loss of enjoyment of life as an element of pain and suffering. That portion of the *McDougald* opinion cited in *Ulrich*, construed in its proper context, merely chronicles the historical basis for permitting consideration for loss of enjoyment of life. *McDougald v. Garber*, 135 A.D.2d 80, 89, 524 N.Y.S.2d 192, 201 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989). In fact, the court in *McDougald* concluded that a "loss of enjoyment of life claim should . . . be submitted as a *separate* element of damages." *Id.* at 94, 524 N.Y.S.2d at 200 (emphasis added).

43. See D. DOBBS, *supra* note 1, at 548. Presumably, when charging a jury, a judge sets forth the same criteria for evaluating a claim's merits that he would apply in a bench trial.

44. See *McDougald v. Garber*, 135 A.D.2d 80, 90, 524 N.Y.S.2d 192, 202 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

45. See *McDougald v. Garber*, 73 N.Y.2d 246, 262, 536 N.E.2d 372, 379, 538 N.Y.S.2d 937, 944 (1989) (Titone, J., dissenting), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988); see also *Nussbaum v. Gibstein*, 138 A.D.2d 193, 208, 531 N.Y.S.2d 276, 285 (2d Dep't 1988) ("A jury, if properly instructed, is fully capable of discerning between the two elements of damages."), *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

46. HARPER AND JAMES, *supra* note 16, at 576 (citing cases for and against a separate claim based on a potential for excessive damages).

York's highest court concluded that separate claims would tend to increase the size of awards.<sup>47</sup>

In contrast, some courts point out that "carefully drafted jury instructions . . . would avoid the danger of duplicitous awards of damages [and that] by requiring the jury to award separate monetary amounts for the various components of damages . . . the court will have a better framework for reviewing the award and determining if it is excessive."<sup>48</sup> Supporting this argument, "reviewing judges have pointed to loss of enjoyment of life to show that an award was not excessive."<sup>49</sup> In a third view, at least one economist has reasoned that, although the concept of loss of enjoyment of life "may preclude . . . getting a low award, . . . it [also] ensures against an unreasonably high award."<sup>50</sup>

Each of these arguments is nullified, however, since New York law mandates that the jury specify, in its verdict, "the applicable elements of . . . damage upon which the award is based."<sup>51</sup> Furthermore, careful instructions to a jury on loss of enjoyment of life as a component element, theoretically, should yield results identical to those that would occur if the claim was separately compensable, unless the claimant had no cognitive awareness.<sup>52</sup> Thus, no analysis precisely illuminates how excessive verdicts are impacted by the status of loss of enjoyment of life claims.

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47. *McDougald*, 73 N.Y.2d at 257, 536 N.E.2d at 376, 538 N.Y.S.2d at 941. In *McDougald*, the court stated: "That separate awards are advocated by plaintiffs and resisted by defendants is sufficient evidence that larger awards are at stake here." *Id.*

48. *Nussbaum v. Gibstein*, 138 A.D.2d at 208, 531 N.Y.S.2d at 291 (noting *McDougald*, 132 Misc. 2d 457, 504 N.Y.S.2d 383 (1986), *aff'd*, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989)).

49. D. DOBBS, *supra* note 1, at 549 n.59 (citation omitted); see Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R.4th 293, 299 (1984).

50. Blum, *More Suing Over Lost Joy of Life*, Nat'l L.J., Apr. 17, 1989, at 24, col. 1 (quoting economist Stanley V. Smith).

51. N.Y. CIV. PRAC. L. & R. 4111(d)-(f) (McKinney 1986).

52. See *McDougald v. Garber*, 135 A.D.2d 80, 94, 524 N.Y.S.2d 192, 200 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

Another ground for opposition is the charge that loss of enjoyment of life is immeasurable, and, therefore, damage computations for this claim are speculative.<sup>53</sup> However, as one author points out, while this may be true, tort law certainly allows recovery for speculative computations of other damage claims such as lost future wages.<sup>54</sup>

Moreover, in one sense, dissatisfaction with speculative, excessive, or duplicative award possibilities is reflective of the imperfection that results when attempts are made to ascribe a value to life itself. There is no actual monetary exchange value for bodily harm.<sup>55</sup> Therefore, at best, affixing a value by a damages award is indefinite.<sup>56</sup> Acknowledging this, the Restatement points out that "damages given for pain and humiliation are called compensatory. They give to the injured person some pecuniary return for what he has suffered or is likely to suffer."<sup>57</sup> Furthermore, absent a definite exchange value, "the only limit is such an amount as a reasonable person could possibly estimate as fair compensation."<sup>58</sup> It is this imperfection in the compensation system that gives rise to allegations of potentially excessive, speculative, and duplicative awards. This also has led some commentators to conclude that damages awards for harm such as pain and suffering are not compensatory since they can, in no way, make the plaintiff whole.<sup>59</sup> Additionally, since jurors have "nothing but their consciences to guide them . . . wide variations in monetary awards result."<sup>60</sup>

These problems, however, are not limited to loss of enjoyment of life claims. They relate to pain and suffering and other

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53. See D. DOBBS, *supra* note 1, at 548 (citing *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938)).

54. *Id.* at 549.

55. See RESTATEMENT (SECOND) OF TORTS § 912 comment b (1979).

56. *Id.*

57. *Id.* § 903 comment a.

58. *Id.* § 905 comment i. In *McDougald v. Garber*, the New York Court of Appeals acknowledged that "recovery for noneconomic losses . . . rests on . . . legal fiction." 73 N.Y.2d 246, 254, 536 N.E.2d 372, 374-75, 538 N.Y.S.2d 937, 939 (1st Dep't 1988).

59. See D. DOBBS, *supra* note 1, at 545.

60. Ingber, *Rethinking Intangible Injuries: A Focus On Remedy*, 73 CALIF. L. REV. 772, 778 (1985) (footnotes omitted).

intangible injury claims as well. Thus, criticism based on indefiniteness of loss is germane to intangible injury in general<sup>61</sup> and, therefore, is not dispositive on loss of enjoyment of life as a claim.

### III. POTENTIAL CONSEQUENCES OF A SEPARATELY COMPENSABLE DAMAGE: LOSS OF ENJOYMENT OF LIFE

Although loss of enjoyment of life claims do not necessarily lead to excessive damages awards, as a separately compensable damage, such claims may lead to an increased number of awards. For example, courts already have found loss of enjoyment of life where plaintiffs were unable to engage in sports, play with children, work, taste, smell, dance, perform housework, or sustain a sex life.<sup>62</sup> Professors Harper, James, and Gray suggest that, potentially, claims could lie for the diminished likelihood of marrying, for impairment of conceiving children, and for shortened life expectancy.<sup>63</sup> Indeed, one New York court broadly defined the claim as “[l]oss of the normal pursuits and pleasures of life.”<sup>64</sup> Given this broad definition, courts are likely to see new kinds of personal losses, resulting in more claims being brought.

In addition to potential increases in the number and kind of claims brought, separately compensable loss of enjoyment of life claims may attach to harms other than bodily harm. For example, one may experience a loss of enjoyment of life, under present definitions, in conjunction with a constitutional tort such as a section 1983<sup>65</sup> stigma claim. One also may experience such a loss in conjunction with a strict products liability claim.<sup>66</sup> Thus, courts potentially open the floodgates to litiga-

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61. *See id.* at 779.

62. *Id.*; *see* HARPER AND JAMES, *supra* note 16, at 578.

63. HARPER AND JAMES, *supra* note 16, at 578.

64. *McDougald v. Garber*, 132 Misc. 2d 457, 460, 504 N.Y.S.2d 383, 385 (N.Y. Sup. Ct. N.Y. County 1986), *aff'd*, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

65. 42 U.S.C. § 1983 (1982).

66. RESTATEMENT (SECOND) OF TORTS § 402A (1979).

tion when they sanction separately compensable loss of enjoyment of life claims.

Even if such claims attach only to bodily harm actions, increased burdens will be placed on courts as well as on society at large. One judge, who upheld loss of enjoyment of life as a separately compensable damage even absent cognitive awareness, stated he was "[m]indful but wary of the precedent which will be established."<sup>67</sup> His comment is not without import. Once courts establish that cognitive awareness is no longer a prerequisite to claims that traditionally were components of pain and suffering, there likely will be a surge of claims brought on behalf of accident victims and medical malpractice victims who seek compensation for loss of enjoyment of life. Potentially, these claimants include babies who suffer serious brain injury during birth, senile geriatric patients, and accident victims who are comatose or in a persistent vegetative state.

Given this potential, two questions arise: who will pay for this increased liability and who will pay for the increased burden on the court system. In response, Professor Ingber points out that costs for intangible injuries are not confined to wrongdoers; they are imposed on the public as well, through price increases in insurance and other services.<sup>68</sup> In this way, damages awards compound societal injury but do not lessen, proportionately, plaintiff's injury.<sup>69</sup>

Setting aside, for the moment, public policy concerns, once courts create and establish a separately compensable claim for loss of enjoyment of life, they may not countereffect escalating costs to the public. For example, courts may not control the damages award, itself, since "the matter is . . . left to the . . . discretion of the jury."<sup>70</sup> This could be particularly troublesome in New York since, according to insurance surveys, between 1962 and 1981, more million-dollar verdicts were ren-

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67. *McDougald v. Garber*, 135 A.D.2d 80, 82, 524 N.Y.S.2d 192, 193 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

68. Ingber, *supra* note 60, at 790.

69. *Id.* at 772.

70. HARPER AND JAMES, *supra* note 16, at 576 (footnote omitted).

dered in New York State than in any other state.<sup>71</sup> This does not mean that the verdicts were excessive,<sup>72</sup> but it does indicate that juries will give large awards when they feel a large award is justified.

Additionally, whereas losses for time or expense generally must be proven with reasonable certainty,<sup>73</sup> losses for intangible injuries, such as loss of enjoyment of life, generally are not apt to be proven with such certainty.<sup>74</sup> Thus, courts generally are not able to demand a high level of proof for loss of enjoyment of life.<sup>75</sup> In this way, they may not control damages awards, and, correspondingly, they may not countereffect the escalating costs to society.<sup>76</sup>

This raises the question of whether, at the cost of increasing insurance rates and increasing prices for services that entail risk, public policy favors increasing damages awards by increasing the pool of eligible claimants. Stated simply, the question is whether the public would choose to pay more for services to obtain the benefit of having separately compensable loss of enjoyment of life claims. Accordingly, the legislature is better suited than are courts to decide whether loss of enjoyment of life should be a separately compensable damage.

Courts, however, as they have done as recently as 1988, remain free to sanction compensation for loss of enjoyment of life as a component element of pain and suffering.<sup>77</sup> In this view, courts may give consideration to meritorious loss of enjoyment

71. *Id.* at 496 n.17 (citing Insurance Information Inst., Insurance Facts 52 (1983-1984)).

72. *Id.*

73. RESTATEMENT (SECOND) OF TORTS § 912 and comment a (1979).

74. *Id.* § 912 comment b.

75. *Id.* ("It is impossible to require anything approximating certainty of amount even as to past harm.").

76. Under the Restatement view, "the only standard [for an award would be] such an amount as a reasonable person would estimate as fair compensation." *Id.* Arguably, this standard, combined with the court's inability to require certainty of proof, leaves vast discretion to the jury.

77. See *Kavanaugh v. Nussbaum*, 71 N.Y.2d 535, 549, 523 N.E.2d 284, 290, 528 N.Y.S.2d 8, 14 (1988) (affirming appellate division decision that debatably included loss of enjoyment of life as a *component* element of a pain and suffering damages award; issue of *separate* recovery of loss of enjoyment was never presented to the jury).

of life claims and, simultaneously, retain control over those claims where compensation would not be just.

#### IV. DISPOSITION BY THE COURT OF APPEALS

When initially confronted with deciding whether loss of enjoyment of life is a separately compensable damage, New York's highest court declined to accept certification of the question from the United States Court of Appeals for the Second Circuit.<sup>78</sup> It is noteworthy that the Second Circuit asked not only "whether . . . loss of enjoyment of life is a separately compensable item of damages" but also, "if so, whether a claimant must possess cognitive awareness . . . to recover for such a loss."<sup>79</sup> The New York court reasoned that it was more desirable to have the issue decided in already pending litigation where it would benefit from deliberate consideration.<sup>80</sup> The Second Circuit "predicted" that "New York [would] . . . recognize loss of enjoyment of life as a separately compensable item of damage."<sup>81</sup> This prediction proved incorrect.<sup>82</sup>

Most recently, in *McDougald v. Garber*,<sup>83</sup> the New York Court of Appeals decided against a separate recovery for loss of enjoyment of life where an obstetrical patient was left permanently brain damaged and comatose as a result of oxygen deprivation suffered during surgical anesthesia.<sup>84</sup> Moreover, in addition to rejecting it as a separate claim, the court concluded that, absent cognitive awareness, plaintiff could not recover for

78. *Rufino v. United States*, 69 N.Y.2d 310, 311, 506 N.E.2d 910, 910, 514 N.Y.S.2d 200, 200 (1987).

79. *Id.* n.\* (quoting *Hatahley v. United States*, 351 U.S. 173, 182 (1956)).

80. *See id.* at 312, 506 N.E.2d at 911, 514 N.Y.S.2d at 202.

81. *See Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987). In *Rufino*, the court noted that "failure to treat loss of enjoyment of life separately in the situation of the comatose plaintiff would essentially obviate one of the prime aims of tort damages, [i.e.,] to make an injured plaintiff whole, as far as possible, by compensating for each loss suffered." *Id.* at 361 (quoting *McDougald*, 132 Misc. 2d at 460-62, 504 N.Y.S.2d at 385-87).

82. *See McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

83. *Id.*

84. *Id.* at 251, 536 N.E.2d at 373, 538 N.Y.S.2d at 938.

loss of enjoyment of life even as a component of pain and suffering.<sup>85</sup>

Paradoxically, while seeming to focus on each relevant issue, the court actually avoided resolving any issue. For example, although the court admitted to the conceptual distinctions between loss of enjoyment of life and pain and suffering, it then decided that suffering could be construed broadly to include loss of enjoyment of life.<sup>86</sup> The court created further confusion when it opined that suffering required cognitive awareness but that fact-finders may include plaintiff's inability to lead a normal life when assessing suffering.<sup>87</sup> Alternatively, the court could have grounded its reasoning in the Restatement, which supports recovery for suffering only when suffering is accompanied by conscious emotive response.<sup>88</sup>

The court also created confusion in defining nonpecuniary compensation.<sup>89</sup> Here, the court reasoned that, although such compensation was a "legal fiction" designed to right the wrong rather than to restore the victim's abilities, compensation could not console a victim who could not perceive that his abilities

85. *Id.* at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940. In *McDougald*, the court upheld the trial court's jury charge that "there must be 'some level of awareness' in order for plaintiff to recover" for pain and suffering. *Id.* The court also extended this standard to loss of enjoyment of life by simply stating: "We think that this is an appropriate standard for all aspects of nonpecuniary loss." *Id.* The dissenters vehemently opposed this conclusion and reasoned that "the victim's ability to comprehend the degree to which his or her life has been impaired is irrelevant since, unlike 'conscious pain and suffering,' the impairment exists independent of the victim's ability to apprehend it." *Id.* at 259, 536 N.E.2d at 378, 538 N.Y.S.2d at 942-43 (Titone, J., dissenting).

86. *See id.* at 256-57, 536 N.E.2d at 376, 538 N.Y.S.2d at 940.

87. *See id.* at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940. In contrast, the dissent noted that this conclusion is undercut by the majority's requirement of some level of cognitive awareness since, under the majority view, compensation for loss of enjoyment of life may be awarded to a plaintiff who has only minimal awareness. *Id.* at 260, 536 N.E.2d at 378, 538 N.Y.S.2d at 943 (Titone, J., dissenting).

88. *See supra* note 29.

89. In *McDougald*, the court stated that "recovery for 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.'" *McDougald v. Garber*, 73 N.Y.2d 246, 254, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 939 (1989) (quoting *Howard v. Lecher*, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364 (1977)), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

were impaired.<sup>90</sup> Furthermore, in lieu of citing authority for this proposition, the court reasoned that compensation was justified only where it had "meaning or utility to the injured person."<sup>91</sup> Applying this, the court concluded that, absent meaning and utility to the plaintiff, a damages award could not be compensatory, but could be only punitive.<sup>92</sup>

In sharp disagreement, the dissenters pointed out that the meaning and utility requirement "has no real foundation in law or logic"<sup>93</sup> and, thus, cannot justify the imposition of a cognitive awareness requirement.<sup>94</sup> Finding the majority's reasoning also fallacious, the dissent further argued that the distinction between compensatory and punitive damages awards was not dependent upon plaintiff's ability to "experience the pleasure of having it."<sup>95</sup>

The court, however, did not address these concerns. Moreover, although the court admitted that calculation of nonpecuniary damages always is imprecise, it concluded that a separate claim for loss of enjoyment of life would only amplify distortion.<sup>96</sup> This conclusion, however, is not substantiated by either case law or commentary.<sup>97</sup>

Thus, although the New York Court of Appeals has resolved the ultimate question of a separately compensable claim, it has not resolved the underlying issues. Instead, to reach its decision, the court relied upon factually deficient and non-persuasive arguments.

More significantly, the court noted, but did not lay to rest, the most troubling issue with which it was confronted: "the

90. *Id.*

91. *See id.*

92. *Id.*

93. *Id.* at 259, 536 N.E.2d at 378, 538 N.Y.S.2d at 943 (Titone, J., dissenting).

94. *McDougald v. Garber*, 73 N.Y.2d 246, 254, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989) (Titone, J., dissenting), *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

95. *Id.* at 259-60, 536 N.E.2d at 378, 538 N.Y.S.2d at 943.

96. *Id.* at 257, 536 N.E.2d at 376-77, 538 N.Y.S.2d at 941. The majority conceded that calculation of nonpecuniary damages is a "murky process," and concluded that "[a]pplication of this murky process to the component parts of nonpecuniary injuries" will amplify distortion. *Id.*

97. *See supra* notes 46-52 and accompanying text.

greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages."<sup>98</sup> The requirement of cognitive awareness bars recovery for nonpecuniary harm to loss of enjoyment of life claimants who, in fact, suffer great loss. To dilute the haunting nature of this paradox, the court simply stated: "the temptation to achieve a balance between injury and damages has nothing to do with meaningful compensation for the victim."<sup>99</sup> In this way, the New York Court of Appeals evaded the prime purpose of tort recovery, that is, to compensate an injured party for his loss.<sup>100</sup> Thus, although the court may have reached the correct result, it did not travel on the right road.

## CONCLUSION

Since 1857, New York courts have recognized loss of enjoyment of life as a component element of pain and suffering damages.<sup>101</sup> Recently, two New York appellate courts upheld loss of enjoyment of life as a separately compensable claim for damages.<sup>102</sup> While there were many reasons for New York's highest court to reject this change in law, there was virtually no reason for the court to accept it. Permitting separate recovery for loss of enjoyment of life may have created a panacea for intangible harms<sup>103</sup> and, ultimately, would have had significant impact on insurance costs.<sup>104</sup> Moreover, the court would have created a remedy that exceeds its present legal foundation.<sup>105</sup>

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98. *McDougald v. Garber*, 73 N.Y.2d 246, 255, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989) (quoting *McDougald v. Garber*, 132 Misc. 2d 457, 460, 504 N.Y.S.2d 383, 386 (N.Y. Sup. Ct. N.Y. County 1986)).

99. *McDougald*, 73 N.Y.2d at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940, *modifying* 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988).

100. *See* D. DOBBS, *supra* note 1, at 136.

101. *See* *Ransom v. New York & Erie R.R.*, 15 N.Y. 415, 416 (1857).

102. *McDougald v. Garber*, 135 A.D.2d 80, 523 N.Y.S.2d 192 (1st Dep't 1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989); *Nussbaum v. Gibstein*, 138 A.D.2d 193, 531 N.Y.S.2d 289 (2d Dep't 1988), *rev'd*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

103. *See supra* notes 62-66 and accompanying text.

104. *See supra* notes 69-76 and accompanying text.

105. *See supra* notes 26-30 and accompanying text.

Accordingly, the New York Court of Appeals has rejected this change. The court, however, based its decision on narrow grounds rather than on broad policy concerns. It foreclosed an avenue of recovery for nonpecuniary harms to injured plaintiffs who lack cognitive awareness, yet failed to provide a palatable or reasoned explanation for its decision. Absent from the court's analysis is a statement that public policy is contravened when law is created by non-legislative bodies.

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