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# Instructing Juries on Loss of Life's Pleasures

It's the Right Thing To Do

*The ultimate value of life depends upon awareness and the power of contemplation rather than upon mere survival.*

—Aristotle

**C**ertainly the inalienable right to enjoy life is one of the critical attributes that we enjoy and separates humans from many other forms of life. Perhaps Norman Lear said it as well as anyone: “Life is made up of small pleasures. Happiness is made up of those tiny successes. The big ones come too infrequently. And if you don’t collect all these tiny successes, the big ones don’t really mean anything.”

The corollary to these observations was made by the Court of Appeals in *Ogden v. J.M. Steel Erecting, Inc.*<sup>1</sup>:

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. ... On the other hand, *damages for “loss of enjoyment of life” compensate for the limitations ... 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.* For example, an award for the diminishment of pleasure resulting from the loss of use of one of the senses, or for a paraplegic’s loss of the ability to participate in certain physical activities, falls under the rubric of hedonic damages. In our view, “loss of enjoyment of life” damages compensate the individual not only for the subjective knowledge that one can no longer enjoy all of life’s pursuits, but also for the objective loss of the ability to engage in these activities. ... [A] separate charge on hedonic damages will minimize the risk that a jury will under- or over-compensate an injured person for her noneconomic losses.<sup>2</sup> (Emphasis added)

Recently, RAJI (Civil) 4th Personal Injury Damages 1 was amended to instruct juries in personal injury cases that they may

grant a monetary award for several categories of damages, including a tort victim’s measurable loss of life’s pleasures. This component of the RAJI is based on the Court of Appeals’ decision in *Ogden*. This article addresses the factual and legal premise for the revised RAJI. The loss of life’s pleasures is not a component of pain and suffering; a separate jury award will not lead to double recovery.

First, we begin with the observation that this argument is—not surprisingly—the same argument made in the Court of Appeals, and it was rejected: “We ... conclude that hedonic damages can be a component of a general damages claim, distinguishable from, and not duplicative of, damages for pain and suffering.”<sup>3</sup>

It’s important to appreciate that a victim’s loss of life’s pleasures is not a fanciful description of disability or pain and suffering. Rather, the revised RAJI defines the components of personal injury damages that may be applicable to a particularly harmed plaintiff. And, because the RAJI is sufficiently specific, jurors can understand exactly what kinds of losses may be recovered and function as intended.

The following analysis explains why RAJI Damages 1 is a fair and reasonable outline of the potential losses for which Arizonans should—if warranted—be compensated.

An injured party’s loss of the enjoyment of life is not duplicative of either pain and suffering or a physical disability. The former is recovery upon proof that a party’s lifestyle has been detrimentally altered or that the injured party has been forced to give up an avocation, hobby or ordinary daily activities because of his injury. The latter involves recovery for physical and emotional response to pain from the physical injury, or an inability to work because of the injury.<sup>4</sup>

Let’s think of it more concretely. Assume a 16-year-old high school student, who happens to have a flair for figure skating, is out riding her bicycle when she is struck down by a drunken driver. Unfortunately, she suffers massive leg fractures and then endures years of rehabilitation so that she is capable of ambulating, but she is never able to return to the ice rink.

What component of the items listed in the former RAJI would



# Instructing Juries on Loss of Life's Pleasures

direct the jury to award damages because plaintiff can no longer ice skate?

Would it be pain and suffering? No.

Would it be disability? No.

There was no damage category in the former jury instruction covering this loss. The amendment correctly resolves that oversight. As the Washington Supreme Court put it, "Recovery for pain and suffering only compensates for physical and mental discomfort caused by the injury. Recovery for disability compensates for inability to lead a 'normal life' but does not imply any recovery for loss of a specific unusual activity such as ballet dancing."<sup>5</sup>

Many courts have found with little trouble that the loss of the enjoyment of life's pleasures is real and quantifiable.<sup>6</sup> Clearly, when an injury prevents a victim from enjoying the qualitative aspects of his or her interests or avocations, then a tangible loss has resulted.<sup>7</sup> And this loss is in principle and in actuality different from pain and suffering or disability.<sup>8</sup>

## A Little Philosophy

Before undertaking a further review of the unerring logic of providing jurors with an instruction defining each possible component of personal injury damages, we would be remiss if we did not remind the reader that in our society, all life has value. The smell of a flower, the sound of a bird chirping, the blueness of the desert sky early in the morning, and on and on. Clearly, each of us has the inalienable right to enjoy these pleasures in the way we most enjoy.

One could subdivide these pleasures into three components:

1. The *quality of life* puts the emphasis on the actual life one is living. In reality, none of us leads the same life. We have different interests, different avocations, different forms of enjoyment, and the tortfeasor always takes the victim as she finds him.
2. The *quantity of life*, on the other hand, considers the victim's age and health when she was injured and must consider whether the injury has shortened her life expectancy.
3. Finally, the *sanctity of life* acknowledges that all of us have the right to go through life without interference due to another's wrongdoing.

These rights are so basic it seems almost sacrilegious to suggest that losing any of these rights is not compensable.

## The RAJI 4th Fairly Instructs on Damages

Currently, case law across the country reveals there are three judicial approaches to the recovery of damages for the loss of the enjoyment of life.

Many courts, like Arizona, recognize this loss as a separate damage component and instruct on it. Other jurisdictions view this loss as a separate part of the generalized recovery for pain and suffering and mention this loss as part of a general instruction. And a third approach has been to allow counsel to argue this loss

to the jury but without a specific jury instruction.<sup>9</sup>

Obviously not every factual or legal contention warrants a jury instruction. However, our appellate courts have stated clearly that jury instructions must be presented in as concise and easy a fashion as possible—so that jurors are not confused and so that they are provided with guidance in deciding the elements of the case presented.<sup>10</sup>

In a prefatory note to the Arizona Civil Jury Instructions, the Committee identified these accepted drafting objectives:

- "RAJI instructions are designed to be neutral, brief, and simply worded."
- "The Committee has intentionally left out routinely requested argumentative instructions and those which explore overly detailed rules of law."
- "Requested jury instructions selectively quoting from appellate court opinions seldom are helpful, nor do they generally reflect the kind of language best adapted to jury instructions."
- "[The Committee has rejected] instructions which fit nearly argumentative, narrow, and particularized statements of law, whether they favor plaintiffs or defendants."<sup>11</sup>

The modified RAJI Personal Injury Damage instruction is worded in a neutral, brief and simple manner. Therefore, the remaining question is whether this added statement helps the parties and our judicial system to accomplish the purposes of our civil compensation system. If in fact, this addendum clarifies and facilitates a jury's consideration of fair compensation, then this instruction is clearly appropriate.

As the *Ogden* court found, the "pleasures of life" involve experiences we all take for granted until we lose them. And when lost, they represent losses different from pain and suffering. Consequently, a jury should be told to account for this loss apart from any damage awarded for pain and suffering.

The two primary bases given by jurisdictions that follow this line of reasoning "are that allowing the trier of fact to separate the two elements of damages prevents inadequate awards and facilitates appellate review of the verdict for excessiveness."<sup>12</sup> As one author explained:

Hedonic loss can be divided into two components. The first component is the general loss of enjoyment of life that an average individual would experience as a result of an injury. This commonly includes such things as the loss of sight, smell, taste, or any other disability that prevents a person from being able to do things that an average person otherwise could do. The second component consists of a specific loss that is unique to a particular individual. This individualized loss encompasses the loss of anything that a specific person enjoys that others may not. Unique losses may include the loss of the ability to pursue a chosen occupation, to participate in athletic endeavors, or to engage in a

# Instructing Jurors on Loss of Life's Pleasures

favorite pastime. Drawing a line between general and specific losses cannot be done with great precision. Because damage is very injury and plaintiff specific, loss depends on the particularities of the injured individual.<sup>13</sup>


In arguing against RAJI Personal Injury Damages 1, it is asserted that listing each element of damages in this instruction may result in excessive awards because of the so-called similarity of these losses. Not surprisingly, this same assertion has been studied with this result:

Posttrial juror interviews suggest, however, that even without an itemized verdict form, the process jurors use in determining a single, total award is to determine separate awards for each component, which are then summed (Selvin & Picus, 1987). Recent simulation studies have found no difference in the size of compensatory awards when jurors were asked to provide one total compensatory award versus itemized awards (past medical expenses, future medical costs, lost earnings, and pain and suffering in Diamond, Dimitropoulos, Landsman & Saks, 1995; medical expenses, lost wages, the physical injury suffered, and pain and suffering in Zickafoose & Bornstein, 1999). These studies did not report the effect of verdict form on award variability. Although itemization may indeed facilitate the review of

awards on appeal (Minzer et al., 1996; Schwartz, 1994), there is no evidence to date that it reduces the size or variability of awards.<sup>14</sup>

## Conclusion

The goal of awarding compensatory damages is to restore the plaintiff to the condition she or he was in before being injured, or at the very least, to compensate the plaintiff for the losses that cannot be regained. The award should be as accurate and reasonable as possible, taking into account the nature of the injury and its short- or long-term effects on the individual plaintiff. Jury instructions ordinarily provide “specificity with which the elements of general damages are defined and establishing more clearly which factors are separate components of damages and which are not may enhance jurors’ understanding and use of the basic instructions concerning which aspects of harm to the plaintiff are compensable.”<sup>15</sup>

Amended RAJI Personal Injury Damages 1 is a fair and appropriate listing of the categories of human losses that often materialize when a tort victim is injured. By defining these losses with specificity, the court system provides reasonable guidance to average citizens called upon to evaluate these claims. They are neither duplicative losses nor damage elements that should or can be ignored. 

## endnotes

1. *Ogden v. J. M. Steel Erecting, Inc.*, 31 P.3d 806 (Ariz. Ct. App. 2001), *rev. denied*.
2. *Id.* at 813 (quoting from a decision of the South Carolina Supreme Court). *See also Kansas City S. Ry. Co., Inc.*, 798 So.2d 374 (Miss. 2001); *Basco v. Liberty Mut. Ins. Co.*, 909 So.2d 660 (La. Ct. App. 2005).
3. *Id.*
4. *Id.*
5. *Kirk v. Washington State Univ.*, 746 P.2d 285 (Wash. 1987).
6. In several jurisdictions, expert testimony is permitted to quantify a victim’s loss of life’s pleasures. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000); *Banks v. Sunrise Hotel*, 102 P.3d 52 (Nev. 2004); *Couch v. Astec Indus., Inc.*, 53 P.3d 398 (N.M. Ct. App.), *cert. denied*, 132 N.M. 551 (2002).
7. *Sheck v. Dalcorsio*, 2005 WL 3543177 (N.J. A.D. 2005).
8. *Otani v. Broudy*, 59 P.3d 126, 129 (Wash. Ct. App. 2002).
9. Maurice B. Graham & Michael D. Murphy, *Hedonic Damages—Where Are We?* 51 J. Mo. B. 265 (1995); 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).
10. *See State v. Ramirez*, 945 P.2d 376 (Ariz. Ct. App. 1997), *rev. dismissed*.
11. RAJI (Civil) 3d (1997), Statement of Purpose and Approach.
12. *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Considered Independently of Pain And Suffering Damage?* 75 A.L.R. 1275, 1281-1282 (1990).
13. *Id.* at 1276.
14. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL’Y & L. 712, 720 (2000).
15. *Id.* at 736.