

Westlaw.

536 N.E.2d 372

73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 57 USLW 2519

(Cite as: 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937)



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Court of Appeals of New York.
Emma McDOUGALD et al., Respondents,
v.
Sara GARBER et al., Appellants.
Feb. 21, 1989.

Comatose patient brought medical malpractice action against hospital and physicians. The Supreme Court, New York County, Gammerman, J., 132 Misc.2d 457, 504 N.Y.S.2d 383, entered judgment in favor of patient. Appeal was taken. The Supreme Court, Appellate Division, Sullivan, J., 135 A.D.2d 80, 524 N.Y.S.2d 192 affirmed. Appeal was taken. The Court of Appeals, Wachtler, C.J., held that: (1) some degree of **cognitive** awareness is a prerequisite to recovery of damages for loss of enjoyment of life, and (2) jury may not be instructed to consider and may not award damages for loss of enjoyment of life separately from damages for pain and suffering.

Order appealed from modified and, as modified, affirmed.

Titone, J., filed a dissenting opinion in which Alexander, J., concurred.

West Headnotes

[1] Damages 115 ↪ 57.9

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.9 k. In General. Most Cited Cases

(Formerly 115k49)

Some degree of cognitive awareness is a prerequisite to recovery of damages for loss of enjoyment of life.

[2] Damages 115 ↪ 57.9

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.9 k. In General. Most Cited Cases

(Formerly 115k49)

That there be "some level of awareness" is appropriate standard for determining whether a plaintiff is entitled to recover nonpecuniary damages for loss of enjoyment of life.

[3] Damages 115 ↪98

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k98 k. Permanent Injuries. Most Cited Cases

Factfinder may, in assessing nonpecuniary damages, consider effect of injuries on plaintiff's capacity to lead normal life.

[4] Damages 115 ↪57.1

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.1 k. In General. Most Cited Cases

(Formerly 115k49)

Damages 115 ↪216(10)

115 Damages

115X Proceedings for Assessment

115k209 Instructions

115k216 Measure of Damages for Injuries to the Person

115k216(10) k. Mental Suffering and Emotional Distress. Most Cited Cases

Jury may not be instructed to consider and may not award damages for loss of enjoyment of life separately from damages for pain and suffering.

*247 **372 ***937 Charles L. Bach, Jr., Luke M. Pittoni, New York City, and Michael F. McGowan, for Sara Garber, appellant.

*248 Steven J. Ahmuty, Jr., and Thomas R. Newman, New York City, for New York Infirmary, appellant.

*249 Michael A. Ellenberg, New York City, for Sonia Armengol and others, appellants.

*250 Thomas A. Moore, New York City, for respondents.

****373** Peter L. Zimroth, Corp. Counsel (Ingeborg B. Garfield and Fay Leoussis, of counsel), New York City, for the City of New York, amicus curiae.

***251 ***938 OPINION OF THE COURT**

WACHTLER, Chief Judge.

This appeal raises fundamental questions about the nature and role of nonpecuniary damages in personal injury litigation. By nonpecuniary damages, we mean those damages awarded to compensate an injured person for the physical and emotional consequences of the injury, such as pain and suffering and the loss of the ability to engage in certain activities. Pecuniary damages, on the other hand, compensate the victim for the economic consequences of the injury, such as medical expenses, lost earnings and the cost of custodial care.

The specific questions raised here deal with assessment of nonpecuniary damages and are (1) whether some degree of cognitive awareness is a prerequisite to recovery for loss of enjoyment of life and (2) whether a jury should be instructed to consider and award damages for loss of enjoyment of life separately from damages for pain and suffering. We answer the first question in the affirmative and the second question in the negative.

I.

On September 7, 1978, plaintiff Emma McDougald, then 31 years old, underwent a Caesarean section and tubal ligation at New York Infirmary. Defendant Garber performed the surgery; defendants Armengol and Kulkarni provided anesthesia. During the surgery, Mrs. McDougald suffered oxygen deprivation which resulted in severe brain damage and left her in a permanent comatose condition. This action was brought by Mrs. McDougald and her husband, suing derivatively, alleging that the injuries were caused by the defendants' acts of malpractice.

A jury found all defendants liable and awarded Emma McDougald a total of \$9,650,102 in damages, including \$1,000,000 for conscious pain and suffering and a separate award of ***252** \$3,500,000 for loss of the pleasures and pursuits of life. The balance of the damages awarded to her were for pecuniary damages-lost earnings and the cost of custodial and nursing care. Her husband was awarded \$1,500,000 on his derivative claim for the loss of his wife's services. On defendants' posttrial motions, the Trial Judge reduced the total award to Emma McDougald to \$4,796,728 by striking the entire award for future nursing care (\$2,353,374) and by reducing the separate awards for conscious pain and suffering and loss of the pleasures and pursuits of life to a single award of \$2,000,000 (McDougald v. Garber, 132 Misc.2d 457, 504 N.Y.S.2d 383). Her husband's award was left intact. On cross appeals, the Appellate Division affirmed (135 A.D.2d 80, 524 N.Y.S.2d 192) and later granted defendants leave to appeal to this court.

II.

We note at the outset that the defendants' liability for Emma McDougald's injuries is unchallenged here, except for a claim by

Dr. Garber that liability against her was predicated on a theory not asserted in the complaint or bill of particulars. We agree with the Appellate Division, for the reasons stated by that court (*see*, 135 A.D.2d 80, 95-96, 524 N.Y.S.2d 192 *supra*), that Dr. Garber's claim does not warrant a new trial on liability.

Also unchallenged are the awards in the amount of \$770,978 for loss of earnings and \$2,025,750 for future custodial care—that is, the pecuniary damage awards that survived defendants' posttrial motions.

What remains in dispute, primarily, is the award to Emma McDougald for nonpecuniary damages. At trial, defendants sought to show that Mrs. McDougald's injuries were so severe that she was incapable of either experiencing pain or appreciating her condition. Plaintiffs, on the other hand, introduced proof that Mrs. McDougald responded to certain stimuli to a sufficient extent to indicate that she was aware of her circumstances. Thus, the extent of Mrs. McDougald's **cognitive** abilities, if any, was sharply disputed.

****374** The parties and the trial court agreed that Mrs. McDougald could not recover for pain and suffering unless she were conscious of the pain. Defendants maintained that such consciousness was also required to support an award for loss of enjoyment of life. The court, however, accepted plaintiffs' view that loss of enjoyment of life was compensable without regard to whether****939** the plaintiff was aware of the loss. Accordingly, ***253** because the level of Mrs. McDougald's **cognitive** abilities was in dispute, the court instructed the jury to consider loss of enjoyment of life as an element of nonpecuniary damages separate from pain and suffering. The court's charge to the jury on these points was as follows:

"If you conclude that Emma McDougald is so neurologically impaired that she is totally incapable of experiencing any unpleasant or painful sensation, then, obviously, she cannot be awarded damages for conscious pain * * *.

"It is for you to determine the level of Emma McDougald's perception and awareness. Suffering relates primarily to the emotional reaction of the injured person to the injury. Thus, for an injured person to experience suffering, there, again, must be some level of awareness. If Emma McDougald is totally unaware of her condition or totally incapable of any emotional reaction, then you cannot award her damages for suffering. If, however, you conclude that there is some level of perception or that she is capable of an emotional response at some level, then damages for pain and suffering should be awarded * * *.

"Damages for the loss of the pleasures and pursuits of life, however, require no awareness of the loss on the part of the injured person. Quite obviously, Emma McDougald is unable to engage in any of the activities which constitute a normal life, the activities she engaged in prior to her injury * * * Loss of the enjoyment of life may, of course, accompany the physical sensation and emotional responses that we refer to as pain and suffering, and in most cases it does. It is possible, however, for an injured person to lose the enjoyment of life without experiencing any conscious pain and suffering. Damages for this item of injury relate not to what Emma McDougald is aware of, but rather to what she has lost. What her life was prior to her injury and what it has been since September 7, 1978 and what it will be for as long as she lives."

We conclude that the court erred, both in instructing the jury that Mrs. McDougald's awareness was irrelevant to their consideration of damages for loss of enjoyment of life and in directing the jury to consider that aspect of damages separately from pain and suffering.

III.

We begin with the familiar proposition that an award of damages to a person injured by the negligence of another is to *254 compensate the victim, not to punish the wrongdoer (see, Sharapata v. Town of Islip, 56 N.Y.2d 332, 335, 452 N.Y.S.2d 347, 437 N.E.2d 1104; Prosser and Keeton, Torts, at 7 [5th ed.]). The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred (1 Minzer, Nates, Kimball, Axelrod & Goldstein, Damages in Tort Actions §§ 1.00, 1.02). To be sure, placing the burden of compensation on the negligent party also serves as a deterrent, but purely punitive damages—that is, those which have no compensatory purpose—are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence (see, Sharapata v. Town of Islip, *supra*, at 335, 452 N.Y.S.2d 347, 437 N.E.2d 1104; Prosser and Keeton, Torts, at 9-10 [5th ed.]; 1 Minzer, *op. cit.*, § 1.03).

Damages for nonpecuniary losses are, of course, among those that can be awarded as compensation to the victim. This aspect of damages, however, stands on less certain ground than does an award for pecuniary damages. An economic loss can be compensated in kind by an economic gain; but recovery for noneconomic losses such as pain and suffering and loss of enjoyment**375 of life rests on “the legal fiction that money damages can compensate for a victim's injury” (Howard v. Lecher, 42 N.Y.2d 109, 111, 397 N.Y.S.2d 363, 366 N.E.2d 64). We accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace***940 for the condition created (see, Skelton v. Collins, 115 CLR 94, 130, 39 ALJR 480, 495 [Austl H C]).

Our willingness to indulge this fiction comes to an end, however, when it ceases to serve the compensatory goals of tort recovery. When that limit is met, further indulgence can only result in assessing damages that are punitive. The question posed by this case, then, is whether an award of damages for loss of enjoyment of life to a person whose injuries preclude any awareness of the loss serves a compensatory purpose. We conclude that it does not.

Simply put, an award of money damages in such circumstances has no meaning or utility to the injured person. An award for the loss of enjoyment of life “cannot provide [such a victim] with any consolation or ease any burden resting on him * * * He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away” (Flannery*255 v. United States, 4th Cir., 718 F.2d 108, 111, *cert. denied* 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874).

We recognize that, as the trial court noted, requiring some cognitive awareness as a prerequisite to recovery for loss of enjoyment of life will result in some cases “in the paradoxical situation that the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages” (McDougald v. Garber, 132 Misc.2d 457, 460, 504 N.Y.S.2d 383, *supra*). The force of this argument, however—the temptation to achieve a balance between injury and damages—has nothing to do with meaningful compensation for the victim. Instead, the temptation is rooted in a desire to punish the defendant in proportion to the harm inflicted. However relevant such retributive symmetry may be in the criminal law, it has no place in the law of civil damages, at least in the absence of culpability beyond mere negligence.

[1][2] Accordingly, we conclude that **cognitive** awareness is a prerequisite to recovery for loss of enjoyment of life. We do not go so far, however, as to require the fact finder to sort out varying degrees of **cognition** and determine at what level a particular deprivation can be fully appreciated. With respect to pain and suffering, the trial court charged simply that there must be “some level of awareness” in order for plaintiff to recover. We think that this is an appropriate standard for all aspects of nonpecuniary loss. No doubt the standard ignores analytically relevant levels of cognition, but we resist the desire for analytical purity in favor of simplicity. A more complex instruction might give the appearance of greater precision but, given the limits of our understanding of the human mind, it would in reality lead only to greater speculation.

We turn next to the question whether loss of enjoyment of life should be considered a category of damages separate from pain and suffering.

IV.

[3][4] There is no dispute here that the fact finder may, in assessing nonpecuniary damages, consider the effect of the injuries on the plaintiff's capacity to lead a normal life. Traditionally, in this State and elsewhere, this aspect of suffering has not been treated as a separate category of damages; instead, the plaintiff's inability to enjoy life to its fullest has been considered one type of suffering to be factored *256 into a general award for nonpecuniary damages, commonly known as pain and suffering.

Recently, however, there has been an attempt to segregate the suffering associated with physical pain from the mental anguish that stems from the inability to engage in certain activities, and to have juries provide a separate award for each **376 (see generally, Annotation, *Damages Element-Loss of Enjoyment of Life*, 34 A.L.R.4th 293; Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac.L.J. 965 [1981]; Hermes, *Loss of Enjoyment of Life-Duplication of Damages Versus Full Compensation*, 63 North Dakota L.Rev. 561 [1987]).

Some courts have resisted the effort, primarily on the ground that duplicative and therefore excessive awards would result (see, e.g., *Huff v. Tracy*, 57 Cal.App.3d 939, 944, 129 Cal.Rptr. 551, 553; *Poyzer v. McGraw*, 360 N.W.2d 748, 752-753 [Iowa]). ***941 Other courts have allowed separate awards, noting that the types of suffering involved are analytically distinguishable (see, e.g., *Rufino v. United States*, 2nd Cir., 829 F.2d 354 [applying its prediction of New York law]; *Thompson v. National R.R. Passenger Corp.*, 6th Cir., 621 F.2d 814, cert. denied 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497; *Mariner v. Marsden*, 610 P.2d 6 [Wyo]; *Lebesco v. Southeastern Pa. Transp. Auth.*, 251 Pa.Super. 415, 380 A.2d 848). Still other courts have questioned the propriety of the practice but held that, in the particular case, separate awards did not constitute reversible error (see, e.g., *Swiler v. Baker's Super Mkt.*, 203 Neb. 183, 277 N.W.2d 697; *Pierce v. New York Cent. R.R. Co.*, 6th Cir., 409 F.2d 1392, 1398-1399).

In this State, the only appellate decisions to address the question are the decision of the Appellate Division, First Department, now under review (135 A.D.2d 80, 524 N.Y.S.2d 192, *supra*), and the decision of the Second Department in *Nussbaum v. Gibstein*, 138 A.D.2d 193, 531 N.Y.S.2d 276, *revd.* 73 N.Y.2d 912, 539 N.Y.S.2d 289, 536 N.E.2d 618 [decided today]). Those courts were persuaded that the distinctions between the two types of mental anguish justified separate awards and that the potential for duplicative awards could be mitigated by carefully drafted jury instructions. In addition, the courts opined that separate awards would facilitate appellate review concerning the excessiveness of the total damage award.

We do not dispute that distinctions can be found or created between the concepts of pain and suffering and loss of enjoyment of life. If the term "suffering" is limited to the emotional response to the sensation of pain, then the emotional response *257 caused by the limitation of life's activities may be considered qualitatively different (see, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac.L.J. 965, 969-973). But suffering need not be so limited-it can easily encompass the frustration and anguish caused by the inability to participate in activities that once brought pleasure. Traditionally, by treating loss of enjoyment of life as a permissible factor in assessing pain and suffering, courts have given the term this broad meaning.

If we are to depart from this traditional approach and approve a separate award for loss of enjoyment of life, it must be on the

basis that such an approach will yield a more accurate evaluation of the compensation due to the plaintiff. We have no doubt that, in general, the total award for nonpecuniary damages would increase if we adopted the rule. That separate awards are advocated by plaintiffs and resisted by defendants is sufficient evidence that larger awards are at stake here. But a larger award does not by itself indicate that the goal of compensation has been better served.

The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application. Translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction. The figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary**377 injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, the distortion will be amplified by repetition.

Thus, we are not persuaded that any salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life. We are confident, furthermore, that the trial advocate's art is a sufficient guarantee that none of the plaintiff's losses will be ignored by the jury.

The errors in the instructions given to the jury require a new trial on the issue of nonpecuniary damages to be awarded *258 to plaintiff Emma McDougald. Defendants' remaining contentions are either without ***942 merit, beyond the scope of our review or are rendered academic by our disposition of the case.^{FN*}

FN* We note especially the argument raised by several defendants that plaintiffs' attorney was precluded by CPLR 3017(c) from mentioning, in his summation, specific dollar amounts that could be awarded for nonpecuniary damages. We do not resolve this issue, which has divided the lower courts (*compare, Bagailuk v. Weiss*, 110 A.D.2d 284, 494 N.Y.S.2d 205; and *Bechard v. Eisinger*, 105 A.D.2d 939, 481 N.Y.S.2d 906, with *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473), inasmuch as the matter was neither presented to nor addressed by the Appellate Division.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be modified, with costs to defendants, by granting a new trial on the issue of nonpecuniary damages of plaintiff Emma McDougald, and as so modified, affirmed.

TITONE, Judge (dissenting).

The majority's holding represents a compromise position that neither comports with the fundamental principles of tort compensation nor furnishes a satisfactory, logically consistent framework for compensating nonpecuniary loss. Because I conclude that loss of enjoyment of life is an objective damage item, conceptually distinct from conscious pain and suffering, I can find no fault with the trial court's instruction authorizing separate awards and permitting an award for "loss of enjoyment of life" even in the absence of any awareness of that loss on the part of the injured plaintiff. Accordingly, I dissent.

It is elementary that the purpose of awarding tort damages is to compensate the wronged party for the actual loss he or she has sustained (1 Minzer, Nates, Kimball, Axelrod & Goldstein, *Damages in Tort Actions* § 1.00, at 1-3). Personal injury damages are awarded "to restore the injured person to the state of health he had prior to his injuries because that is the only way the law knows how to recompense one for personal injuries suffered" (*Romeo v. New York City Tr. Auth.*, 73 Misc.2d 124, 126, 341 N.Y.S.2d 733; see, *Thompson v. National R.R. Passenger Corp.*, 6th Cir., 621 F.2d 814, 824, cert. denied, 449 U.S. 1035, 101

S.Ct. 611, 66 L.Ed.2d 497). Thus, this court has held that “[t]he person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act” (Steitz v. Gifford, 280 N.Y. 15, 20, 19 N.E.2d 661).

The capacity to enjoy life-by watching one's children grow, participating in recreational activities, and drinking in the many other pleasures that life has to offer-is unquestionably an attribute of an ordinary healthy individual. The loss of *259 that capacity as a result of another's negligent act is at least as serious an impairment as the permanent destruction of a physical function, which has always been treated as a compensable item under traditional tort principles (e.g., Simpson v. Foundation Co., 201 N.Y. 479, 95 N.E. 10 [loss of sexual potency]; see, Robison v. Lockridge, 230 App.Div. 389, 390, 244 N.Y.S. 663). Indeed, I can imagine no physical loss that is more central to the quality of a tort victim's continuing life than the destruction of the capacity to enjoy that life to the fullest.

Unquestionably, recovery of a damage item such as “pain and suffering” requires a showing of some degree of cognitive capacity. Such a requirement exists for the simple reason that pain and suffering are wholly subjective concepts and cannot exist **378 separate and apart from the human consciousness that experiences them. In contrast, the destruction of an individual's capacity to enjoy life as a result of a crippling injury is an objective fact that does not differ in principle from the permanent loss of an eye or limb. As in the case of a lost limb, an essential characteristic of a healthy human life has been wrongfully taken, and, consequently, the injured party is entitled to a monetary award as a substitute, if, as the majority asserts, the goal of tort compensation is “to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred” (majority opn., at 254, at 939 of 538 N.Y.S.2d, at 374 of 536 N.E.2d).

Significantly, this equation does not suggest a need to establish the injured's awareness of the loss. The victim's ability to comprehend the degree to which his or ***943 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. Indeed, the majority reaches the conclusion that a degree of awareness must be shown only after injecting a new element into the equation. Under the majority's formulation, the victim must be aware of the loss because, in addition to being compensatory, the award must have “meaning or utility to the injured person.” (Majority opn., at 254, at 940 of 538 N.Y.S.2d, at 375 of 536 N.E.2d.) This additional requirement, however, has no real foundation in law or logic. “Meaning” and “utility” are subjective value judgments that have no place in the law of tort recovery, where the primary goal is to find ways of quantifying, to the extent possible, the worth of various forms of human tragedy.

Moreover, the compensatory nature of a monetary award *260 for loss of enjoyment of life is not altered or rendered punitive by the fact that the unaware injured plaintiff cannot experience the pleasure of having it. The fundamental distinction between punitive and compensatory damages is that the former exceed the amount necessary to replace what the plaintiff lost (see, Hartford Acc. & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737). As the Court of Appeals for the Second Circuit has observed, “[t]he fact that the compensation [for loss of enjoyment of life] may inure as a practical matter to third parties in a given case does not transform the nature of the damages” (Rufino v. United States, 2nd Cir., 829 F.2d 354, 362).

Ironically, the majority's expressed goal of limiting recovery for nonpecuniary loss to compensation that the injured plaintiff has the capacity to appreciate is directly undercut by the majority's ultimate holding, adopted in the interest of “simplicity,” that recovery for loss of enjoyment of life may be had as long as the injured plaintiff has “ ‘some level of awareness’ ”, however slight (majority opn., at 255, at 940 of 538 N.Y.S.2d, at 375 of 536 N.E.2d). Manifestly, there are many different forms and levels of awareness, particularly in cases involving brain injury. Further, the type and degree of cognitive functioning necessary to experience “pain and suffering” is certainly of a lower order than that needed to apprehend the loss of the ability to enjoy life in all of its subtleties. Accordingly, the existence of “some level of awareness” on the part of the injured plaintiff says nothing

about that plaintiff's ability to derive some comfort from the award or even to appreciate its significance. Hence, that standard does not assure that loss of enjoyment of life damages will be awarded only when they serve "a compensatory purpose," as that term is defined by the majority.^{FN*}

FN* Another problem with the majority's analysis is the absence of any discussion about the time frame to be used in measuring the award of damages for plaintiff's loss of enjoyment of life. Damages for "pain and suffering" are directly correlated to the plaintiff's experience of "pain and suffering" and thus are routinely awarded only for that period of time during which the injured had sufficient cognitive powers to have that experience. Damages for loss of enjoyment of life, in contrast, are awarded as a monetary replacement for the plaintiff's diminished ability to participate in the pleasures and pursuits of healthy living during the remainder of his or her natural life span. Thus, a legitimate question exists as to whether the plaintiff is entitled to recover an award representing his entire lifetime's loss notwithstanding that he was conscious of the loss for only a few moments before lapsing into **cognitive** oblivion. Furthermore, in view of the majority's conclusion that an award is not truly compensatory if it cannot be enjoyed by the injured party, an additional question arises as to whether the **cognitive** capacity of the plaintiff must be measured at the time when the award is to be given rather than at some earlier point before the commencement of trial.

*261 **379 In the final analysis, the rule that the majority has chosen is an arbitrary one, in that it denies or allows recovery on the basis of a criterion that is not truly related to its stated goal. In my view, it is fundamentally unsound, as well as grossly unfair, to deny recovery to those who are completely without cognitive capacity while permitting it for those with a mere spark of awareness, regardless of the latter's ability to appreciate either the loss sustained or the benefits of the monetary award offered in compensation. In both instances, the injured plaintiff is in essentially the same position, and an award that is punitive as to one is equally punitive as to the other. Of course, since I do not subscribe to the majority's conclusion that an award to an unaware plaintiff is punitive, I would have no difficulty permitting recovery to both classes of plaintiffs.

Having concluded that the injured plaintiff's awareness should not be a necessary precondition to recovery for loss of enjoyment of life, I also have no difficulty going ***944 on to conclude that loss of enjoyment of life is a distinct damage item which is recoverable separate and apart from the award for conscious pain and suffering. The majority has rejected separate recovery, in part because it apparently perceives some overlap between the two damage categories and in part because it believes that the goal of enhancing the precision of jury awards for nonpecuniary loss would not be advanced. However, the overlap the majority perceives exists only if one assumes, as the majority evidently has (*see*, majority opn, at 256-257, at 940-942 of 538 N.Y.S.2d, at 375-377 of 536 N.E.2d), that the "loss of enjoyment" category of damages is designed to compensate only for "*the emotional response* caused by the limitation of life's activities" and "*the frustration and anguish caused by the inability to participate in activities that once brought pleasure*" (emphasis added), both of which are highly *subjective* concepts.

In fact, while "pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; * * * loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury", a distinctly *objective* loss (*Thompson v. National R.R. Passenger Corp. supra*, at 824). In other words, while the victim's "emotional response" and "frustration and anguish" are elements *262 of the award for pain and suffering, the "limitation of life's activities" and the "inability to participate in activities" that the majority identifies are recoverable under the "loss of enjoyment of life" rubric. Thus, there is no real overlap, and no real basis for concern about potentially duplicative awards where, as here, there is a properly instructed jury.

Finally, given the clear distinction between the two categories of nonpecuniary damages, I cannot help but assume that

permitting separate awards for conscious pain and suffering and loss of enjoyment of life would contribute to accuracy and precision in thought in the jury's deliberations on the issue of damages. Indeed, the view that itemized awards enhance accuracy by facilitating appellate review has already been expressed by the Legislature in enacting CPLR 4111(d) and (f) (*see*, 4 Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶ 4111.13, at 41-205). In light of the concrete benefit to be gained by compelling the jury to differentiate between the specific objective and subjective elements of the plaintiff's nonpecuniary loss, I find unpersuasive the majority's reliance on vague concerns about potential distortion owing to the inherently difficult task of computing the value of intangible loss. My belief in the jury system, and in the collective wisdom of the deliberating jury, leads me to conclude that we may safely leave that task in the jurors' hands.

For all of these reasons, I approve of the approach that the trial court adopted in its ****380** charge to the jury. Accordingly, I would affirm the order below affirming the judgment.

SIMONS, KAYE, HANCOCK and BELLACOSA, JJ., concur with WACHTLER, C.J.

TITONE, J., dissents and votes to affirm in a separate opinion in which ALEXANDER, J., concurs.

Order, insofar as appealed from, modified, with costs to defendants, by granting a new trial on the issue of nonpecuniary damages of plaintiff Emma McDougald and, as so modified, affirmed.

N.Y., 1989.

McDougald v. Garber

73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 57 USLW 2519

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