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Hedonic Damages:
The Rapidly Bubbling Cauldron

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Hedonic Damages

THE RAPIDLY BUBBLING CAULDRON*

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I. INTRODUCTION

In the last days of its 2002 session, the Mississippi legislature overruled a series of state supreme court decisions[1] expanding the availability of damages for loss of enjoyment of life, in one fell swoop restoring traditional principles to the state's tort law. The comprehensive tort reform bill covered such issues as joint and several liability, products liability, and

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[1] Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911 (Miss. 2002) (en banc) (permitting the testimony of several character witnesses on the decedent's enjoyment of life in a wrongful death action and allowing recovery of hedonic damages where death was instantaneous); Dorrough v. Wilkes, 817 So. 2d 567 (Miss. 2002) (permitting hedonic damages in a wrongful death action where the decedent was aware and conscious of her injury for 29 hours before death); Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374 (Miss. 2001) (allowing hedonic damages separate and apart from pain and suffering and permitting expert testimony regarding the calculation of damages for lost enjoyment of life).

punitive damages.[2] While this reform package received significant media coverage,[3] a damages provision that significantly alters Mississippi jurisprudence went unnoticed. That section provided:

> In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering.[4]

It further provided that expert testimony is not admissible on the issue of the "monetary value" of damages for "pain and suffering and the loss of enjoyment of life," and it prohibited damages for loss of enjoyment of life in wrongful death actions.[5]

Damages for loss of enjoyment of life, which have also become known as "hedonic damages," purportedly compensate an injured person for the loss of quality of life or the value of life itself. Courts have defined these damages as compensating for "the inability to perform activities which had given pleasure to this particular plaintiff, which are distinguished from basic losses, which are, disabilities that include the basic mechanical body functions of walking, climbing, feeding oneself and so on."[6] The United States Court of Appeals for the Tenth Circuit, applying New Mexico law, found such factors as "the ability to enjoy the occupation of your choice, activities of daily living, social leisure activities, and internal well-being" as appropriate for consideration.[7] Prior to Mississippi's 2002 tort reform, that state's supreme court considered hedonic damages appropriate

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[2] *See* H.B. 19, 3d Extraordinary Sess. (Miss. 2002) (enacted November 26, 2002 and signed into law by the Governor on December 3, 2002).

[3] *See, e.g.*, Lynne W. Jeter, *Business Liability Legislation an Early Gift?*, MISS. BUS. J., Dec. 9, 2002, at 1; *Governor Signs Tort Reform Bill*, CHI. TRIB., Dec. 4, 2002, at 21; Tim Lemke, *Mississippi Restricts Lawsuit Damages*, WASH. TIMES, Nov. 27, 2002, at A1.

[4] H.B. 19, 3d Ex. Sess., § 10 (Miss. 2002) (effective January 1, 2003, and codified at MISS. CODE ANN. § 11-1-69 (2003)).

[5] *See id.*

[6] *See* McGarry v. Horlacher, 775 N.E.2d 865, 877-78 (Ohio Ct. App. 2002) (internal quotations omitted) (quoting with approval the trial court's definition of hedonic damages and ruling that the trial court properly excluded expert testimony on hedonic damages).

[7] Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1245-46 (10th Cir. 2000) (internal quotations omitted) (finding that while expert testimony on the calculation of hedonic damages was impermissible, expert testimony on the definition of hedonic damages included "four broad areas of human experience" that the jury could consider in determining an award).

to remedy the lost enjoyment of "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities."[8] Applying this reasoning, a person injured in a car accident might recover – in addition to separate awards for past and future pain and suffering and disability – for being "deprived of the simple enjoyments of a father with a young child" and the enjoyment of outdoor recreational activities.[9]

Despite the retrenchment of Mississippi law, a growing minority of state courts are gradually expanding the availability of hedonic damages.[10] The Ohio Supreme Court recognized the beginning of this trend in 1992. As the court observed:

> [R]ecently in Ohio, as elsewhere, plaintiffs' attorneys have more frequently included an additional element of damage, which they generally term "loss of enjoyment of life," in complaints in personal injury actions. . . . [T]he question remains for our consideration whether such damage, be it known as loss of enjoyment of life or by another name, may be allowed in other types of negligence actions, and may be considered as a separate element of damages in the jury instructions, interrogatories submitted to the jury, and in a special verdict form.[11]

As the Supreme Court of Texas recently recognized, "Courts across the country have struggled with whether loss of

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[8] *See* Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374, 381 (Miss. 2001).

[9] *See* Matos v. Clarendon Nat'l Ins. Co., 808 So. 2d 841, 848 (La. Ct. App. 2002); *see also* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 486 (Ohio 1992) ("Such damages include loss of ability to play golf, dance, bowl, play musical instruments, engage in specific outdoor sports, along with other activities.").

[10] *See infra* note 39 and accompanying text. State legislators have also demonstrated a recent interest in hedonic damages. Rhode Island Governor Lincoln Almond recently vetoed legislation that would have permitted recovery of hedonic damages in wrongful death actions. *See, e.g.*, Press Release, Office of the Governor, State of Rhode Island and Providence Plantations, Almond Vetoes Bills Concerning Jury Selection, Wrongful Death Actions (July 12, 2001), available at http://www.uri.edu/library/special_collections/almond/press/documents/july1201c.html. The Governor stated:

> I have three principle objections to awarding damages for the loss of enjoyment of life. . . . The intangible, emotional, and highly subjective nature of hedonic damages may lead to disproportionate awards. And, the social burden of providing such speculative damages will ultimately be borne by the public through increased insurance premiums. Second, hedonic damages can create double recovery (for the same loss) for survivors. Third, some advocates view hedonic damages as a way of punishing the wrongdoer. I do not share this view.

Id. (quoting Governor Almond).

[11] *See Fantozzi*, 597 N.E.2d at 483. The Ohio Supreme Court ruled that loss of enjoyment of life as a separate element of damages would be redundant with damages for the "inability to perform the usual activities of life," but was distinct from pain and suffering. *See id.* at 485-86.

enjoyment of life is compensable at all, and if so, whether it is part of pain and suffering, mental anguish, or physical impairment, or is a separate, independent category of damages."[12] This Article aims to provide guidance to courts and legislatures considering these questions. Part II examines the development of hedonic damages, places them in the broader context of tort law, and briefly discusses their calculation. Part III outlines the numerous problems with hedonic damages. First, counting hedonic loss separate and apart from pain and suffering creates a significant risk of double compensation. Second, hedonic damages threaten legislative and judicial limits on the size of punitive or non-economic damages, potentially leading to windfall awards. Moreover, hedonic damage awards challenge important, time-tested principles underlying wrongful death statutes and survivorship actions, which usually and wisely limit recovery to pecuniary loss. Not only is the idea of hedonic damages conceptually lacking, but the measure suffers from evidentiary problems. Because purported experts can offer no real economic baseline in quantifying the incalculable value of life, the testimony often prejudices by leading jurors to an arbitrary and inflated award. Finally, there is no reliable systemic check at the end of the process, as the highly subjective nature of hedonic damages makes meaningful appellate review quite difficult. After concluding that hedonic damages are fraught with problems, this Article suggests that courts and state legislatures act to stop their development as a new, separate category of damages.

II. THE ORIGIN AND THEORY OF HEDONIC DAMAGES

A. *The Rise of Hedonic Damages*

Hedonic damages are not a new idea. As a Louisiana appellate court recognized, "[w]hile this term is new to our jurisprudence, the concept is not."[13] Prior to the mid- to late-1980s, courts did not refer to hedonic damages, but instead awarded damages for "loss of enjoyment of life." These damages were usually part of damages for pain and suffering or a

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[12] Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 768 (Tex. 2003) (compiling cases).

[13] Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 285 (La. Ct. App. 1992).

general damage award.[14] Today, however, with increasing frequency in personal injury and wrongful death actions, plaintiffs' lawyers are attempting to introduce expert testimony on hedonic damages and requesting that courts provide juries with a separate instruction and verdict form for lost enjoyment of life.

The term "hedonic damages" made its debut in the 1980s when economists began using the term to explain the non-pecuniary damages available in any given case. "Hedonic," derives from the Greek "hēdon(ē)" or "hēdonikós," meaning "pleasure" or "pleasurable."[15] Dr. Stanley V. Smith, an economist and financial consultant, is given credit as coining the phrase in a § 1983 federal civil rights lawsuit, *Sherrod v. Berry*.[16] In that case, the decedent, an innocent African-American male who unknowingly offered a ride to a man who had just robbed a florist, was shot by police after being pulled over in a white Illinois suburb.[17] Subsequently, the decedent's

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[14] *See id.*

[15] *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 657 (1994). Hedonism can be traced back to the writings of the ancient philosophers, Aristippus (c. 435-366 BC) and Epicurus (c. 341-271 BC). Aristippus, the founder of the Cyrenaic school of hedonism and a disciple of Socrates, believed that the good life rests upon the belief that pleasure is the highest and pain is the lowest human value – and one that should be avoided. Epicurus later expanded on this thinking and suggested that people act for the sake of ultimately gaining pleasure.

Hedonic thinking continued in modern times with Jeremy Bentham (1748-1832). Bentham, a lawyer by trade, believed that the goal of all human conduct is to obtain happiness, and that consequently actions that are "right" provide pleasure and those that are "wrong" result in pain. As Bentham wrote:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. I, § 1 (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789). It is on the basis of pleasures and pains that Bentham thought one could construct a "calculus of value," including "Hedons," units of pleasure, and "Dolors," units of pain. Bentham did not advocate selfishness. Rather, Bentham's "hedonic utilitarianism" proposed that *legislators* determine the interests of the community on the basis of the interests of the individual, and strive to achieve the greatest happiness for the greatest number. *See id.* ch. IV, § 5. Bentham could not have anticipated that a similar calculus would be used to arrive at a monetary award for the lost enjoyment of life in a private lawsuit, as they are today.

[16] *See* Marcia Coyle, *Updating 'Hedonic' Damages*, NAT'L L.J., Apr. 9, 2001, at A1 (most likely referring to Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *reh'g granted and opinion vacated on other grounds*, 835 F.2d 1222 (7th Cir. 1988), *on reh'g en banc*, 856 F.2d 802 (7th Cir. 1988)).

[17] *See Sherrod*, 629 F. Supp. at 160-62.

father, as administrator of his son's estate, brought a wrongful death action under 42 U.S.C. § 1983 against the city, its police chief, and the police officer.[18] The court found that "the loss of life means more than being deprived of the right to exist, or of the ability to earn a living; it includes deprivation of the pleasures of life."[19] It then permitted the testimony of Dr. Smith, who explained that "hedonic value" refers to "the larger value of life . . . including economic, including moral, including philosophical, including all the value with which you might hold life."[20] The trial resulted in a jury verdict for $300,000 in compensatory damages and $850,000 in hedonic damages.[21] The United States Court of Appeals for the Seventh Circuit upheld the admission of Dr. Smith's expert testimony, found that the award did not violate the rule against "speculative damages," and did not require remittitur.[22]

Due to variations in application between individual courts and because many state supreme courts have not ruled on the issue, it is difficult to precisely gauge the extent to which states allow juries to separately award hedonic damages. Most jurisdictions appear to regard hedonic damages as an element of pain and suffering or disability.[23] The highest courts of Kansas, Nebraska, New York, Ohio, Pennsylvania, and appellate-level decisions in California, Minnesota, and Texas, support this position.[24] Other states, including Maryland, New Mexico, South Carolina, and Wyoming, allow recovery of hedonic damages as a separate element of damages.[25] Some courts appear to allow recovery of hedonic damages in some situations, such as to compensate for the loss of a specific skill, but not in other situations, such as wrongful death and survival actions.[26] In some states, such as Louisiana, appellate

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[18] *See id.* at 162-63.

[19] *Id.* at 163.

[20] *Id.*

[21] *See Sherrod*, 827 F.2d at 208 (awarding $300,000 for "pecuniary loss to the estate" and $850,000 for "the value of [the decedant's] life").

[22] *Id.* at 205-09.

[23] *See infra* Part III.A.

[24] *See id.*

[25] *See id.*

[26] *Compare* Kirk v. Wash. State Univ., 746 P.2d 285, 292-93 (Wash. 1987) (allowing injured cheerleader to recover for "loss opportunity or loss of a chance to become a professional dance performer"), *with* Wooldridge v. Woolet, 638 P.2d 566, 570 (Wash. 1981) (en banc) (finding that "lost pleasures . . . essentially represent pain and suffering" and were not available in a survival action where the decedent was killed in a car accident).

courts split on the issue and the law is largely in flux.[27] Hedonic damages remain unknown in a few states.[28] Most courts do agree, however, that "expert" testimony on hedonic damages has no place in the courtroom[29] and that hedonic damages are not available in wrongful death or survival actions.[30]

B. Calculating Hedonic Damages: Priceless

In 1997, MasterCard launched a successful advertising campaign that pointed out the "priceless" moments in life. MasterCard's "Priceless" ads proclaimed, "There are some things money can't buy. For everything else, there's MasterCard." The ads emphasized the personal relationships and sentimental, special moments that make life good. It is priceless, for example, for a preschooler to spill most of the milk from her cereal bowl down her shirt, for a mother to take her adult daughter to the place where she first met her husband, or for a child to come home after a night of camping in the neighbor's backyard. The notion of hedonic damages, however, takes the opposite approach. It implies that every positive life experience can and should be converted into a cash equivalent, and asks the jury to do so.

Juries have two ways of arriving at an economic value for the lost enjoyment of life or the loss of life itself. The first

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[27] Several courts in Louisiana permit a separate award for hedonic damages. *See, e.g.*, Bruce v. State Farm Ins. Co., 859 So. 2d 296, 300, 306 (La. Ct. App. 2003) (ruling that "[a] plaintiff is entitled to recover damages for loss of enjoyment of life if he proves that his lifestyle was detrimentally altered or if he was forced to give up activities because of his injury" and therefore upholding a $7,500 award for loss of enjoyment of life on top of a $20,000 pain and suffering award); Matos v. Clarendon Nat'l Ins. Co., 808 So. 2d 841, 847-48 (La. Ct. App. 2002) (ruling that separate damage award of $45,000 for loss of enjoyment of life to motorist injured in rear-end collision was not duplicative of damages awarded for pain and suffering and disability); Day v. Ouachita Parish Sch. Bd., 823 So. 2d 1039 (La. Ct. App. 2002) (upholding separate awards for pain and suffering and loss of enjoyment of life to a high school athlete who injured his back in weight training class and could no longer participate in sports at the varsity level). Some Louisiana courts have taken the opposite approach. *See, e.g.*, Mistich v. Volkswagen of Germany, Inc., 698 So. 2d 47, 51 (La. Ct. App. 1997) (ruling that hedonic damages are included in pain and suffering "because, like pain and suffering, they cannot be quantified with any degree of 'pecuniary exactitude' or measured definitely in terms of money") (quoting Foster v. Trafalgar House Oil & Gas Co., 603 So. 2d 284, 285 (La. Ct. App. 1992).

[28] *See* Anderson v. Hale, No. CIV-02-0113-F, 2002 WL 32026151, at *7 (W.D. Okla. Nov. 4, 2002) (noting that "[h]edonic damages, as a subject of recovery separate from (or even to be expressed separately from) those elements of damages [contained in Oklahoma's Uniform Jury Instructions], are unknown to Oklahoma law").

[29] *See infra* Part III.C.

[30] *See infra* Part III.B.3.

method involves a measure similar to the one used for pain and suffering. This method asks jurors to use their own life experience and judgment to arrive at an award based on how much enjoyment of life they feel the injured party has lost. The jury may rely on testimony from people who knew the injured party, combined with their own values, to determine the plaintiff's lost enjoyment of life. For example, in a recent Mississippi wrongful death case, the court permitted five character witnesses – out of roughly sixteen proposed by the plaintiff's lawyer – to testify about the decedent, his family, and the loss of enjoyment of life he suffered through his death.[31]

The second approach calculates hedonic damages according to a supposedly scientific formula, derived from government studies and models of consumer behavior and worker risk avoidance. This formula, which incorporates expert testimony, including that of economists and psychologists, is more fully described in Part III.C below. As the next Part shows, each of these methods for valuating hedonic damages is flawed because it is highly subjective and incapable of meaningful judicial review.

III. PROBLEMS WITH HEDONIC DAMAGES

A. The Danger of Redundancy

Among the gravest risks hedonic damages pose is the risk of double counting. Cognizant of this risk, most states permit the jury to consider hedonic damages, but only as a component of general damages, pain and suffering, or disability.[32] For instance, in one of the first cases to face the

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[31] *See* Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 921-22 (Miss. 2002). On appeal, the court found that if any error was committed by the trial court in permitting the cumulative testimony, it was harmless. *See id.* at 922. Surely, repeated testimony about how much a person loved his family and enjoyed his life just before being instantly killed in a collision with a truck has real potential for invoking passion and prejudice with the jury.

[32] *See, e.g.*, Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 763-72 (Tex. 2003) (recognizing that "Texas courts of appeal have uniformly held that loss of enjoyment of life is not a separate category of damage" and holding that "in the proper case, when the evidence supports such a submission, loss of enjoyment of life fits best among the factors a factfinder may consider in assessing damages for physical impairment . . . . but the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury."); Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990); McAlister v. Carl, 197 A.2d 140, 142 (Md. 1964) ("Under the usual form of instructions in Maryland relating to damages in

issue, *Huff v. Tracy*, a California appellate court found that a trial court erred in an automobile accident case when it instructed the jury on both general damages and loss of enjoyment of life.[33] The court explained:

> The standard pain-and-suffering instruction . . . describes a unitary concept of recovery not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. A separate enjoyment-of-life instruction only repeats what is effectively communicated by the pain-and-suffering instruction. Commentators have pointed out that the enjoyment-of-life instruction opens the possibility of double compensation. A trial court errs when it follows the pain-and-suffering instruction by another which tells the jurors that they may also, that is, additionally, award damages for injury to the enjoyment of life.[34]

In 1995, the Nebraska Supreme Court addressed the availability of hedonic damages in two cases involving the

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negligence cases involving personal injuries, recovery of damages for non-pecuniary harm is allowed as compensation for pain and suffering.); Leonard v. Parrish, 420 N.W.2d 629, 634 (Minn. App. 1988) (ruling that the trial court properly rejected a request for a separate instruction for loss of enjoyment of life and that such injury was adequately covered as a general element of damages); Anderson/Couvillon v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 739-41 (Neb. 1995); McDougald v. Garber, 73 N.Y.2d 246, 256-58, 536 N.E.2d 372, 376-77 (N.Y. 1989); Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484-87 (Ohio 1992); Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1191 (Pa. 1978) ("Even where the victim survives a compensable injury, this Court has never held that loss of life's pleasures could be compensated other than as a component of pain and suffering."); Wooldridge v. Woolett, 638 P.2d 566, 570 (Wash. 1981) (en banc) (finding *Willinger* persuasive authority and finding that "lost pleasures . . . essentially represent pain and suffering"); *see also* Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943-44 (Tenn. 1994) (ruling that hedonic damages were inappropriate in a wrongful death case and criticizing the reasoning of *Sherrod*); *but cf.* Lawrence v. Town of Brighton, No. 02A01-9801-CV-00020, 1998 WL 749418, at *4-5 (Tenn. Ct. App. Oct. 28, 1998) (limiting *Spencer* to wrongful death cases and recognizing loss of enjoyment of life as a distinct category of damages in personal injury cases).

[33] 129 Cal. Rptr. 551, 553 (Cal. App. 1976). The court gave the following two instructions:

> (1) Reasonable compensation for any pain, discomfort, fears, anxiety, and mental and emotional distress suffered by the plaintiff and of which his injury was a proximate cause and for similar suffering reasonably certain to be experienced in the future from the same cause.
>
> (2) You may also award plaintiff reasonable compensation for the physical and mental effects of the injury on his ability to engage in those activities which normally constitutes (sic) the enjoyment of life.

Id. at 553 n.1 & n.2.

[34] *Id.* at 553 (internal quotations and citations omitted). The court found that that the error was harmless, however, because of the relatively small jury award and because the jury did not receive written instructions but rather as "part of an oral flow of instructions." *Id.* at 554.

negligent placement of children in foster homes.[35] The court reaffirmed that "[l]oss of enjoyment of life may, in a particular case, flow from a disability and be simply part thereof, and where the evidence supports it, may be argued to the jury. A separate instruction therein may be redundant."[36] It further explained that "while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages."[37] Likewise, after considering the various approaches taken by courts with respect to awarding hedonic damages, the Supreme Court of Kansas:

> took the more realistic approach that, as a general rule, the loss of enjoyment of the pleasurable things in life is inextricably included within the more traditional areas of damages for disability and pain and suffering. While it is true that a person may recover from the physical pain of a permanent injury, the resultant inability to carry on one's normal activities would appear to fall within the broad category of disability. In the majority of cases, loss of enjoyment of life as a separate category of damages would result in a duplication or overlapping of damages.[38]

A growing minority of courts, however, permit hedonic damages as a separate and distinct award. This trend is exemplified by recent decisions in Mississippi (now superceded by statute) and South Carolina, and follows similar rulings by the highest courts of Maryland, New Mexico, Washington, and Wyoming, as well as the United States Court of Appeals for the Sixth Circuit as it interpreted Tennessee law.[39]

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[35] *See* Talle v. Neb. Dep't of Soc. Servs., 541 N.W.2d 30 (Neb. 1995), *appeal after remand*, 572 N.W.2d 790 (Neb. 1998); *Anderson*, 538 N.W.2d at 739.

[36] *Anderson*, 538 N.W.2d at 739 (quoting Swiler v. Baker's Super Mkt., Inc., 277 N.W.2d 697, 700 (Neb. 1979)); *see also* Westcott v. Crinklaw, 133 F.3d 658, 660-61 (8th Cir. 1998) (ruling that Nebraska law does not permit a separate jury instruction for hedonic damages).

[37] *Anderson*, 538 N.W.2d at 741. Hawaii law specifically provides that loss of enjoyment of life is recoverable as a component of noneconomic damages. *See* HAW. REV. STAT. § 663-8.5(a) (2002) ("Noneconomic damages which are recoverable in tort actions include damages for pain and suffering, mental anguish, disfigurement, *loss of enjoyment of life*, loss of consortium, and all other nonpecuniary losses or claims.") (emphasis added).

[38] *See Gregory*, 791 P.2d 1329, 1336 (Kan. 1990).

[39] *See* Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824-25 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980); McAlister v. Carl, 197 A.2d 140 (Md. 1964) (may be awarded in certain cases, but later precedent says not available in wrongful death cases); Kansas City S. Ry. v. Johnson, 798 So. 2d 374 (Miss. 2001) (superceded by statute); Romero v. Byers, 872 P.2d 840 (N.M. 1994); Boan v. Blackwell, 541 S.E.2d 242 (S.C. 2001); Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987) (en banc) (but not in

Courts permitting recovery for hedonic loss as a separate element of damages attempt to draw technical distinctions between the concepts of pain and suffering, disability, and lost enjoyment of life. For instance, in *Kirk v. Washington State University*, a twenty-year-old cheerleader who permanently injured her elbow during practice sued the university, claiming damages to compensate for the inability to become a professional dancer.[40] The Washington Supreme Court rejected the defendant's argument that damages for pain and suffering and for disability and disfigurement already encompassed hedonic damages.[41] In that case, the court distinguished pain and suffering as compensating for "physical and mental discomfort," disability as compensating for the "inability to lead a normal life," and recovery for lost wages or earning capacity as compensating for economic loss.[42] In the court's analysis, such measures did not reach the noneconomic rewards of being a dancer.[43] It would appear, however, that if the cheerleader was able to continue to lead a normal life, her loss stemmed from the heartache caused by accepting that she is unlikely to achieve her personal and professional goal of becoming a dancer. This emotion is properly considered by a jury as a part of pain and suffering.

The United States Court of Appeals for the Sixth Circuit, interpreting Tennessee law, has made a similar distinction. In *Thompson v. National R.R. Passenger Corp.*, the trial court awarded passengers who sustained injuries in an Amtrak derailment separate damages for "1) expenses, 2) pain, suffering, and fright, 3) permanent injuries, 4) impairment of earning capacity, and 5) impairment of enjoyment of life."[44] The Sixth Circuit distinguished and upheld the multiple awards:

> 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

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survival actions); Mariner v. Marsden, 610 P.2d 6 (Wyo. 1980); *see also* Ogden v. J.M. Steel Erecting, Inc., 31 P.3d 806, 812-13 (Ariz. App. 2002) (ruling in a case of first impression in Arizona that hedonic damages may be awarded separately from pain and suffering and disability).

[40] *See* Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987).

[41] *See id.* at 292.

[42] *Id.* at 292-93.

[43] *See id.* The Court limited its holding to cases in which the injured party experiences a "loss of a specific unusual activity," such as artistic or athletic skills, rather than a general loss of enjoyment of life. *See id.*

[44] Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 823 (6th Cir. 1980).

> 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.[45]

Most recently, in an automobile negligence case in which the only issue for the jury was the amount of damages to be awarded, the Supreme Court of South Carolina made a similar distinction:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself [with separate damages for mental anguish where warranted by the evidence]. . . . On the other hand, damages for "loss of enjoyment of life" compensate[s] for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies or avocations.[46]

Based on this distinction, the court ruled that "'loss of enjoyment of life' and 'pain and suffering' are separately compensable elements of damages."[47]

Regardless of whether a technical distinction can be drawn between the concepts, in practice, allowing a separate award for hedonic damages poses an extraordinary risk of duplicative damage awards. In *McDougald v. Garber,* the New York Court of Appeals answered the technical distinctions described above.[48] In that case, the jury awarded a plaintiff, who was rendered comatose through the negligence of her physician, a total of $9.6 million in damages, including $1 million for pain and suffering and a separate $3.5 million award for the "loss of the pleasures and pursuits of life."[49] The Court of Appeals vacated the $3.5 million hedonic damages award, rejecting separate awards for pain and suffering and lost enjoyment of life:

> 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

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[45] *Id.* at 824.

[46] Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001).

[47] *Id.* at 243.

[48] *See* 536 N.E.2d 372, 73 N.Y.2d 246 (1989).

[49] *See* 536 N.E.2d at 373, 73 N.Y.2d at 251-52.

> nonpecuniary damages is not amendable 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 injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, *the distortion will be amplified by repetition*.[50]

The court recognized that if it were to allow separate awards, it had "no doubt that, in general, the total award for nonpecuniary damages would increase" and emphasized that "a larger award does not by itself indicate that the goal of compensation has been better served."[51]

Prior to the rise of hedonic damages, courts addressed a similar question with respect to damages for "pain" and damages for "suffering."[52] Although the two concepts are analytically distinguishable, courts recognized pain and suffering to be a single element of damages because of the potential for duplicative awards. As the California Supreme Court explained,

> In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal.[53]

As an analytical matter, "pleasure" and "pain" are related words of opposite meaning.[54] Awarding damages both for "lost pleasure" and "pain and suffering" appears entirely redundant. Furthermore, to the extent that hedonic damages compensate a victim for the lost ability to undertake a physical activity, those damages are already provided for as disability. For instance, the Supreme Court of Pennsylvania explained the interrelatedness of pain and suffering and loss of enjoyment of life in *Corcoran v. McNeal*:

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[50] *See* 536 N.E.2d at 376-77, 73 N.Y.2d at 257 (emphasis added).

[51] *Id.* at 376.

[52] *See, e.g.*, Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co., 23 Ohio St. 10, 18-19 (1872).

[53] Capelouto v. Kaiser Found. Hosps., 500 P.2d 880, 883 (Cal. 1972) (footnote omitted); *see also* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484 (Ohio 1992) ("Generally, pain and suffering has been viewed as a unitary concept.").

[54] ROGET'S II: THE NEW THESAURUS 740 (3rd ed. 1995).

> The loss of well-being is as much a loss as an amputation. The inability to enjoy what one has heretofore keenly appreciated is a pain which can be equated with the infliction of a positive hurt. The conscious loss of a benefit to which one is entitled hurts as much as a festering wound.[55]

Apart from the analytical murkiness, there is a problem of application. The subjective nature of lost enjoyment of life enhances the potential for excessive awards in personal injury cases. This is especially so because alongside pain and suffering damages, juries are asked to decide a second subjective award. As early as 1938, the Kansas Supreme Court did not permit an accomplished sixty-three-year-old violinist to recover for her loss of enjoyment of life when an injury prevented her from playing the violin.[56] In that case, the majority held that "loss of enjoyment . . . is too speculative and conjectural to form a sound basis for the assessment of damages."[57] Juries must perform an even more subjective determination of hedonic damages when the case does not involve the lost enjoyment of some specific and valuable skill, but rather the loss of a general enjoyment of life or the loss of life itself, as in a wrongful death case.

In sum, hedonic damages pose the risk of double counting for two major reasons. First, the standard is quite conceptually similar to both pain and suffering and disability, especially when one considers that pain and suffering may continue after its physical dimension passes, and that disability necessarily must continue into the future. But even if there is an analytical distinction, the problem of application remains. Given that hedonic damages, like pain and suffering, cannot be measured against a concrete economic baseline, there is no way for a jury to keep the categories distinct in their calculations.

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[55] 161 A.2d 367, 372-73 (Pa. 1960) (ruling that loss of enjoyment of life is recoverable only as an element of pain and suffering).

[56] *See* Hogan v. Santa Fe Trail Trans. Co., 85 P.2d 28, 33 (Kan. 1938).

[57] *Id.* at 32; *see also* McAlister v. Carl, 197 A.2d 140 (Md. 1964) (holding that the trial court properly did not submit to the jury a student's claim for hedonic damages when she was unable to pursue her chosen profession as a physical education teacher due to an injury sustained in a car accident). In a more recent case demonstrating the trend toward greater availability of hedonic damages, the Supreme Court of Washington permitted a twenty-year-old college cheerleader who sustained a permanent injury to her elbow to recover for the "the reasonable value of the lost opportunity or loss of a chance to become a professional dance performer." *See* Kirk v. Wash. State Univ., 746 P.2d 285, 292 (Wash. 1987).

B. *Hedonic Damages as an End-Run Around Liability Rules*

This section addresses how hedonic damages pose additional risks different in kind from double counting but with the similar effect of inappropriately aggravating jury awards. Apart from the danger described above, hedonic damages provide opportunities for escaping various liability limits, namely, caps on punitive damages, the cognitive awareness requirement for compensatory, non-economic damages, and the scope of remedies for wrongful death. Each limit, and the effect hedonic damages has upon it, is discussed in turn.

1. Avoiding Limits on Punitive Damages

In the late 1970s and early 1980s, the size and number of punitive damage awards "increased dramatically"[58] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[59] In light of the rampant nature of excessive punitive awards, a number of states enacted legislation to address the problem.[60] At least fifteen states placed limits on the amount of such awards.[61] The

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[58] George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

[59] John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); *see also* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991). Until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded. *See* Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages); Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (Cal. Ct. App. 1967) ($175,000 compensatory, $250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. Ct. 1969) ($920,000 compensatory damages, $10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

[60] *See, e.g.*, Leo M. Stepanian, II, *The Feasibility of Full State Extraction of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 302-03 (1994) (describing various statutory curbs on punitive damages).

[61] A few states have simply abolished punitive damage awards. For example, the Louisiana Civil Code permits award of punitive damages only when authorized:

> (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
> (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

LA. CIV. CODE ANN. art. 3546 (West 2003); *see also* N.H. REV. STAT. ANN. § 507:16 (2003) (permitting punitive damages awards only when expressly provided for by statute); Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982); Fisher Props., Inc. v.

most common statutory limit on punitive damage awards is the greater of three times compensatory damages or an amount set by law.[62] Other popular approaches to limiting the size and frequency of punitive damage awards include increasing the burden of proof for punitive damages claims to "clear and convincing" evidence,[63] and requiring bifurcated trials to keep potentially prejudicial evidence relevant to punitive damages out of the liability and compensatory phase of the trial.[64]

Unlike punitive damages, which are meant to punish bad conduct and deter the defendant and others from taking similar actions, pain and suffering awards are intended to reasonably *compensate* an injured party for past and future pain and suffering caused by the defendant.[65] Because pain and suffering awards are inherently subjective, courts generally will not second-guess the jury's decision making. "Juries are left with nothing but their consciences to guide them."[66]

Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986) (holding that punitive damages are not allowed unless expressly authorized by statute). Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. *See* Yamaha Motor Corp. v. Tri-City Motors, 429 N.W.2d 871, 881 (Mich. Ct. App. 1988).

[62] *See, e.g.*, FLA. STAT. ANN. § 768.73 (West 2003); IND. CODE ANN. §§ 34-51-3-2, -4 (West 2003); NEV. REV. STAT. ANN. § 42.005 (Michie 2003); N.C. GEN. STAT. § 1D-25(b) (2003).

[63] The United States Supreme Court specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991) (stating that "[t]here is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). More than half of the states and the District of Columbia now require a claimant to meet this higher evidentiary standard before a jury can award punitive damages. *See* PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 562-63 (Victor E. Schwartz et al. eds., 10th ed. 2000) [hereinafter PROSSER, WADE & SCHWARTZ]. Colorado has adopted an even higher standard of "proof beyond a reasonable doubt" for an award of punitive damages. COLO. REV. STAT. ANN. § 13-25-127(2) (West 2003).

[64] *See* PROSSER, WADE & SCHWARTZ, *supra* note 63, at 562 (citing cases and statutes providing for bifurcation of trials when the plaintiff seeks punitive damages).

[65] *See* RESTATEMENT (SECOND) OF TORTS § 903 (compensatory damages) [hereinafter RESTATEMENT].

[66] Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778 (1985). In order to control the potential for arbitrary and excessive pain and suffering awards, several state legislatures have placed limits on noneconomic damages. *See, e.g.*, HAW. REV. STAT. ANN. § 663-8.7 (Michie 2003) (limiting "recoverable pain and suffering" to $375,000); IDAHO CODE § 6-1603 (Michie 2003) (limiting noneconomic damages in cases of "personal injury, including death" excluding those arising out of willful or reckless conduct or acts constituting a felony to $250,000, adjusted for inflation); KAN. STAT. ANN. § 60-19a02(a)-(b) (2002) (limiting noneconomic damages to $250,000 in "any action seeking damages for personal injury or death."); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (2003) (limiting noneconomic damages to $500,000 "in any action for damages for personal injury or

As plaintiffs find themselves constrained in their recovery of punitive damage awards, ostensibly compensatory pain and suffering awards have reached hundred-million-dollar levels.[67] The rise in hedonic damages compounds this improper new use of pain and suffering awards because, as with pain and suffering awards, they have the potential to be used for punitive, rather than compensatory, purposes.[68] As the New York Court of Appeals recognized in *McDougald*, "recovery for

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wrongful death"). In most cases, state legislatures apply these limits only to medical malpractice claims, which show great potential for excessive awards and may effectively render health insurance unaffordable for the average consumer. *See, e.g.*, COLO. REV. STAT. ANN. § 13-64-302 (West 2003) (placing a $250,000 limit on noneconomic damages in lawsuits against a "health care professional"); MASS. GEN. LAWS. ch. 231 § 60H (2003) (limiting damages for pain and suffering in medical malpractice cases "against a provider of health care" to $500,000 in most circumstances); MICH. COMP. LAWS ANN. § 600.1483(1) (West 2003) (placing a $280,000 cap on noneconomic damages, and a $500,000 cap in certain special circumstances, in actions "for damages alleging medical malpractice by or against a person or party"); MO. ANN. STAT. § 538.210 (West 2003) (limiting noneconomic damages to $350,000, adjusted annually for inflation, in medical malpractice cases); MT. CODE ANN. § 25-9-411(1)(a) (2002) (limiting recovery for noneconomic damages in malpractice lawsuits to $250,000); UTAH CODE ANN. § 78-14-7.1 (2003) (placing a $400,000 cap, to be adjusted for inflation, on noneconomic damages in lawsuits against a "health care provider"); W. VA. CODE ANN. 55-7B-2(c) (Michie 2003) (placing a $250,000 cap on noneconomic damages in medical malpractice cases per occurrence and placing a $1,000,000 cap in the event that the statute's $250,000 cap is found unconstitutional); WISC. STAT. § 893.55(4) (2002) (placing a $350,000 general cap, adjusted annually for inflation, on recovery in medical malpractice cases); *see also* Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N.Y. TIMES, May 28, 2003, at A6 (reporting recent legislative activity to limit noneconomic damages in medical malpractice lawsuits). Most states have not enacted general limits on pain and suffering awards.

[67] *See, e.g.*, Brown v. AC&S Corp., No. 12658-00 (N.Y. Sup. Ct. 2002) (awarding the family of a deceased brake mechanic $53 million in compensatory damages, including $17 million in pain and suffering, for his asbestos-related injuries), *reported in New York Jury Awards Meso Victim, Family $53 Million for Brake Lining Exposure*, 1-12 MEALEY'S PROD. LIAB. & RISK 12 (2002); Miss. *Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp.*, 16-19 MEALEY'S LITIG. REP.: ASBESTOS 1 (2001) (reporting award of $150 million in compensatory damages to six plaintiffs who alleged they were merely exposed to asbestos but did not have actual injuries – $25 million each); Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20 (Miss. Ct. App. Sept. 28, 2001) (awarding $100 million in compensatory damages to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid), *reported in Nation's First Rezulin Trial Ends in Settlement*, 6-22 MEALEY'S EMERGING DRUGS & DEVICES 15 (2001); Raimondi v. Ford Motor Co., No. H197262-5 (Cal. Ct. App. May 31, 2001) (unpublished) (awarding $38.1 million in compensatory damages to a driver in a SUV stability case and $13 million for loss of consortium to his wife, which was cut in half due to the plaintiff's contributory negligence), *reported in Calif. Appeals Court Upholds $25.88M Rollover Verdict*, VERDICTS & SETTLEMENTS, July 9, 2001, at A13.

[68] *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47 (2002); *see also* Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. TIMES, Oct. 28, 2002, at A14 (reporting how plaintiffs' lawyers are repackaging punitive damages claims as pain-and-suffering damages due to state laws limiting on the amount of punitive damage awards).