

\$1 MILLION VERDICT FOR LOSS OF ENJOYMENT OF LIFE
UPHELD BY FIRST DEPARTMENT

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Did I capture your curiosity? Good! Stick with me while develop a recent trend in New York State law on tort damages in the general liability field which may eventually have a serious impact on your case evaluations and investigations.

In the case of McDougald v. Garber, et al.,¹ the court stated in this medical malpractice action that the real issue in a case involving a comatose patient (diagnosis: permanent spastic quadriplegic in a vegetative state) is whether recovery may be had for "loss of enjoyment of life" absent cognitive awareness. Of course, the defendants argued that "loss of enjoyment of life" is an inseparable component of pain and suffering, and therefore is not compensable absent a conscious awareness on plaintiff's part of her condition. The court concluded that there was a conceptual difference between pain and suffering and loss of enjoyment of life and that the latter is a separate element of damage to which, cognitive awareness or the ability to spend the award of damages is irrelevant.

While you may disagree with the court that there is a conceptual difference, consider pain as the physiological response to the corporeal injury while suffering refers to the emotional or psychological reaction to these sensations. Loss of enjoyment of life, however, involves the impairment of a person's ability to

perform those functions or engage in activities which were part of one's life prior to the injury causing event. 2

Prior to McDougald loss of enjoyment of life was part and parcel of damages in New York State only as an element of pain and suffering, and if the plaintiff was comatose (lacked cognitive awareness), of course, there would be no award.³

With the McDougald case in mind and the fact that the plaintiff was comatose, ⁴ let us now look at a case that was decided in July, 1988 in the Appellate Division, Second Department (Nussbaum v. Gibstein ⁵) in which the Court upheld in a medical malpractice case an award of \$200,000 for loss of enjoyment of life and \$300,000 for conscious pain and suffering.

Wait a minute! This is all very interesting but how does this affect the general liability field since the above two cases deal with medical malpractice?

The court in McDougald concluded that there is a conceptual difference between pain and suffering and loss of enjoyment of life, and that the latter is a separate element of damage to which cognitive awareness or the ability to spend the award of damages is irrelevant. A loss of enjoyment of life claim should, therefore, consonant with the purpose and spirit of CPLR Rule 4111(d), which requires an itemization of malpractice awards, be submitted as a separate element of damages, even though it is not explicitly listed therein as an element, while pain and suffering is. It should also be noted that the sections listing of damage elements is expressly stated to be

non-inclusive. Moreover, in this case, the separate submission of the loss of enjoyment claim has the advantage of facilitating appellate review of the issue of excessiveness of damages and segregating the claim, which does not require a showing of cognitive awareness, from conscious pain and suffering, which does.

With the above conclusion of the court in mind, let us now answer the question previously posed "how does this affect the general liability field since the above cases deal with medical malpractice?

CPLR Rule 4111 (d) has a counterpart in Rule 4111(f)⁶ wherein the latter applies to actions for personal injury, injury to property and wrongful death.

Under the law, in both of the above statute instances, the jury is to assign an amount of money on its verdict sheet to each element of damages such as medical expenses, dental expenses, loss of earnings, impairment of earning ability and pain and suffering. There is no mention of "loss of enjoyment of life" in the statute which historically in New York State has always been lumped together in a single charge to the jury under the topic of "pain and suffering," and has always historically received one line on the jury general and special verdict sheet.

Under McDougald and Nussbaum, the "loss of enjoyment of living" is now a separate and independent element of damages which will now achieve a "line of its own treatment" on the jury general and special verdict sheet, and in addition thereto, the plaintiff

will now be entitled to a separate charge to the Jury as opposed to the "lumped together" charge under pain and suffering.

As a demonstrative example only, prior to McDougald and Nussbaum, the charge under PJI 2:280 ⁷ for "pain and suffering" is as follows:

If you decide for the plaintiff on the question of liability, you may include in your verdict an award for the injury you find that he suffered and for conscious pain and suffering which you find to have been caused by negligence of the defendant. The plaintiff is entitled to recover the sum of money which will justly and fairly compensate him for his injury and for his conscious pain and suffering to date.

Post McDougald and Nussbaum the Court will not only charge the above language to the jury, but in addition thereto, will also give instructions to the jury as follows (as it did in McDougald):

Damages for the loss of pleasures of the pursuits of life, however, require no awareness of loss on the part of the injured person. Quite obviously, Emma McDougald, is unable to engage in any of the activities which constitute a normal life, the activities she engaged in prior to her injuries, *8*. Loss of enjoyment of life may, of course, accompany the physical sensation and emotional responses that refer to as pain and suffering, and in most cases it does. It is possible, however for an injured person to lose the enjoyment of life without experiencing any conscious pain and suffering. Damages for this item of injury relates not to what Emma McDougald is aware of, but rather to what she has lost. What her life was prior to her injury and what it has been since September 7, 1987 and what it will be fore the rest of her life.

Let us look at the instructions to the jury as given by the court in Nussbaum:

With respect to the cause of action for the pain and suffering, physical and emotional allegedly undergone by Miss [sic] Celetti for the year and nine months immediately preceding her death from September of '83 to June 8, 1985 when she died, her estate is entitled to recover for all the conscious pain, physical pain and suffering and disability Miss [sic] Celetti underwent during said one year and nine months as a result of the defendants' negligence. Her estate is entitled to recover damages for any mental suffering including emotional disturbances undergone by her during the one year and nine months as a result of defendants' negligence.

Additionally, her estate is entitled to recover for any loss of the normal pursuits of pleasures of daily life attributable to defendants' negligence during that one year and nine month period. The normal pursuit and pleasures of life encompass all those things that make up life's pleasure.

Any award for the loss of the normal pursuits and pleasures of life is to be separate and distinct from an award for any conscious pursuit [sic] of suffering and death result [.With] respect to the action of the wrongful death, the measure of damage is fixed by statute.

Based upon the foregoing in this writers opinion, not only does the plaintiff now have a "double" charge to the jury, but now has a "double" line on the general or special verdict jury sheet, which will most probably result in higher verdicts.

As in Nussbaum the Appellate Division Second Department affirmed a \$500,000 verdict to the estate of a 35 year old woman who died of cancer and left a 4 year old daughter. The jury awarded the estate \$300,000 for conscious pain and suffering and

\$200,000 for the loss of enjoyment of life she experienced during the two years that she battled the disease of breast cancer before dying in June, 1985 (wrongful death action award was \$375,000). If not for the "double" charge and "double" line, would the jury have brought back a \$500,000 verdict for "conscious pain and suffering"? This writer thinks not. Also of serious note in Nussbaum is the fact that plaintiff was not comatose as in McDougald.

What does this all mean? What are dealing with here when we refer to the "value of life", "loss of amenities of life" or "loss of enjoyment of life" is sometimes referred to as the "Hedonic" value of life. "Hedonic" stems from the Greek word Hedone which in its broadest sense denotes pleasure.

It seems clear that while a person is alive he possesses a right to continue to be alive without any interference in that right by others and that in some states (not New York), the elements of general damages that may be awarded in a wrongful death action, include compensation for the destruction of life's enjoyment. There also appears to be a developing trend in the law to be moving towards recognizing the right of an estate to recover damages for the loss of life's pleasures by outright rejection of the limitations imposed by the restrictive state wrongful death acts which are inconsistent with federal policies.⁸

Will McDougald and Nussbaum be the developing trend in New York State wherein the Court through its judicial activism ultimately rules the New York State wrongful death statute that

has been in existence since 1847 unconstitutional or add language
to the statute that isn't there?⁹

ENDNOTES

1. McDougald v. Garber, et al, 542 NYS2d 192 (App.Div., 1st Dept, Jan. 1988) The fact pattern is as follows: On September 7, 1978, while undergoing an elective caesarean section and tubal ligation at New York Infirmary, plaintiff Emma McDougald, then thirty-one years of age, became anoxic (oxygen deprived) and suffered severe diffuse brain damage after being delivered of her second child, a girl, born healthy. Plaintiff lapsed into a comatose condition and has since remained in a vegetative state. She is a permanent spastic quadriplegic with incontinence of urine and feces. In this lawsuit she and her husband, suing derivatively, charged the defendants, the obstetrician/gynecologist surgeon at the subject procedure, the anesthesiologists and the hospital, with various acts of malpractice. The jury returned a verdict in their favor in the amount of \$11,150,102.00, collectively, which was reduced by the trial court to \$6,296,728.00.

2. Comment Loss of Enjoyment of Life As a Separate Element of Damages, 12 Pac LJ 965, 978-979.

3. There are a host of cases discussing the issue of "loss of enjoyment of life" tangentially, usually in the context of defending awards for pain and suffering, such as, "plaintiff has effectively lost much of the use of the right arm and has been deprived of a social life." (Sternemann v. Langs, 460 NYS2d 614 [App.Div.]); "It is also proper to consider impairment of loss of artistic pursuits which this housewife did not receive financial enunciation but was an important part of her life." (Riddle v. Memorial, 349 NYS2d 855 [App.Div.]).

4. Plaintiff's medical expert concluded that whatever awareness plaintiff had would be the lowest form of cognition while defendant's medical expert concluded that plaintiff was incapable of having any cognitive awareness of pain and suffering or of her state of life in her hospital bed, but concluded that she would fluctuate between different degrees of responsiveness.

5. Nussbaum v. Gibstein, _____ App. Div.2d _____, July, 1988.

6. CPLR Rule 4111(f): Itemized verdict in certain actions. In an action brought to recover damages for personal injury, injury to property or wrongful death, which is not subject to subdivisions (d) and (e) of this rule, the court shall instruct

the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element including, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.

7. New York Pattern Jury Instructions - Civil, Volume I, Second Edition, p.627.

8. Bell v. City of Milwaukee, 746F2d 1205 (7th Cir., 1984), applying Wisconsin and federal law.

9. As of the writing of this article leave to appeal to the Court of Appeals has been granted in the McDougald case and leave has not been sought in the Nussbaum case.