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ESTABLISHING RECOVERY FOR LOSS OF ENJOYMENT OF LIFE APART FROM CONSCIOUS PAIN AND SUFFERING: *McDOUGALD v. GARBER*

Damages in personal injury actions are awarded to compensate the plaintiff for the loss he or she has sustained.¹ Customarily, the recovery is segregated into recompense for medical expenses, loss of earning capacity, and conscious pain and suffering.² Conscious pain and suffering is treated as a unitary concept because of the intimate relation of its two component elements,³ encompassing

¹ See D. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* § 8.1, at 540 (1973); 1 M. MINZER, *DAMAGES IN TORT ACTIONS* § 1.00, at 1-3 (1987); Comment, *Loss of Enjoyment of Life - Should It Be a Compensable Element of Personal Injury Damages?*, 11 *WAKE FOREST L. REV.* 459, 459 (1975). "The primary purpose of awarding 'compensatory damages' is to place the injured party in the same position that party would have occupied had the wrong not occurred." 1 M. MINZER, *supra*, § 1.00, at 1-3. An award of money damages is the generally recognized way of compensating the person for the loss sustained. See *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980).

The primary goal of the awards is to compensate the plaintiff, not to punish the tortfeasor; therefore, punitive or exemplary damages are generally not awarded in personal injury actions. See 3 L. FRUMER, R. BENOIT & M. FRIEDMAN, *PERSONAL INJURY ACTIONS, DEFENSES, DAMAGES* § 2.02, at 21-23 (1965) [hereinafter *PERSONAL INJURY ACTIONS*]; 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 25.5A, at 526 (2d ed. 1986) [hereinafter *THE LAW OF TORTS*].

² See D. DOBBS, *supra* note 1, § 8.1, at 540; Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 *DICK. L. REV.* 639, 639 (1969); Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 *PAC. L.J.* 965, 965-66 (1981).

The general category of medical expenses includes all forms of treatment received because of the injury, as well as that treatment reasonably expected to be necessary in the future. See *PERSONAL INJURY ACTIONS*, *supra* note 1, § 3.04, at 111-13.

Loss of earning capacity is regarded as "the difference between the capacity to work and to earn money before and after [the] injury." *Id.* at 127. Actual lost earnings constitute an element of lost earning capacity, but are not dispositive of this element of damages. See *id.* at 127-28.

For a detailed discussion of the concept of conscious pain and suffering, see *infra* notes 3-4 and accompanying text.

³ See *THE LAW OF TORTS*, *supra* note 1, § 25.10, at 571 ("There is no clear line of distinction between physical pain and mental suffering; nor does the law insist on drawing one."); Koskoff, *The Nature of Pain and Suffering*, 13 *TRIAL*, July 1977, at 21-22. Koskoff noted that "[s]uffering in the language of the law is traditionally coupled with pain. They are invariably conjoined. Thus, over time, a Doctrine of Pain and Suffering has been created." *Id.*

Compensation for pain and suffering usually constitutes the largest portion of the dam-

both the physical pain experienced as a result of one's injury, and one's emotional reaction to that physical pain.⁴ Many jurisdictions include "loss of enjoyment of life" as an element of the conscious pain and suffering award.⁵ Other jurisdictions, however, noting

ages for a personal injury action. See 1 M. MINZER, *supra* note 1, § 4.01, at 4-6. As with the other elements of damages, recovery for pain and suffering includes both past pain and suffering and that which is likely to be experienced in the future. See D. DOBBS, *supra* note 1, § 8.1, at 540; THE LAW OF TORTS, *supra* note 1, § 25.10, at 570.

⁴ See 1 M. MINZER, *supra* note 1, §§ 4.10-4.11, at 4-20-4-24. One commentator has suggested that pain and suffering is actually made up of three distinct elements: (1) physical pain; (2) mental suffering arising from awareness of such pain; and (3) mental anguish encompassing the unpleasant mental consequences of the injury. See *id.* § 4.10, at 4-20.

"Pain" is not easily defined; one suggested definition is as follows: "Pain is that specific bodily sensation which is commonly evoked by a variety of different forms of energy intense enough to injure the body at least minimally or transiently." 4 L. CHAPMAN, COURTROOM MEDICINE § 2.05, at 2-6 (1988). This definition, however, evidences the difficulty in defining such a subjective term. See generally *id.* § 2.01, at 2-2 (discussing difficulty of defining pain).

The concept of "suffering" has proven to be no more amenable to definition than "pain," as it is also based on a subjective standard; one suggested definition is that "[s]uffering is a mood in which anxiety/depression predominates. There is no suffering without anxiety/depression." Koskoff, *supra* note 3, at 23. Suffering is generally recognized as the emotional component of the pain and suffering award and it embraces such elements as "fright, fear, shock, apprehension, worry and anxiety, humiliation and embarrassment, wounded feelings, psychasthenia, and other forms of emotional distress, that are the proximate consequences of the physical injury." PERSONAL INJURY ACTIONS, *supra* note 1, § 3.04, at 65-66 (footnotes omitted).

Pain and suffering is an intangible loss for which the jury is given broad discretion, subject to the strictures of a "reasonableness" standard. See D. DOBBS, *supra* note 1, § 8.1, at 545; THE LAW OF TORTS, *supra* note 1, § 25.10, at 563-565; *cf. infra* note 35 (discussing statutory enactments in New York that modify the standard of appellate review). A generally recognized limitation on the award is that it be for "conscious" pain and suffering. See THE LAW OF TORTS, *supra* note 1, § 25.10, at 563. For a further discussion of the "consciousness" requirement, see *infra* notes 22, 44 and accompanying text.

A substantial amount of critical commentary has addressed the issue of pain and suffering. See generally D. DOBBS, *supra* note 1, § 8.1, at 550-51 (discussing articles calling for abolition or amendment of pain and suffering concept); THE LAW OF TORTS, *supra* note 1, § 25.10, at 563 n.2 (noting "[c]ritical and provocative treatments" of issue).

⁵ See, e.g., *Hoskie v. United States*, 666 F.2d 1353, 1357 (10th Cir. 1981) (New Mexico law includes "impairment of physical and social activities as damages for pain and suffering"); *Huff v. Tracy*, 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551, 553 (1976) ("A separate enjoyment-of-life instruction only repeats what is effectively communicated by the pain-and-suffering instruction."); *Long v. Yellow Cab Co.*, 137 Ill. App. 3d 324, 329, 484 N.E.2d 830, 832 (1985) (included in general damages); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985) (loss of enjoyment of life is part of future pain and suffering); *Ledogar v. Giordano*, 122 App. Div. 2d 834, 838, 505 N.Y.S.2d 899, 903 (2d Dep't 1986) (effect of injury on normal pursuits of life part of pain and suffering); *Missouri Pac. R.R. v. Lane*, 720 S.W.2d 830, 834 (Tex. Ct. App. 1986) (part of general damages or pain and suffering); *Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980) (diminished enjoyment of life part of pain and suffering); see also 4B L. CHAPMAN, *supra* note 4, § 121.10, at 121 & n.1 (discussing loss of enjoyment of life as part of either general damages or pain and

conceptual differences between conscious pain and suffering and loss of enjoyment of life, have denoted the latter an independent category of damages.⁶ Recently, in *McDougald v. Garber*,⁷ the Ap-

suffering and listing additional cases recognizing this concept); THE LAW OF TORTS, *supra* note 1, § 25.10A, at 575-76 & 576 n.4 (same); 2 M. MINZER, *supra* note 1, § 8.12, at 8-27 & n.1 (1986) (same); Comment, *supra* note 2, at 967 & n.15 (same).

Damages for loss of enjoyment of life are granted as compensation for "interference[s] with the injured person's ability to lead what would have been a normal lifestyle in the absence of injury." 2 M. MINZER, *supra* note 1, § 8.01, at 8-4 (1986). As would be expected with such an expansive definition, recovery for loss of enjoyment of life encompasses a broad spectrum of activities, including restrictions of abilities to engage in recreational pursuits, inability to partake in family activities, and losses of senses of smell or taste. *See* Comment, *supra* note 1, at 459-60; *see also* *Burke v. United States*, 605 F. Supp. 981, 1000 (D. Md. 1985) (ability of "loving mother and wife . . . to provide emotional support and physical companionship to her family" impaired); *Powell v. Hegney*, 239 So. 2d 599, 599 (Fla. Dist. Ct. App. 1970) ("no longer able to swim competitively and was restricted in other activities, sportwise and socially"); *Long*, 137 Ill. App. 3d at 327, 484 N.E.2d at 832 (active in sports—tennis, running, and bicycling); *Gallo v. Supermarkets Gen. Corp.*, 112 App. Div. 2d 345, 347, 491 N.Y.S.2d 796, 798 (2d Dep't 1985) ("formerly healthy, athletic, social, confident and helpful young man has now become a virtual recluse"); *Alexander v. Eldred*, 100 App. Div. 2d 666, 667, 473 N.Y.S.2d 864, 866 (3d Dep't) (volleyball, tennis, and skiing), *aff'd*, 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984); *Sternemann v. Langs*, 93 App. Div. 2d 819, 820, 460 N.Y.S.2d 614, 616 (2d Dep't 1983) ("has been deprived of a social life, can no longer properly care for her young children"); *Corcoran v. McNeal*, 400 Pa. 14, 21, 161 A.2d 367, 372 (1960) (lost sense of smell and taste); *Cantu v. Del Carmen Pena*, 650 S.W.2d 906, 910 (Tex. Ct. App. 1983) (unable to engage in gardening, yardwork, cooking, and housework).

One commentator has suggested that loss of enjoyment of life can be defined in two ways: "(1) *Descriptively*, where the injury consists of a permanent impairment of a mental or physical faculty . . . [and] (2) *Operationally*, where the direct physical or mental injuries measure among their consequences the injured party's reasonable withdrawal from one or more family, social, career, or recreational pursuits or activities" 2 M. MINZER, *supra* note 1, § 8.01, at 8-8-8-10 (1986).

⁶ *See, e.g.*, *Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987) (predicting New York law will recognize separate elements); *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir.) ("Pain and suffering . . . and loss of enjoyment of life each represent separate losses which the victim incurs."), *cert. denied*, 449 U.S. 1035 (1980); *Pierce v. New York Cent. R.R.*, 409 F.2d 1392, 1398-99 (6th Cir. 1969) (separate awards not reversible error); *Mariner v. Marsden*, 610 P.2d 6, 12 (Wyo. 1980) (either separate awards or part of general damages is acceptable).

The basis for the distinction between the two concepts is that "pain and suffering compensates the victim for the physical and mental discomfort caused by the injury [while] loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury." *Thompson*, 621 F.2d at 824; *see also* 4B L. CHAPMAN, *supra* note 4, § 121.11, at 121-5-121-6 (suggesting same distinction); 2 M. MINZER, *supra* note 1, § 8.01[1], at 8-16 (1986) (citing *Thompson*, 621 F.2d at 824).

Despite the foregoing, many courts refuse to distinguish recovery for loss of enjoyment of life from that for pain and suffering. *See supra* note 5 and accompanying text. The primary reason expressed for not separating the two concepts is fear of duplicative recovery. *See, e.g.*, *Akers v. Kelley Co.*, 173 Cal. App. 3d 633, 655, 219 Cal. Rptr. 513, 526 (1985) ("vice of coupling 'pain and suffering' with 'loss of enjoyment of life' is that the door is

pellate Division of the Supreme Court of the State of New York drew this same distinction and held that loss of enjoyment of life is a separate element of damages from conscious pain and suffering.⁸ Further, the court held that recovery for loss of enjoyment of life, unlike that for conscious pain and suffering, does not require cognitive awareness of one's loss as a prerequisite to recovery.⁹

In *McDougald*, plaintiff Emma McDougald suffered severe brain damage while undergoing a cesarian section and tubal ligation.¹⁰ She fell into a coma and remained unconscious continuously thereafter.¹¹ She and her husband, Johnny McDougald, instituted an action alleging medical malpractice against the obstetrician/gynecologist-surgeon, the anesthesiologists, and the hospital.¹² The jury returned a verdict in favor of the plaintiffs for \$11,150,102¹³ which was reduced pursuant to post-trial motions to \$6,296,728.¹⁴ An appeal ensued based upon the lower court's ruling that loss of

thereby opened to double compensation"); *Poyzer*, 360 N.W.2d at 753 ("It would be plainly duplicative to allow a separate award for loss of enjoyment of life."). A second reason that has been offered is that the conjectural nature of damages for loss of enjoyment of life precludes recovery. See *Hogan v. Sante Fe Trail Transp.*, 148 Kan. 720, 728, 85 P.2d 28, 32 (1938). This criticism, however, is rarely expressed today and virtually all jurisdictions allow recovery for loss of enjoyment of life either as a part of, or separate from, other damages. See 2 M. MINZER, *supra* note 1, § 8.02, at 8-19 (1986).

⁷ 135 App. Div. 2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988), *leave to appeal granted*, Nos. M-537, M-553, M-565 (App. Div. 1st Dep't Mar. 15, 1988).

⁸ *Id.* at 82, 524 N.Y.S.2d at 193. The Appellate Division, Second Department, relying, *inter alia*, on the *McDougald* decision, recently reached the same conclusion. See *Nussbaum v. Gibstein*, No. 2568E, slip op. at 2 (App. Div. 2d Dep't July 5, 1988).

⁹ *Id.* at 82, 94, 524 N.Y.S.2d at 193, 200.

¹⁰ *Id.* at 82, 524 N.Y.S.2d at 193. The incident occurred on September 7, 1978 and resulted from the plaintiff's failure to receive sufficient oxygen, a condition known as anoxia. *Id.* Nevertheless, the infant was born healthy. *Id.*

¹¹ *Id.* The court also noted that Mrs. McDougald "is a permanent spastic quadriplegic with incontinence of urine and feces." *Id.*

¹² See *id.*

¹³ *Id.* The jury awarded \$1,500,000 to Johnny McDougald for loss of services and \$9,650,102 to Emma McDougald which was itemized as follows: loss of earnings - \$770,978; future custodial care - \$2,025,750; future nursing care - \$2,353,375; conscious pain and suffering - \$1,000,000; and loss of enjoyment of life - \$3,500,000. See *McDougald v. Garber*, 132 Misc. 2d 457, 458, 504 N.Y.S.2d 383, 384 (Sup. Ct. N.Y. County 1986). It should be noted that while the damages were reported as listed above, the total actually equaled \$11,150,103, with Mrs. McDougald's award being \$9,650,103.

¹⁴ See *McDougald*, 135 App. Div. 2d at 82, 524 N.Y.S.2d at 193. The award was reduced by striking the recovery for future nursing care as it was "not supported by the evidence," see *id.* at 87, 524 N.Y.S.2d at 196, and by lowering the collective award of \$4,500,000 for conscious pain and suffering and loss of enjoyment of life to \$2,000,000 due to excessiveness. See *id.* The other itemized damages, plus Johnny McDougald's derivative award for loss of services, were not disturbed. See *id.*

enjoyment of life is a separately compensable element of damages for which cognitive awareness is not required.¹⁵ The Appellate Division of the Supreme Court affirmed the lower court's ruling and dismissed the appeal.¹⁶

Writing for the court, Justice Sullivan acknowledged that numerous New York decisions had included loss of enjoyment of life as an element of conscious pain and suffering.¹⁷ Nevertheless, the court, while noting the risk of duplicative recovery¹⁸ and the inherent difficulty in affording compensation for intangible losses,¹⁹ asserted that the two elements were distinguishable and deserved separate compensation.²⁰ The court also suggested that appellate review would be facilitated by recognition of this distinction.²¹ Furthermore, the court held that the requirement of cognitive awareness, which is generally regarded as a *sine qua non* to recovery for pain and suffering,²² is not applicable to damages for loss of

¹⁵ See *id.* at 82, 524 N.Y.S.2d at 193. The other issues raised on appeal involved the admissibility of expert testimony, see *id.* at 94-95, 524 N.Y.S.2d at 201, and theories of malpractice. See *id.* at 95-96, 524 N.Y.S.2d at 201-02. Each of these allegations of error was dismissed, see *id.* at 94-96, 524 N.Y.S.2d at 201-02, as was the plaintiffs' cross-appeal regarding the recovery for future nursing care. See *id.* at 96, 524 N.Y.S.2d at 202.

¹⁶ *Id.*

¹⁷ See *id.* at 89, 524 N.Y.S.2d at 197-98. The court pointed out that the majority of New York cases expressing this view have done so in the context of appellate review of damages for pain and suffering. See *id.* at 89, 524 N.Y.S.2d at 197.

¹⁸ See *id.* at 90, 524 N.Y.S.2d at 198.

¹⁹ See *id.* at 91, 524 N.Y.S.2d at 198-99. The court stated that while pain and suffering may be a more tangible concept, damages for each loss can be calculated. See *id.* Objection to loss of enjoyment of life as an element of damages based on its uncertainty is often raised but generally rejected as it is no more difficult to calculate these damages than those for pain and suffering. See 2 M. MINZER, *supra* note 1, § 8.22, at 8-38-8-40 (1986); see also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (risk of uncertainty in tort damages should be placed on wrongdoer).

²⁰ See *McDougald*, 135 App. Div. 2d at 91, 524 N.Y.S.2d at 199.

²¹ See *id.* at 91-92, 94, 524 N.Y.S.2d at 199-200. The court suggested that recognition of a separate element of damages is consonant with CPLR 4111(d), N.Y. CIV. PRAC. L. & R. 4111(d) (McKinney Supp. 1988), which requires itemized verdicts in malpractice cases. See *id.* at 94, 524 N.Y.S.2d at 200. One of the reasons for this requirement is to assist appellate review of the excessiveness or inadequacy of damage awards. See 4 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 4111.13, at 41-205 (1987). The requirement of itemized verdicts in malpractice actions has been extended to all actions seeking recovery for personal injury, injury to property, or wrongful death. See N.Y. CIV. PRAC. L. & R. 4111(f) (McKinney Supp. 1988). This provision is applicable to actions commenced on or after July 30, 1986. See *id.* at notes. For a further discussion of statutory enactments that attempt to control jury verdicts, see *infra* note 35 and accompanying text.

²² See *McDougald*, 135 App. Div. 2d at 194, 524 N.Y.S.2d at 200. The clause is generally known as "conscious pain and suffering" and, as the adjective connotes, requires plaintiffs to be "conscious of [their] pain and suffering." See *THE LAW OF TORTS*, *supra* note 1, §

enjoyment of life since lack of consciousness does not eliminate one's inability to engage in ordinary activities.²³

The *McDougald* court recognized loss of enjoyment of life as an element of damages that is distinct from conscious pain and suffering, and which does not demand cognitive awareness for its recovery. It is submitted, however, that while plaintiffs deserve to be properly compensated for their losses, regardless of their cognitive state, the court's recognition of loss of enjoyment of life as a separate component of the damage award was erroneous. This Comment will discuss the court's attempt to distinguish loss of enjoyment of life from conscious pain and suffering, and suggest that because recovery for conscious pain and suffering has always included recoupment for loss of enjoyment of life, demarcating the two concepts creates an unnecessary opportunity for duplicative recovery. In addition, it will be asserted that while the court's ultimate decision to allow the comatose plaintiff recovery for loss of enjoyment of life was correct, the court should have limited the scope of its holding to encompass only similarly situated plaintiffs.

DUPLICATIVE RECOVERY

The *McDougald* court allowed the plaintiff, whom the court regarded as having some cognitive capacity,²⁴ to recover damages

25.10, at 563 n.1. In this context, however, it should be noted that courts often allow recovery when very little awareness is exhibited. *See id.*

²³ *See McDougald*, 135 App. Div. 2d at 93-94, 524 N.Y.S.2d at 200. The court relied in large measure on two English cases recognizing "loss of amenities" as a distinct element of damages that does not require cognitive awareness to be recovered. *See id.*; *see also* Comment, *Nonpecuniary Damages for Comatose Tort Victims*, 61 GEO. L.J. 1547, 1549-1551 (1973) (discussing these English cases). "Loss of amenities refers to loss of enjoyment of life." R. DIAS & B. MARKESINIS, *THE ENGLISH LAW OF TORTS* 220 (1976). The court also relied on a recent decision of the United States Court of Appeals for the Second Circuit, *Rufino v. United States*, 829 F.2d 354 (2d Cir. 1987). *See McDougald*, 135 App. Div. 2d at 92-93, 524 N.Y.S.2d at 199-200. The *Rufino* court allowed recovery for loss of enjoyment of life absent consciousness based primarily on the lower court decision of Justice Gammernan in the *McDougald* case. *See Rufino*, 829 F.2d at 360-61.

The *McDougald* court stated that not only is cognitive awareness unnecessary, but also that the plaintiff need not possess the ability to spend the award. *See McDougald*, 135 App. Div. 2d at 94, 524 N.Y.S.2d at 200. This assertion directly contradicts a ruling by the United States Court of Appeals for the Fourth Circuit refusing to allow recovery for loss of enjoyment of life to a similarly situated plaintiff on the grounds that the award was punitive. *See Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

²⁴ *See McDougald*, 135 App. Div. 2d at 87-88, 524 N.Y.S.2d at 197. The court noted that evidence of some cognition, adduced by the plaintiffs' expert, the attending nurses, and the husband-plaintiff, was sufficient to support the jury's finding. *Id.* at 88, 524 N.Y.S.2d at

for loss of enjoyment of life over and above her recoupment for conscious pain and suffering.²⁵ In reaching this decision, the court relied on the decisions of other jurisdictions and the opinions of numerous commentators which have suggested that, while the concepts are often equated, loss of enjoyment of life is distinguishable from conscious pain and suffering.²⁶ Loss of enjoyment of life, it has been argued, compensates one for the loss of his or her capacity to enjoy life, an objective standard, while conscious pain and suffering concerns the physical discomfort and concomitant mental anguish that one experiences.²⁷ Although a semantic argument can be constructed for this distinction, it is submitted that the court's holding ignores the practice of the trial advocate to include objective evidence of loss of enjoyment of life as part of the proof of conscious pain and suffering.

Leading authorities on personal injury law, including those cited by the *McDougald* court, suggest that proof of conscious pain and suffering is facilitated by the presentation of "objective" evidence of such suffering.²⁸ One who represents himself as "anxious"

197.

²⁵ See *id.* at 82, 524 N.Y.S.2d at 193.

²⁶ See *id.* at 89-92, 524 N.Y.S.2d at 198-99; see also *supra* note 6 and accompanying text (discussing distinction).

²⁷ See *supra* note 6 and accompanying text. The trial judge's charge to the jury in *McDougald* further suggests the conceptual distinction between the elements: "[D]amages for pain and suffering compensate the injured person for the conscious physical and mental discomfort caused by the injury. Damages for loss of the normal pleasures and pursuits of life compensate the injured person for the limitations on his or her life created by the injury." *McDougald v. Garber*, 132 Misc. 2d 457, 462, 504 N.Y.S.2d 383, 387 (Sup. Ct. N.Y. County 1986).

²⁸ See PERSONAL INJURY ACTIONS, *supra* note 1, § 3.04, at 62, 69; 1 M. MINZER, *supra* note 1, § 4.13[1], at 4-28, 4-31. One commentator has noted, regarding proof of pain and suffering, that:

[P]laintiff's counsel should strive to develop as much objective evidence of pain and suffering as possible, as a means of convincing the trier of fact that the plaintiff is neither feigning those effects nor malingering. Whether the pain and suffering are "objective" depends on . . . the behavioral consequences or changes in the plaintiff's lifestyle which can be attributed to the alleged pain and suffering.

Id. at 4-28. A clear example of the plaintiff's double-edged use of loss of enjoyment of life is as follows:

In addition, the plaintiff - particularly one with a genuinely serious injury - has an excellent opportunity to enhance an award of damages for pain and suffering by presenting proof as to the adverse effects of the injuries on his or her daily activities. Withdrawal from participation in family, business, social, or recreational activities pursued and enjoyed prior to the time of injury can be effective evidence that the plaintiff's claims of pain, anxiety, depression, embarrassment, fear, or humiliation are real, and not exaggerated.

about his inability to care for his family, and thus seeks recovery for conscious pain and suffering, should attempt to present evidence of the familial relationship that existed prior to the incident.²⁹ Similarly, one who is attempting to demonstrate how his disfigurement has caused him "humiliation" should offer evidence that he no longer possesses an active social life.³⁰ The same evidence that is used to prove conscious pain and suffering is then utilized to show loss of enjoyment of life.³¹ The New York cases that preceded the *McDougald* decision apparently recognized this commingling process since they included loss of enjoyment of life as part of the award for conscious pain and suffering.³² Thus, the

Id. at 4-31; see also 1 A. AUERBACH, *HANDLING ACCIDENT CASES* § 92, at 1:232-1:235 (1958) (discussing loss of enjoyment of life as proof of mental stress); 4B L. CHAPMAN, *supra* note 4, § 120.32, at 120-25 (criteria for proving pain and suffering include "comparison of pre- and post-accident habits and pursuits"); 3 J. KELNER, *PERSONAL INJURY - SUCCESSFUL LITIGATION TECHNIQUES* 65-66 (1986) (discussing use of lay testimony to prove pain and suffering).

Despite the exhortations of the foregoing authorities, the *McDougald* court held that pain and suffering was distinguishable from loss of enjoyment of life. *McDougald*, 135 App. Div. 2d at 82, 91, 524 N.Y.S.2d at 193, 199; see also *PERSONAL INJURY ACTIONS*, *supra* note 1, § 3.04, at 186 ("Failure to differentiate between loss of enjoyment as evidence of damage, and loss of enjoyment as an element of damages, has resulted in a denial of recovery or admissibility of such evidence.").

²⁹ See, e.g., *Birkhill v. Todd*, 20 Mich. App. 356, 365-66, 174 N.W.2d 56, 61 (1969) (plaintiff entitled to recovery for "worry, anxiety, distress or apprehension 'about finances and [his] wife at home'"); *Warmesley v. City of New York*, 89 App. Div. 2d 982, 984, 454 N.Y.S.2d 144, 146 (2d Dep't 1982) (plaintiff's pain and suffering included worry that "her husband does not have the same emotional feeling towards her because she is a one-legged woman"). In addition, the actual interference with the plaintiff's family relations would be separately compensable under the concept of loss of enjoyment of life. See 2 M. MINZER, *supra* note 1, § 8.35, at 8-73-8-80 (1986).

³⁰ See, e.g., *Gallo v. Supermarkets Gen. Corp.*, 112 App. Div. 2d 345, 346-47, 491 N.Y.S.2d 796, 798 (2d Dep't 1985) (extensive burns disfigured plaintiff's body, resulting in "fear of contact with people"); *Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980) (pain and suffering includes "humiliation and embarrassment from permanent scars and disability"). In addition, interferences with the plaintiff's social life would add to his or her recovery for loss of enjoyment of life. See 2 M. MINZER, *supra* note 1, § 8.35, at 8-73-8-80 (1986).

³¹ See 4B L. CHAPMAN, *supra* note 4, § 121.02, at 121-2. Loss of enjoyment of life has been defined by factors which include the inability to engage in family and recreational activities. See *id.*; see also *supra* note 5 (discussing loss of enjoyment of life).

³² See, e.g., *Kavanaugh v. Nussbaum*, 129 App. Div. 2d 559, 564, 514 N.Y.S.2d 55, 59 (2d Dep't 1987) (pain and suffering award may be based on effect of injuries on plaintiff's ability to enjoy pleasures of life); *Gallo*, 112 App. Div. 2d at 347, 491 N.Y.S.2d at 798 (pain and suffering damages compensate formerly confident man who became virtual recluse); *Bottone v. New York Tel. Co.*, 110 App. Div. 2d 922, 924, 487 N.Y.S.2d 170, 173 (3d Dep't 1985) (restrictions on past, present, and future activities compensable); *Alexander v. Eldred*, 100 App. Div. 2d 666, 666, 473 N.Y.S.2d 864, 866 (3d Dep't) (plaintiff compensated for deprivation of ability to participate in recreational activities), *aff'd*, 63 N.Y.2d 460, 472 N.E.2d

McDougald court appears to be asking jurors to make distinctions which the New York courts have never drawn.³³ Invariably, it is submitted, this apportionment will lead to duplicative recovery since jurors will increase the award for conscious pain and suffering if there is "objective" evidence of the suffering, and will concurrently grant separate recompense in the form of damages for loss of enjoyment of life based upon that same "objective" evidence.

The *McDougald* court suggested that judicial review of verdicts would be facilitated by recognizing loss of enjoyment of life as a separate element of damages.³⁴ This would comport with recent legislative enactments attempting to control jury verdicts by requiring itemized damages under the belief that appellate courts can more readily determine the propriety of such awards.³⁵ Requir-

996, 483 N.Y.S.2d 168 (1984); *Neal v. Rainbow House Fruits*, 87 App. Div. 2d 511, 511, 447 N.Y.S.2d 487, 488 (1st Dep't 1982) (compensation for restriction of normal activities).

³³ See *McDougald*, 135 App. Div. 2d at 89-91, 524 N.Y.S.2d at 197-99. The court acknowledged the New York precedents, see *id.* at 89, 524 N.Y.S.2d at 197-98, but, nonetheless, carved out a distinct element of damages for loss of enjoyment of life. See *id.* at 91, 524 N.Y.S.2d at 198-99.

³⁴ *Id.* at 91-92, 94, 524 N.Y.S.2d at 199-200. The court stated that segregation of loss of enjoyment of life from conscious pain and suffering assists appellate review of "excessiveness." *Id.* See also *Pierce v. New York Cent. R.R.*, 409 F.2d 1392, 1399 (6th Cir. 1969) ("Review of the award will be facilitated by separating it from pain and suffering, thereby providing an additional safeguard against excessiveness."); 4B L. CHAPMAN, *supra* note 4, § 121.13, at 121-14 (separate treatment provides additional criteria for appellate review).

³⁵ See *supra* note 21 and accompanying text. CPLR 4111(d) requires an itemized verdict in medical, dental, or podiatric malpractice actions, N.Y. CIV. PRAC. L. & R. 4111(d) (McKinney Supp. 1988), and CPLR 4111(f) extends this requirement to damages for personal injury, injury to property, or wrongful death. N.Y. CIV. PRAC. L. & R. 4111(f) (McKinney Supp. 1988). The statutes list "medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering" as the elements of recovery, but, as the *McDougald* court properly recognized, the legislature expressly provided that the list was not intended to be exclusive. N.Y. CIV. PRAC. L. & R. 4111(d)(f) (McKinney Supp. 1988). See *McDougald*, 135 App. Div. 2d at 94, 524 N.Y.S.2d at 200.

Another recent legislative enactment is CPLR 5501(c), N.Y. CIV. PRAC. L. & R. 5501(c) (McKinney Supp. 1988), which provides that review of jury verdicts rendered pursuant to CPLR 4111 shall be governed by the following standard: "[A]n award is excessive or inadequate if it deviates materially from what would be reasonable compensation." *Id.* The provision applies to actions commenced on or after July 30, 1986. *Id.* at notes. Prior to this addition, the appellate courts would overturn a jury's verdict only if it "shock[ed] the conscience of the court." See *Merrill v. Albany Medical Center Hosp.*, 126 App. Div. 2d 66, 68, 512 N.Y.S.2d 519, 520 (3d Dep't 1987); 1 T. NEWMAN, *NEW YORK APPELLATE PRACTICE* § 4.10, at 4-24 (1986). Although the intent of the legislature was to facilitate appellate review, see N.Y. CIV. PRAC. L. & R. 5501(c), commentary at 3 (McKinney Supp. 1988), one commentator has suggested that the change is not necessarily monumental. See *id.* ("Is it all that unusual for a judge's conscience to be shocked by a verdict that deviates materially from 'reasonable compensation'?").

ing jurors to separately allocate damages for medical expenses, loss of earning capacity, and conscious pain and suffering allows the courts to review such awards more effectively.³⁶ It is submitted, however, that in the context of attempting to distinguish loss of enjoyment of life from conscious pain and suffering, the court has suggested an illusory benefit. The mere fact that the elements are conceptually distinguishable does not mean the losses can be individually quantified.³⁷ The recognition of conscious pain and suffering as a singular loss, despite the theoretical distinction between the two component elements, provides an apposite analogy for this reasoning.³⁸ Ultimately, it is suggested that even if juries are required to itemize the damages, the reviewing courts will be forced, either expressly or tacitly, to merge loss of enjoyment of life and conscious pain and suffering in recognition of the interrelation of the two concepts.³⁹

AFFORDING PROPER COMPENSATION FOR THE COMATOSE PLAINTIFF

Compensatory damages are designed to place the plaintiff in the position he or she would have occupied had the injuries not been sustained.⁴⁰ Recovery for loss of enjoyment of life is correctly

A complementary enactment to CPLR 4111 and CPLR 5501(c) was the adoption of CPLR 5522(b), N.Y. CIV. PRAC. L. & R. 5522(b) (McKinney Supp. 1988), which requires the appellate division to "set forth in its decision the reasons therefor, including the factors it considered" if it rules on a verdict that was challenged as either being excessive or inadequate. *Id.* It was suggested that "[t]his will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Governor's Memorandum on Approval of ch. 682, N.Y. Laws (1986), reprinted in [1986] N.Y. LEGIS. ANN. 289. See generally Newman, *Damages: A Call for Meaningful Precedents*, 3 PACE L. REV. 605 *passim* (1983) (suggesting need for establishment of meaningful precedents, which is exactly what CPLR 5522(b) is intended to provide).

³⁶ See *supra* notes 2, 34-35 and accompanying text.

³⁷ See *supra* notes 29-31 and accompanying text. For a listing of cases that have included loss of enjoyment of life as part of pain and suffering or general damages, see *supra* notes 5 and 32. *But cf.* Comment, *supra* note 2, at 978 (suggesting distinction between pain and suffering and loss of enjoyment of life often not drawn because of similar circumstances and parallel methods of proof, yet submitting the two concepts are distinct).

³⁸ See *supra* notes 3-4 and accompanying text.

³⁹ This is the precisely what occurred in the lower court in *McDougald*. See *McDougald v. Garber*, 132 Misc. 2d 457, 462-63, 504 N.Y.S.2d 383, 387 (Sup. Ct. N.Y. County 1986). The trial judge noted that "Mrs. McDougald will never be able to engage in any of the activities and relationships which constitute a normal life," *id.* at 460, 504 N.Y.S.2d at 385, but then joined the separate jury verdicts for conscious pain and suffering and loss of enjoyment of life and reduced them as a single unit. See *id.* at 462, 504 N.Y.S.2d at 387.

⁴⁰ See *supra* note 1 and accompanying text.

factored into the determination of one's losses.⁴¹ The *McDougald* court, relying expressly on decisions of the English courts that have recognized "loss of amenities" as a distinct damage,⁴² held that this loss is compensable regardless of the plaintiff's cognitive awareness of the loss.⁴³ This is the proper result in light of the limitation of recovery for pain and suffering to those plaintiffs deemed "conscious" of their injuries.⁴⁴ It would be anomalous to allow a plaintiff who is not severely injured to recover for conscious pain and suffering, often the largest component of the damage award, while precluding one who is rendered comatose from receiving compensation for any non-pecuniary loss.⁴⁵ It is submitted that

⁴¹ See *supra* notes 5-6 and accompanying text; see also *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 335, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 ("fundamental purpose of damages . . . is to have the wrongdoer make the victim whole").

⁴² See *supra* note 23. But see *Flannery v. United States*, 297 S.E.2d 433, 439 n.9 (W. Va. 1982) (despite recognizing loss of enjoyment of life as compensable to semi-comatose plaintiff, court suggests reliance on English cases not helpful due to "differences in the English and [American] damage law"); D. DOBBS, *supra* note 1, § 8.1, at 549 (noting that English cases have retained concept but have limited damages).

⁴³ *McDougald*, 135 App. Div. 2d at 94, 524 N.Y.S.2d at 200.

⁴⁴ See *Fiederlein v. New York City Health & Hosps. Corp.*, 56 N.Y.2d 573, 574, 435 N.E.2d 398, 399, 450 N.Y.S.2d 181, 182 (1982) ("Mere conjecture, surmise or speculation is not enough to sustain a claim for damages."); *Huertas v. State*, 84 App. Div. 2d 650, 651, 444 N.Y.S.2d 307, 309 (3d Dep't 1981) (no evidence consciousness regained); *Teller v. Fairchild*, 67 App. Div. 2d 1105, 1106, 415 N.Y.S.2d 138, 140 (4th Dep't 1979) (requires conscious pain and suffering); see also *supra* note 22 and accompanying text (discussing conscious pain and suffering).

⁴⁵ See *McDougald v. Garber*, 132 Misc. 2d 457, 460, 504 N.Y.S.2d 383, 385-86 (Sup. Ct. N.Y. County 1986). The trial judge stated:

Defendants maintain that no damages for the loss of the pleasures and pursuits of life are recoverable unless that loss is consciously perceived. Accepting that argument would lead to the conclusion that a severely brain damaged plaintiff rendered totally incapable of experiencing any conscious pain or appreciating his or her condition would be entitled to no general damages. The subjective perception standard urged by defendants would result in the paradoxical situation that the greater the degree of brain damage inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages.

Id. The plaintiff would always retain the ability to recover for lost earning capacity and medical expenses. See *supra* note 2 and accompanying text.

Eradication of a similarly anomalous situation was behind the development of wrongful death statutes. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. At common law, Lord Ellenborough stated that "in a civil court the death of a human being [can]not be complained of as an injury," *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808), quoted in PROSSER AND KEETON, *supra*, § 127, at 945, leading to the unacceptable conclusion that it was better for the defendant to kill the plaintiff than to merely injure him. See PROSSER AND KEETON, *supra*, § 127, at 945. For a general history of wrongful death statutes, see 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 1.1-1.2, at 2-10 (2d ed. 1975).

the *McDougald* court recognized this anomaly and, noting that the limited cognitive capacity of the plaintiff would substantially diminish her recovery, deemed it necessary to permit recovery for loss of enjoyment of life in the absence of cognitive awareness of one's loss.

Adoption of such a standard could be objected to on the grounds that the recovery of a comatose plaintiff for loss of enjoyment of life will inure to a third party, rather than to the plaintiff, thus creating a punitive award instead of a compensatory one.⁴⁶ This analysis has been soundly rejected by the United States Court of Appeals for the Second Circuit, which has held that such an award maintains its compensatory purpose.⁴⁷ Additionally, the *McDougald* court's holding does not substantially deviate from prior rulings allowing recovery for loss of enjoyment of life by an infant who has exhibited no understanding of the nature of his or her loss.⁴⁸ Although these concepts are distinguishable, since the

⁴⁶ See *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). The *Flannery* court declared that if recovery by a comatose person for loss of the ability to enjoy life is compensatory at all, "it is compensatory to those relatives who will survive him." *Id.* The *Flannery* court disallowed such recovery by deeming it punitive in nature and thereby violative of the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976). See *Flannery*, 718 F.2d at 111.

The *Flannery* case had an interesting procedural history. The United States Court of Appeals for the Fourth Circuit originally certified to the Supreme Court of Appeals of West Virginia the question of whether a plaintiff rendered semi-comatose could recover for loss of enjoyment of life. *Flannery v. United States*, 649 F.2d 270, 273 (4th Cir. 1981). The West Virginia court held that such recovery was permissible even though the plaintiff was not aware of his loss. *Flannery*, 297 S.E.2d at 439. Nonetheless, the Fourth Circuit deemed the award punitive and disallowed recovery. *Flannery*, 718 F.2d at 111.

⁴⁷ See *Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987). The *Rufino* court stated that "[t]he purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss. The fact that the compensation may inure as a practical matter to third parties in a given case does not transform the nature of the damages." *Id.* In reaching its conclusion, the *Rufino* court relied on a decision of the United States Court of Appeals for the Ninth Circuit, *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984), which had refused to follow the *Flannery* ruling. See *Rufino*, 829 F.2d at 362.

⁴⁸ See *Kavanaugh v. Nussbaum*, 129 App. Div. 2d 559, 564, 514 N.Y.S.2d 55, 59 (2d Dep't 1987); *Ledogar v. Giordano*, 122 App. Div. 2d 834, 838, 505 N.Y.S.2d 899, 903 (2d Dep't 1986). The *Kavanaugh* court noted that:

[A]lthough there is no evidence that the infant plaintiff is capable of fully appreciating the consequences of his injuries, or that he is presently conscious of pain, an award for pain and suffering may be based upon the effect that the injuries had upon the infant plaintiff's ability to enjoy the normal pursuits and pleasures of life.

Kavanaugh, 129 App. Div. 2d at 564, 514 N.Y.S.2d at 59 (citing *Ledogar*, 122 App. Div. 2d at 838, 505 N.Y.S.2d at 903). See also *Capelouto v. Kaiser Found. Hosps.*, 7 Cal. 3d 889, 894-95, 500 P.2d 880, 884-85, 103 Cal. Rptr. 856, 860-61 (1972) (en banc) (infant need not

child will eventually understand the limitations on his or her life while the comatose individual will not,⁴⁹ there is nonetheless a time frame during which the child does not understand the loss, and yet is permitted to receive compensation. Allowing recovery in favor of a comatose plaintiff presents a logical extension of this analysis.⁵⁰ However, if this recovery is still regarded as punitive, a legislative enactment, similar to that adopted for survival statutes,⁵¹ can be promulgated whereby the legislature can signify that, as a matter of public policy, recovery for loss of enjoyment of life by a comatose person is not punitive.

Allowing recovery for loss of enjoyment of life without concomitant cognitive awareness achieves the compensatory goal of the American tort system.⁵² It is submitted, however, that the *McDougald* court could have adequately afforded such compensation without creating the duplicative recovery that resulted from the demarcation of loss of enjoyment of life and conscious pain and suffering. The court should have adopted a disjunctive standard whereby a plaintiff could recover for conscious pain and suffering, which includes loss of enjoyment of life, or, if no cognition was evident, the plaintiff could recover only for loss of enjoyment of life.⁵³

explain pain to recover for pain and suffering); *Flannery v. United States*, 297 S.E.2d 433, 438-39 (W. Va. 1982) ("There are obviously many situations, particularly injuries to infants or young children where [their] experience of life is so minimal that their ability to comprehend the extent of their permanent disability is negligible, and yet these young plaintiffs have not been denied recovery for permanent injuries.").

⁴⁹ See Brief for Appellants Armengol, Kulkarni, Sharma, and Empire Anesthesia Associates at 48, *McDougald*, 135 App. Div. 2d at 80, 524 N.Y.S.2d at 192.

⁵⁰ See *Flannery*, 297 S.E.2d at 438-39.

⁵¹ See N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(b) (McKinney Supp. 1988). The statute allows an action to be brought by a personal representative in favor of the decedent's estate for any claim that could have been brought by the decedent. *Id.* Recovery pursuant to this statute has included damages for conscious pain and suffering for the time between injury and death despite the fact that it is clearly a windfall for a third party. See *Stein v. Lebowitz-Pine View Hotel, Inc.*, 111 App. Div. 2d 572, 573, 489 N.Y.S.2d 635, 637 (3d Dep't 1985); *Teller v. Fairchild*, 67 App. Div. 2d 1105, 1106, 415 N.Y.S.2d 138, 139 (4th Dep't 1979); see also PROSSER AND KEETON, *supra* note 45, § 126, at 943 (discussing windfall concept). But see ARIZ. REV. STAT. ANN. § 14-3110 (1975) (disallowing damages for pain and suffering in survival action); WASH. REV. CODE ANN. § 4.20.046 (1962) (same). For a general discussion of survival statutes, see PROSSER AND KEETON, *supra* note 45, § 126, at 942-45.

⁵² See *supra* note 1 and accompanying text. See also D. DOBBS, *supra* note 1, § 8.1, at 549-50 (suggesting that recovery for "lost years" could be allowed as "society's symbolic statement of belief in the security of the person").

⁵³ See *Flannery*, 297 S.E.2d at 435 n.2. The West Virginia court noted the memorandum and order of the federal district court wherein this disjunctive standard was suggested. *Id.* Another commentator has suggested the integration of the English view of loss of amenities into the American system by creating a general category of non-pecuniary damages for

The same standard would be applicable to injuries sustained between the time of injury and that of death when survival statutes are applicable.⁵⁴ Adoption of such a rule would continue the practice of presenting the factual question of "consciousness" to juries⁵⁵ and would enhance the ability of appellate courts to review these juries' verdicts.⁵⁶

CONCLUSION

The *McDougald* court was faced with the anomalous situation whereby a plaintiff rendered comatose would have been precluded from recovering damages for any non-pecuniary loss. The court sought to prevent this result by distinguishing damages recoverable for one's loss of enjoyment of life from those compensating conscious pain and suffering. Unfortunately, the court established a precedent that invariably leads to duplicative reparation for plaintiffs. Limiting recognition of loss of enjoyment of life as a distinct component of damages to cases involving comatose plaintiffs would effectively achieve the compensatory goal of the American tort system without imposing punitive measures upon the tortfeasor.

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comatose tort victims. See Comment, *supra* note 23, at 1557-58.

The trial judge in *McDougald* appeared to recognize the problem but, it is submitted, arrived at the wrong solution. Justice Gammerman stated that "[l]oss of the enjoyment of life may . . . accompany the physical sensation and emotional responses that we refer to as pain and suffering and, in most cases, does. It is possible, however, for an injured person to lose the enjoyment of life without experiencing any conscious pain and suffering." *McDougald v. Garber*, 132 Misc. 2d 457, 462, 504 N.Y.S.2d 383, 386-87 (Sup. Ct. N.Y. County 1986).

⁵⁴ For a general discussion of survival statutes, see *supra* note 51 and accompanying text.

⁵⁵ See *supra* notes 22, 44 and accompanying text.

⁵⁶ See *supra* notes 21, 35 and accompanying text. It is suggested that the courts must carefully review awards for loss of enjoyment of life to insure equitable application of the concept. The wealthy person who has lost the ability to travel or engage in extravagant recreational activities has not necessarily "lost" any more than the poor person who can no longer enjoy spending time with his or her family.