In Ogden v. J.M. Steel Erecting, Inc., the Arizona Court of Appeals held that it was appropriate to instruct the jury on both pain and suffering and hedonic damages because they compensate the injured person for different things.

Pain and suffering, said the court, 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, hedonic damages: compensate 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. … 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.

As a result, the Ogden court approved a jury instruction given in that case that allowed the jury to award separate categories of damages for pain and suffering damages and for hedonic damages. And based on Ogden, the current Arizona RAJI (Civil) 4th Personal Injury Damages 1 also includes separate categories for pain and suffering and hedonic damages.

But a closer look at the Ogden-approved jury instruction—and hence the RAJI—reveals a problem. The language of the RAJI tracks the language of the instruction approved in the case. But the language of the approved instruction—and thus of the RAJI—does not embody Ogden’s analysis or its reasoning. The result is a dangerous invitation for the jury to award duplicative damages.

Instead, I would suggest that we rethink and retool our RAJI personal injury damages instruction so that its language comports with Ogden’s analysis and eliminates the danger of duplicative damages.

Jurisdictions around the country take differing views on the “loss of enjoyment of life” and whether it is simply a component of pain and suffering or whether it is a separate category of damages for which the jury can be separately instructed. Regardless of how the courts deal with the issue, however, no one disputes that damages must not be duplicated.

At least one commentator has persuasively suggested that damages for the “loss of enjoyment of life” are no more than a way of awarding money for a plaintiff’s permanent disability. According to this author, the jurisdictions that recognize “loss of enjoyment of life” as a separate element of damages have done so as a way of compensating for “permanent injury or disability.”

The author’s point is persuasive. To compensate one for the loss of enjoyment of his life is really no different from compensating him for the fact of his disability and the permanence of his injury. A “disabled” plaintiff, by definition, might no longer “be able” to do or enjoy the activities as he once did. His counsel can certainly argue the point to the jury. But the injury—the inability to do things or enjoy them as before—is the same regardless of whether it is called disability, permanent impairment or loss of enjoyment of life. Giving this facet of his injury different labels does not authorize the jury to award duplicative damages for the same injury.

Perhaps for this reason, commentators and many cases around the country recognize that although the jury—in an appropriate case—may certainly consider a plaintiff’s “loss of enjoyment of life” when assessing his general damages, the loss of enjoyment of life should not be a separate element of damages that is separately instructed and awarded. Instead, it is more appropriately considered a component of pain and suffering or disability.

In McDougald v. Garber, for example, New York’s highest court acknowledged that “distinctions can be found or created...
between the concepts of pain and suffering and loss of enjoyment of life,” if pain and suffering is limited to the emotional response to pain. But pain and suffering, said the court, is traditionally more broadly defined to include the “frustration and anguish caused by the inability to participate in activities that once brought pleasure.” The court concluded that departing from the “traditional approach” and approving a separate award for the loss of enjoyment of life would not ensure a more accurate award.\(^\text{10}\)

But back to Arizona, which by virtue of *Ogden* does allow separate awards.

At the time *Ogden* came down, RAJI (Civil) 3rd Personal Injury Damages 1 was a “traditional approach” jury instruction that more broadly defined pain and suffering to include the “frustration and anguish caused by the inability to participate in activities that once brought pleasure.” It stated:

If you find [any] defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person]:

1. the nature, extent, and duration of the injury.
2. the pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
3. Reasonable expenses of necessary medical care, treatment and services rendered, and reasonably probable to be incurred in the future.
4. Lost earnings to date, and any decrease in earning power or capacity in the future.
5. Loss of love, care, affection, companionship, and other pleasures of the [marital] [family] relationship.

A jury should not be allowed to consider awarding separate amounts for these two items of damage.
In response to Ogden, and tracking the instruction Ogden approved, the RAJI (Civil) 4th simply added to the list of compensable elements new category (6) “loss of enjoyment of life, that is, the participation in life’s activities to the quality and extent normally enjoyed before the injury.”

Now one can accept Ogden’s premise that the loss of enjoyment of life is an injury for which a plaintiff can be compensated. One can further accept the notion that if “pain and suffering” were narrowly defined as the Ogden court indicated—as “the physical discomfort and the emotional response to the sensation of pain caused by the injury itself”—then pain and suffering damages would not duplicate damages for the loss of enjoyment of life—the objective loss of the ability to engage in all of life’s pursuits.

The problem with the instruction approved in Ogden, and with the RAJI 4th instruction based on Ogden, is that it attempts to engraft Ogden’s theory—which requires a narrow definition of pain and suffering—onto an existing traditional jury instruction that broadly defines pain and suffering in category (2) to already include the concept of “disability”—both its physical and emotional components. By allowing the jury to award damages for (1) the nature, extent, and duration of the plaintiff’s injury, plus (2) past and future “pain, suffering, disability, disfigurement, and anxiety,” plus (3) “loss of enjoyment of life,” the instruction essentially tells the jury that it can award some money under categories 1 and 2 for the fact that plaintiff might be permanently “disabled from doing” the things he used to do the way he used to do them; and under Ogden (category 6) for the fact that plaintiff might not be able to participate in life’s activities to the quality and extent normally enjoyed before the injury. This certainly seems like the same injury for which only one award,
if any, should be made. A jury should not be allowed to consider awarding separate amounts for these two items of damage.

So what about a rule for the future? Here are some suggestions.

Hedonic damages can be a component of a general damages claim, if the evidence supports such a claim. In addition, counsel can argue that plaintiff’s injury caused him or her to lose enjoyment of life and that such loss should be compensated. However, the loss of enjoyment of life should not be listed as a separate item of damages if the jury instruction already broadly includes “disability, suffering and anxiety” within the category for pain and suffering. And counsel should be precluded from arguing that plaintiff’s loss of enjoyment of life is an element of damages separately compensable in addition to plaintiff’s past and future suffering and disability.

If the loss of enjoyment of life is to be detailed as a separately compensable item in the RAJI instruction on damages, then one of two things should occur to avoid duplication.

First, if a new category (6) is to be included for hedonic damages, as the RAJI 4th does, then category (2) should be revised to mirror the Ogden court’s definition of pain and suffering—so that it reads “the physical discomfort and the emotional response to the sensation of pain caused by the injury itself.” Alternatively, if the category (2) pain and suffering damages is to remain the way it has traditionally been written—which already includes the concept of physical and emotional disability—then the concept of hedonic damages should be included within category 2 as follows:

(2) the pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury, including the loss of enjoyment of life.

Revising the Recommended Arizona Jury Instruction in this fashion will allow juries to compensate plaintiffs to the fullest extent they should be, without improperly duplicating damages.

endnotes

2. Id. at ¶ 31.
3. Id. at ¶ 27.
5. Pamela J. Hermes, Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation, 63 N.D. L. Rev. 561, 577-80 (1987) (“A review of case law indicates that the vast majority of cases in which courts have recognized that a separate award of damages for loss of enjoyment of life can be given exists where there was no separate award for permanent injury or disability”) (cases cited therein).
6. See also Kansas City S. Ry. Co., Inc. v. Johnson, 798 So.2d 374 (Miss. 2001) (separating pain and suffering as the physical and mental discomfort caused by an injury, from loss of enjoyment of life as the limitations placed on one’s ability to enjoy pleasures of life; approving instruction in which “disability” is not included in pain and suffering category); Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474 (Ohio 1992) (allowing separate instruction for loss of ability to perform usual activities, which includes permanency of the disability suffered, provided that jury is instructed not to award additional damages for that same loss when considering physical and mental pain and suffering); Boan v. Blackwell, 541 S.E.2d 242 (S.C. 2001) (separating pain and suffering as physical discomfort and emotional response to pain caused by injury itself, from loss of enjoyment which compensate for limitations on ability to participate in and derive pleasure from activities of life).
7. See Bennett v. Lembo, 761 A.2d 494 (N.H. 2000) (jury can award loss of enjoyment of life damages as part of award for permanent impairment).
10. Id. at 257.