Hedonic Damages: A New Trend in Compensation?

I. INTRODUCTION

"Hedonic damages" were first awarded in 1985 and have since been a source of confusion for the courts. As with many novel approaches to the law there is a lack of uniformity regarding this new form of compensation in personal injury and wrongful death actions. This Note first will define the concept of "hedonic damages" and discuss its debut in the American legal system. Second, this Note will analyze methods used by economists in calculating hedonic damages and explain how a jury might apply this hedonic methodology. Finally, this Note will discuss several recent decisions involving hedonic damages or damages involving loss of enjoyment of life to illustrate the varied approaches taken as the courts attempt to come to terms with this remedy.

II. HEDONIC DAMAGES: DEFINED AND APPLIED

A. *What Are "Hedonic Damages"?*

Hedonic damages[1] compensate an individual for the loss of life and loss of the pleasures of living. They encompass the "larger value of life . . . including [the] economic . . . moral . . . [and] philosophical . . . value with which you might hold life."[2] Other elements of the hedonic value of life may include an individual's expectations for the future as well as enjoyment of past activities. In contrast to damages for pecuniary loss, these damages involve a more subjective analysis of the pleasure that the particular individual derived from living.[3]

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1. This term was used first in Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *vacated and remanded on other grounds*, 835 F.2d 1222 (7th Cir. 1988).

2. *Id.* at 163.

3. To date, the term "hedonic damages" has only been used in ten cases. *See* Sterner v. Wesley College, Inc., No. 12-290 (D. Del. 1990) (LEXIS, Genfed library, Dist file) (predicting Delaware law, the court granted the defendants' motion to exclude evidence of hedonic damages except to the extent such damages are included in damages for pain and suffering); Gonzales v. City Wide Insulation, Inc., No. 88-C-1299 (N.D. Ill. May 25, 1990) (WESTLAW, State library) (the Illinois Wrongful Death Act does not provide for award of hedonic damages but was designed to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death); Nichols v. Estabrook, 741 F. Supp. 325, 329 (D. N.H. 1989) (dismissed the plaintiff's claim for hedonic damages reasoning that "[t]o allow for the enjoyment of continued life would mean an entrance into a boundless field of arbitrary assessment."); Lucy v. Washington Metro. Area Transit Auth., No. 87-2630 (D. D.C. June 9, 1989) (LEXIS, Genfed library, Dist file) (hedonic damages not recoverable in the District of Columbia); Clement v. Consolidated Rail Corp., 734 F. Supp. 151, 155-56 (D. N.J. 1989) (hedonic damages, limited to the two-hour period decedent was alive after injury and prior to his death, were potentially recoverable under common law); Leiker v. Gafford, 245 Kan. 325, 340, 778 P.2d 823, 835 (1989) (loss of enjoyment of life not separate category of nonpecuniary damages); Singleton v. Chung Sun Suhr, No. 55367 (Ohio Ct. App. May 18, 1989) (LEXIS, States library); Peek v. Equipment Serv. Co., 779 S.W. 2d 802, 803 (Tex. 1989) (uses the terms "loss of enjoyment of life" and "hedonic damages" interchangeably); *and Sherrod*, 629 F. Supp. at 159. "Hedonic damages" generally encompass elements similar, if not identical to, damages for loss of enjoyment of life. *See also* Marcotte, *Lost Pleasure Suit*, A.B.A. J. April 1990, at 30 (discussing settlement of first personal injury case to award hedonic damages). For a recent discussion of hedonic damages see R. PALFIN & B. DANNINGER, HEDONIC DAMAGES: PROVING DAMAGES FOR LOST ENJOYMENT OF LIVING (1990) [hereinafter R. PALFIN]; Comment, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 7 GEO. L.J. 1687 (1990) (authored by Erin A. O'Hara) [hereinafter O'Hara].

Courts have awarded damages for the loss of enjoyment of life in non-death personal injury cases for some time;[4] however, the question of whether an individual may recover hedonic damages in survival and wrongful death actions is a relatively new issue and the courts are not in agreement.[5] Many early

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4. According to Carleton Robert Cramer in his article *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 965 (1981), the concept of loss of enjoyment of life as an element of damages emerged in the 1890's perhaps due to the industrial revolution and the increase in industrial related accidents. *See, e.g.*, Isgett v. Seaboard Coast Line R.R., 332 F. Supp. 1127, 1143 (D. S.C. 1971):

> In addition to his physical pain and suffering he has suffered mental anguish, and anxiety, the shame of being transposed from an able-bodied, self-respecting working man to a pitiable, legless dependent, disfigurement, loss of sex life, humiliation and emotional strains attendant to such a deplorable condition . . . [t]his court feels it appropriate that the award for the disability per se should include the non-pecuniary, non-pain aspects of the disabled condition, such as deprivation of a normal, full life and a chance to pursue non-economic hobbies or recreation.

See also Jackson v. United States, 526 F. Supp. 1149, 1153 (E.D. Ark. 1981); Nice v. Chesapeake & Ohio Ry., 305 F. Supp. 1167, 1181 (W.D. Mich. 1969) (applying Michigan law) ("loss of life's enjoyments"); McNeill v. United States, 519 F. Supp. 283, 289-90 (D. S.C. 1981) (applying South Carolina law) (awarded damages for "being deprived of an opportunity to enjoy life . . . [and] to pursue non-economic hobbies and recreation"); Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 406, 522 P.2d 596, 601 (1974) ("loss of enjoyment of life"); Powell v. Hegney, 239 So. 2d 599, 600 (Fla. Dist. Ct. App. 1970); Burnham v. Frey-Shoemaker-Colbert-Brodnax, 445 So. 2d 477, 482 (La. Ct. App. 1984). *Cf.* Anunti v. Payette, 268 N.W.2d 52, 55 (Minn. 1978)(permissible to consider effect of injuries "on the enjoyment of the amenities of life"); Swiler v. Baker's Super Market, Inc., 203 Neb. 183, 187-88, 277 N.W.2d 697, 700 (1979); Lebesco v. Southeastern Pa. Transp. Auth., 251 Pa. Super. 415, 423-24, 380 A.2d 848, 852 (1977); Basset v. Milwaukee Northern Ry., 169 Wis. 152, 159, 170 N.W. 944, 946-47 (1919) ("diminished capacity for enjoying life"); Mariner v. Marsden, 610 P.2d 6, 10-11 (Wyo. 1980) (loss of enjoyment of life is a general damage and need not be specifically pleaded).

5. This lack of uniformity may be attributed to the confusion of many state courts and legislatures regarding the difference between wrongful death and survival as causes of action. In general a survival action is a "cause of action held by the decedent immediately before or at death, not transferred to his personal representative." PROSSER & KEETON ON TORTS at 942 (5th ed. 1984) [herainfter PROSSER]. *See generally*, Comment, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113, 1117-18 (1985). Damages recoverable under a survival statute often include decedents' lost wages, pain and suffering and medical expenses, and are usually limited to the time period between injury and death. *See* PROSSER at 943; *see also* Clement v. Consolidated Rail Corp., 734 F. Supp. 151, 155 (D. N.J. 1989). A wrongful death action, on the other hand, is usually brought by plaintiff's statutory beneficiaries. Generally only the pecuniary loss to the beneficiaries may be recovered. These losses might include, for example, the value of any lost wages or services that the decedent would have contributed to the household. *See* PROSSER at 951. One state which has confused wrongful death and survival is New Mexico. The New Mexico civil jury instructions on damages recoverable in a wrongful death action include "the monetary worth of the life of the deceased." N.M. STAT. ANN. § 13-1830 (1978 & Supp. 1990). This implies that damages for the loss of enjoyment of a decedent's life may be awarded and is thus contrary to the general principle that these types of damages may only be recovered on behalf of a decedent in a survival action rather than by his or her beneficiaries in a wrongful death action. This jury instruction came about largely in reaction to Stang v. Hertz Corp., 81 N.M. 69, 463 P.2d 45 (Ct. App. 1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970) where the decedent was a nun who had taken a vow of poverty. Although no pecuniary loss to the survivors could be shown, the court allowed substantial damages. For a more accurate analysis of the differences between wrongful death and survival actions see *Clement*, 734 F. Supp. at 151 discussed at *infra* notes 75-80.

See also Gonzales v. City Wide Insulation, Inc., No. 88-C-1299 (N.D. Ill. May 25, 1990) (WESTLAW, State library) (Illinois Wrongful Death Act does not provide for award of hedonic damages as it was designed to "compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death," *citing* Elliot v. Willis, 92 Ill. 2d 530, 540, 442 N.E.2d 163, 168 (1982)). *See generally* S. SPEISER, AMERICAN LAW OF TORTS § 8:20 (1985) (discussing personal injury damages for loss of enjoyment of life); Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R.4th 293 (1984 & Supp. 1990); Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D.L. REV. 561, 564-87 (1987); Comment, *Loss of Enjoyment of Life—Should it Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459, 471-72 (1975) (advocating loss of enjoyment of life as a separate element of damages); Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639, 645-46 (1969) (advocating adoption of loss of enjoyment of life damages as a separate element of personal injury damages).

courts refused to recognize damages for the loss of enjoyment of life.[6] Later courts have not specifically awarded "hedonic damages" but often have looked at the plaintiff's loss of enjoyment of life in determining the adequacy of the award.[7] Another group of decisions looks at the loss of enjoyment of life as a part of, or duplicative of, damages awarded for pain and suffering.[8] As with damages for personal injury, damages for the loss of the ability to enjoy life usually are left to the jury and, as there is no single method of valuation, can be quite difficult to determine.[9] Nevertheless, many courts that have considered the

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6. *See, e.g.*, City of Columbus v. Strassner, 124 Ind. 482, 489, 25 N.E. 65, 67 (1890) ("lack of personal enjoyment"); Northern Indiana Public Serv. Co. v. Robinson, 106 Ind. App. 210, 216, 18 N.E.2d 933, 936 (1939) ("inability to enjoy life"), *noted in Recent Cases*, 38 MICH. L. REV. 97, 97-100 (1939); Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 725, 85 P.2d 28, 31-34 (1938) (loss of ability to play violin), *noted in Recent Cases*, 13 S. CAL. L. REV 152, 152-54 (1939); Louisville Gas Co. v. Fuller, 122 Ky. 614, 619-21, 92 S.W. 566, 567-68 (1906).

7. *See, e.g.*, Dagnello v. Long Island R.R., 289 F.2d 797, 808 (2d Cir. 1961) (where the court, in upholding amount of verdict in a leg amputation case for "pain and suffering and loss of limb," said, "[h]is normal recreational activities will no longer be possible"); Averna v. Industrial Fabrication and Marine Service, Inc., 562 So. 2d 1157, 1163 (La. Ct. App. 1990) ("loss of lifestyle"); Brown v. McDonald's Corp., 428 So. 2d 560, 564 (La. Ct. App. 1983) (plaintiff's inhibition to participate in school's athletic program for fear of further injury to her back considered in terms of the pain and suffering and restriction of activities experienced by plaintiff in evaluating whether general damages award was excessive); Lee v. Southern Bell Telephone & Telegraph Co., 561 So. 2d 373, 376 (Fla. Dist. Ct. App. 1990); Packard v. Whitten, 274 A.2d 169, 178 (Me. 1971); Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 685 (Minn. 1977).

8. *See* Boyd v. Bulala, 905 F.2d 764, 767 (4th Cir. 1990) (Virginia does not recognize "loss of enjoyment of life" as a separate element of damages for personal injury); Tyminski v. United States, 481 F.2d 257, 271 (3rd Cir. 1973) (approving award so developed by District Court); Dugas v. Kansas City S. Ry. Lines, 473 F.2d 821, 827 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973) (damages instruction asserting loss of enjoyment of life as separate element constituted reversible error); Swanson v. United States, 557 F. Supp. 1041, 1048 (D. Idaho 1983) (lump sum for "past and future mental and physical pain and suffering and destruction of capacity to pursue a normal course of life"); McDonald v. United States, 555 F. Supp. 935, 971 (M.D. Pa. 1983); Huff v. Tracy, 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551, 553 (1976); Winter v. Pennsylvania R.R., 45 Del. 108, 112, 68 A.2d 513, 515 (1949) (court disallowed additional damages for "deprivation of pleasure" for amateur pianist and organist who suffered impaired finger); Canfield v. Sandcock, 546 N.E.2d 1237, 1240 (Ind. Ct. App. 1989) (error to instruct that loss of enjoyment of life is a separate element of damages); Marks v. Gaskill, 546 N.E.2d 1245, 1248 (Ind. Ct. App. 1989) (court reasoned that there was no doubt that injury affected quality of victim's life but allowing jury to award such damages risked double recoveries and awards based upon sentiment); Seifert v. Bland, 546 N.E.2d 1242, 1244 (Ind. Ct. App. 1989) (error to allow jury to consider "loss of quality and enjoyment of life" as separate element of damages); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) (loss of enjoyment of life could not be submitted as separate element of damages); Leiker v. Gafford, 245 Kan. 325, 340, 778 P.2d 823, 835 (1989) (holding that under Kansas law loss of enjoyment of life is not a separate category of nonpecuniary damages in a personal injury action); Polyak v. Reus, Inc., Nos. C6-89-2038, C6-90-196 (Minn. Ct. App. Aug. 14, 1990) (WESTLAW, State library) (Minnesota does not recognize loss of enjoyment of life as a separate element of damages). It is interesting to note that the court excluded the expert testimony of Stanley Smith, *see infra* note 27. *See also* First Trust Co. v. Scheel's Hardware & Sports Shop, Inc., 429 N.W.2d 5, 13 (N.D. 1988); Indianapolis St. Ry. v. Ray, 167 Ind. 236, 248, 78 N.E. 978, 981 (1906); Cantu v. del Carmen Pena, 650 S.W.2d 906, 911 (Tex. Ct. App. 1983) (loss of "simple sources of enjoyment" such as gardening, taking care of family, and realizing satisfaction from work with elderly was considered in assessing damages for past and future mental pain and anguish); Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216, 1221 (Utah 1980) (loss of enjoyment of life included in pain and suffering award). Where recovery is denied, the speculative nature of any attempt to place a value on the loss is often cited as a reason for its rejection. *Id.*

9. *See infra* notes 34-73 and accompanying text. *See, e.g.*, Jerz v. Humphrey, 160 Conn. 219, 223, 276 A.2d 884, 886 (1971) ("restriction of physical activities"); Reale v. Township of Wayne, 132 N.J. Super. 100, 114, 332 A.2d 236, 244 (Law Div. 1975) (damages "for permanent disability" including "impairment of plaintiff's . . . ability to participate in activities"); Robert v. Chodoff, 259 Pa. Super. 332, 370, 393 A.2d 853, 872-73 (1978); Allen v. Whisenhunt, 603 S.W.2d 242, 244 (Tex. Ct. App. 1980) (damages for "physical impairment" beyond loss of earning capacity and pain and suffering). *See generally* Ogus, *Damages for Lost Amenities: For a Foot, A Feeling or a Function?*, 35 MOD. L. REV. 1, 2-10 (1972); Annotation, *Excessiveness or Adequacy of Damages*

issue apparently view hedonic damages as distinguishable from those awarded for pain and suffering.[10] In *Thompson v. National Railroad Passenger Corp.*,[11] for example, the Sixth Circuit applying Tennessee law, distinguished the different types of damages involved as follows:

> Permanent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person['s] life created by the injury.[12]

Courts have granted separate awards in order to assure sufficient compensation as well as to preserve judicial control over verdicts.[13] When the loss of enjoyment of life is viewed as an appropriate element of damages, juries have been permitted to consider the reduction in that person's ability to enjoy both sensory perception as well as physical activities due to the individual's injury. "Examples of provable elements are: inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and,

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Awarded for Injuries to Trunk or Torso, or Internal Injuries, 16 A.L.R.4th 238 (1982 & Supp. 1990); Annotation, *Excessiveness or Adequacy of Damages for Injuries to Back, Neck or Spine*, 15 A.L.R.4th 294 (1982 & Supp. 1990); Annotation, *Excessive or Adequacy of Damages Awarded for Injuries to, or Conditions Induced in, Respiratory System*, 15 A.L.R.4th 519 (1982 & Supp. 1990); Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to Head or Brain, or for Mental or Nervous Disorders*, 14 A.L.R.4th 328 (1982 & Supp. 1990); Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to, or Conditions Induced in, Sexual Organs and Processes*, 13 A.L.R.4th 183 (1982 & Supp. 1990); Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to Legs and Feet*, 13 A.L.R.4th 212 (1982 & Supp. 1990); Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to Arms and Hands*, 12 A.L.R.4th 96 (1982 & Supp. 1990).

10. *See, e.g., supra* notes 3, 4 & 7. *See also* Rufino v. United States, 829 F.2d 354, 362 (2d Cir. 1987) (predicting New York law); Shaw v. United States, 741 F.2d 1202, 1208 (9th Cir. 1983); Thompson v. National R.R. Passenger Corp., 621 F.2d 814, 824-25 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980) (applying Tenessee law) (*see infra* notes 11-13 and accompanying text); Pierce v. New York Cent. R.R., 409 F.2d 1392, 1398 (6th Cir. 1969) (Michigan law); Dyer v. United States, 551 F. Supp. 1266, 1281 (W.D. Mich. 1982); McNeill v. United States, 519 F. Supp. 283, 290 (D. S.C. 1981) (South Carolina law). *See generally* Annotation, *Loss of Enjoyment of Life as A Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R.4th 293 (1982 & Supp. 1990); Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK. L. REV. 639, 644-45 (1969); Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D.L. REV. 561, 576-88 (1987); Comment, *Loss of Enjoyment of Life—Should it Be a Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459, 469 (1975).

11. Thompson v. National R.R., 621 F.2d 814 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980) (Tennessee law). *See also* Kirk v. Washington State Univ., 109 Wash. 2d 448, 461-62, 746 P.2d 285, 292-93 (1987) ("loss of enjoyment" instruction, which allowed jury to consider plaintiff's inability to pursue interests and abilities in ballet did not mislead jury or foster a double recovery). Other jurisdictions which have allowed recovery for loss of specific artistic or athletic skills include Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127,133 (E.D. Pa. 1973) (opera singer awarded damages for impairment to her career after bus accident); Thompson v. Tartler, 166 Colo. 247, 254-55, 443 P.2d 365, 368-69 (1968) (in assessing damages jury could consider whether injuries tended to diminish plaintiff's ability to play accordion); Locicero v. State Farm Mut. Ins. Co., 399 So. 2d 712, 714-15 (La. Ct. App. 1981) (not too speculative to consider plaintiff's inability to try-out for college football team).

12. *Thompson*, 621 F.2d at 824.

13. *See, e.g., id.* at 824-25 ("pain and suffering", "permanent injury," and "loss of enjoyment of life" all distinguishable); *cf. Reale*, 132 N.J. Super. at 114, 332 A.2d at 244 (1975)(damages for "permanent disability," including "impairment of plaintiff's . . . ability to participate in activities," distinguishable from pain and suffering). *See generally* Cramer, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 979-83 (1981).

inability to engage in the usual family activities."[14] The court may consider the circumstances of the individual's lifestyle in determining whether he or she has in fact experienced a loss of enjoyment of life. For example, the Supreme Court of Alaska affirmed a judgment denying an award stating that:

> [A]lthough the [plaintiff] emphasize[d] [his] social withdrawal as an indication of his loss of enjoyment of life, there is evidence that he and his wife did not do a great deal of socializing before the accident. There is also evidence that [they] took vacations and often visited family after the accident.[15]

B. *The Debut:* Sherrod v. Berry[16]

In *Sherrod v. Berry*, the United States District Court for the Northern District of Illinois was the first court[17] to authorize an award of hedonic damages.[18] In 1987 the Seventh Circuit Court of Appeals reviewed the *Sherrod* decision and upheld the admission of an economist's expert testimony regarding "hedonic" value of life.[19]

On December 8, 1979, Ronald Sherrod left work at the Sherrod Auto Repair (a family owned auto repair shop in Joliet, Illinois) with an acquaintance, Gary Duckworth, to help him start his car.[20] Unknown to Sherrod, Duckworth had just robbed a local gift shop. Sherrod had never been arrested for a crime and was not known to the police.[21] Police Officer Berry recognized Duckworth and stopped Sherrod's vehicle ordering both men out of the car with their hands up.[22] Berry later testified that he saw Sherrod's hand move toward the left pocket of his jacket. Feeling threatened, he shot Sherrod in the temple killing

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14. Downie v. United States Lines Co., 359 F.2d 344, 347 n.3 (3rd Cir. 1966), *noted in Recent Cases*, 65 MICH. L. REV. 786, 790 (1967); *Recent Cases*, 51 MINN. L. REV. 558, 561 (1967). *See also* Dyer v. United States, 551 F. Supp. 1266, 1281 (W.D. Mich. 1982) (loss of sensory perception allowed); Purdy v. Swift & Co., 34 Cal. App. 2d 656, 657-58, 94 P.2d 389, 390 (1939) (jury could consider loss of sense of smell and taste, impairment of memory and alertness, as well as pain and suffering); Quade v. Hartfield Enter., Inc., 120 Mich. App. 704, 706-07, 327 N.W.2d 343, 344 (1982) (court allowed, although reduced, damages for curtailment of sporting activities and less satisfying sex life resulting from slip and fall injuries); Allen v. Whisenhunt, 603 S.W.2d 242, 244 (Tex. Ct. App. 1980); Wharf Cat, Inc. v. Cole, 567 S.W.2d 228, 232 (Tex. Ct. App. 1978) (inability to hunt, fish or sit in car for long periods of time); Texas Farm Products Co. v. Leva, 535 S.W.2d 953, 959 (Tex. Ct. App. 1976)(inability to type, play a saxophone, and play tennis). Corcoran v. McNeal, 400 Pa. 14, 24, 161 A.2d 367, 373 (1960) (taste and smell as part of mental suffering award).

15. Buoy v. ERA Helicopters, Inc., 771 P.2d 439, 447 (Alaska 1989).

16. Sherrod v. Berry, 629 F. Supp. 159, 163 (N.D. Ill. 1985), *aff'd*, 827 F.2d 1985 (7th Cir. 1987), *vacated and remanded*, 835 F.2d 1222 (7th Cir. 1988). This is the first time expert testimony was permitted on the issue of hedonic damages.

17. *See* Launey, Sherrod v. Berry: *The Hedonic Valuation of Human Life*, 45 J. MO. BAR. 273 (1989)(discussing first use of hedonic valuation methodology in *Sherrod v. Berry*) (see *infra* note 51); Blodgett, *Hedonic Damages*, A.B.A. J., Feb. 1985, at 25 (noting first use of hedonic damages in *Sherrod v. Berry*); Tarr, *Illinois Jury Awards 'Hedonic Damages,'* NAT'L L.J., Nov. 26, 1984 at 3, col. 1 (discussing *Sherrod v. Berry*).

18. This case has received a great deal of attention. *See, e.g.*, R. PALFIN, *supra* note 3, at 38-143; Blount, *Hedonic Damages: Compensation for the Lost Pleasure of Living*, 5 COOLEY LAW REV. 861 (1988); Williamson, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321, 326 (1987).

19. While the 1985 opinion in *Sherrod* has been vacated, the reversal was on grounds wholly unrelated to the damages issue; the Seventh Circuit did not disturb the jury's verdict on hedonic damages. *See supra* note 16.

20. *Sherrod*, 629 F. Supp. at 161.

21. *Id.* at 160.

22. *Id.* at 161.

him instantly.[23] Sherrod was not armed.[24] Lucien Sherrod, Ronald's father, individually and on behalf of Ronald Sherrod's estate, sued Berry, the City's Police Chief and the City of Joliet, Illinois.[25]

At trial, Sherrod produced evidence that Ronald, age 19 at the time of the shooting, was a loving and companionable youngster who "enjoyed life."[26] Plaintiff's expert economist Stanley Smith[27] testified as to pecuniary loss and was permitted, over defense objections, to testify as to the "hedonic value" of Ronald's life.[28] Smith testified that "hedonic value of life" refers to "the larger value of life" which includes the "pleasure of living," and it exists "separate from" the economic and productive value of an individual.[29] Smith, basing his conclusions upon a recent study by economist Glen Blomquist,[30] concluded that the hedonic value of life could be estimated to be from three to thirty times the present value of lost future earnings.[31] Based upon Smith's testimony, the jury awarded Ronald's father $450,000 for loss of parental companionship, $300,000 for economic loss to the estate, $1,700 for funeral expenses, and $850,000 for the hedonic value of Ronald's life.[32] The defense appealed, and the Seventh Circuit affirmed the trial court's decision.[33]

III. METHODS OF CALCULATING HEDONIC DAMAGES[34]

A federal court, commenting on the complexity of determining compensation for human loss, noted that "[i]n any effort to translate such catastrophic

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23. *Id.* at 162.

24. *Id.*

25. *Id.*

26. *Id.* at 160.

27. Stanley Smith is an economist holding his master's degree in economics from the University of Chicago. Smith has written several articles concerning the concept of hedonic damages including *Litigation, Hedonic Damages in Wrongful Death Cases*, A.B.A. J., Sept. 1988, at 70. *See supra* notes 67-73 and accompanying text.

28. *Sherrod*, 629 F. Supp. at 162. According to Launey, this is the first time in the United States that an economic expert was permitted to testify as to the valuation of hedonic damages. Launey, *supra* note 17, at 274.

> Contrary to what may be the popular view, the idea that an estate can recover for the hedonic value of life of the person killed is not new in Anglo-American law. In England, for example, hedonic damage awards have been allowed since 1976. Section 1 of the Law Reform (Miscellaneous Provisions) Act of 1934 has been construed by English judges so that the estate of the person killed can recover for "loss of expectation of life."

Sherrod, 629 F. Supp. at 164.

See also PRITCHARD, PERSONAL INJURY LITIGATION, 137-42 (London 1976); McCann v. Sheppard, 1 W.L.R. 540 (C.A. 1973).

29. *Sherrod*, 629 F. Supp. at 162-63. For a good discussion of the hedonic valuation methodology used in *Sherrod* see Launey, *supra* note 17.

30. *See infra* note 66.

31. *Sherrod*, 629 F. Supp. at 163. The *Sherrod* court relied on several economic studies that attempt to value life. *See, e.g.*, S. SPEISER, RECOVERY FOR WRONGFUL DEATH, ECONOMIC HANDBOOK § 3:9 (2d ed. 1975)(discussing possible relationship between an individual's earnings and the value of the individual's life); Dardis, *The Value of a Life: New Evidence from the Marketplace*, 70 AM. ECON. REV. 1077, 1078-82 (1980) (discussing relationship between value of life and consumers' willingness to pay for personal injury risk reduction devices such as smoke detectors); Linneroth, *The Value of Human Life: A Review of the Models*, 17 ECON. INQUIRY 52, 55 (1979)(noting that economic analyses of value of life are actually value of risk reduction analyses).

32. *Sherrod*, 629 F. Supp. at 160.

33. *Id.* at 164.

34. For an excellent discussion of the calculation of hedonic damages see R. PALFIN, *supra* note 3, at 5-9, 221-464; O'Hara, *supra* note 3, at 1694-1706. For a more general discussion of the relationship between economic

human loss . . . into money damages . . . precision is not achievable."[35] Courts have, however, been willing to accept expert testimony from economists regarding the value of the lost earnings of victims in wrongful death and personal injury cases.[36] In addition, the United States Supreme Court has recently expanded upon the procedures which are acceptable for determining the present value of economic loss.[37] Plaintiffs' counsel have seized the opportunity to use expert economists to educate courts with numerous statistical and graphical illustrations.[38]

Ordinarily, the economic value of life is considered to be the sum of any earnings (including services and non-wage income), contributed to the family or household,[39] reduced by the dollar value representing the cost of living.[40] This amount often is used as part of computing "compensatory" damages.[41]

Situations frequently arise, however, in which the tort victim is awarded "compensatory" damages, and yet the monetary award seems inadequate. Consider, for example, a child killed in a tortious accident.[42] One method of determining compensatory damages in tort law is through the standard economic concept of indifference: compensation is "perfect" when the victim is indifferent between the damages award and the injury.[43] It is difficult to imagine, however, a threshold dollar value at which a parent reaches economic indifference be-

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theory and law see R. COOTER & T. ULEN, LAW AND ECONOMICS (Scott, Foresman and Co. 1988); C. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS 326-476 (1984); W. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (2d ed. 1988); A. POLINSKY, AN INTRODUCTION OF LAW AND ECONOMICS (1983) and R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). *See also* Easterbrook, *Foreward: The Court and the Economic System*, 98 HARV. L. REV. (1984); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1984); Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1984).

35. Frankel v. Heym, 466 F.2d 1226, 1228 (3rd Cir. 1972).

36. Launey, *The Valuation of Human Life*, 43 J. MO. BAR 105 (1987).

37. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 532-46 (1983).

38. For various approaches to methods of valuing a human life see sources cited *supra* note 31. *See also* Broome, *Trying to Value a Life*, 9 J. PUB. ECON. 91 (1978).

39. Determining the value of a "homemaker" can pose some problems not otherwise faced in determining the economic worth of an individual with traditional income-producing employment. One approach is the "replacement cost" theory where an attempt is made to estimate the cost of replacing the homemaker's services. A seemingly unavoidable drawback is that there is not a perfect market substitute for services actually rendered by a homemaker. A second method, the "opportunity-cost" approach, determines the financial value of the services that the homemaker would have earned if employed in the marketplace. This approach assumes that the homemaker would seek "outside" employment if the services were worth more in the market. *See* Potnick, *Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?*, 50 U. COLO. L. REV. 59, 64-74 (1978); Darnell, *Hedonic Value: Economists Put Price on a Life*, NAT'L L.J., Oct. 16, 1989, at 15-17. *See also* R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 125 (Little, Brown & Co. 1982).

40. *See also* O'Hara, *supra* note 3, at 1694-97. The methodology that economists use in estimating the economic value of life is fairly well standardized. *See* Darnell, *supra* note 39 (Dr. Darnell, a professor of finance and business economics at the University of Colorado in Boulder, also serves as a consultant and expert witness in personal injury cases); C. GILLETE & T. HOPKINS, FEDERAL AGENCY EVALUATIONS OF HUMAN LIFE: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 26 (1988).

41. Compensatory damages are defined as damages "such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 352 (5th ed. 1979). *See, e.g.*, Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432, 434 (5th Cir. 1962).

42. This issue also presents an interesting question in the case of the wrongful death of an unborn child. *See generally* Comment, *Torts—The Right of Recovery for the Tortious Death of the Unborn*, 27 HOW. L.J. 1649 (1984).

43. R. COOTER & T. ULEN, *supra* note 34, at 380.

tween the money awarded and his child's life. Here damages cannot be adequately computed by the formula: "[f]ind a sum of money such that the parents are indifferent between having the money and a dead child, or not having the money and having their child alive."[44] Consequently, this model is most relevant to cases were the injury can be adequately compensated by procuring substitute goods available in the marketplace. This methodology primarily lends itself to valuing financial earnings and, therefore, to arriving at pecuniary damages.

Despite these analytic shortcomings, economists, as well as the courts, recognize the importance of other, non-pecuniary, forms of damages such as "pain and suffering" and the general pleasure of life. Introducing these intangible factors into the damages equation reduces the "perfection" of compensation for injuries involving the loss of a life or a limb. A more accurate determination of the value of human life or limb, then, would include the value of pecuniary damages plus the present value of the individual's non-pecuniary income.[45] Over the last twenty years, economists have made significant advances in the calculation of the "hedonic" value of life.[46]

Although it is a fairly new branch of economic valuation theory, economists and scholars have conducted several studies in an attempt to provide further guidelines for determining the hedonic value of life.[47] At least two of those studies have appeared in the American Economic Review.[48] In addition, a summary of many more recent studies may be found in a report submitted to the Office of Policy Analysis of the Environmental Protection Agency.[49]

This economic analysis begins by observing that while few would deny that a nonsuicidal individual likely would place an infinite value on his or her own life, many individuals exchange a portion of their life for either a greater or a lesser probability of death on a daily basis. Exposure to the risk of death is a necessary part of living, as is evidenced by the common pursuits of flying in an airplane or driving an automobile. Often, at some expense, these risks can be reduced. For example, consumers demand and bear the cost of lifesaving products, such as smoke alarms, auto safety belts, or more frequent airplane safety inspection and repairs. These are examples in which the individual makes a rational decision about the risks involved and balances the costs and benefits of precaution. The individual, in effect, trades money for a reduced probability of death and a corresponding increase in the probability of survival. This risk-

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44. *Id.*

45. Although the insurance industry would no doubt disagree, economists familiar with damage awards in tort litigation believe that such awards may substantially understate the non-economic and intangible injuries suffered by accident victims.

46. *See supra* notes 27, 31 & 34.

47. According to Launey all empirical studies found the value of life to be greater than lifetime future earnings. *See* Launey *supra* note 17.

48. *See* Dardis, *The Value of a Life: New Evidence From the Market Place*, 70 AM. ECON. REV. 1077, 1078-82 (1980); Conley, *The Value of Human Life in the Demand for Safety*, 66 AM. ECON. REV. 45, 46-55 (1976).

49. Fisher, Chestnut & Violette, *The Value of Reducing Risks of Death: A Note on New Evidence* (March, 1988) (unpublished report submitted to U.S. Environmental Protection Agency), *reprinted in*, 8 J. POL'Y ANALYSIS MGMT. 88 (1989). "The most defensible empirical results indicate a range for the value-per-statistical-life estimates of $1.6 million to $8.5 million (in 1986 dollars)." Darnell, *supra* note 39, at 15.

equivalent method is critical to the hedonic valuation methodology and may provide a more satisfactory understanding of the damage calculus.[50]

There are a variety of methods for calculating hedonic damages, all of which are based upon the following theory: the hedonic value of life may be estimated by examining what an individual is willing to pay (or receive) for a decrease (or increase) in the probability of dying (or living).[51] Economist Professor George Launey[52] presents an interesting illustration:

> Take, for example, a community of 1,000 individuals exposed to a life-threatening virus. Suppose that it can be predicted that 50 people will die from the disease, and that a vaccine can be purchased that will reduce that number, if everyone is vaccinated, to 40 people. Under the circumstances, the probability of dying is reduced from .05 to .04, or one percentage point. Clearly the vaccine has a value, and that value is dependent upon the individual's willingness to pay for the vaccine together with the vaccine's effectiveness. Moreover, the hedonic valuation hypothesis asserts that the individual's willingness to pay is a function of the implicit value placed by that individual upon his/her own life.
>
> Suppose further that 100 people of the community would pay at least $5,000 each for the vaccine. The 'hedonic value of life' for that 100 people can be extrapolated from the equation V = S/p where V = the hedonic value of life, S = the present value of the cost of the lifesaving activity (product) and p = the marginal reduction in the probability of dying attributed to the lifesaving activity (product). Thus the hedonic value of life for those 100 people may be computed V = $5,000/.01 = $500,000.
>
> Suppose further that another 400 people in our mythical community would pay at least $3,000 each for the vaccine. These people implicitly value their lives at $300,000. Finally, if another 200 people would pay $1,000 each they would value their lives at $100,000 . . . . It must be noted that the hedonic valuation function is not a linear and proportionate function of the probability of dying. One might pay $3,000 to avert a 1% increase in the probability of dying. It does not follow automatically that one would pay a proportionate amount more to avert a 50% increase in the probability of dying or the certainty of dying.[53]

A. *Models Illustrating Hedonic Valuation Theory*

This Note will briefly examine three different models[54] illustrating the hedonic valuation theory described above: the "Willingness to Accept" model, the

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50. R. COOTER & T. ULEN, *supra* note 34, at 381-82.

51. Launey, *supra* note 17, at 274.

52. George V. Launey is a professor of Economics and Chairman of the Division of Social Sciences at Franklin College, Franklin, Indiana. In 1970, Dr. Launey received his Ph.D. in economics from the University of Arkansas.

53. Launey, *supra* note 17, at 275.

54. An alternative method has been proposed by Jerome Staller, president of the Center for Forensic Economic Studies, "a Philadelphia based firm that provides economic and statistical analyses in legal matters." Staller, *Placing a Value on the Enjoyment of Life*, 31 FOR. DEF. 8, 10 (1989). Staller criticizes *Sherrod*'s vague approach in placing a value on the "enjoyment of life," and proposes a "time" method of valuation as being more precise than an approach based on an individual's income. *Id.* at 9. This alternative analysis may begin with the amount of time spent in leisure activities valued by using hourly indicators such as minimum wage, average earnings or an individual's wage in the marketplace. This will usually yield a measure of hedonic damages significantly lower than that arrived at via the willingness-to-pay model. *Id.* at 10. Staller relies on a 1975-76 study conducted by Frank Staford and Greg J. Duncan at the Survey Research Center for Social Research at the University of Michigan which examines the amount of time Americans spend in everyday purusuits, including pleasurable leisure activities. *Id.* at 9.

"Willingness to Pay" model[55] and the "Questionnaire" method.[56]

The "Willingness to Accept" model is most often used in studies evaluating the hedonic value of life.[57] This model focuses on the individual's production activity. It is based upon the idea that individuals are "willing to accept" certain amounts of money (i.e., hazard premiums) in return for a higher risk of death (e.g., working in a high-risk occupation.)[58]

The second model focuses on the injured party's consumption activities—his "Willingness to Pay."[59] The hedonic life valuation is estimated from compiled information expressing what individuals are " 'willing to pay' to reduce the probability of dying."[60] This model asserts that the amount an individual is willing to pay for a "life-saving" product such as a smoke alarm or auto safety belts is related to the practical value placed on human life.[61] A recent study conducted by W. Kip Viscusi, Professor of Economics at Northwestern University and Michael J. Moore, Assistant Professor of Business Administration at Duke University, attempts to arrive at a monetary value for the value of life of certain types of individuals.[62] They have concluded, by means of a sampling process, that the value of a statistical life would range from $5.2 to $6.6 million.[63]

These two models are based upon the assumption that an individual's behavior relates to his or her perception of the changes in probabilities which are used in valuation studies.[64] The premise, however, rests on dubious assumptions of human behavior. It is more likely that people's buying decisions are not at all affected by these probabilities. These purchases are often largely motivated by a desire to avoid serious injury which is different from the avoidance of death. Many times a weighting system is involved which allocates the motivation between the avoidance of injury as opposed to the avoidance of death. A strength of these studies, however, is that they are based on actual market purchases, which is a characteristic that is lacking in the following method.[65]

The third approach to hedonic valuation uses a questionnaire to determine what an individual is willing to pay to reduce the chance of dying by some finite

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55. Both the "willingness to accept" and the "willingness to pay" models are based on observed market behavior but face the drawback of assuming that people have a subjective idea of the effect that certain market activities will have upon the probability of survival.

56. The questionnaire method does not share the above mentioned disadvantage; however, it lacks conclusions based upon observed market behavior.

57. Launey, *supra* note 17, at 276. *See also* O'Hara, *supra* note 3, at 1700-06.

58. *See* R. THALER & S. ROSEN, *The Value of Saving a Life: Evidence From the Labor Market*, in HOUSEHOLD PRODUCTION AND CONSUMPTION 265 (N. Terleckyj ed. 1975).

59. Launey, *supra* note 17, at 276. *See also* O'Hara, *supra* note 3, 1697-1700.

60. Launey, *supra* note 17, at 276.

61. *See* Blomquist, *Value of Life Saving: Implications of Consumption Activity*, 87 J. POL. ECON 540 (1979). *See also* M. BAILY, REDUCING RISKS TO LIFE: MEASUREMENT OF THE BENEFITS 28-46 (Am. Enterprise Inst. 1980).

62. Moore & Viscusi, *Doubling the Estimated Value of Life: Results Using New Occupational Fatality Data*, 7 J. POL'Y ANALYSIS MGMT. 476, 476 (1988).

63. *Id.* at 485 (calculated in 1986 dollars).

64. *See supra* notes 34-62 and accompanying text.

65. Launey, *supra* note 17, at 276.

percentage.[66] A strength of this method is that it furnishes an objective probability of death. Nevertheless, this approach is disadvantaged by the fact that many people do not respond to questionnaires honestly and accurately. Therefore, this method is based more on what people speculate they will do, rather than on what they actually will do.[67]

B. *How Should a Jury Apply This Methodology?*

Stanley Smith,[68] in a recent article,[69] suggests that in order to simplify the analysis of hedonic value, "[the jury] should be asked to consider several assumptions."[70] First, an individual's financial worth is not necessarily determinative of the hedonic value of his or her life. Obviously, the life of an unemployable individual or an infant (who has the ability to earn money) would have some value despite the absence of financial worth or current income.[71] Second, a jury should assume that the hedonic value of an individual's life is independent of his or her wealth, education, gender, family or other socioeconomic characteristics.[72] Third, the jury should assume that the hedonic value of life is related to

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66. This method was used by J.P. Acton in asking what the respondent would be willing to pay to reduce the probability of a fatal heart attact by 1%. *See* Acton, *Evaluating Public Programs to Save Lives: The Case of Heart Attacks*, Research Report, 68 Rand Corp. Series No. R-950-RC (1973).

67. *See generally* Blomquist, *The Value of Human Life: An Empirical Perspective*, 19 ECON. INQUIRY 157, 158 table 1 (1981) (relied on by *Sherrod* court), *quoted in*, Launey, *supra* note 17, at 277. Blomquist surveyed the findings of nine earlier studies and valued life in 1979 dollars to be between $50,000 and $8,900,000. These extremes were produced by questionnaire studies. When limited to studies of observed behavior, the range reduces to $310,000—$2,500,000 for a life valued in 1979 dollars. Moreover, the studies based on observed behavior concluded that life valuation ranged from 2.5 to 27 times the present value of future lifetime earnings. This table is reproduced below.

TABLE 1 HEDONIC VALUE OF LIFE

Enter CPI = 345.8	Value of Life $1979 (V)	Life income $1979 (Y)	V/Y	Value of Life $1988
Description-Based on observed behavior				
Production Activity:				
Dillingham	$330,000	$118,000	2.8	$524,903
Thaler & Rosen	$430,000	$99,000	4.3	$683,965
Brown	$930,000	n/a	n/a	$1,479,273
Smith	$2,400,000	$91,000	26	$3,817,479
Viscusi	$2,500,000	$93,000	27	$3,976,541
Consumption Activity:				
Blomquist	$410,000	$163,000	2.5	$652,153
Ghosh, Lees & Seal	$310,000	$ 45,000	6.8	$493,091
Based on Questionnaire:				
Acton	$ 50,000	$39,000	1.3	$ 79,531
Jones-Lee	$8,900,000	$83,000	107	$14,156,486

Launey, *supra* note 17, at 277.

68. Smith is the expert economist who testified in *Sherrod* regarding hedonic damages. *See supra* note 27.

69. Smith, *Hedonic Damages in Wrongful Death Cases*, A.B.A. J., Sept. 1988, at 70.

70. *Id.* at 72. While the assumptions are not provable Smith believes that they may assist the juror in framing the issue and forming an opinion.

71. *Id.* Smith cautions that income does have some correlation to hedonic value, especially with regard to the "willingness to pay approach." *See also* Stang v. Hertz Corp., 81 N.M. 69, 463 P.2d 45 (Ct. App. 1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970) discussed *supra* note 5.

72. *Id.* Smith compares, as an illustration, the value of Picasso's life to one who paints outdoor advertising signs.

life expectancy.[73] Finally, Smith asks the jury to assume that "the hedonic value of life of each future year has a zero real discount rate."[74]

IV. Recent Decisions Involving "Hedonic-Type" Damages

Recent courts have taken a variety of approaches in analyzing the award of hedonic damages. While some refuse to allow recovery of hedonic damages as a separate form of compensation, others deviate from this stance by permitting either a limited or relatively unlimited recovery for loss of enjoyment of life.

In *Clement v. Consolidated Rail Corp.*,[75] for example, the United States District Court for the District of New Jersey predicted that New Jersey law would permit a victim of an automobile accident to recover hedonic damages. The court, however, limited the award to damages suffered by the victim for the two-hour period between the time of his injury and the time of his death.[76] The court reasoned that awarding hedonic damages furthered the basic goal of tort law in compensating the injured party.[77] On the other hand, the court acknowledged that such damages must be limited to damages suffered by the victim while alive because the cause of action under a survival statute is extinguished at the time the injured party dies.[78] The plaintiffs argued that it was irrational to place a limitation on hedonic damages which had the effect of decreasing compensation where a more severe injury results in a more expedient death. The court refused to comment upon the equitable nature of the result[79] and declined to decide the much debated issue of whether hedonic damages were duplicative of those awarded for pain and suffering.[80]

While *Clement* limited damages to those experienced by the victim while living, another significant recent decision, *McDougald v. Garber*,[81] took this analysis one step further. In that case the New York Court of Appeals held that "cognitive awareness is a prerequisite to recovery for loss of enjoyment of life"[82] and that loss of enjoyment is not a separate element of damages from pain and suffering.[83]

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73. *Id.* For example, a 20-year-old individual usually has a greater hedonic value than an 88-year-old individual.

74. *Id.* Smith gives several reasons for this assumption. First, the present real rate of interest is almost zero. Second, every asset has broad substitutability, *i.e.*, we exchange labor for money, health for pleasure (smoking/quitting). However, a 26-year-old cannot substitute or exchange the pleasure of living her 28th year. Smith also emphasizes that jurors should be made aware of the various means of measuring the value of a human life. *See supra* notes 34-62 and accompanying text. For further explanation of discounting to present value see Goetz, *supra* note 34, at 157-60.

75. *Clement*, 734 F. Supp. 151 (D. N.J. 1989).

76. *Id.* at 155.

77. *Id.* at 154-55.

78. *Id.* at 155.

79. *Id.* at 156.

80. *Id.* at 155.

81. *McDougald*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989). For a more complete discussion of this case see R. Palfin, *supra* note 3, at 66-204.

82. *McDougald*, 73 N.Y.2d at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940.

83. *Id.* at 257, 536 N.E.2d at 375, 538 N.Y.S.2d at 941. In a companion case, the New York Court of Appeals held that "loss of enjoyment of life is not a separate element of damages deserving a distinct award but is, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering." Nussbaum v. Gibstein, 73 N.Y.2d 912, 914, 536 N.E.2d 618, 619, 539 N.Y.S.2d 289, 290 (1989).

On September 7, 1978, thirty-one year old Emma McDougald gave birth by the Caesarean method. During her delivery and subsequent tubal ligation, McDougald suffered oxygen deprivation causing severe brain damage which left her permanently comatose.[84] The parties agreed that the plaintiff must be conscious of the pain in order to recover for pain and suffering.[85] Nevertheless, the plaintiff argued that "loss of the enjoyment of life [was] compensable without regard to whether the plaintiff [was] aware of the loss."[86] The court of appeals held that it was error for the trial court to instruct "the jury that Mrs. McDougald's awareness was irrelevant to their consideration of damages for loss of enjoyment of life and [direct] the jury to consider that aspect of damages separately from pain and suffering."[87] The court focused on the compensatory goal of tort damages. The court found that the "legal fiction that money damages can compensate for a victim's injury"[88] comes to an end when it no longer serves the compensatory goal of tort damages. According to the court, when a plaintiff loses cognitive awareness the recovery becomes punitive in nature.

In assessing damages, the court found no measurable distinction between pain and suffering, and loss of enjoyment of life.[89] Separate awards for the two elements would, in the court's view, increase the total award for nonpecuniary damages. "But a larger award does not by itself indicate that the goal of compensation has been better served."[90]

The dissent sharply criticized the majority's analysis and contended that loss of ability to enjoy life is an "objective fact" which "unlike 'conscious pain and suffering,' . . . exists independent of the victim's ability to apprehend it."[91] The dissent went on to explain:

> Moreover, the compensatory nature of a monetary award 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.[92]

The only case the majority cited for the requirement that there be consciousness for loss-of-enjoyment recovery was a Fourth Circuit case, *Flannery v. United States*.[93] Other federal courts reviewing the issue have held otherwise.[94]

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84. *McDougald*, 73 N.Y.2d at 251, 536 N.E.2d at 373, 538 N.Y.S.2d at 938.

85. *Id.* at 252, 536 N.E.2d at 374, 538 N.Y.S.2d at 938. *See generally* 22 AM. JUR. 2D, *Damages* §§ 241, 249 (1988). *See also* Leiker v. Gafford, 245 Kan. 325, 342-46, 778 P.2d 823, 836-39 (1989).

86. *McDougald*, 73 N.Y.2d at 252, 536 N.E.2d at 374, 538 N.Y.S.2d at 938-39.

87. *Id.* at 253, 536 N.E.2d at 374, 538 N.Y.S.2d at 939.

88. *Id.* at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 939 (quoting Howard v. Lecher, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364 (1977)).

89. A Minnesota court reached the same conclusion holding that the plaintiff was not entitled to a separate jury instruction on loss of enjoyment of life—a general instruction on damages was sufficient. Leonard v. Parrish, 420 N.W.2d 629, 634 (Minn. Ct. App. 1988). *See supra* note 8 and accompanying text.

90. *McDougald*, 73 N.Y.2d at 257, 536 N.E.2d at 376, 538 N.Y.S.2d at 941.

91. *Id.* at 259, 536 N.E.2d at 378, 538 N.Y.S.2d at 942-43 (Titone, J., joined by Alexander, J., dissenting).

92. *Id.* at 259-60, 536 N.E.2d at 378, 538 N.Y.S.2d at 943 (Titone, J., joined by Alexander, J., dissenting).

93. *Flannery*, 718 F.2d 108 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). Recently, the Seventh Circuit Court of Appeals in *Molzof v. United States*, 911 F.2d 18, 21-22 (7th Cir. 1990), followed the Fourth Circuit's *Flannery* decision holding that a comatose patient is not entitled to recover for loss of enjoyment of life in a Federal Tort Claims Act action. It is interesting to note that in *Rufino v. United States*, 829 F.2d 354, 361

The plaintiff in *Flannery* was a victim of an automobile accident who, after suffering severe brain damage, lapsed into a coma.[95] The Fourth Circuit Court of Appeals certified two questions to the Supreme Court of Appeals of West Virginia.[96] In response, the West Virginia court found that there was no requirement of cognitive awareness under West Virginia law for a plaintiff to recover for the loss of enjoyment of life.[97] While holding that "loss of enjoyment of life" is an element of a permanent injury award[98] the court distinguished damages for "pain and suffering" from "loss of enjoyment of life" stating:

> This loss of capacity to enjoy life is not a function of pain and suffering in the traditional sense of those words since one can lose his eyesight or a limb and be without physical pain [and] [y]et, it is obvious that such injuries will impair the person's capacity to enjoy life.[99]

The West Virginia court described two categories of damages.[100] "Liquidated," or pecuniary damages, are those which can be determined to a reasonable degree of certainty. "Unliquidated" damages are those intangible losses which cannot be represented by a mathematical figure.[101] According to the court, in order to recover future unliquidated damages, the plaintiff must have suffered a permanent injury.[102] The loss of enjoyment of life is associated with the permanency of an injury, since "the degree of a permanent injury is measured by ascertaining how the injury has deprived plaintiff of his customary activities as a whole person."[103] According to the court, the evaluation of the permanency of the plaintiff's injury, as an element of intangible damages, was the appropriate area for separate consideration of the loss of enjoyment of life. As a result, the court faced the issue of whether a semi-comatose plaintiff can recover the loss of enjoyment of life's pleasures despite his lack of awareness of such loss.

With little discussion, the court held that the plaintiff's subjective knowledge was not controlling, and he was entitled to recover for the loss of enjoyment of his life as a measure of the permanency of his injury. Although the West Virginia court clearly stated the law, the Fourth Circuit, in deciding this Federal Tort Claims Act[104] action, held that any money awarded to the plaintiff for the loss of enjoyment of life would not "provide him with any consolation or ease any burden resting upon him . . . . He cannot spend it upon necessities or

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(2d Cir. 1987), the court predicted that New York law would allow a recovery for loss of enjoyment of life regardless of the victim's conscious awareness of the loss.

94. *See* Moore, *Loss of Enjoyment of Life, An Emerging Theory of Nonpecuniary Damages*, TRIAL, Sept. 1989, at 59.

95. *Flannery*, 718 F.2d at 110.

96. Flannery v. United States, 297 S.E.2d 433, 434 (W. Va. 1982).

97. *Id.* at 438-39.

98. *Id.* at 436.

99. *Id.* at 437.

100. *Id.* at 435.

101. *Id.*

102. *Id.*

103. *Id.* at 436.

104. 28 U.S.C. §§ 1346(b), 2671-80 (1988).

pleasures. He cannot experience the pleasure of giving it away."[105] Since the plaintiff was unable to spend any of the money, the court predicted that the money would accumulate and would be distributed to his survivors upon his death.[106] Therefore, the court found that damages for loss of enjoyment of life in this case would be punitive, and, hence not compensatory.[107]

The Federal Tort Claims Act, a limited waiver of federal governmental immunity, forbids punitive damages[108] and therefore, the plaintiff could not recover for the loss of enjoyment of life.[109] The dissent disagreed with the federal court's decision holding damages for the loss of enjoyment of life to be punitive, despite the West Virginia court's opinion to the contrary.[110] According to the dissent, the court's holding "succeeded in creating two conflicting standards for damages awards in West Virginia. In the future, a victim, such as Flannery, who is injured by a private party, will be entitled to recover damages for loss of enjoyment of life, while that same person, if injured at the hands of the government will receive nothing."[111]

In addition, the Federal District Court for the District of Delaware refused to allow a separate recovery for hedonic damages. In *Sterner v. Wesley College, Inc.*,[112] the court, predicting Delaware law, granted the defendant's motion to exclude evidence of hedonic damages with the exception of those damages recoverable as a part of pain and suffering.[113] The plaintiffs, parents of the decedent, filed suit against Wesley College and two students who were allegedly responsible for setting a fire in a dormitory killing one student and severely injuring a second.[114] The court found that hedonic damages were not recoverable under Delaware's survival statute and stated:

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105. *Flannery*, 718 F.2d at 111. *But see* Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984) which held an award for mental anguish, pain and suffering, and destruction of ability to enjoy life under the Federal Tort Claims Act to be excessive since the child "is capable of feeling, can perceive his environment, and is sensitive to auditory stimuli such as music." *Id.* at 1209.

106. *Flannery*, 718 F.2d at 111.

107. *Id. But cf.* Kalavity v. United States, 584 F.2d 809 (6th Cir. 1978) (applying Ohio law) (quoting Milwaukee R.R. v. Arms, 91 U.S. (1 Otto) 489, 493 (1875)). The court rejected that any award of damages in excess of the plaintiff's out-of-pocket-losses is punitive and recognized that damages are "punitive" only when "awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries 'maliciously or wantonly, and with circumstances of contumely or indignity.' " *Id.* at 811 n.1. The court also noted that:

> the purpose of ordinary tort damages, as distinguished from "punitive" damages, is both to compensate and to deter. Tort law mixes these two purposes . . . when it awards ordinary damages. Tort law may award as customary damages something more than . . . out-of-pocket loss, something for deterrence, without spilling over into "punitive" damages awarded solely for the purpose of punishment . . . . In excluding "punitive" damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together.

Id. at 811.

108. *Flannery*, 718 F.2d at 110.

109. *Id.* at 111.

110. *Id.* at 113 (Hall, J., dissenting).

111. *Id.* at 114.

112. Sterner v. Wesley College, Inc., 747 F. Supp. 263 (D. Del. 1990).

113. *Id.* at 265.

114. *Id.*

> Unlike one who is permanently injured, one who dies as a result of injuries is not condemned to watch life's amenities pass by. Unless we are to equate loss of life's pleasures with loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss.[115]

The court gave similar treatment to the plaintiffs' claim under Delaware's wrongful death statute and held that evidence of hedonic damages was inadmissible "either as a distinct basis for recovery or as a purported measure of the parents' mental anguish."[116]

An example of this view in the context of a personal injury action can be found in *Yosuf v. United States*,[117] decided by the Federal District Court for the Middle District of Pennsylvania. In *Yosuf* damages for loss of enjoyment were combined with those for pain, suffering and disfigurement to produce a single nonpecuniary damage award.[118] Factually, a federal prisoner sought damages for wrist injuries sustained as the result of a fall and allegedly improper medical treatment.[119] In addition to damages for medical expenses, the court stated that it would consider the plaintiff's "past, present and future pain, suffering, disfigurement, and loss of enjoyment of life."[120] The court found that the plaintiff suffered from pain in his left wrist and hand, and would continue to suffer such pain in addition to numbness, although the disfigurement would be reduced with further medical treatment.[121] In determining the plaintiff's loss of enjoyment of life, the court considered his inability to engage in recreational (athletic), household (woodworking), and religious (Islamic group prayer/eating habits) activities.[122] For these reasons, the court awarded the plaintiff $50,000 for pain, suffering, disfigurement and loss of enjoyment of life.[123]

Other courts, however, have not agreed. The Supreme Court of Connecticut, for example, has held that an award for loss of enjoyment of life was not duplicative of other elements of damages, and was not a windfall to plaintiff's family.[124] Connecticut is the first state to have permitted such damages under its wrongful death statute.[125] The Connecticut wrongful death statute provides that a decedent's estate is entitled to "just damages" together with the cost of medical, hospital, and nursing services, including funeral expenses.[126] "Just damages" include "compensation for the destruction of [a decedent's] capacity

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115. *Id.* at 272 (quoting Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 447, 393 A.2d 1188, 1191 (1978).

116. *Id.* at 274.

117. Yosuf v. United States, 642 F. Supp. 432 (M.D. Pa. 1986).

118. *Id.* at 439-40.

119. *Id.* at 434.

120. *Id.* at 439.

121. *Id.*

122. *Id.*

123. *Id.* at 440. Note that the court did not attempt to divide the award into specific categories.

124. Mather v. Griffin Hosp., 207 Conn. 125, 149-50, 540 A.2d 666, 678 (1988). Damages for the loss of life's pleasures were also awarded in Kiniry v. Danbury Hosp., 183 Conn. 448, 460, 439 A.2d 408, 414 (1981). *See also* Kirk v. Washington State Univ., 109 Wash. 2d 448, 459-62, 746 P.2d 285, 292-93 (1987); Andrews v. Mosley Well Serv., 514 So. 2d 491, 498-99 (La. Ct. App. 1987).

125. Some courts have not declined to recognize loss of enjoyment of life as a separate category of noneconomic damages despite the fact that it is not itemized as a separate element of damages in the statute. *See, e.g.*, cases cited *supra* note 10.

126. CONN. GEN. STAT. § 52-555 (Supp. 1988).

to carry on and enjoy life's activities in a way she would have done had she lived," as well as the value of decedent's lost earning capacity and compensation for conscious pain and suffering.[127] Some states, in addition to Connecticut, have specifically included "loss of enjoyment of life" as a permissible element of non-economic damages in civil liability cases through legislation,[128] while others may permit damages for loss of enjoyment of life by including such general terms as "other non-pecuniary damages" in their statutes.[129]

Damages for loss of enjoyment of life also were permitted in *Shaw v. United States*.[130] There, the Ninth Circuit Court of Appeals confirmed its rejection of the *Flannery* court's analysis and allowed an award for damages including loss of enjoyment of life for permanent injuries to a child, which included severe brain damage.[131] The child was not, however, unconscious, but was able to perceive his environment and was sensitive to auditory stimuli such as music.[132]

Another example of this view is found in *Andrews v. Mosley Well Service*,[133] where the jury's separate award for past and future loss of enjoyment of life, in addition to damages for pain and suffering, was affirmed.[134] Andrews dove through the open door of his car to avoid being hit by a backing truck.[135] After the accident, his back muscles began to spasm resulting in hospitalization for fifteen days in addition to being in a back and neck brace for a year.[136] The plaintiff remained unable to work, and surgery did not relieve his pain.[137] At trial, in an attempt to recover for his back injury, Andrews testified that since his injury he was unable to drive a car, work in his yard, wash his feet, fish, or play ball with his sons.[138] Andrews asserted that his inability to work to support his family and the harsh restrictions upon his daily activities detrimentally affected his self-esteem.[139] The jury agreed with Andrews, and in addition to pecuniary damages, awarded $250,000 for physical pain and suffering, $75,000 for mental pain and suffering, and $75,000 for past and future loss of enjoyment of life.[140] On appeal, the defendants argued that the award for loss of enjoyment of life was duplicative, since enjoyment of life was accounted for in the jury's assessment of damages for pain and suffering.[141]

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127. Sanderson v. Steve Snyder Enter., 196 Conn. 134, 149 n.12, 491 A.2d 389, 397 n.12 (1985).

128. *See, e.g.*, ALASKA STAT. § 09.17.010 (1989); FLA. STAT. § 768.80 (1988); HAW. REV. STAT. § 663-8.5 (1989).

129. *See, e.g.*, ALA. CODE § 6-5-544 (1989); GA. CODE ANN. § 33-34-2 (1989); IDAHO CODE § 6-1601 (1989); KY. REV. STAT. ANN. § 304.39-020(11) (Baldwin 1988); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (1989); ME. REV. STAT. ANN. tit. 17-A, § 1322 (1988); MICH. COMP. LAWS § 600.1483 (1989); N.C. GEN. STAT. § 15B-2 (1990); OHIO REV. CODE ANN. § 2743.51(k) (Baldwin 1989); UTAH CODE ANN. § 78-14-7.1 (1989).

130. Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984). *See also supra* note 106.

131. The court reduced the award as being excessive under Washington law. *Shaw*, 741 F.2d at 1209.

132. *Id.*

133. Andrews v. Mosley, 514 So. 2d 491 (La. Ct. App. 1987).

134. *Id.* at 498-99.

135. *Id.* at 493.

136. *Id.* at 498.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 497.

141. *Id.* at 498-99.

The court of appeals rejected this argument, citing two reasons. First, the trial judge had clearly differentiated between "loss of enjoyment of life" and "pain and suffering." Secondly, the court was limited to considering the total award (not on an item to item basis) in determining whether there was an abuse of discretion.[142] In the court's view, the total award was not excessive.[143]

V. CONCLUSIONS

Hedonic damages awards and their calculation have confused the courts. While several recent decisions, such as *McDougald*, hold that damages for "loss of enjoyment of life" may not be awarded for the benefit of a plaintiff afflicted with a permanent unconscious or comatose condition as a result of extensive brain damage, this rationale results in a paradoxical situation where the more brain damage suffered by a victim, the lower the recovery permitted to such a victim. The fact that there might exist some level of cognitive awareness on the part of the victim does not necessarily reflect upon that individual's ability to appreciate or enjoy the award. The line drawn by these recent decisions, allowing a plaintiff with minimal awareness to recover damages for loss of enjoyment of life while a plaintiff with no awareness is being precluded from recovery, or restricting a more severely injured plaintiff dying within hours of the injury to a lower recovery than a lesser injured plaintiff who survives for a longer period of time, is both bizarre and illogical. This analysis is further complicated by the fact that damages for loss of enjoyment of life have been awarded in wrongful death cases such as *Sherrod*.

As the Second Circuit Court of Appeals appropriately observed in *Rufino v. United States*:

> The 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. Indeed, such a rule, carried to its logical conclusion, would render all damages recovered by a decedent's estate punitive in nature.[144]

On the other hand it might seem illogical to award damages for loss of enjoyment of life to an individual who is already dead. It is likely that state legislatures will be asked to re-examine their wrongful death statutes and consider adding hedonic damages to the items of damages already permitted. Courts are increasingly being asked to consider the constitutionality of statutory limits on non-economic damages.[145] As society evolves to achieve a higher level

142. *Id.* at 499.

143. *Id.*

144. Rufino v. United States, 829 F.2d 354, 362 (2d Cir. 1987).

145. According to the 1989 Insurance Information Institute, courts in seven states have struck down caps: Idaho, Illinois, New Hampshire, North Dakota, Ohio, Texas, Washington, the last state to do so. Courts in five states have upheld caps: California, Indiana, Virginia, Kansas and most recently in Louisiana. In September 1989, the Louisiana Supreme Court ruled that a state law that limited medical malpractice awards from a state insurance fund to $400,000 was constitutional. Medical malpractice victims can receive up to $100,000 in claim payments from physicians and hospitals and $400,000 from the state fund. In April, the Washington Supreme Court ruled that caps on pain and suffering awards violate the state's constitution. The ruling came in a case, Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989), involving an asbestos-related

of sophistication it seems only fitting that the law keep pace in protecting an increasingly valued fundamental individual interest—that of the enjoyment of life.

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death from lung cancer. Overturning the rulings of lower courts, the Virginia Supreme Court held that the state's Medical Malpractice Act—which limits awards "in any verdict returned against a health care provider"—is constitutuional because it is "not arbitary" and is "reasonable." Etheridge v. Medical Center Hosp., 237 Va. 87, 95-104, 376 S.E.2d 525, 529-34 (1989). The January 1989 *Etheridge* decision upheld the $1 million cap on medical malpractice awards. The limit on damages is absolute, regardless of the actual amount of losses sustained by the claimant. The court also ruled that the cap covers all defendants involved in a particular negligence case, not $1 million from each defendant, as the attorneys had contended. Only a decision by the United States Supreme Court could overrule the Virginia high court's finding that the cap is constitutional. The statute survived a separate challenge in Boyd v. Bulala, 877 F.2d 1191, 1199 (4th Cir. 1989) decided on appeal after certification to the Virginia Supreme Court in Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990). *See generally* Comment, *Blasting the Cap: Constitutional Issues Arising from Maryland's Limitation of Non-economic Damages in Personal Injury Claims*, 16 U. BALT. L. REV. 327 (1987).