Joyless Life and Lifeless Joy: The Recovery of Hedonic Damages by Plaintiffs in a Persistent Vegetative State

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I. INTRODUCTION

As Hillary Jones and her family drove through an intersection, a U.S. Forest Service water truck sped through a red light and struck the side of Hillary's car.[1] She suffered serious internal injuries and mental trauma, placing her in a neurovegetative state.[2] Because of her extensive injuries, Hillary lives in a long-term care facility.[3] Patients in a persistent vegetative state, such as Hillary, suffer from severe brain damage and are in a coma that puts them in a state of "wakefulness without detectable awareness."[4] When Hillary's representative sued the United States government in the United States District Court for the Southern District of California, he requested both compensatory and punitive damages.[5] However, despite the fact that Hillary can no longer grow old with her husband or watch her children become adults, some courts would claim that she was not entitled to damages for her loss of joy.[6]

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1. Scott Marshall, *Poway Crash Results in Lawsuit Against U.S. Government*, N. COUNTY TIMES (June 8, 2007, 12:00 AM), http://www.nctimes.com/news/local/article_3671fea1-c099-58bf-8c43-e9685358e3f4.html. The victim's name has been changed to protect her identity.

2. *Id.*

3. *Id.*

4. The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* (pt. 1), 330 NEW ENG. J. MED. 1499, 1499 (1994), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJM199405263302107.

5. Marshall, *supra* note 1. Compensatory damages seek to compensate the plaintiff for the actual injury suffered while punitive damages seek to punish the wrongdoer. *See* CAL. CIV. CODE § 3333 (West 2013) (defining compensatory damages as "the measure of damages . . . which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"); BLACK'S LAW DICTIONARY 448 (9th ed. 2009) (defining punitive damages as those "awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif[ically] damages assessed by way of penalizing the wrongdoer or making an example of others").

6. *See* McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989) (holding that cognitive awareness is a prerequisite to the recovery of hedonic damages). Many courts have not yet ruled on the recovery of hedonic damages by plaintiffs in a persistent vegetative state but have ruled on the distinction between hedonic damages and pain and suffering damages. *See, e.g.*, Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 575 (Ct. App. 1998)

Courts award damages to plaintiffs injured by the negligence of others to compensate them for the harm suffered, rather than to punish the wrongdoers.[7] Compensatory damages fulfill the court's objective by replacing what the injured party lost.[8] By burdening wrongdoers with the duty to compensate their own victims, damages also deter future wrongdoing.[9]

Courts may award plaintiffs in a persistent vegetative state—plaintiffs such as Hillary—compensatory damages for pain and suffering, emotional distress, and loss of enjoyment of life.[10] Pain and suffering damages identify those sensations that are direct results of a physical injury or condition.[11] By contrast, negligent infliction of emotional distress focuses on mental or emotional injury, rather than physical injury, caused by the negligence of another.[12] Both pain and suffering and emotional distress require a showing of some sort of harm suffered by the plaintiff.[13] Indisputably, Hillary is suffering within some meaning of the term,[14] but

(holding that hedonic damages are one component of a larger award for pain and suffering damages). In this Comment, the terms *loss of joy* and *loss of enjoyment of life* will be used interchangeably.

7. *See McDougald*, 536 N.E.2d at 374. "The basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained." Flannery v. United States (Flannery I), 297 S.E.2d 433, 435 (W. Va. 1982).

8. *See McDougald*, 536 N.E.2d at 374 ("The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred.").

9. *See id.*

10. *See* CAL. CIV. CODE § 3333 ("For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.").

11. Consol. Rail Corp. v. Gottshall (Conrail), 512 U.S. 532, 544 (1994) (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 485 n.45 (1982)).

12. *See id.* at 544.

13. *See* Nakamura v. Superior Court, 100 Cal. Rptr. 2d 97, 103 (Ct. App. 2000) (stating that pain and suffering "reflects a consequence of the plaintiff's personal and physical injury and a subjective loss for which money could compensate the victim"); *see also* 3 JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS: CACI § 1620 (2012) (stating that to establish a claim of emotional distress, the plaintiff must prove that the plaintiff "suffered serious emotional distress," which includes "suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame").

14. Webster's Dictionary defines *suffer* as "to submit to or be forced to endure the infliction, imposition, or penalty of . . . to cause pain or suffering to . . . to submit to or endure death, affliction, penalty, or pain or distress . . . to sustain loss or damage." WEBSTER'S

courts may still withhold an award of pain and suffering or emotional distress damages because of her diagnosis as a patient in a persistent vegetative state.[15] Patients in a persistent vegetative state can occasionally smile, cry, grunt, moan, or even scream.[16] Nevertheless, they are neither awake nor aware, and it is difficult to prove that they experience pain, suffering, or emotional distress.[17]

It would seem that the damages awarded to those in a persistent vegetative state would be for loss of joy.[18] Loss of enjoyment of life represents the deprivation of the ability to experience and enjoy certain pleasurable sensations due to the impairment of the capability to engage in activities formerly enjoyed by the plaintiff.[19] Courts frequently refer to these damages as *hedonic damages*, a term that derives its name from the Greek word *hedonikos*, meaning "pleasure" or "pleasing."[20] Although individuals in a persistent vegetative state are no longer able to enjoy life and thus damages may compensate for their loss, courts continue to struggle with

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THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2284 (1986).

15. *See, e.g.*, Flannery v. United States (Flannery II), 718 F.2d 108, 111 (4th Cir. 1983); McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989).

16. The Multi-Society Task Force on PVS, *supra* note 4, at 1500.

17. *Id.* at 1501 ("Patients in a vegetative state are unconscious because, although they are wakeful, they lack awareness."). Patients are diagnosed as being in a persistent vegetative state when they meet the following factors:

> (1) no evidence of awareness of self or environment and an inability to interact with others; (2) no evidence of sustained, reproducible, purposeful, or voluntary behavioral responses to visual, auditory, tactile, or noxious stimuli; (3) no evidence of language comprehension or expression; (4) intermittent wakefulness manifested by the presence of sleep–wake cycles; (5) sufficiently preserved hypothalamic and brain-stem autonomic functions to permit survival with medical and nursing care; (6) bowel and bladder incontinence; and (7) variably preserved cranial-nerve reflexes . . . and spinal reflexes.

Id. at 1500.

18. *See* 1 CAL. CIVIL PRACTICE TORTS § 5:13 (1992) (defining *loss of joy* as "the impairment of a person's capacity to engage in recreational or other pleasurable activities of a normal person"). A plaintiff in a persistent vegetative state will obviously be unable to engage in recreational or other activities engaged in by a normal, healthy person.

19. *See* Bennett v. Lembo, 761 A.2d 494, 498 (N.H. 2000).

20. *See* Sherrod v. Berry, 629 F. Supp. 159, 163 (N.D. Ill. 1985). The term *hedonic* was first suggested by economist Stanley Smith in *Sherrod*. *Id.* at 162. Smith suggested three assumptions regarding hedonic damages: (1) "the hedonic value of life is not necessarily dependent on earnings capacity"; (2) hedonic value is independent of "social rank, education, and gender"; and (3) "hedonic value is correlated to life expectancy." Lori A. Nicholson, Note, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer's Disease*, 2 ELDER L.J. 249, 253 (1994) (citing Stanley V. Smith, *Hedonic Damages in Wrongful Death Cases*, A.B.A. J., Sept. 1988, at 72).

whether or not to award damages to plaintiffs in such a condition.[21] The majority of courts distinguish between damages for pain and suffering and damages for loss of enjoyment of life.[22] Some states even preclude loss of enjoyment of life damages altogether, ruling that plaintiffs in a persistent vegetative state are not conscious of their loss.[23]

This Comment focuses on the potential injustice to patients in a persistent vegetative state and the proper manner in which to handle these cases. Based on tort principles underlying the justification for the award of damages to plaintiffs, including deterrence and compensation, plaintiffs in a persistent vegetative state should be entitled to damages for loss of enjoyment of life. To allow for these awards, courts must separate loss of enjoyment of life from pain and suffering, thereby allowing vegetative plaintiffs who cannot prove that they are in pain to recover hedonic damages from their wrongdoers.

Part II discusses the effects the tort reform movement and public policy have had on damage awards. Part III explains both the distinction between pain and suffering damages and loss of enjoyment of life damages and the various methods by which courts have determined whether to award hedonic damages to those in a persistent vegetative state. First, this Part analyzes the manner in which courts determine if there is a difference between pain and suffering damages and loss of enjoyment of life damages. Second, this Part examines how courts determine the loss of enjoyment of life damages that are recoverable by patients in a persistent vegetative state. Part IV recommends that courts divide pain and suffering damages and loss of enjoyment of life damages into separate categories of recovery, thereby preventing an injustice to plaintiffs injured by the wrongdoing of others and allowing plaintiffs in a persistent vegetative

21. David Polin, *Damages for Loss of Enjoyment of Life*, *in* 49 AM. JUR. PROOF OF FACTS 3D 339 § 2 (1998) ("This is one of the relatively rare areas of law where different jurisdictions apply fundamentally different rules.").

22. *See* Eyoma v. Falco, 589 A.2d 653, 659 (N.J. Super. Ct. App. Div. 1991) (stating that the majority of jurisdictions allow damages for loss of enjoyment of life "but only as one of the numerous factors characterizing a general damage award for pain and suffering"). The minority of jurisdictions refuses to allow the recovery of *any* loss of enjoyment of life damages. *Id.* at 658–59.

23. *See* McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989) (holding that "cognitive awareness is a prerequisite to recovery for loss of enjoyment of life"). In a similar scenario, the Supreme Court of Ohio ruled that a newborn cannot suffer hedonic damages because "he or she has not had adequate time to develop an ability to perform a pleasurable activity or hobby specifically identified to his or her lifestyle." Ramos v. Kuzas, 600 N.E.2d 241, 243 (Ohio 1992).

state to recover hedonic damages. Part V reiterates that courts should separate hedonic damages from pain and suffering damages and allow for the recovery of loss of enjoyment of life damages by plaintiffs in a persistent vegetative state.

II. THE PURPOSE OF THE TORT SYSTEM AND THE AVAILABLE REMEDIES

A. Legal Implications of Plaintiffs in an Unconscious State

When an action is brought on behalf of an incompetent individual, the court appoints a guardian *ad litem* or conservator to handle the incompetent's litigation matters.[24] The court, in hopes that the person will have the incompetent's best interests in mind, generally appoints the next of kin or another family member.[25] Courts usually favor the spouse of an incompetent—or a person the spouse chooses—for appointment as the guardian.[26] The change in society's definition of *family* has complicated the situation.[27] It is often the case that the person with the most knowledge of the incompetent's wishes is not related by blood or marriage.[28] Ultimately, the court will appoint the person who best protects the interests of the incompetent, sometimes selecting a more distant relative.[29]

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24. *See* Peter G. Guthrie, Annotation, *Priority and Preference in Appointment of Conservator or Guardian for an Incompetent*, 65 A.L.R. 3D 991, 995 (1975). In federal court, a general guardian, committee, conservator, or a like fiduciary can sue or defend on behalf of an incompetent person. FED. R. CIV. P. 17(c)(1). If an incompetent person does not have an appointed representative, the person "may sue by a next friend or by a guardian ad litem." *Id.* 17(c)(2). "The court must appoint a guardian ad litem . . . to protect a[n] . . . incompetent person who is unrepresented in an action." *Id.* In California, a guardian *ad litem* is appointed for an incompetent person when the court deems it "expedient," even if the incompetent person already has a guardian or conservator appointed for the person's estate. CAL. CIV. PROC. CODE § 372(a) (West 2013). A guardian *ad litem* is "[a] guardian, usu[ally] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." BLACK'S LAW DICTIONARY 774 (9th ed. 2009). A conservator is "[a] guardian, protector, or preserver." *Id.* at 347.

25. *See* Guthrie, *supra* note 24, at 995.

26. *Id.* at 996.

27. *See* Amy L. Brown, Note, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults*, 41 HASTINGS L.J. 1029, 1073 (1990). The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research used a broad definition of the term *family* in recognition of the fact that "[n]o neat formulas will capture the complexities involved in determining who among a patient's friends and relatives knows the patient best and is most capable of making decisions in the patient's place." *Id.* (quoting PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL & BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 127 (1983)) (internal quotation marks omitted).

28. *See id.*

29. *See* Guthrie, *supra* note 24, at 997–98. In the past, some believed that the interests of the incompetent were best protected by female guardians. *See id.* at 996. However, the few cases that have held this were from the 1800s. *See id.*; Gibson's Case, 1 Bland

In survival actions, a decedent's estate sues for claims the decedent could have pursued had the decedent not died.[30] Most states have survival statutes that allow for personal injury claims to survive the death of the injured party.[31] The types of damages recoverable in a survival action are generally the same as those available in actions for personal injuries.[32] Damages in survival actions may include pain and suffering, medical expenses, loss of earnings, disability, and in some jurisdictions, punitive damages.[33] Some states, including California, Arizona, and Colorado, do not allow for the recovery of pain and suffering damages in survival actions.[34] The recovery of hedonic damages in survival actions poses many of the same problems as the recovery of loss of enjoyment of life damages

Ch. 138, 141 (Md. 1827) (holding that "if the lunatic be a *female*, it is generally deemed most proper to appoint a female committee to take charge of her person" and "the comfort of the unfortunate person would best be promoted by having his person placed under the care of a female committee, as by appointing the wife to be the committee of her husband").

30. 10 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 45.08 (Matthew Bender rev. ed. 2012).

31. *See, e.g.*, CAL. CIV. PROC. CODE § 377.30 (West 2013) ("A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest . . . and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest."); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (Consol. 2008) ("No cause of action for injury to person or property is lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the personal representative of the decedent . . . .").

32. *See* 10 FRUMER & FRIEDMAN, *supra* note 30, § 45.08.

33. *See id.*; *see also* Willinger v. Mercy Catholic Med. Ctr., 362 A.2d 280, 286–87 (Pa. Super. Ct. 1976) (allowing for the recovery of medical expenses, past and future earnings, and pain and suffering endured prior to death).

34. *See* ARIZ. REV. STAT. ANN. § 14-3110 (2012) (West) ("Every cause of action . . . shall survive the death of the person entitled thereto or liable therefor, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed."); CAL. CIV. PROC. CODE § 377.34 ("In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."); COLO. REV. STAT. § 13-20-101 (2012) ("[T]he damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death and shall not include damages for pain, suffering, or disfigurement . . . .").

by plaintiffs in a persistent vegetative state.[35] Some states allow for the recovery of loss of enjoyment of life damages separate from pain and suffering under the survival statute.[36] If courts allow the trier of fact to consider the recovery of hedonic damages as a separate element of damages, there seems to be a guarantee that the general damages award will consider hedonic damages.[37] Some state survival statutes allow only for the recovery of hedonic damages to the extent that they are part of the pain and suffering award.[38] Those states limit the award to the pain and suffering experienced by the victim after the injury and before death.[39] In addition to the issue regarding loss of enjoyment of life as a separate element of pain and suffering damages, the companion issue of whether hedonic damages are recoverable by comatose plaintiffs is present in survival actions.[40]

B. Damages Recoverable in Personal Injury Actions

A tort is a civil wrong—other than breach of contract—that causes an injury that the judicial system can remedy,[41] most often through an

35. *See* 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 8.04 (Matthew Bender ed. 2012); 1 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 3:65 (3d ed. 1997).

36. *See* Mariner v. Marsden, 610 P.2d 6, 12 (Wyo. 1980) (holding that "loss of enjoyment of life is a compensable damage" in a survival action and "the fact finder . . . may either make a separate award for loss of enjoyment of life or take into consideration the loss of enjoyment of life in arriving at the total general damages").

37. *See* 1 STEIN, *supra* note 35, § 3:65.

38. *See, e.g.*, Sterner v. Wesley Coll., Inc., 747 F. Supp. 263, 273 (D. Del. 1990) (applying Delaware law). An Arizona court also held that loss of enjoyment of life damages are part of pain and suffering and therefore unrecoverable under a survival statute that excludes damages for pain and suffering. *See* Quintero v. Rodgers, 212 P.3d 874, 877 (Ariz. Ct. App. 2009).

39. *See Sterner*, 747 F. Supp. at 273 (holding that "[p]laintiffs may offer evidence of the hedonic value of the decedent's life only to the extent that it is relevant as a measure of the decedent's pain and suffering in the time between the start of the fire in Williams Hall and decedent's death"). In *Sterner v. Wesley College, Inc.*, one student was killed and one student was injured when a dorm caught fire at Wesley College. *Id.* at 265. The district court allowed for the recovery of hedonic damages incurred while the students were caught in the burning building. *Id.* at 273. However, the district court noted that because the period during which the students may have suffered was so brief, the defendants could present evidence that expert testimony on hedonic damages "would not be an aid to the jury in assessing the pain and suffering incurred by the decedent." *Id.*

40. *See* 1 STEIN, *supra* note 35, § 3:65. A New Jersey court allowed for the recovery of loss of enjoyment of life damages in a survival action when the plaintiff was in a persistent vegetative state prior to the time of death. *See* Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991).

41. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 439 (2006). Webster's Dictionary defines *tort* as "a wrongful

award of damages.[42] A party has a right to the recovery of an element of damages "if the element is reasonable and finds support in the pleadings and evidence."[43] The two most common explanations for tort theory lie in the law and economics and corrective justice theories.[44] Law and economics theory relies upon the concept of "economic efficiency"[45] and seeks to correct social costs by imposing liability rules that will force people in society "to bear the cost of their activities to others."[46] Alternatively, corrective justice seeks to "apportion[] moral responsibility"[47] by "focus[ing] on the wrongs done in each individual case."[48] Corrective justice calls for the rectification of the equilibrium that exists in society, which is most often achieved through monetary compensation.[49] Most often the

act for which a civil action will lie except one involving a breach of contract." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2413 (2002).

42. *See* Hubbard, *supra* note 41, at 439.

43. Carleton R. Cramer, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965, 976 (1981). In personal injury actions, a plaintiff is entitled to damages for "all of the natural and proximate consequences of a tortfeasor's wrongful act or omission," even if the injury "was not contemplated or foreseen." Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4TH 293, 297 (1984) [hereinafter *Loss of Enjoyment of Life as a Distinct Element*].

44. *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 4 (1998). A third common explanation for tort law is based upon a concept of social justice. *See* Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 459–60 (2011). Social justice theorists believe tort law should "vindicate public wrongs and hold corporate wrongdoers accountable." *Id.* at 460. The theory differs greatly from corrective justice in that it goes beyond the wrong done to the individual plaintiff and attempts to serve a broader public purpose. *Id.* at 461.

45. Rustad, *supra* note 44, at 457.

46. Zipursky, *supra* note 44, at 45–46. Law and economics theorists hope to "internalize" the externalities produced when a person makes a decision that economically affects another. *Id.* at 46. The law and economics theory considers efficiency to be the general goal of tort law, "without necessarily arguing that efficiency *should* be the goal of the legal system." Rustad, *supra* note 44, at 457 (quoting FRANK H. STEPHEN, THE ECONOMICS OF THE LAW 129 (1988)) (internal quotation marks omitted).

47. Zipursky, *supra* note 44, at 4.

48. Rustad, *supra* note 44, at 464. In order for defendants to be liable for wrongs, their actions must injure another's "interest that has the status of a right." *Id.* at 463–64 (quoting Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 352 (2002)) (internal quotation marks omitted).

49. *See id.* at 463. Monetary compensation is considered the "functional equivalent of rectification or restorative justice." *Id.*

wrongdoer must pay enough compensatory damages to the plaintiff in order to return the plaintiff to the status quo ante.[50]

By imposing the liability of paying compensatory damages on the defendant, the tort system compels due care and deters wrongdoing.[51] Compensatory damages are composed of three separate types of damages: "(1) loss of earning capacity; (2) out-of-pocket expenses; and (3) pain and suffering."[52] Loss of earning capacity damages are awarded when a "person's future employability has been adversely affected."[53] Courts measure earning capacity damages by calculating the difference between the plaintiff's ability to earn money before and after the wrong occurred.[54] Out-of-pocket expenses encompass funds spent in response to an injury, including medical expenses.[55] The third category covers physical pain and suffering.[56] Courts consider pain and suffering to be "the physiological response by the injured person to a corporal injury."[57] Pain and suffering is a subjective category of damages and "is evidenced exclusively by the plaintiff's subjective complaints."[58] It is universally accepted that pain and suffering damages are recoverable in personal injury actions.[59]

Some courts also recognize a fourth type of compensatory damages: those for loss of enjoyment of life.[60] Loss of enjoyment of life damages

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50. *See* Hubbard, *supra* note 41, at 440.

51. *See id.* at 445–56.

52. Cramer, *supra* note 43, at 965–66 (citing D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, *Damages for Personal Injury* § 8.1, at 540 (1973)).

53. 9 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 43.08 (Matthew Bender rev. ed. 2012).

54. *See id.* Like many other types of damages, there is no set manner in which to measure loss of earning capacity. *Id.* The court can consider several factors, including "the plaintiff's age, life expectancy, work-life expectancy, health habits, occupation, talents, skill, experience, training, and industry." *Id.* The plaintiff's recovery need not be restricted to the amount of earnings made prior to the injury. *Id.* Proof of prior earnings is one factor to be considered but is not controlling. *See id.*; *see also* Sallis v. Lamansky, 420 N.W.2d 795, 798 (Iowa 1988) (noting that the loss of the ability to earn money is the compensable damage, not the actual loss of earnings).

55. Cramer, *supra* note 43, at 966.

56. *Id.*

57. *See* 9 FRUMER & FRIEDMAN, *supra* note 53, § 43.06.

58. Braun v. Edelstein, 554 A.2d 1102, 1104 (Conn. App. Ct. 1989) (quoting Delott v. Roraback, 426 A.2d 791, 793 (Conn. App. Ct. 1980)) (internal quotation marks omitted).

59. *See* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484 (Ohio 1992). "In addition to compensation for the physical pain, the jury is permitted to award compensation for the mental suffering endured." *Id.*

60. Cramer, *supra* note 43, at 966. Hedonic damages became more popular in the 1980s. *See* Scott F. Gibson & Jerome M. Staller, *Is the Hedonic Damages Party Almost Over?*, FOR THE DEFENSE, Aug. 1997, at 35, 35, *available at* http://www.cfes.com/publications/Hedonic_Damages.htm. The increase in hedonic damage awards was largely attributable to the ability the category had for greatly increasing damage awards. *Id.* Expert witness testimony on the topic allows for large awards based on the percentage of the plaintiff's

first became an available remedy in personal injury actions in the 1890s.[61] Some courts consider these hedonic damages the equivalent of pain and suffering damages for two reasons: first, both hedonic damages and pain and suffering damages arise under similar circumstances, and second, both are intangible in nature.[62]

Once the court establishes that a type of damages is available to a plaintiff, the finder of fact must determine the amount of the award.[63] Generally speaking, there is no set formula that can be used to determine punitive damages in any given case.[64] The determination of the amount of pain and suffering damages is no easier to determine, and juries have used several different methods to come up with award figures, including such random methods as splitting the difference between the plaintiff's and the defendant's suggested figures, doubling the defendant's suggested amount, and multiplying the amount of medical expenses by three.[65] Because the assessment of pain and suffering is a matter solely for the trier of fact, there is "no substitute for simple human evaluation."[66]

Moreover, the calculation of hedonic damages poses just as complicated of a problem as the computation of pain and suffering or punitive

"loss of joy" taken from the overall value of the person's life, which is usually somewhere between $1 million and $8 million. *Id.*

61. Cramer, *supra* note 43, at 965. Cramer based this contention on his inability to find any cases prior to the 1890s in which loss of enjoyment of life was considered. *Id.* at 965 n.3.

62. *Id.* at 973.

63. *See* Jay M. Zitter, Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to Head or Brain*, 50 A.L.R. 5TH 1, 1 (1997) ("The personal injury case is certainly not over when liability is established or admitted, but the plaintiff must then prove the proper amount of damages to be awarded."); *Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 297.

64. *See* Warhurst v. White, 838 S.W.2d 350, 352 (Ark. 1992). "Such damages constitute a penalty and must be sufficient not only to deter similar conduct on the part of the same tortfeasor, but they must be sufficient to deter any others who might engage in similar conduct." *Id.* (citing Matthews v. Rodgers, 651 S.W.2d 453, 458 (Ark. 1983)). The amount of actual damages and the defendant's financial wealth are two factors to be considered in determining the proper amount of punitive damages. *See id.*

65. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 784 (1995) (quoting Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 254–55 (1993)).

66. Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 482 (Ohio 1992) (quoting Flory v. N.Y. Cent. R.R., 163 N.E.2d 902, 905 (Ohio 1959)) (internal quotation marks omitted).

damages.[67] Economists generally suggest that hedonic damages are assessed based on the amount people are willing to pay to reduce the risk of death.[68] Other theorists argue that expert witnesses should present "hedonic damages testimony," which attempts to place a value on loss of enjoyment of life.[69] The inconsistency in methods used to calculate noneconomic damages fosters a fear in courts and legislatures regarding excessive damage awards.[70]

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67. *See* Gibson & Staller, *supra* note 60, at 35–38.

68. *See* Ann Fisher et al., *The Value of Reducing Risks of Death: A Note on New Evidence*, 8 J. POL'Y ANALYSIS & MGMT. 88, 88 (1989). In order to illustrate this simple "market theory," one must look at the price people are willing to spend on safety. *See* MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS app. 1, at 225–26 (1990); Gibson & Staller, *supra* note 60, at 36. Smith and Brookshire ask one to assume that someone is willing to spend $700 on a safety device that will decrease the person's likelihood of death from 7 in 10,000 to 5 in 10,000. *See* BROOKSHIRE & SMITH, *supra*, at 226. The chance of dying is reduced by 2/10,000, making it "one chance in 5,000 at a cost of $700." Gibson & Staller, *supra* note 60, at 36 (quoting BROOKSHIRE & SMITH, *supra*, at 226) (internal quotation marks omitted). Therefore, this person values his life at $3.5 million. *Id.* (quoting BROOKSHIRE & SMITH, *supra*, at 226).

69. *See* Thomas R. Ireland, *The Last of Hedonic Damages: Nevada, New Mexico, and Running a Bluff*, 16 J. LEGAL ECON. 91, 91 (2009). One survey of studies "puts the value of life's enjoyment at between $1.5 and $3.5 million." Gibson & Staller, *supra* note 60, at 36 (citing Ted R. Miller, *The Plausible Range for the Value of Life—Red Herrings Among the Mackerel*, 3 J. FORENSIC ECON. 17, 32–33 (1990)). The studies that Miller analyzed examine "the relationship between expenditures and risk—what economists call willingness-to-pay." *Id.* (citing Miller, *supra*, at 17). The admittance of expert witness testimony regarding the hedonic value of life is governed by the rules of evidence applicable to the court in which the case is heard. *See* FED. R. EVID. 702; CAL. EVID. CODE § 801 (West 2013). Federal Rule of Evidence 702 allows for the use of expert witness testimony if

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the scientific evidence used by expert witnesses need not be that of "general acceptance." 509 U.S. 579, 588–89 (1993). However, the trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. Gibson and Staller, in their article, *Is the Hedonic Damages Party Almost Over?*, argue that a study examining expert testimony about the value of "enjoyment of life" shows that "hedonic testimony will not meet the guidelines" established in *Daubert*. Gibson & Staller, *supra* note 60, at 35.

70. *See* Gibson & Staller, *supra* note 60, at 36 ("While the hedonic-damages experts are unanimously vague as to how they arrive at the value of life, the values they put on the board in court are anything but vague. Various hedonic-damages specialists have placed the value of life at between $1 million and more than $8 million."); *see also* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary*

C. The Effects of Tort Reform on Damages for Personal Injuries

Courts and legislatures have been concerned that damage awards—specifically those for nonpecuniary losses—are difficult to measure and can be excessive.[71] Two very significant tort reform movements reflected this concern: the workers' compensation movement and the no-fault automobile accident system.[72] The workers' compensation movement abolished employer tort liability and created a system in which workers' compensation handled employees' work-related injuries.[73] Under the no-fault system, the right to recovery exists no matter who is at fault, abolishing pain and suffering expenses while guaranteeing out-of-pocket medical expenses.[74] Courts continue to discuss and even extend the reform concepts adopted in those movements to other tort areas.[75] One such area involves restrictions on both punitive damages and pain and suffering damages, fueled by the continued increase in tort damage awards.[76] The tort reform movement included pain and suffering damages

Harms and Punitive Damages, 80 IOWA L. REV. 1109, 1115 (1995) (arguing that inconsistent and excessive damage awards are "inherent in a system that allocates responsibility for the valuation and assessment of awards to inexperienced jurors who are asked to make individualized damage assessments without reference to any external standards defining the appropriate award level").

71. *See* Hubbard, *supra* note 41, at 493 ("[D]amages for noneconomic injuries are said to be 'erratic' and 'excessive' because juries are too generous in awarding noneconomic damages based on sympathy for a plaintiff elicited by skillful plaintiffs' attorneys."). "Reservations about compensating for intangible loss are not new. There has been long-standing criticism about the seemingly insurmountable problem of translating suffering into dollar-and-cents terms. Moreover, pain and suffering is subjective in the added sense that it varies tremendously from one individual to another." 9 FRUMER & FRIEDMAN, *supra* note 53, app. N.

72. *See* Hubbard, *supra* note 41, at 441–42. The no-fault system is characterized by the following six elements: (1) right to recovery regardless of fault; (2) inapplicability of the collateral source rule; (3) abolishment of pain and suffering; (4) guaranteed recovery of out-of-pocket medical costs and recovery of loss of earnings; (5) barring of suits against the manufacturer; and (6) tort system returns when damages reach a certain level or the injury is of a certain type. *See* 9 FRUMER & FRIEDMAN, *supra* note 53, app. G.

73. *See* Hubbard, *supra* note 41, at 441.

74. 9 FRUMER & FRIEDMAN, *supra* note 53, app. G.

75. *See id.* app. N. "The question now arises whether such wholesale reform ought to be adopted either (1) system-wide, (2) in selected areas of high-risk activity, or (3) for a category of cases involving seriously disabled accident victims." *Id.*

76. *See Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1515–16 (1997). The RAND Institute for Civil Justice published a series of reports on the compensation and administrative costs of the tort system. *See, e.g.*, DEBORAH HENSLER &

because courts considered compensatory awards to be speculative, of little compensatory consequence, and of great variation from case to case.[77] Courts have responded to the excessiveness of pain and suffering awards in a variety of ways, including capping the recoverable amount and making greater use of remittitur or additur.[78] In using remittitur, the court gives the plaintiff the option of accepting a lower amount of damages than the jury awarded; if the plaintiff declines, the court will order a new trial.[79] In addition, the American Bar Association (ABA) has suggested

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ERIK MOLLER, INSTITUTE FOR CIVIL JUSTICE, TRENDS IN PUNITIVE DAMAGES: PRELIMINARY DATA FROM COOK COUNTY, ILLINOIS AND SAN FRANCISCO, CALIFORNIA (1995); MARK PETERSON ET AL., INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987). In a report published in 1986, the institute analyzed data from Cook County, Illinois and San Francisco, California. *See* RAND INST. FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS, APRIL 1980–MARCH 1986, at 3–4 (1986). The data showed a 400% increase in the average monetary damage awards between 1960 and 1985. *Id.* at 3. This increase reflects the growth of significantly large damage awards. *Id.* at 3. During the 1960s, only 0.3% of awards were for $1 million or more. *Id.* at 4. By the 1980s, million dollar awards constituted almost two-thirds of the damage awards in San Francisco and Cook County. *Id.*

77. *See* 9 FRUMER & FRIEDMAN, *supra* note 53, app. N.

78. In California, courts cap the recovery of noneconomic losses in medical malpractice actions at $250,000. *See* CAL. CIV. CODE § 3333.2 (a)-(b) (West 1997) ("In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars . . . ."). "[T]rial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification." 9 FRUMER & FRIEDMAN, *supra* note 53, app. N; *see also* Korman v. Pub. Serv. Truck Renting Inc., 497 N.Y.S.2d 480, 481 (App. Div. 1986) (upholding the trial judge's decision to adjust the jury's verdict for conscious pain and suffering from $500,000 to $50,000).

79. *See* BLACK'S LAW DICTIONARY 1409 (9th ed. 2009). In *Dimick v. Schiedt*, the Supreme Court upheld the use of remittitur. 293 U.S. 474, 484–85 (1935). The Court noted that in order to preserve the original meaning of the Seventh Amendment, it must follow the common law rules established at the time of the adoption of the amendment. *See id.* at 476. The common law rules in 1791 prohibited courts from increasing damage awards but did not forbid the decrease of awards. *Id.* at 482. Therefore, the legislators that passed the Seventh Amendment intended for the allowance of remittitur. *See id.* at 488. Despite the Supreme Court's acceptance of remittitur, a few courts continue to question its constitutionality. *See, e.g.*, Bonura v. Sea Land Serv., Inc., 505 F.2d 665, 669 (5th Cir. 1974) ("A district judge's discretion as to remittitur is circumscribed by the Seventh Amendment: He must not substitute his judgment of damages for that of the jury."). The Supreme Court of Missouri went as far as abolishing the use of remittitur altogether at one point, claiming that it is an "invasion of the jury's function by the trial judge." Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985) (en banc). In contrast to remittitur, some courts also use additur to increase the damage award amount in order to avoid a new trial because of an insufficient damage award. *See*

the creation of tort award commissions to review tort awards from the preceding year.[80]

Because the purpose of tort law is to compensate the victim,[81] the tort reform movement also continues to focus on punitive damages.[82] Tort law accepts the awarding of punitive damages for intentional wrongdoing.[83] In recent years, many courts have incorrectly classified situations as "intentional," thereby allowing for punitive damage awards.[84] In response

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BLACK'S LAW DICTIONARY 44 (9th ed. 2009). Additur is prohibited in federal courts because of its inconsistency with the Seventh Amendment of the United States Constitution. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). For example, in *Davis v. Naviera Aznar*, the United States District Court for the District of Maryland deemed a third party defendant's motion to modify the judgment and add an award for attorneys' fees as "tantamount to an additur" and therefore denied the relief sought. *See* 37 F.R.D. 223, 224–26 (D. Md. 1965). However, some state courts do allow for additur. *See* LA. CODE CIV. PROC. ANN. art. 1814 (2003) ("If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur."); MISS. CODE ANN. § 11-1-55 (West 2008) ("The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial . . . upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.").

80. 9 FRUMER & FRIEDMAN, *supra* note 53, app. N. The ABA also suggested that courts provide juries with more guidance on the "appropriate range of damages to be awarded for pain and suffering in a particular case." *Id.*

81. "It is elementary that the purpose of awarding tort damages is to compensate the wronged party for the actual loss he or she has sustained." McDougald v. Garber, 536 N.E.2d 372, 377 (N.Y. 1989) (Titone, J., dissenting).

82. 9 FRUMER & FRIEDMAN, *supra* note 53, app. N. "Since the main purpose of tort law is to provide compensation to injury victims rather than vindicate a public sense of indignation, punitive damages have always been somewhat of an anomaly in the tort system." *Id.*

83. *See id.* Two theories support the awarding of punitive damages for intentional misconduct: (1) punitive damages express societal outrage and "assure the appropriate deterrent effect in cases where a defendant's conduct is outside the bounds of civilized behavior," and (2) punitive damages ensure "a measure of punishment for essentially private unlawful conduct that is commensurate with the antisocial nature of the act." *Id.*

84. *See id.*

> [T]he judicial willingness to allow punitive damage awards in cases involving egregious conduct falling short of intentional wrongdoing has increasingly fostered a sense of concern that the limited function of such awards—to punish

to this misclassification, many states have enacted legislation narrowly defining punitive damages or specifically identifying the situations in which they are allowed.[85] The ABA recommends that courts narrowly employ punitive damage awards and limit them to situations in which the defendant's action is indicative of a great indifference to the safety of others.[86]

The fear of excessive noneconomic damages is the likely culprit behind the movement in several states toward not recognizing an unconscious plaintiff's right to hedonic damages. Many courts even consider an award of hedonic damages to those in a persistent vegetative state as beyond compensatory and in fact punitive in nature.[87] However, many of the basic arguments for tort damages made by both courts and scholars refute this view and call for awarding loss of enjoyment of life damages, regardless of the state of consciousness of the plaintiff.[88] Loss of enjoyment of life is an objective fact that should not be contingent upon a plaintiff's ability to comprehend the degree of impairment.[89] In addition, the argument that hedonic damages are too speculative and difficult to measure is also applicable to several other widely accepted damages, including pain and suffering and emotional distress.[90] Perhaps the most obvious and strongest argument for awarding hedonic damages to plaintiffs in a persistent

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> misconduct that is either clearly malicious or at least borders on intentional wrongdoing—might be exceeded in some cases.

Id.

85. *See, e.g.*, CAL. CIV. CODE § 3294 (West 2013) ("In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."); N.J. STAT. ANN. § 2A:15–5.14 (West 2000) (limiting the amount of punitive damages for which the defendant is liable to "five times the liability of that defendant for compensatory damages or $350,000, whichever is greater"); Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (App. Div. 2001) (noting that "[p]unitive damages are only allowed to vindicate public rights and not private wrongs").

86. 9 FRUMER & FRIEDMAN, *supra* note 53, app. N.

87. *See, e.g.*, McDougald v. Garber, 536 N.E.2d 372, 374–75 (N.Y. 1989). The *McDougald* court determined that because the awarding of nonpecuniary damages was simply indulging the "legal fiction" of being able to compensate a plaintiff monetarily for a noneconomic loss, it was not willing to indulge that fiction when the plaintiff was unconscious and unable to enjoy the award of money damages. *Id.*

88. *See, e.g.*, Holston v. Sisters of the Third Order of St. Francis, 618 N.E.2d 334, 345–46 (Ill. App. Ct. 1993); Eyoma v. Falco, 589 A.2d 653, 658–62 (N.J. Super. Ct. App. Div. 1991); Flannery v. United States (Flannery I), 297 S.E.2d 433, 438–39 (W. Va. 1982).

89. *See* Rufino v. United States, 829 F.2d 354, 361 (2d Cir. 1987). The loss of enjoyment of life is "to be assessed objectively, that is, by the difference between the injured plaintiff's current capacity and those which existed before the injury." *Id.*

90. *See* Polin, *supra* note 21, at 339, 349–52, 372–73.

vegetative state is the concept that a plaintiff should not receive a smaller award for greater injury.[91]

III. CURRENT GAPS IN THE LAW

As the law currently stands, when a plaintiff in a persistent vegetative state files a lawsuit for personal injury damages, the court will likely be faced with an issue of first impression.[92] Several jurisdictions will be confronted with two new issues: first, whether to separate hedonic damages from pain and suffering damages, and second, what damages are recoverable by a plaintiff in a persistent vegetative state.[93]

A. Why Is This an Issue?

Nonpecuniary damages play a special role in personal injury litigation.[94] By compensating the victim for the physical and emotional effects of an injury, nonpecuniary damages rest on the belief that money damages attempt to compensate for the injury a person sustained from another's wrong.[95] Although money may not cure injuries or stop pain, awarding damages is the best way for society to right a wrong.[96] In addition, "life may be priceless and irreplaceable, but its value can be estimated with a reasonable degree of economic certainty so that fair compensation for its loss can be determined."[97] Because nonpecuniary damages do not compensate for economic losses, trial courts struggle with determining

91. *See* Fla. Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783, 792–93 (Fla. 1985) (Overton, J., dissenting). A plaintiff who is in a persistent vegetative state should not be precluded from recovering an item of damages that a less severely injured person can recover. *See id.*

92. *See infra* Part III.A.

93. *See infra* Part III.B–C.

94. *See Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 69 (Supp. 2012). Nonpecuniary damages are "those damages awarded to compensate an injured person for the physical and emotional consequences of the injury, such as pain and suffering and the loss of ability to engage in certain activities." McDougald v. Garber, 536 N.E.2d 372, 373 (N.Y. 1989).

95. *See McDougald*, 536 N.E.2d at 374–75. "There is no exact standard by which damages can be measured in personal injury cases, because of the lack of equivalence between money and pain and suffering, fright, or humiliation, but money nevertheless is awarded as 'compensation.'" *Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 297.

96. *McDougald*, 536 N.E.2d at 375.

97. Nicholson, *supra* note 20, at 255–56 (quoting BROOKSHIRE & SMITH, *supra* note 68, at 161) (internal quotation marks omitted).

how much a plaintiff's pain and suffering or loss of joy is worth monetarily.[98] Despite this difficulty and the important role damages play in remedies for torts, no general consensus exists on whether unconscious plaintiffs can recover loss of enjoyment of life damages.[99] The type of damages recognized in a particular jurisdiction depends upon whether the court views loss of enjoyment of life damages as separate from other compensatory damages, such as those for pain and suffering or permanent disability.[100] The courts that have considered this dilemma usually discuss the different categories of compensatory damages in general, as well as the recovery of compensatory damages by unconscious plaintiffs specifically.[101] The courts that have considered loss of enjoyment of life damages and plaintiffs in a persistent vegetative state fall into three general categories: (1) those that do not allow for any recovery of loss of enjoyment of life damages in any situation, whether or not the plaintiff is in a persistent vegetative state;[102] (2) those that consider loss of enjoyment

98. *See* Flannery v. United States (Flannery I), 297 S.E.2d 433, 435 (W. Va. 1982). Compensatory damages "consist[] of intangible damages since they are 'unliquidated' in the sense that there is no precise monetary calculation that can be used to determine the amount of the loss." *Id.*

99. *See* Eyoma v. Falco, 589 A.2d 653, 658–59 (N.J. Super. Ct. App. Div. 1991) ("[T]he issue of damages for loss of enjoyment of life has generated divergence of opinion among legal scholars."); *infra* Part III.C.1.

100. Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 483 (Ohio 1992).

101. *See, e.g.*, Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990) ("[L]oss of enjoyment of the pleasurable things in life is inextricably included within the more traditional areas of damages for disability and pain and suffering."); *Eyoma*, 589 A.2d at 658 ("[L]oss of enjoyment of life is a separate and distinct item of damages . . . ."); *McDougald*, 536 N.E.2d at 377 ("[No] salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life.").

102. *See* Pamela J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D. L. REV. 561, 565 (1987). In *City of Columbus v. Strassner*, the Supreme Court of Indiana denied the recovery of loss of enjoyment of life damages to a plaintiff who was injured while walking on the city's sidewalk because measuring the damages would have been "an insuperable difficulty." 25 N.E. 65, 67 (Ind. 1890). Similarly, in *Locke v. International & Great Northern Railroad*, the Court of Civil Appeals of Texas denied the recovery of hedonic damages because of the uncertainty surrounding how to calculate them. 60 S.W. 314, 316 (Tex. App. 1901). The Kansas Supreme Court also denied the recovery of loss of enjoyment of life damages in *Hogan v. Santa Fe Trail Transportation Co.*, noting that a plaintiff's loss from the inability to play the violin was too speculative and therefore unrecoverable. 85 P.2d 28, 33–34 (Kan. 1938). The *Hogan* court recognized that several other cases have allowed for the recovery of hedonic damages; however, the *Hogan* court declined to follow these cases. *Id.* at 33; *see also* Hermes, *supra*, at 566 n.21 (discussing the *Hogan* decision). It is important to note that the cases that rejected the recovery of hedonic damages are older and are all based on the belief that calculating hedonic damages "would be too vague or speculative." Hermes, *supra*, at 565–66. Most jurisdictions have rejected this contention, and it is now accepted that measurements of hedonic damages are "no more vague or

of life a component of pain and suffering or disability damages;[103] and (3) those that consider loss of enjoyment of life as its own separate type of damages.[104] This Comment focuses on the last two categories.[105]

B. Conflicting Approaches to the Awarding of Compensatory Damages

Several states have yet to consider whether hedonic damages are a separate type of damages from pain and suffering damages.[106] This gap in the law exists due to a severe lack of clarity in the definitions of the different types of damages that courts give in jury instructions.[107] The following analysis focuses on some of the states that have considered this issue.

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speculative than th[ose] for other items of general damages such as pain and suffering or mental anguish." *Id.* at 568.

103. *See* Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 575 (Ct. App. 1998) (holding that hedonic damages are "one component of a general damage award for pain and suffering"). In *Willinger v. Mercy Catholic Medical Center*, the Supreme Court of Pennsylvania compared the recovery of a separate element of damages for "loss of life's pleasures" with the recovery of damages for "loss of life itself," which was never allowed in Pennsylvania. *See* 393 A.2d 1188, 1191 (Pa. 1978). The *Willinger* court allowed for the recovery of hedonic damages only as a portion of pain and suffering. *Id.* The courts that consider hedonic damages to be only one portion of a larger award for pain and suffering usually base this contention on the rationale that they are preventing "an impermissible duplication" of damages. *See* Hermes, *supra* note 102, at 569; *see also* Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) ("It would be plainly duplicative to allow a separate award for loss of enjoyment of life.").

104. *See* Hermes, *supra* note 102, at 576; *infra* Part III.B.2. Courts that support the separation of loss of enjoyment of life damages from pain and suffering usually allow for a separate jury instruction on hedonic damages. *See* Hermes, *supra* note 102, at 576. In *District of Columbia v. Woodbury*, the Supreme Court of the United States noted that "[a]ll evidence, tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, [is] pertinent to the issue." 136 U.S. 450, 459 (1890).

105. At this point, it is generally accepted that loss of enjoyment of life damages should be recoverable or considered to some extent in personal injury suits. *See* Hermes, *supra* note 102, at 568 ("[I]n most modern cases, regardless of whether loss of enjoyment of life is considered a separate element of damages or a component of some other element of damages, evidence of such alleged losses may be introduced and argued to the jury . . . .").

106. *See Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 295–96.

107. Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 745 (2000) ("Jury instructions on damage awards are notoriously vague and ambiguous."); Cramer, *supra* note 43, at 972.

1. Loss of Enjoyment of Life as an Element of Pain and Suffering

Some courts consider loss of enjoyment of life damages to be but one aspect of pain and suffering damages.[108] In *Loth v. Truck-A-Way Corp.*, the California Court of Appeal deemed loss of enjoyment of life damages to be one component of the general damage award for pain and suffering.[109] The court made this decision based on the belief that pain and suffering includes "physical impairment which limits the plaintiff's capacity to share in the amenities of life."[110] The *Loth* court stated that California courts achieve a result consistent with the "'enjoyment of life' rubric" without actually following it.[111] This point is based on the fact that California does not preclude plaintiffs' attorneys from arguing loss of

108. *See, e.g.*, *Loth*, 70 Cal. Rptr. 2d at 571; Leiker v. Gafford, 778 P.2d 823 (Kan. 1989); McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989). In *Leiker*, the Supreme Court of Kansas held that "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." 778 P.2d at 835. The court based its decision on the contention that the recovery of loss of enjoyment of life damages separate from damages for pain and suffering would cause a "duplication or overlapping of damages." *Id.* The *Leiker* court also took into account the "slight majority" of cases that have held in this manner and the wording of the Kansas statute on itemized verdicts in personal injury actions. *Id.* Kansas Statutes Annotated section 60-249a states that if the trier of fact finds for the plaintiff in an action for damages for personal injury, the trier of fact must itemize

> the amounts awarded for the following items of damage, subject to the provisions of subsection (a): (1) Noneconomic injuries and losses, as follows: (A) Pain and suffering, (B) disability, (C) disfigurement, and any accompanying mental anguish; (2) reasonable expenses of necessary medical care, hospitalization and treatment received; and (3) economic injuries and losses other than those itemized under subsection (b)(2).

KAN. STAT. ANN. § 60-249a (2008). The *Leiker* court made sure to clarify that loss of enjoyment of life damages can still be taken into account in the calculation of disability and pain and suffering damages "and may certainly be argued by counsel to the jury." 778 P.2d at 835.

109. *See Loth*, 70 Cal. Rptr. 2d at 575. In *Loth*, the plaintiff, who had been injured in a car accident with a 24-wheel truck, asked for both pain and suffering and loss of enjoyment of life damages for the constant pain she experienced in her neck and back. *Id.* at 573–74. The plaintiff's injuries were so severe that the act of driving a car caused her jaw to hurt, requiring her to drive with her mouth agape to prevent clenching. *Id.* at 574.

110. *Id.* at 575 (quoting Huff v. Tracy, 129 Cal. Rptr. 551, 553 (Ct. App. 1976)) (internal quotation marks omitted). In *Huff v. Tracy*, the defendant ran a red light and collided with the plaintiff's automobile. 129 Cal. Rptr. 2d at 552. The plaintiff suffered from a severe tongue injury, which permanently impaired his sense of taste. *Id.* at 553. He requested that the court give the jury instructions on loss of enjoyment of life damages. *Id.* The Court of Appeal refused to allow the separate instruction for hedonic damages, noting that attorneys in California are not precluded from arguing a loss of joy but must include it in the award for pain and suffering damages. *Id.* The *Huff* court was concerned with "the possibility of double compensation" and believed the instruction for pain and suffering damages was sufficient. *Id.*

111. *Loth*, 70 Cal. Rptr. 2d at 575.

enjoyment of life as an element of damages in personal injury cases.[112] In addition, "[d]amage for mental suffering supplies an analogue."[113] The *Loth* court rendered expert witness testimony on the value of hedonic damages inadmissible because of the lack of a definite method for calculating pain and suffering damages.[114]

In an effort to limit the amount of damages available to a personal injury plaintiff, New York decided to consider loss of enjoyment of life damages as only one element of the general award for pain and suffering.[115] In *McDougald v. Garber*, the Court of Appeals of New York discussed the pain and suffering damages recoverable by a comatose plaintiff and considered the term *suffering* to be all encompassing, allowing for the recovery of "the frustration and anguish caused by the inability to participate in activities that once brought pleasure," in addition to the usual sensation of pain felt from an injury.[116] Because the *McDougald* court was concerned with increasing nonpecuniary damage awards without "yield[ing] a more accurate evaluation of the compensation due to the plaintiff," the court refused to separate the two types of damages.[117] The Court of Appeals of New York decided that larger compensatory damage awards are not necessarily an indication that the award is more

112. *Id.*; *see supra* note 110.

113. *Loth*, 70 Cal. Rptr. 2d at 575.

114. *Id.* at 578. California courts allow for the use of expert witness testimony only if the subject matter is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." CAL. EVID. CODE § 801 (West 2013). The *Loth* court did not believe that an expert witness's testimony would be helpful for a jury because the value of life is not something measurable, unlike the value of "a stock, car, [or] home." 70 Cal. Rptr. 2d at 578.

115. *See* McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989).

116. *Id.* at 376. The *McDougald* court acknowledged the fact that there are some differences between the notions of pain and suffering damages and loss of enjoyment of life damages. *Id.* By limiting the term *suffering* to "the emotional response to the sensation of pain, then the emotional response caused by the limitation of life's activities may be considered qualitatively different." *Id.* The court rejected such a "limited" reading of *suffering*, mentioning the "[t]raditional[]" path taken by courts in giving the term a broad meaning. *Id.* California also considered loss of enjoyment of life to be part of pain and suffering damages. *See Loth*, 70 Cal. Rptr. 2d at 575 ("[P]ain and suffering . . . may include compensation for the plaintiff's loss of enjoyment of life. Loss of enjoyment of life, however, is only one component of a general damage award for pain and suffering. It is not calculated as a separate award.").

117. *McDougald*, 536 N.E.2d at 376. The *McDougald* court pointed out that the fact that the plaintiff asked for two separate awards and the defendant opposed the separation was "sufficient evidence that larger awards are at stake here." *Id.*

accurate.[118] In addition to its concern with increased awards, the *McDougald* court made note of the possibility that separate awards would lead to repetition.[119] The rather "murky" manner in which nonpecuniary damages are calculated—by "[t]ranslating human suffering into dollars and cents"—led the *McDougald* court to hold that no "salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life."[120]

2. Loss of Enjoyment of Life Separate from Pain and Suffering

Few courts currently allow for the recovery of separate awards for hedonic damages and pain and suffering damages.[121] In *Fantozzi v. Sandusky Cement Products Co.*,[122] the question before the Ohio Supreme Court was whether jury instructions that directed separate elements of damages for the "inability to perform usual activities," the disability the plaintiff would experience in the future, and the pain and permanency of the injury were proper.[123] In making its decision, the Ohio Supreme Court first focused on the concept of pain and suffering damages.[124] The court determined physical pain to be "the neurological response to physical damage to the body"[125] and suffering to be the "mental or emotional state

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118. *See id.* at 376–77.

119. *Id.* at 377.

120. *Id.* at 376–77. The *McDougald* court went on to state that it was confident "that the trial advocate's art is a sufficient guarantee that none of the plaintiff's losses will be ignored by the jury." *Id.* at 377. The court held that the instructions given by the lower court regarding the separation of loss of enjoyment of life damages and pain and suffering damages were incorrect and ordered a new trial on the issue of nonpecuniary damages. *Id.*

121. *See Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 297–98.

122. 597 N.E.2d 474 (Ohio 1992). In *Fantozzi*, the plaintiff was struck by a "warped" chute being used by the defendant company to offload cement to a construction site. *Id.* at 476. The plaintiff filed a lawsuit "alleging reckless, gross, willful, wanton and negligent conduct by Sandusky Cement." *Id.* at 476–77. The lower court awarded damages for past and future medical expenses, lost wages, pain and suffering, and loss of life's enjoyment. *Id.* at 477.

123. *Id.* at 486–87. Loss of enjoyment of life damages were already a type of damage recognized in Ohio, so the *Fantozzi* court did not need to create a "new and additional element" of damage to encompass the "claimed loss and resulting damage." *Id.* at 484.

124. *See id.* Pain and suffering is generally viewed as a "unitary concept." *Id.* Courts have generally refrained from distinguishing between the concepts of pain and suffering. *Id.* (in bank) (quoting Capelouto v. Kaiser Found. Hosps., 500 P.2d 880, 883 (Cal. 1972)). Pain and suffering is now known to include "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." *Id.* at 484–85 (quoting *Capelouto*, 500 P.2d at 883).

125. *Id.* at 485. *Physical pain* has been defined as "a more or less localized sensation of discomfort, distress or agony resulting from the stimulation of specialized nerve endings." Jack H. Werchick, *Unmeasurable Damages and a Yardstick*, 17 HASTINGS L.J. 263, 264

brought on by the plaintiff's injury."[126] The *Fantozzi* court determined that pain and suffering damages were distinguishable from damages for the impairment "of one's physical capacity to enjoy the amenities of life."[127] Because hedonic damages focus on the loss of the ability to experience "positive sensations of pleasure" and not the current or future suffering the plaintiff experiences, hedonic damages represent "a loss of a positive experience rather than the infliction of a negative experience."[128] Based on this distinction, the court concluded that damages that cover injuries affecting the ability to perform usual functions—including basic mechanical and hedonic functions—are separate from other types of damages.[129] The court believed its conclusion was reasonable based on a number of factors.[130] First, because damage awards should restore plaintiffs to the position they occupied prior to their injuries, allowing the recovery of hedonic damages separate from pain and suffering damage awards will help the jury take into account each separate type of injury, adding more "clarity and objectivity to this part of the jury determination."[131] Second, the separation of hedonic damages and pain and suffering damages will

(1965) (quoting DORLAND'S MEDICAL DICTIONARY (24th ed. 1965)) (internal quotation marks omitted).

126. *Fantozzi*, 597 N.E.2d at 485. This definition of *suffering* is quite general. *Id.* Suffering can include a number of concepts and take many forms. *Id.* "Any definition of suffering, although not definitive, may include a broad range of emotional responses which may occur in conjunction with the trauma and resultant physical injury and pain, or irrespective of any physical injury and pain." *Id.* The California Supreme Court held that mental suffering "constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." *Id.* (quoting Crisci v. Sec. Ins. Co. of New Haven, Conn., 426 P.2d 173, 178 (Cal. 1967)) (internal quotation marks omitted). Pain is commonly characterized as "physiological," whereas suffering is "psychological." Cramer, *supra* note 43, at 972. "Whereas pain refers to the physical sensations resulting from the corporeal injury, suffering is concerned primarily with the person's emotional reaction to these sensations." *Id.* Nevertheless, *pain and suffering* does not refer to the restrictions placed on a person's life because of the person's injury. *Id.*

127. *Fantozzi*, 597 N.E.2d at 485.

128. *Id.* at 486. Hedonic damages refer to experiences that "are all positive sensations of pleasure, the loss of which could provide a basis for an award of damages to the plaintiff in varying degrees depending upon his involvement, as shown by the evidence." *Id.* The mental suffering covered in pain and suffering damages, on the other hand, refers to "nervousness, grief, shock, anxiety, and so forth." *Id.*

129. *See id.* This position was furthered by the fact that Ohio jury instructions already recognized hedonic damages as a separate element of damages. *See id.*

130. *Id.*

131. *Id.*

facilitate appellate review.[132] Separate findings allow for the parties to determine whether an appeal is proper and also allow for appellate courts to better review the lower court's findings.[133] In addition, the *Fantozzi* court recognized the concern over duplicity in awards and thus called for more specific jury instructions.[134] By directing juries to award damages for loss of the ability to perform usual activities, thereby encompassing the permanency of the injury suffered, courts preclude juries from awarding additional damages for that same loss.[135]

Loss of enjoyment of life damages need not be its own independent category of damages to be considered separate from pain and suffering damages.[136] By categorizing hedonic damages as a type of permanent injury damages, West Virginia courts allow for hedonic damage recovery

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132. *Id.*

133. *Id.* Appellate review of lower court decisions improves the trial process by correcting errors and clarifying the law through "well-thought-out decisions." Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1143 (2012). The threat of having an appellate court review a decision also gives trial courts an incentive to be "more diligent" in their decisionmaking. *Id.*

134. *Fantozzi*, 597 N.E.2d at 486. Several jurisdictions have declined to separate hedonic damages from pain and suffering damages for fear of duplication in awards. *See* Huff v. Tracy, 129 Cal. Rptr. 551, 553 (Ct. App. 1976) (noting that a separate jury instruction for loss of enjoyment of life damages "only repeats what is effectively communicated by the pain-and-suffering instruction"); Swiler v. Baker's Super Market, Inc., 277 N.W.2d 697, 700 (Neb. 1979) (holding that a separate jury instruction for loss of enjoyment of life from pain and suffering would be redundant); Flannery v. United States (Flannery I), 297 S.E.2d 433, 438 (W. Va. 1982) (holding that separate rewards for pain and suffering and hedonic damages would be an "impermissible duplication of damages"). In *Flannery I*, the Supreme Court of Appeals of West Virginia noted that "there can be only one recovery of damages for one wrong or injury. . . . [T]he law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." 297 S.E.2d at 438 (quoting Harless v. First Nat'l Bank, 289 S.E.2d 692, 705 (W. Va. 1982)) (internal quotation marks omitted).

135. *Fantozzi*, 597 N.E.2d at 486. This may come into play when determining physical and mental pain and suffering. *Id.* The court recommended the following jury instruction:

> If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, etc., or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages.
>
> Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages.

Id. at 486–87.

136. *See Flannery I*, 297 S.E.2d at 437.

separate from pain and suffering.[137] In *Flannery v. United States (Flannery I)*, the Supreme Court of Appeals of West Virginia considered the relation between lost joy and the permanency of a plaintiff's injury in its determination of whether hedonic damages should be included within the category of pain and suffering.[138] A jury looks at the permanency of the injury to determine how the injury has affected the plaintiff's "ability to perform and enjoy the ordinary functions of life."[139] The *Flannery I* court recognized that a plaintiff can experience a loss of joy without feeling any pain and suffering; thus, it considered loss of joy an element of damages for permanency of injury.[140]

Hedonic damages are occasionally classified as a type of "disability" damages.[141] Courts award disability damages "for the loss resulting from complete or partial disability in health, mind, or person."[142] In *Eyoma v. Falco*, a New Jersey superior court held that loss of pleasure and enjoyment damages is a "natural and direct consequence" of a plaintiff's disability or impairment.[143] In New Jersey, disability and impairment damages "encompass[] compensation for the inability to pursue one's normal activities and compensate[] for the status of being limited or incapacitated."[144] The New Jersey court refused to group loss of enjoyment

137. *See id.* Disability damages "focus[] on the lessening of the plaintiff's abilities from 100 percent rather than on the plaintiff's particular activities and hobbies . . . ." Zitter, *supra* note 63, at 64.

138. *See* 297 S.E.2d at 437.

139. *Id.* The *Flannery I* court decided that a portion of its definition of *permanent injury damages*—"those future effects of an injury which have reduced the capability of an individual to function as a whole man"—encompassed the loss of joy a person experiences from an injury. *Id.* (quoting Jordan v. Bero, 210 S.E.2d 618, 634 (W. Va. 1974)) (internal quotation marks omitted).

140. *Id.* Hedonic damages are not part of pain and suffering "in the traditional sense" because someone can endure an injury without suffering any physical pain. *Id.* However, an injury can obviously "impair the person's capacity to enjoy life." *Id.*

141. *See* Holston v. Sisters of the Third Order of St. Francis, 618 N.E.2d 334, 347 (Ill. App. Ct. 1993) (holding that a disability "logically includes" the loss of joy one experiences from the disability-causing injury); Brown v. Glaxo, Inc., 790 So. 2d 35, 43 (La. Ct. App. 2000) ("Although both are categories of general damages, loss of enjoyment is a separate award from mental and physical pain and suffering."); Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991) (holding that loss of pleasure and enjoyment damages are a result of a plaintiff's disability and therefore should be taken into account when calculating disability and impairment damages).

142. 22 AM. JUR. 2D *Damages* § 228 (2003). "The measure of [disability] damages . . . is compensation for the disabling effect of the injury . . . ." *Id.*

143. *Eyoma*, 589 A.2d at 662.

144. *Id.* at 661–62.

of life damages with those damages recovered for pain and suffering, believing that the "inability to carry on activities and pursuits" should be recognized and properly compensated.[145] The *Eyoma* court noted that New Jersey has long accepted disability and impairment damages, which "must provide just and adequate compensation for the interruption of mental and physical functions."[146] Because it believed that the separation of loss of enjoyment of life damages from pain and suffering was not "too esoteric for a jury to understand," the *Eyoma* court concluded that a jury would not be "overly speculative or improperly punitive" when calculating hedonic damages along with pain and suffering damages.[147] This conclusion allowed the jury to consider loss of enjoyment of life in the calculation of disability and impairment damages.[148]

C. The Inconsistent Treatment of Unconscious Plaintiffs

Few states have considered whether unconscious plaintiffs can recover hedonic damages.[149] The following analysis focuses on the limited number of states that have considered this issue.

1. Persistent Vegetative State

Because the court determined loss of enjoyment of life damages to have "no meaning or utility" to a plaintiff in a persistent vegetative state, the court in *McDougald v. Garber* decided that consciousness was a prerequisite to an award of hedonic damages.[150] In *McDougald*, the plaintiff Emma McDougald underwent a Caesarean section and the accompanying surgeries.[151] During surgery, she experienced oxygen deprivation, which caused "severe brain damage and left her in a permanent comatose condition."[152] The plaintiff's husband, suing derivatively, brought an action seeking, among other things, damages for loss of enjoyment of life.[153] In determining which damages were available to the plaintiff, the court focused on the purpose of personal injury tort damages—

145. *Id.* at 662. The *Eyoma* court's discussion of disability and pain and suffering damages was largely focused on the recovery of hedonic damages by plaintiffs in a persistent vegetative state. *Id.* at 661–62.
146. *Id.* at 662.
147. *Id.*
148. *Id.*
149. *See infra* Part III.C.1.
150. *See* McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989).
151. *Id.* at 373.
152. *Id.*
153. *See id.*

compensation, rather than punishment.[154] Because nonpecuniary damages can be compensatory, the *McDougald* court noted that they rest on "the legal fiction that money damages can compensate for a victim's injury."[155] The *McDougald* court refused to "indulge this fiction" when a plaintiff lacks cognitive awareness of the loss.[156] Because an unconscious plaintiff cannot use the money awarded "upon necessities or pleasures" or give it away, the award does not provide the victim "with any consolation or ease any burden resting on him."[157] Despite acknowledging the paradoxical situation that "the greater degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages," the court determined that "meaningful compensation" rules require that some cognitive awareness be present to recover hedonic damages.[158] Accordingly, the *McDougald* court held that the recovery of loss of enjoyment of life damages requires cognitive awareness.[159]

In contrast to the treatment of hedonic damages by New York courts, New Jersey courts allow for the recovery of loss of enjoyment of life damages by plaintiffs in a persistent vegetative state.[160] For example, in

154. *See id.* at 375. The goal of tort damages is to "restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred." *Id.* at 374. "To be sure, placing the burden of compensation on the negligent party also serves as a deterrent, but purely punitive damages—that is, those which have no compensatory purpose—are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence." *Id.*

155. *Id.* at 374–75 (quoting Howard v. Lecher, 366 N.E.2d 64, 65 (N.Y. 1977)) (internal quotation marks omitted). Courts accept this "legal fiction" because it is the best comfort that the law can provide the victim. *Id.* at 375.

156. *See id.* The *McDougald* court considered the recovery of compensatory damages by plaintiffs in a persistent vegetative state to be punitive in nature because the damages ceased "to serve the compensatory goals of tort recovery." *Id.*

157. *Id.* (quoting Flannery v. United States (Flannery II), 718 F.2d 108, 111 (4th Cir. 1983)) (internal quotation marks omitted).

158. *Id.* (quoting McDougald v. Garber, 504 N.Y.S.2d 383, 386 (App. Div. 1986)). "[T]he temptation is rooted in a desire to punish the defendant in proportion to the harm inflicted. However relevant such retributive symmetry may be in the criminal law, it has no place in the law of civil damages, at least in the absence of culpability beyond mere negligence." *Id.*

159. *Id.* The court went on to state that the fact finder need not "sort out varying degrees of cognition" to determine when a plaintiff's injury can be fully appreciated. *Id.* The court was satisfied with the use of the instruction that "some level of awareness" was required. *Id.* This instruction ignored the varying levels of cognition, but the *McDougald* court favored simplicity over "analytical purity." *Id.* "A more complex instruction might give the appearance of greater precision but, given the limits of our understanding of the human mind, it would in reality lead only to greater speculation." *Id.*

160. *See, e.g.*, Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991).

Eyoma v. Falco, the plaintiff suffered a deprivation of sufficient oxygen during a gallbladder removal surgery.[161] Because of his oxygen deprivation, the plaintiff remained in a persistent vegetative state until he died a year later.[162] The *Eyoma* court acknowledged that consciousness is a prerequisite for an award of pain and suffering damages.[163] However, the court concluded that consciousness is not required for other compensatory damages, including disability and impairment.[164] Because these two damage categories "encompass[] compensation for the inability to pursue one's normal activities and compensate[] for the status of being limited or incapacitated," the *Eyoma* court determined that disability and impairment do not require the plaintiff to show conscious awareness of the disability.[165] From this, the court held that the loss of joy an injured plaintiff suffers is the usual result of the incapacity from a disability, and therefore, loss of enjoyment of life damages are not dependent upon a

161. *Id.* at 654–55.

162. *Id.* at 655.

163. *Id.* at 661. The *Eyoma* court based its reasoning on a previous New Jersey case, *Lewis v. Read*. *See id.* *Lewis* emphasized that pain and suffering damages must be "limited to compensation and compensation alone," and "conscious suffering is the only proper basis for pain and suffering." 193 A.2d 255, 269 (N.J. Super. Ct. App. Div. 1963).

164. *See Eyoma*, 589 A.2d at 661.

165. *See id.* at 661–62. An Illinois appellate court, in *Holston v. Sisters of the Third Order of St. Francis*, also determined that plaintiffs who are unconscious of their loss can recover loss of enjoyment of life damages by including them within damages for disability. 618 N.E.2d 334, 347 (Ill. App. Ct. 1993). In *Holston*, the plaintiff underwent gastric bypass surgery in order to relieve her morbid obesity. *Id.* at 337. While in surgery, the plaintiff's heart was pierced, causing her to suffer cardiac arrest. *Id.* at 338. The plaintiff ultimately suffered permanent brain damage. *See id.* at 340. The plaintiff's husband and children brought a negligence action and requested loss of enjoyment of life damages. *Id.* at 337. The appellate court allowed for the recovery of loss of enjoyment of life damages by the plaintiff, even though she was in a persistent vegetative state. *Id.* at 347. The court stated that because plaintiffs in persistent vegetative states have been "disabled" to the extent that they have been "deprived of [their] consciousness and therefore [their] ability to enjoy . . . life," they are entitled to loss of enjoyment of life damages despite their unconsciousness. *Id.* The *Holston* court was also presented with the issue of whether plaintiffs must be aware of their own disfigurement to be awarded disfigurement damages. *Id.* at 347–48. The court declined to consider this "awareness requirement" because it believed that the jury could have properly awarded the $400,000 to the plaintiff based on her disability alone. *Id.* at 348. However, this presents another example of the possible injustice a plaintiff in a persistent vegetative state can experience. *See* Fla. Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783, 792 (Fla. 1985) (Boyd, C.J., dissenting) (stating that a comatose plaintiff should be able to recover compensatory damages, including those for disfigurement and loss of enjoyment of life, in order to prevent "the most grievously injured individuals" from receiving a reduced award "because of the nature and seriousness" of their injuries). Some disfigurements can be even more easily identified than loss of joy, yet plaintiffs that suffer from lack of consciousness will be denied the recovery for disfigurement if they have not been as seriously injured. *See id.*

showing of conscious loss.[166] Accordingly, the *Eyoma* court compensated the comatose plaintiff, who lost "the real personal joy and pleasure" that he "might have otherwise experienced," with loss of enjoyment of life damages.[167]

The Supreme Court of Appeals of West Virginia similarly held that plaintiffs in a persistent vegetative state could recover hedonic damages.[168] In *Flannery v. United States*, the plaintiff was only twenty-two years old when he was involved in an automobile accident that placed him in a permanently semicomatose state.[169] The court determined the permanency of the plaintiff's injury by looking at whether his capability to "function as a whole man" had been reduced.[170] By using this concept and ignoring the label "loss of enjoyment of life," the *Flannery I* court stripped the subjective content of the damage award.[171] This allowed the court to hold that "the plaintiff's lack of knowledge of the extent of his permanent injury is not a factor under the *Jordan* 'whole man' test."[172] The *Flannery I* court also compared the situation of a comatose plaintiff to other situations in which the ability to comprehend a permanent injury is minimal.[173] For instance, permanently injured infants or children can recover permanent injury damages despite their inability to understand the extent of their

166. *See Eyoma*, 589 A.2d at 662. "Thus, a plaintiff who has been comatose should, as part of disability and impairment, be compensated for the loss caused by existing in a comatose state including the resultant loss of enjoyment of normal activities." *Id.*

167. *Id*. The *Eyoma* court was concerned that the other forms of damages would not sufficiently compensate a comatose plaintiff. *Id.* Damages for out-of-pocket pecuniary loss, medical care, and loss of consortium "cannot fully or adequately compensate for the total disability inflicted on the injured tort victim who is rendered comatose." *Id.* A similar conclusion was reached by a Louisiana appellate court in *Brown v. Glaxo, Inc. See* 790 So. 2d 35, 43 (La. Ct. App. 2000). In *Brown*, a woman was in a vegetative state and therefore not "conscious" of her loss, precluding her recovery of pain and suffering. *Id.* The court did allow for the recovery of hedonic damages, stating "the argument that a wife and mother in her early forties did not lose the enjoyment of her life for the almost two years she remained in a vegetative state cannot be seriously supported." *Id.*

168. Flannery v. United States (Flannery I), 297 S.E.2d 433, 438 (W. Va. 1982).

169. *See* 649 F.2d 270, 271 (4th Cir. 1981); *Flannery I*, 297 S.E.2d at 434.

170. *See Flannery I*, 297 S.E.2d at 436. In *Jordan v. Bero*, the Supreme Court of Appeals of West Virginia stated, "Residuals or those future effects of an injury which have reduced the capability of an individual to function as a whole man" is the manner in which courts should define the recovery of damages for the permanent effects of an injury. 210 S.E.2d 618, 634 (W. Va. 1974).

171. *See Flannery I*, 297 S.E.2d at 438.

172. *Id.*

173. *See id.*

injuries.[174] The *Flannery I* court disagreed with the argument that a plaintiff must be conscious of the plaintiff's permanent injury to recover hedonic damages, which it analogized to a situation in which a defendant is not liable for "injuries made more severe because of the plaintiff's preexisting ill health or disability."[175] Because of the injustice that would unfold from precluding the recovery of loss of enjoyment of life damages to a plaintiff in a persistent vegetative state, the court held that consciousness of loss of joy is not a condition for recovery of hedonic damages.[176]

Another method by which to determine the compensatory damages available to a plaintiff in a persistent vegetative state is illustrated in *Gregory v. Carey*.[177] In *Gregory*, the plaintiff, Mark Marquette, suffered severe brain damage during preparation for knee surgery.[178] Marquette entered a persistent vegetative state, a state of "wakeful unresponsiveness," from which he would never completely recover.[179] Marquette's guardian and conservator brought an action against the defendants, including an anesthesia service, a doctor, and a medical center, asking the court to award several items of damages, including those for loss of enjoyment of life.[180] Kansas courts allow the recovery of pain and suffering damages only by plaintiffs who consciously experience the pain or suffering.[181] However, the *Gregory* court allowed the plaintiff to introduce evidence that attempted to demonstrate that a plaintiff in a persistent vegetative state can in fact experience pain or suffering.[182] Even though the court included loss

174. *See id.* at 438–39. A common example of this situation is one in which an infant is blinded by the use of too much oxygen in an incubator. *Id.* at 438. A child in that situation "would be unaware of what full vision meant and consequently his permanency as reflected by his subjective knowledge of his loss of enjoyment of visual life would be minimal." *Id.* at 439.

175. *Id.*

176. *See id.* ("We accordingly hold that a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life as a measure of the permanency of his injuries even though he may not be able to sense his loss of enjoyment of life.").

177. 791 P.2d 1329 (Kan. 1990).

178. *Id.* at 1331.

179. *Id.*

180. *Id.*

181. *See id.* at 1333. In *Leiker ex rel. Leiker v. Gafford*, the Kansas Supreme Court held that "damages are recoverable only for pain and suffering which is consciously experienced." 778 P.2d 823, 836 (Kan. 1989). The *Leiker* court also concluded that hedonic damages are included within the larger category of pain and suffering damages. *Id.* at 835; *see also Loss of Enjoyment of Life as a Distinct Element*, *supra* note 43, at 299 & n.12 (noting the same thing in another case, *Hogan v. Santa Fe Trail Transp. Co.*, 85 P.2d 28 (Kan. 1938)).

182. *See Gregory*, 791 P.2d at 1334. An earlier Kansas court also allowed for the introduction of evidence that a patient in a semicomatose state experienced loss of enjoyment of life. *See Leiker*, 778 P.2d at 835. The court stated that "loss of enjoyment of life is definitely admissible and proper for the jury's consideration as it relates to

of enjoyment of life damages with pain and suffering and disability damages,[183] a plaintiff in a persistent vegetative state would still be able to potentially recover loss of enjoyment of life damages.[184] The *Gregory* court's decision is notable because of its inclusion of loss of enjoyment of life in more general categories of damages, despite its acknowledgement of the difference between all of the types of damages resulting from physical injuries.[185] The opinion openly recognized that disability damages compensate a plaintiff for permanent injuries, notwithstanding any pain or inconvenience; pain and suffering damages, by contrast, allow plaintiffs to recover damages for the physical and mental discomfort associated with their injuries.[186] Loss of enjoyment of life is also its own type of

disability and pain and suffering, and may certainly be argued by counsel to the jury." *Id.* An Ohio appellate court also allowed for the introduction of evidence that a patient in a persistent vegetative state experienced pain or suffering. *See* Watkins v. Cleveland Clinic Found., 719 N.E.2d 1052, 1066–67 (Ohio Ct. App. 1998). Because there was conflicting evidence from doctors on whether the patient experienced pain, the matter was a question of fact to be resolved by the jury. *Id.* at 1066.

183. *See Gregory*, 791 P.2d at 1336.

184. *See id.* "[T]he trial court properly allowed plaintiff to argue in closing that [the patient in the persistent vegetative state] had suffered a loss of enjoyment of life and instructed the jury that such a loss is an element of *disability, pain, and suffering*." *Id.* The *Gregory* court's attempt at allowing plaintiffs in a persistent vegetative state to recover hedonic damages through a showing of the presence of pain runs in direct conflict with most medical findings on the topic. *See, e.g.*, The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* (pt. 2), 330 NEW ENG. J. MED. 1572, 1576 (1994). "[E]xtensive clinical experience, the results of positron-emission tomographic (PET) studies, and neuropathologic examination support the belief that patients in a persistent vegetative state are unaware and insensate and therefore lack the cerebral cortical capacity to be conscious of pain." *Id.* The *Gregory* opinion cites testimony from a neurologist, Dr. Dilawer Abbas, stating that "when he struck Marquette with a pin, 'there was some reaction when he moaned and sighed.'" 791 P.2d at 1334. The doctor testified that he believed Marquette's response "was not purely a reflex." *Id.* (internal quotation marks omitted). However, science accepts that the small responses to stimulation by plaintiffs in a persistent vegetative state are simply "behavioral responses governed by functional motor systems," and "[n]one of these responses necessarily reflect the perception of pain." The Multi-Society Task Force on PVS, *supra*, at 1576 ("The perceptions of pain and suffering are conscious experiences: unconsciousness, by definition, precludes these experiences.").

185. *See Gregory*, 791 P.2d at 1336.

186. *See id.* (quoting Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980)). In *Thompson*, the Court of Appeals for the Sixth Circuit applied Tennessee law in determining whether a damage award for physical injuries sustained by passengers on a train was duplicative. 621 F.2d at 824–25. Tennessee allows for the recovery of damages for pain, suffering, and fright. *Id.* However, damages for fright alone cannot be recovered. *See* Hoskins v. Blalock, 384 F.2d 169, 171 (6th Cir. 1967). Physical pain and suffering damages caused by fright can be recovered. *See id.*

damages, compensating the victim for the restrictions placed on the victim's life by the injury.[187] In spite of these seemingly obvious differences, the court decided to include loss of enjoyment of life as a subcategory of the other two damage categories and in fact failed to clarify how to take into account loss of enjoyment of life when determining pain and suffering or disability awards.[188]

2. Federal Tort Claims Act

Under the Federal Tort Claims Act (FTCA), the United States is liable in the same manner as "private individual[s] under like circumstances" but cannot be liable for "interest prior to judgment or for punitive damages."[189] Federal courts have jurisdiction over these claims but must apply the law of the state "where the act or omission occurred."[190] The exception to the rule applies in situations where the law of the state provides only for punitive damages in regard to the injury in question.[191]

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187. *See Gregory*, 791 P.2d at 1336 (quoting *Thompson*, 621 F.2d at 824).

188. *See id.* The court decided to include loss of enjoyment of life "within the more traditional areas of damages for disability and pain and suffering." *Id.*

189. 28 U.S.C. § 2674 (2006). Under the FTCA, plaintiffs can recover money damages for damage to property or personal injury caused by government employees. *See* 1 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 6A.04 (Matthew Bender ed. 2012). In order to recover, plaintiffs must prove "that the negligence or wrongful conduct of a government employee caused the injury." *Id.* The government is liable in the same manner as "private individual[s] under like circumstances" in that the FTCA imposes liability on the United States under circumstances where, if it were a private person, it would be liable to the claimant. *Id.*; *see also* 28 U.S.C. § 2674 (stating the same).

190. 28 U.S.C. § 1346(b)(1). Courts often refuse to allow claims under the FTCA based on "direct violation[] of the federal Constitution, statutes, or regulations" because of the provision that the law "where the . . . act or omission occurred" applies. 1 STEIN ET AL., *supra* note 189, § 6A.04[2][g] (citing 28 U.S.C. § 1346(b)(1)). Section 2680 also lists claims that are excluded under the FTCA, including "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). This exclusion is commonly referred to as the "discretionary function exclusion." 1 STEIN ET AL., *supra* note 189, § 6A.04[3][a]. The discretionary function exclusion is said to be an example of Congress "exercis[ing] care to protect the Government from claims, however negligently caused, that affected the governmental functions." Dalehite v. United States, 346 U.S. 15, 32 (1953).

191. *See* 28 U.S.C. § 2674. As stated in *Flannery v. United States (Flannery II)*, the United States' liability encompasses all compensatory damages. 718 F.2d 108, 110 (4th Cir. 1983). However, "the question arises about the allowability of damages treated and labeled under state law as 'compensatory' which are in excess of those necessary to provide compensation for injuries and losses actually sustained." *Id.* The *Flannery II* court went on to clarify that the question of what is and is not punitive is a federal question. *Id.* Whether an award is punitive should not be decided by the "widely varying laws of the fifty states, but under a uniform standard." *Id.* "[A] state's statutory measure of damages 'must be judged not by its language or the state's characterization, but by its consequences.'" *Id.* (quoting D'Ambra v. United States, 481 F.2d 14, 18 (1st Cir. 1973)).

In that case, the United States is liable for actual or compensatory damages.[192] Some federal courts have held that under the FTCA, an unconscious plaintiff, who is incapable of enjoying anything, cannot recover loss of capacity to enjoy life damages, whether or not the damages would be recoverable under the applicable state law.[193]

In *Flannery v. United States* (*Flannery II*), the Court of Appeals for the Fourth Circuit certified a question to the West Virginia Supreme Court regarding the recovery of loss of capacity to enjoy life damages by comatose plaintiffs.[194] The West Virginia Supreme Court held that hedonic damages are recoverable by a comatose plaintiff, despite the fact that the plaintiff "has no awareness of . . . loss."[195] The *Flannery II* court would have accepted the *Flannery I* court's response had it not determined that the issue involved a federal question and therefore had to be decided based on federal law.[196] The Fourth Circuit acknowledged that a plaintiff in a persistent vegetative state has lost the capacity to enjoy life.[197] Further, the court held that an award made to a comatose patient for loss of enjoyment of life does not ease any pain or give any consolation to the patient.[198] An award in this situation would be used only by the plaintiff's relatives and therefore would be compensatory only to those who survive

192. *See* 28 U.S.C. § 2674.

193. *See, e.g.*, *Flannery II*, 718 F.2d at 111. In *Nemmers v. United States*, the United States District Court for the Central District of Illinois also analyzed the awarding of hedonic damages to a plaintiff under the FTCA. 681 F. Supp. 567, 569, 576 (C.D. Ill. 1988). However, in that case, the plaintiff was mentally disabled and considered "conscious." *Id.* at 575–76. The court determined that under *Flannery II*, the plaintiff could recover damages for loss of enjoyment of life because he was still "mentally conscious" and "aware." *Id.* However, the court wrote that the $1 million award requested by plaintiff was excessive given its intent: compensation. *Id.* at 576. Recognizing the plaintiff's "abilities and disabilities," the court awarded the plaintiff $400,000. *Id.*

194. 297 S.E.2d 433, 434 (W. Va. 1982). The Supreme Court of Appeals of West Virginia's answer to the certified question was previously discussed. *See supra* notes 136–40, 168–76 and accompanying text.

195. *Flannery II*, 718 F.2d at 110; *see also Flannery I*, 297 S.E.2d at 439 (holding that a plaintiff in a permanently semicomatose state may recover enjoyment of life damages "even though he may not be able to sense his loss of enjoyment of life").

196. *See Flannery II*, 718 F.2d at 110.

197. *Id.* at 111. A plaintiff in a persistent vegetative state is "conscious of nothing and incapable of enjoying anything." *Id.* Plaintiffs in Flannery's state are also rather susceptible to infections, and "[t]here is no likelihood whatever that [they] will ever become aware of anything." *Id.*

198. *See id.*

the plaintiff and inherit the award.[199] Therefore, the award would be punitive in nature and not allowed under the FTCA.[200] Accordingly, the Fourth Circuit held that it was sufficient to award damages for future medical care.[201]

The Second Circuit, on the other hand, allows for an award of hedonic damages to a comatose plaintiff under the FTCA.[202] In *Rufino v. United States*, a New York hospital admitted the plaintiff, Neil Rufino, after he had suffered a heart attack.[203] Doctors erroneously concluded that he had recovered from the heart attack, and Rufino suffered a second attack.[204] After suffering from oxygen deprivation, Rufino entered a permanent comatose state.[205] In deciding whether Rufino was entitled to hedonic damages, the appellate court—as prescribed by the FTCA—looked to New York's law on loss of enjoyment of life damages.[206] Because New York had not yet resolved the issue, the Second Circuit attempted to determine the rule that New York would enforce.[207] The Second Circuit believed that, based on the current state of the law in New York, the New York courts would adopt the rule laid out in *McDougald v. Garber*,[208] an opinion that allowed for the recovery of loss of enjoyment of life by plaintiffs in a persistent vegetative state.[209] The *Rufino* court was persuaded by the lower court's reasoning and adopted its holding.[210]

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199. *See id.* The Supreme Court of Appeals of West Virginia awarded $1.3 million for loss of enjoyment of life. *Id.* The *Flannery II* court decided that the award the plaintiff received for medical care would provide enough for his "maintenance as well as his nursing and professional care." *Id.* The $1.3 million could not provide the plaintiff with any "direct benefit" and therefore was determined to be punitive. *Id.*

200. *See id.*; *see also* 28 U.S.C. § 2674 (2006) ("The United States . . . shall not be liable . . . for punitive damages.").

201. *See Flannery II*, 718 F.2d at 111.

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

203. *See id.* at 356.

204. *See id.*

205. *Id.*

206. *Id.* at 359.

207. *See id.* If this issue had reached the Third Circuit after 1989, *McDougald v. Garber* would have applied and the court would have been forced to deny the awarding of hedonic damages to a comatose patient. *See* 536 N.E.2d 372, 375 (N.Y. 1989) (holding that cognitive awareness must be present to recover loss of enjoyment of life damages).

208. 504 N.Y.S.2d 383 (N.Y. Sup. Ct. 1986). The *McDougald* court stated,

> Proof of the loss of enjoyment of life relates not to what is perceived by the injured plaintiff but to the objective total or partial limitations on an individual's activities imposed by an injury. A jury, if properly charged, will not make redundant awards in assessing damages for the loss of enjoyment of life and conscious pain and suffering. The loss is to be assessed objectively, that is, by the difference between the injured plaintiff's current capacity and those which existed before the injury.

Id. at 386.

209. *See id.* at 387 (holding that "failure to treat loss of enjoyment of life separately in the situation of a comatose plaintiff would essentially obviate one of the prime aims of

The Court of Appeals for the Third Circuit also affirmed an award for loss of enjoyment of life under the FTCA.[211] In *Frankel v. Heym*, the plaintiff, Marilyn Heym, was almost totally disabled after her car was involved in an accident with an army vehicle.[212] The district court awarded the plaintiff $650,000 in damages, which was said to encompass damages for pain and suffering, loss of enjoyment of life, and "inconvenience, disfigurement and permanent injuries."[213] Recognizing that translating human loss into monetary value is inherently difficult, the Third Circuit determined that the plaintiff's damage award was not "shocking, unfair or biased."[214] The Third Circuit was able to come to this conclusion because of the district court's analysis of the relevant considerations in the case, including the pain the plaintiff endured and her inability to communicate with those she recognized while in a coma.[215]

3. Similar Situations

a. Alzheimer's Disease

Alzheimer's disease is a "progressive and irreversible" brain disorder[216] that poses a significant obstacle when determining hedonic damage awards.[217] Specifically, Alzheimer's is a preexisting condition that can affect the "value of the interest destroyed."[218] Because of the effects Alzheimer's has on a plaintiff's brain, courts have taken various approaches in incorporating the disease into the determination of hedonic damages.[219] One such approach suggests that no recovery of loss of enjoyment of life damages should be allowed for plaintiffs that suffer from Alzheimer's

tort damages, to make an injured plaintiff whole, as far as possible, by compensating for each loss suffered").

210. *See* 829 F.2d at 361.
211. *See* Frankel v. Heym, 466 F.2d 1226, 1228 (3d Cir. 1972).
212. *Id.* at 1227.
213. *Id.* (internal quotation marks omitted).
214. *Id.* at 1228.
215. *See id.* at 1227–28.
216. Nicholson, *supra* note 20, at 250.
217. *See id.* at 253.
218. *Id.* at 265. A preexisting condition is a "disease, condition, or force that has become sufficiently associated with the victim to be factored into the value of the interest destroyed." *Id.* (quoting Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1357 (1981)) (internal quotation marks omitted).
219. *See id.* at 267.

disease.[220] This rule suggests that Alzheimer's is a disease that renders a plaintiff completely incapacitated and therefore unable to experience pleasure or enjoyment of life prior to the wrongdoer's actions.[221] Critics of this "no-recovery" rule argue that different stages of Alzheimer's can have differing effects on plaintiffs and that current data does not support the contention that those with Alzheimer's have no enjoyment of life.[222]

A second approach calls for the full recovery of hedonic damages by a plaintiff with Alzheimer's disease.[223] The strongest argument in favor of this approach is deterrence.[224] Because of the potential for malpractice claims against physicians, tort liability can successfully deter possible wrongful actions on their part.[225] Alzheimer's patients benefit from this deterrence because they are often in nursing homes or under the care of a physician.[226] Conversely, the argument against such an approach is overdeterrence.[227] Physicians that are worried about possible malpractice suits may "administer[] more tests, shoot[] more X rays, and pile[] on a paper trail."[228]

A third approach for the recovery of hedonic damages by those with Alzheimer's disease is the independent jury determination of hedonic damages, which would allow for the jury to decide, without the guidance of experts, the percentage of loss of enjoyment of life suffered by the Alzheimer's plaintiff.[229] This approach may pose problems because of the uncertainties coming from jury determinations that are not based on expert guidance.[230] Nevertheless, several scholars endorse such an approach.[231]

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220. *Id.* at 268.

221. *Id.* Another argument in support of this rule finds its support in psychological and medical literature. *Id.* at 269. "According to some commentators, disabilities, such as Alzheimer's disease, frequently impact on *life satisfaction* or enjoyment." *Id.*

222. *See id.* at 271–72.

223. *See id.* at 272.

224. *See id.* Some commentators also believe that there is a second argument in favor of full recovery of loss of enjoyment of life damages by Alzheimer's patients—"monetary damages for elderly individuals in personal injury and wrongful death claims are usually low." *Id.* at 273. In addition, Alzheimer's disease progresses differently in each individual, and some only experience small change over a rather long period of time. *See id.* at 274. An Alzheimer's patient might even live up to twenty years after being diagnosed. *Id.* This may indicate that a person with Alzheimer's can enjoy life "throughout the course of the illness." *Id.*

225. *See id.* at 273–74.

226. *See id.* at 273.

227. *See id.* at 275.

228. *Id.* at n.214 (quoting PETER W. HUBER, LIABILITY 170 (1988)).

229. *Id.* at 283.

230. *See id.* at 286.

231. *See e.g.*, *id.* at 287. In her note, Lori Nicholson concludes that jurors should determine the amount of hedonic damages without the help of expert guidance on the amount of loss of enjoyment of life experienced by the plaintiff. *Id.* at 288.

b. Wrongful Life and Birth

Wrongful life and birth actions are relatively new tort causes of action.[232] A wrongful life action alleges that the parents of a child born with birth defects would not have conceived or given birth to the child but for the negligent actions of the doctor.[233] Either the parents of the child or the child may bring a wrongful life action.[234] By contrast, only the parents of a child born with birth defects may bring a wrongful birth action.[235] Wrongful birth actions commonly arise from the failure of

232. *See* Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One To Be Born*, 83 A.L.R. 3D 15, 19 (1978). A wrongful life action is a cause of action brought by the infant "on allegations that its very existence is wrongful and that 'but for' the defendant's misfeasance it would not exist." *Id.* at n.3. Wrongful birth actions, on the other hand, are brought by a member of the infant's family "on allegations attributing the infant's unplanned or unwanted birth to the tortfeasor's misfeasance." *Id.* at n.4.

233. *See* BLACK'S LAW DICTIONARY 1752 (9th ed. 2009). In order to successfully bring a wrongful life action, either the child or the child's parents must prove "that the physician had a duty to inform the child's parents of the potential deformity, that the physician failed to inform the parents adequately, and that the parents would have prevented the birth of the child if the parents had been so informed." 1 DAVID R. ILER ET AL., HEALTH LAW PRACTICE GUIDE § 12:15 (2012). Some states do not allow wrongful life actions for births prior to the Supreme Court's decision in *Roe v. Wade*. *See* 410 U.S. 113, 153 (1973) (holding that a person's constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); Hummel v. Reiss, 589 A.2d 1041, 1042 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 608 A.2d 1341 (N.J. 1992). In *Hummel v. Reiss*, a New Jersey superior court determined that at the time of the plaintiff's pregnancy, she could not obtain a "eugenic" abortion or an abortion "directed solely to eliminate a potentially defective fetus." 589 A.2d at 1042. Therefore, for any births prior to *Roe*, the doctors owed a duty of care only to the mother. *Id.* In addition, the superior court noted that in *Planned Parenthood of New York City, Inc. v. New Jersey Department of Institutions*, 379 A.2d 841, 842 (N.J. 1977), the New Jersey Supreme Court rejected a claim that *Roe v. Wade* applied retroactively. *See Hummel*, 589 A.2d at 1042. Some states refuse to recognize wrongful life actions all together. *See* 1 ILER ET AL., *supra*, § 12:15; *see also* Walker *ex rel.* Pizano v. Mart, 790 P.2d 735, 740 (Ariz. 1990) (en banc) (holding that the impairment of a child does not automatically imply a "legally cognizable injury" because "any wrong that was done was a wrong to the parents, not to the fetus"); Greco v. United States, 893 P.2d 345, 347 (Nev. 1995) (holding that Nevada courts do not recognize wrongful life actions because the claims "would require [courts] to weigh the harms suffered by virtue of the child's having been born with severe handicaps against 'the utter void of nonexistence' . . . a calculation the courts are incapable of performing" (quoting Gleitman *ex rel.* Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967))).

234. *See* BLACK'S LAW DICTIONARY 1752 (9th ed. 2009); 1 ILER ET AL., *supra* note 233, § 12:15.

235. *See* BLACK'S LAW DICTIONARY 1752 (9th ed. 2009); 1 ILER ET AL., *supra* note 233, § 12:16. Wrongful birth actions differ from wrongful life actions in that the parents

doctors to administer tests that detect genetic deformities or the negligent performance of those tests.[236] In measuring damages in a wrongful birth or life case, the court must take into account the harm caused by having an "unwanted child" against the "joy[s] of parenthood."[237] The recovery of hedonic damages in wrongful life and birth actions provides a useful comparison to the recovery by plaintiffs in a persistent vegetative state.[238]

In *Nemmer v. United States*, a district court in Illinois allowed for the recovery of loss of enjoyment of life damages in a wrongful life action.[239] Because the child was born with a disability, the court found that he would never live a full and complete life and that he experienced "a drastic reduction in 'enjoyment of life.'"[240] The court declined to speculate whether the child would have gotten married, been a parent, or enjoyed a particular activity.[241] Instead, it acknowledged that he would never be

bringing the action need not claim that their child would have been aborted if they had known about the genetic defect. *See* Provenzano v. Integrated Genetics, 22 F. Supp. 2d 406, 415 (D. N.J. 1998) (holding that a "but for" proximate cause test does not apply to wrongful birth claims and the parents need not show that *but for* the doctor's negligence, they would have aborted their child). Thirty-one states currently recognize wrongful birth actions, including California, Arizona, New York, and Texas. *See* Bader v. Johnson, 675 N.E.2d 1119, 1122–23 (Ind. Ct. App. 1997), *vacated* 732 N.E.2d 1212 (Ind. 2000). However, several states do not recognize wrongful birth actions. *See, e.g.*, Azzolino v. Dingfelder, 337 S.E.2d 528, 536 (N.C. 1985) ("[T]he myriad problems arising from claims for . . . wrongful birth can be resolved properly only by a legislative body."). Some states also recognize a wrongful conception or wrongful pregnancy cause of action, which arises when a child without birth defects is born after the mother or father was sterilized. *See* 1 ILER ET AL., *supra* note 233, § 12:16; *see also Walker ex rel. Pizano*, 790 P.2d at 737 (stating that in a wrongful conception or pregnancy case, "parents of a normal but unplanned child seek damages either from a physician who allegedly was negligent in performing a sterilization procedure or abortion, or from a pharmacist or pharmaceutical manufacturer who allegedly was negligent in dispensing or manufacturing a contraceptive prescription or device"). The jurisdictions that allow for wrongful conception or pregnancy causes of action usually allow recovery only for the expenses of the child's birth, but some allow for pain and suffering. *See* Miller v. Johnson, 343 S.E.2d 301, 305, 307 (Va. 1986); 1 ILER ET AL., *supra* note 233, § 12:16.

236. *See* 1 ILER ET AL., *supra* note 233, § 12:16.

237. Sarno, *supra* note 232, at 21.

238. *See* 1 ILER ET AL., *supra* note 233, §§ 12:15–12:16. Wrongful life and birth actions are brought after the birth of a child with genetic defects. *Id.* Some birth defects, such as Down syndrome, are lifelong and affect a person's quality of life. *See* A.D.A.M. Medical Encyclopedia, *Down Syndrome: Trisomy 21*, PUBMED HEALTH, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001992/ (last reviewed May 10, 2013). Therefore, it can be argued that those with severe genetic disorders are suffering from a loss of joy similar to that suffered by unconscious plaintiffs.

239. *See* 681 F. Supp. 567, 575 (C.D. Ill. 1988).

240. *Id.*

241. *Id.*

able to do most of the normal activities in life and therefore would be suffering a loss of joy.[242]

By contrast, the majority of courts have declined to allow hedonic damage recovery in wrongful birth or life actions.[243] In *Ramos v. Kuzas*, the Supreme Court of Ohio narrowly construed the definition of *hedonic damages* to include only the inability to perform the "usual specific activities" that the plaintiff enjoyed.[244] Because the plaintiff was injured either in utero or at birth, she had not yet developed the ability to perform an enjoyable activity and did not have any hobbies that she previously enjoyed and was no longer able to perform.[245] The court, however, did allow the plaintiff to recover for her "basic losses," which included the basic

242. *See id.* Because "none of the accoutrements of normalcy" existed in the plaintiff's life, "the loss of enjoyment of life means a loss of any objective expectation of ever being able to experience those aspects of life normally considered to be part of our day to day existence." *Id.* The court also determined that the recovery of hedonic damages in this case was allowed under the FTCA. *See id.* The court found that

> an award for loss of enjoyment of life is appropriate here pursuant to Maryland law and the Federal Tort Claims Act. The Court further finds that, in keeping with the degree of loss of enjoyment of life involved, [plaintiff's] limited ability to comprehend, and the significant period of time that this loss of enjoyment of life is expected to continue (for the rest of [plaintiff's] life), $400,000 is the appropriate sum to compensate him for this loss.

Id. at 577.

243. *See* Moscatello v. Univ. of Med. & Dentistry of N.J., 776 A.2d 874, 881–82 (N.J. Super. Ct. App. Div. 2001) (declining to apply the *Eyoma v. Falco* holding to wrongful life suits and holding that a loss of enjoyment of life claim cannot be made by a plaintiff in a wrongful life case). *But see* Cepeda v. N.Y.C. Health & Hosps. Corp., 756 N.Y.S.2d 189, 190 (App. Div. 2003). In *Cepeda v. New York City Health & Hospitals Corp.*, the plaintiff lived for only twelve days, during which time she required constant medical care and invasive procedures. 756 N.Y.S.2d at 190. The delivering doctor's negligence caused the infant's medical issues. *Id.* When the trial court reduced the damage award from $12 million to $750,000, the appellate court ruled the reduction to be excessive. *Id.* The appellate court rejected the trial court's reasoning that an infant "could not have any cognitive awareness of her impending death" and applied the standard from *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989), prohibiting the fact finder from "sort[ing] out [the] varying degrees of cognition and determin[ing] at what level a particular deprivation can be fully appreciated." *Id.* (quoting *McDougald*, 536 N.E.2d at 375 (internal quotation marks omitted)).

244. Ramos v. Kuzas, 600 N.E.2d 241, 243 (Ohio 1992) (citing Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 486 (Ohio 1992)). The court's examples of the usual, specific enjoyable activities included "playing golf, dancing, bowling, playing musical instruments, and engaging in specific outdoor sports." *Id.*

245. *See id.*

mechanical body movements.[246] Additionally, the court made clear that if a plaintiff recovers for the loss of ability to perform usual activities, which also includes the permanency of a disabling injury, the jury cannot award damages for that same loss when considering other damages, including "physical and mental pain and suffering."[247] Because there is a high likelihood that a plaintiff in a persistent vegetative state is old enough to have enjoyed specific activities that bring pleasure, the *Ramos* court's ruling might allow for the recovery of loss of enjoyment of life damages by those plaintiffs, as long as that loss is not also taken into account when computing other types of damages.[248]

c. Wrongful Death

Wrongful death actions provide recovery to certain relatives of plaintiffs killed by the negligence of others.[249] In order to determine which damages to award, courts look to the loss suffered by the relatives or the deceased's estate, rather than the loss suffered by the deceased.[250] Because of

246. *Id.* The court's examples of basic mechanical body movements included "walking, climbing stairs, feeding oneself, and driving a car." *Id.* (citing *Fantozzi*, 597 N.E.2d at 484–85).

247. *Id.* (emphasis omitted) (quoting *Fantozzi*, 597 N.E.2d at 486).

248. *See id.*

249. *See* 1 NATES ET AL., *supra* note 35, § 8.04.

250. *See id.*

> Damages recovered on behalf of the decedent's estate are generally distributed to the heirs in the same manner as intestate personal property is distributed, or, in some states, according to the provisions of the decedent's will pertaining to distribution of personal property. Damages recovered on behalf of the survivors, to compensate them for their pecuniary losses are, in some states, apportioned by the court or the jury and distributed to the beneficiaries according to the pecuniary loss sustained. In other states, however, the award is distributed to the beneficiaries in the same manner as intestate personal property would be distributed.

10 FRUMER & FRIEDMAN, *supra* note 30, § 45.08. Wrongful death actions are one of the civil counterparts to criminal actions brought by "the people" on behalf of the deceased plaintiff. *See* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 674 (1980). Criminal actions seek to punish wrongdoers for their breach and violation of public rights and duties. *See, e.g.*, United States v. Colasuonno, 697 F.3d 164, 177 (2d Cir. 2012) ("[A] criminal action seeks, in the end, to punish a person for crimes committed against the public . . . ."). Under the utilitarian theory, punishment in criminal cases is used to maximize the net happiness of society. *See* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000). Punishment is permitted under the utilitarian theory only if "its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes." *Id.* Under the retributive theory, on the other hand, punishment is limited to the amount deserved. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 242 (2009) (stating that retributive damages are "an authorized coercive condemnatory setback to

the focus on the loss of the survivors, loss of enjoyment of life claims are not common in wrongful death actions.[251] However, some courts have awarded hedonic damages in wrongful death suits.[252]

In *Sherrod v. Berry*, a district court in Illinois allowed for the recovery of hedonic damages in a wrongful death action filed under 28 U.S.C. § 1983.[253] An expert witness testified to the "hedonic value of life," which included the "pleasure of living which is destroyed by the blow that is lethal."[254] The court believed the expert witness's evidence was "competent" and established a "legitimate" item of damage, therefore making it relevant and admissible.[255] This evidence allowed for the recovery of hedonic damages, despite being difficult to measure.[256] The *Sherrod* court also acknowledged that the recovery of the hedonic value of life has been recoverable in Anglo-American law.[257] Although the recovery of hedonic damages is "novel," it is not completely "unknown" and is therefore supported by the past actions of both English and American courts.[258]

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the defendant's interests on account of an offense against the legal order"). Retributive damages "create a message that the offender's behavior is prohibited." *Id.*

251. *See* 1 NATES ET AL., *supra* note 35, § 8.04.

252. *See id.* § 8.04[2]. Connecticut and Georgia are two states that expressly allow recovery of postdeath hedonic damages. *See* McQurter v. City of Atlanta, 572 F. Supp. 1401, 1422 (N.D. Ga. 1983); Mather v. Griffin Hosp., 540 A.2d 666, 678 (Conn. 1988).

253. *See* 629 F. Supp. 159, 160 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds on reh'g en banc*, 835 F.2d 802 (7th Cir. 1988). 42 U.S.C. § 1983 (2006) states,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

254. *Sherrod*, 629 F. Supp. at 163.

255. *Id.* at 164.

256. *See id.*

257. *See id.* "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 a person killed can recover for 'loss of expectation of life.'" *Id.* (citing JOHN M. PRITCHARD, PERSONAL INJURY LITIGATION 137–42 (1976)).

258. *Id.*

Nevertheless, some courts refuse to allow for the recovery of hedonic damages in wrongful death actions.[259] In addition, economists frequently argue that hedonic damages should not be allowed in wrongful death actions because it would allow for the recovery of billions of dollars in awards, distorting the tort system and the economy.[260]

IV. THE PROPER MANNER IN WHICH TO FILL THE GAPS IN THE LAW AND PREVENT FUTURE INJUSTICES

A. All State and Federal Courts Should Allow for the Recovery of Hedonic Damages Separate from Pain and Suffering Damage Awards

Loss of enjoyment of life damages should be classified as a separate category from pain and suffering damages because of the methods used to prove damages, the appellate process of review, and the defendant's obligation to fully compensate the plaintiff.[261] In addition, courts should allow recovery of both types of damages regardless of whether mental or physical pain and suffering accompany them. Because personal injury damages "restore the injured person to the state of health he had prior to his injuries because that is the only way the law knows how to recompense one for personal injuries suffered,"[262] loss of enjoyment of life damages should be separate from pain and suffering to allow for the full recovery of injuries suffered.[263] This separation allows for the "person responsible for the injury [to] respond for all damages resulting directly from and as a natural consequence of the wrongful act."[264]

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259. *See, e.g.*, Clement v. Conrail Rail Corp., 734 F. Supp. 151, 156 (D. N.J. 1989) (holding that hedonic damages are not available under the state's wrongful death act).

260. *See* Thomas Havrilesky, *Errors in the Application of Hedonic Damages to Wrongful Death and Injury Litigation*, *in* THE ECONOMIC EXPERT IN LITIGATION: 1993, at 57, 58 (Donald J. Hirsch & Pamela M. Kaplan eds., 1993).

261. *See* Cramer, *supra* note 43, at 973.

262. Romeo v. N.Y.C. Transit Auth., 341 N.Y.S.2d 733, 735 (App. Div. 1973).

263. *See* Cramer, *supra* note 43, at 965. Cramer argued that "[i]n those jurisdictions which fail to recognize loss of enjoyment of life as a separate element of damages, plaintiffs are less likely to receive adequate compensation for their injuries." *Id.*

264. Steitz v. Gifford, 19 N.E.2d 661, 664 (N.Y. 1939). An increase in the amount of damages recoverable by a plaintiff in a persistent vegetative state may upset those who believe that the tort system no longer successfully requires the wrongdoers to pay for their actions. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275 (2001) ("That personal injury litigation revolves around liability insurance has become almost a truism among tort teachers, scholars, and practitioners alike."). A distinction is often drawn between "blood money" and "insurance money." *See id.* at 276. Blood money is "money paid directly to plaintiffs by defendants out of their own pockets." *Id.* Blood money, therefore, fulfills the corrective justice purpose of tort law. *See id.* at 275–76. Insurance money in this context comes

The tort reform movement's focus on and fear of excessive pain and suffering damage awards is misguided.[265] The movement's limits on pain and suffering damages have been successful despite the little evidence available showing awards to be markedly high.[266] The absence of any guidance on proper compensation levels has led many courts and legislatures to believe that pain and suffering damages have become excessive.[267] However, this shortage of uniformity in pain and suffering damage awards calls for rules that help define the elements to be considered in calculating

from liability insurance and is "bargain[ed] for . . . in the shadow of law." *See id.* at 276. The source of a plaintiff's compensation greatly affects tort litigation. *See id.* ("[I]nsurance money can be imagined as cold, hard, and flat; blood money as hot, soft, and highly textured."). However, the plaintiff's "legal right to exact blood money retains an important role in the tort settlement process." *Id.* at 277. The plaintiff's ability to assert a right to blood money helps settlement discussions and continues to punish wrongdoers. *Id.* In addition, some scholars and attorneys believe that money from the defendant's own pocket is not blood money if the defendant failed to purchase enough insurance. *Id.* at 296. For instance, when an uninsured or underinsured motorist causes a serious collision, the motorist's failure to purchase insurance can be seen as another "bad" act, therefore requiring the person to pay out of pocket. *Id.* "This finding reflects a moral judgment that people have a responsibility to purchase insurance. The failure to meet that responsibility is itself a wrongful act." *Id.* Interestingly, jury instructions regularly omit information regarding the source of the damages, including any "insurance carried by the litigants." Greene & Bornstein, *supra* note 107, at 755. The rationale behind this omission "is that (a) the procedure will prevent bias that might be introduced by the undisclosed information, (b) some facts are so complex that they might confuse rather than educate the jury, and (c) certain evidence simply lacks probative value and wastes the jury's time." *Id.*

265. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 777 (1995).

266. *See id.*

267. *See id.* & n.8 (citing W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 100 (1991)) ("[T]he absence of any well-defined criteria for setting compensation levels has led many observers to speculate that there has been an escalation of pain and suffering awards."). In those states that responded to the tort reform movement by capping damage awards at a specific limit, the caps are usually "an absolute limit, a maximum permitted ratio (i.e., a certain multiple of the compensatory damages), or both." Greene & Bornstein, *supra* note 107, at 761. Some argue that caps provide "unmistakable guidance to juries, trial courts, and appellate courts." *See* Crookston v. Fire Ins. Exch., 817 P.2d 789, 809 (Utah 1991). However, caps can "place artificial limits on the jury's ability to assess awards commensurate with the defendant's behavior, thereby blunting the effect of punitive damages as a weapon of punishment and deterrence." Greene & Bornstein, *supra* note 107, at 761. Capping jury awards has also been found to increase "both the size and variability of the plaintiff's awards," thereby working against the very purpose of establishing the caps in the first place. *Id.* at 762.

damages, rather than the general denial of pain and suffering.[268] Because the fear of excessive pain and suffering damages can be handled without directly limiting the damages, courts should not consider loss of enjoyment of life damages another "excessive" award.[269] Instead, courts could separate loss of enjoyment of life damages from pain and suffering damages and fully compensate the plaintiff for all the wrongdoings.[270]

The *McDougald* court's ruling failed to apply the obvious distinction between pain and suffering and "the emotional response caused by the limitation of life's activities."[271] The Court of Appeals of New York concluded that allowing a separate award for loss of enjoyment of life damages would only "amplify the speculative and 'distorted' nature of nonpecuniary damages."[272] In "bowing to a public policy of limiting malpractice awards," the court "relied on an internally inconsistent rationale that is unresponsive to the noncompensatory goals of tort damages."[273] As noted by Judge Titone in his dissent in *McDougald*, loss of enjoyment of

268. *See* Geistfeld, *supra* note 265, at 777. "To be sure, there is evidence that supports the need for some type of reform. Studies have shown that jury awards for pain and suffering vary widely for injuries that appear to be equally severe." *Id.*

269. *See* Gary R. Albrecht, *The Application of the Hedonic Damages Concept to Wrongful Death and Personal Injury Litigation*, 7 J. FORENSIC ECON. 143, 148–49 (1994). Economists accept that "when the price of a resource does not reflect the value that society places on it, the allocation of that resource will be sub-optimal." *Id.* If the amount a defendant pays in damages in personal injury cases is "less than the value" society places on the plaintiff's enjoyment of life, the number of personal injury cases will "exceed the optimal number." *Id.* Canadian courts have also decided to limit nonpecuniary damages. *See* Stephen Waddams, *The Price of Excessive Damage Awards*, 27 SYDNEY L. REV. 543, 551 (2005). Because of the limit, which is currently $300,000, Canadian courts often have trouble determining if the upper limit placed on the more serious injuries also places a lower limit on the less serious injuries. *See id.* Additionally, by limiting the amount recoverable in even the most serious cases, Canadian courts are implying that there is "an artificial limit on some otherwise appropriate higher figure to which the plaintiff has a natural entitlement." *Id.*

270. *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 88 (2006). Those who support the awarding of pain and suffering damages frequently cite deterrence as support for their view. *See id.* By requiring defendants to pay for their transgressions, pain and suffering damages make defendants "bear the full social cost of their conduct." *Id.* This same argument supports the requirement that a defendant also pay for a plaintiff's loss of enjoyment of life.

271. McDougald v. Garber, 536 N.E.2d 372, 376 (N.Y. 1989); *see also* Recent Case, *Damages — Loss of Enjoyment of Life — New York Court of Appeals Denies Loss-of-Enjoyment Damages to Comatose Plaintiffs*, 103 HARV. L. REV. 811, 812 (1990) [hereinafter *Damages — Loss of Enjoyment of Life*] (discussing *McDougald*).

272. *Damages — Loss of Enjoyment of Life*, *supra* note 271, at 813 (citing *McDougald*, 536 N.E.2d at 376–77).

273. *Id.* at 812.

life damages compensate for an "objective" loss[274] and therefore are separate from "the emotional response to the loss of life's pursuits" that is part of pain and suffering.[275] In addition, because there is a clear distinction between the two types of damages, "separate awards would both increase accuracy and facilitate appellate review."[276] This distinction between the two types of damages would provide clarity to an area that the tort reform movement argues is extremely speculative.[277]

Ohio, West Virginia, and New Jersey all provide an appropriate model for how courts should treat loss of enjoyment of life damages and pain and suffering damages.[278] Courts should consider loss of enjoyment of life damages separate from pain and suffering, either as its own category of damages or as part of a separate category.[279] In *Holston*, the Illinois Appellate Court appropriately concluded that loss of enjoyment of life damages are part of disability damages and therefore recoverable separate from pain and suffering damages.[280] In a rather circular argument, the *Holston* court stated that disability damages compensate for the "disabling effect of the injury,"[281] and disability rationally includes the loss of enjoyment of life because a person who has lost consciousness is unaware of the loss.[282] Because a plaintiff who has suffered loss of enjoyment of life is precluded from enjoying life's pleasures, such as "enjoy[ing] the

274. *See McDougald*, 536 N.E.2d at 379 (Titone, J., dissenting) ("'[L]oss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury,' a distinctly *objective* loss." (quoting Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980))).

275. *Damages — Loss of Enjoyment of Life*, *supra* note 271, at 814.

276. *Id.* Because juries can clearly distinguish between the two types of damages, it is logical to conclude that allowing for separate awards of hedonic and pain and suffering damages "would contribute to accuracy and precision in thought in the jury's deliberations on the issue of damages." *McDougald*, 536 N.E.2d at 379 (Titone, J., dissenting).

277. *See* 9 FRUMER & FRIEDMAN, *supra* note 53, app. N.

278. *See supra* Part III.B.2.

279. Loss of enjoyment of life damages can be included in categories such as "disability," "permanency of injury," or "impairment." Disability damages "focus[] on the lessening of the plaintiff's abilities from 100 percent rather than on the plaintiff's particular activities and hobbies." Zitter, *supra* note 63, at 64. Before a jury can award damages for the permanency of an injury, there should be a presentation by an expert witness on the subject of permanency. *Id.* at 67. Impairment damages compensate the victim for the inability "to pursue one's normal activities" and for "the status of being limited or incapacitated." Eyoma v. Falco, 589 A.2d 653, 661–62 (N.J. Super. Ct. App. Div. 1991).

280. *See* Holston v. Sisters of the Third Order of St. Francis, 618 N.E.2d 334, 347 (Ill. App. Ct. 1993).

281. *Id.*

282. *See id.*

occupation of [one's] choice, activities of daily living, social leisure activities, and internal well-being,"[283] the plaintiff's ability to enjoy life has been significantly "disabled" and the plaintiff is therefore deserving of disability damages.[284]

The Supreme Court of Appeals of West Virginia also properly included loss of enjoyment of life damages in a separate category from pain and suffering.[285] The *Flannery I* court came to this conclusion through the discussion of its definition of *permanent injury*, which includes "those future effects of an injury which have reduced the capability of an individual to function as a whole man."[286] By categorizing loss of enjoyment of life damages as a single "element" to be considered in damage awards, the *Flannery I* court avoided criticism for double recovery of the same damages.[287] State and federal courts should follow the *Flannery* court's example and consider loss of enjoyment of life damages as a single component in the overall determination of damage awards.

By recognizing the requirement that there be "just and adequate compensation for the interruption of mental and physical functions," courts further support the separation of loss of enjoyment of life damages from pain and suffering.[288] By rendering a plaintiff unconscious, a wrongdoer deprives the plaintiff of the enjoyment the plaintiff would have otherwise experienced in life.[289] This concept, although difficult to explain, is not "too esoteric for a jury to understand and evaluate."[290] The Superior Court of New Jersey based its holding in *Eyoma* on this deprivation of life, recognizing that juries are able to comprehend the loss of life experienced by an unconscious plaintiff.[291] In order to avoid the unjust situation of denying damages for the obvious loss of a joyous life experienced by comatose plaintiffs, courts should allow juries to determine how much loss of enjoyment of life comatose plaintiffs have suffered.

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283. Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1038 (2004) (quoting Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1245 (10th Cir. 2000)) (internal quotation marks omitted).

284. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 642 (1986). Webster's Dictionary defines *disability* as "the condition of being disabled: deprivation or lack esp. of physical, intellectual, or emotional capacity or fitness." *Id.*

285. *See* Flannery v. United States (Flannery I), 297 S.E.2d 433, 438 (W. Va. 1982).

286. *Id.* at 437 (quoting Jordan v. Bero, 210 S.E.2d 618, 634 (W. Va. 1974)) (internal quotation marks omitted).

287. *See Flannery I*, 297 S.E.2d at 438. "Just as a jury may consider the nature, effect and severity of pain when fixing damages for personal injury, or may consider mental anguish caused by scars and disfigurement, it may consider loss of enjoyment of life." *Id.*

288. *See* Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991).

289. *See id.*

290. *Id.*

291. *See id.*

Additionally, the separation of hedonic damages from pain and suffering in survival and wrongful death actions bolsters the argument that the two are distinct types of damages.[292] Because survival actions are based on the recovery of damages that the deceased could have recovered but for death, the same problem is posed with regard to distinctions between various types of compensatory damages.[293]

Commentators argue that pain and suffering and loss of enjoyment of life damages should be grouped together because of "the similar circumstances and seemingly parallel methods of proof surrounding the two concepts."[294] Courts rarely consider pain and suffering damages as two separate elements; they have a "complementary relationship" that necessitates treating them as a "unitary concept."[295] Because pain and suffering and loss of enjoyment of life damages also arise in comparable situations, courts often decide to merge the two types of damages.[296] However, this concept incorrectly classifies the methods of proof courts use in determining loss of enjoyment of life damages.[297] Pain and suffering focuses on the suffering and accompanying pain caused by a specific injury.[298] By contrast, loss of enjoyment of life damages focus on the "limitations placed on a person's ability to enjoy the amenities of life."[299] In determining the amount of loss of enjoyment a plaintiff has suffered, the fact finder must consider "the nature and extent of plaintiff's lifestyle

292. *See supra* Part III.B.2.
293. *See* 1 NATES ET AL., *supra* note 35, § 8.04.
294. Cramer, *supra* note 43, at 978.
295. *Id.*
296. *Id.* Loss of enjoyment of life damages and pain and suffering damages are treated the same for the purposes of determining what is taxable under the Internal Revenue Code. *See* I.R.C. § 104(a)(2) (2006). Under the Internal Revenue Code, gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." *Id.* Any damages that are recovered "on account of" a physical injury must be recovered "because of" physical injury in order to be excluded from gross income. *See* Murphy v. IRS, 460 F.3d 79, 84 (D.C. Cir. 2006). In *Murphy v. IRS*, the plaintiff recovered damages for past and future emotional distress caused by her employer's actions, which were in violation of a federal whistleblower statute. *Id.* at 81. The emotional distress resulted in physical manifestations. *Id.* The *Murphy* court determined that damages for emotional distress with physical manifestations are not received because of physical injury but are received because of emotional injury and therefore are not excludable under I.R.C. § 104(a)(2). *Id.* at 84.
297. *See* Cramer, *supra* note 43, at 978.
298. *See id.*
299. *Id.*

prior to being injured" and the "limited lifestyle of the plaintiff afterwards."[300] This allows for courts to ascertain the loss suffered by a plaintiff "with a reasonable degree of certainty."[301]

Carefully drafted jury instructions will allow every jurisdiction to award both pain and suffering and hedonic damages, while avoiding the duplicative nature these damages can take on.[302] Without separate awards, the tort system cannot fulfill its goal of "reasonable compensation to the plaintiff."[303] Detailed jury instructions will also prevent speculation on what the jury considered in calculating the total amount to award.[304] Using carefully crafted jury instructions to separate loss of enjoyment of life damages from pain and suffering also supports the appellate process.[305] Appellate courts can order new trials only if the damages awarded by a jury are "so

300. *Id.* at 979 (emphasis omitted).

301. *Id.*

302. *See id.* at 983. For example, section 501.1 of the jury instruction concerning personal injury damages in Florida states, "You should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [claimant] . . . for [claimant's] . . . [loss] [injury] [or] [damage], including any damage (claimant) is reasonably certain to [incur] [experience] in the future." *Standard Jury Instructions – Civil Cases*, FLORIDA SUP. CT. (last visited Nov. 24, 2013), *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500. Section 501.2(a) goes on to state that plaintiffs can recovery for "[a]ny bodily injury . . . and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]." *Id.* If implemented properly, these Florida jury instructions allow for the recovery of loss of enjoyment of life damages separate from pain and suffering damages, without being duplicative. The Ninth Circuit Model Civil Jury Instructions also properly separate hedonic damages from pain and suffering damages. *See Manual of Model Civil Jury Instructions*, U.S. COURTS FOR NINTH CIRCUIT (last visited Nov. 24, 2013), *available at* http://www.akd.uscourts.gov/docs/general/model_jury_civl.pdf. The Ninth Circuit model instructions allow for multiple types of damages to be incorporated in the instruction, including disability, disfigurement, and loss of enjoyment of life experienced separate from mental, physical, or emotional pain and suffering. *Id.* In Colorado, on the other hand, jurors are asked to award an amount of damages that will "reasonably compensate the plaintiff for his injuries." Greene & Bornstein, *supra* note 107, at 745. In determining the amount of the award, the jurors are to consider "[a]ny noneconomic losses or injuries incurred . . . including: pain and suffering; inconvenience; emotional stress; [and] impairment of the quality of life." *Id.* at 745 (quoting COLORADO JURY INSTRUCTION 3D: CIVIL (1989) (internal quotation marks omitted)). The Colorado jury instructions do not even attempt to list all of the types of noneconomic damages available, let alone define them, making it a "more difficult task [to determine damages] than deciding on liability." *Id.* (quoting COLORADO JURY INSTRUCTION 3D: CIVIL (1989) (internal quotation marks omitted)).

303. Cramer, *supra* note 43, at 983–84.

304. *See id.* at 984. Because of the vague instructions that are often given, jurors are not "instructed on the definitions of various terms (e.g., pain and suffering, emotional stress), about how to consider and weigh these components, or about how to translate these components into an aggregate award." Greene & Bornstein, *supra* note 107, at 746.

305. *See* Cramer, *supra* note 43, at 984.

grossly inadequate as to leave no reasonable doubt that they resulted from passion or prejudice."[306] By separating loss of enjoyment of life damages from pain and suffering, the appellate court would have more information to use in reviewing the jury's damages award.[307] The separation of the damage awards would also provide more guidance to the parties, allowing them to determine whether an appeal is necessary or even worthwhile.[308] Therefore, the separation of hedonic damages from pain and suffering would benefit "litigants, jurors and the courts."[309]

B. Every Court Should Permit Plaintiffs in a Persistent Vegetative State To Recover Hedonic Damages

Withholding loss of enjoyment of life damages from comatose plaintiffs is contrary to general tort principles.[310] Tort damages compensate victims and provide motivation for members of society to exercise due care.[311] Courts

306. *Id.*; *see also* Roberts v. Bushore, 182 So. 2d 401, 401 (Fla. 1966) ("[A] verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages and . . . a new trial may be readily granted in the one case as the other."); Carter v. Reese, 258 S.E.2d 165, 166 (Ga. Ct. App. 1979) ("[T]o grant a new trial at the appellate level it must appear that the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias.").

307. *See* Cramer, *supra* note 43, at 984.

308. *See id.*

309. *Id.* The vagueness that is common to jury instructions regarding damages may be partially attributed to the inherent vagueness of the law of damages in general. *See* Greene & Bornstein, *supra* note 107, at 747. Many jurisdictions lack a standard "defining when a certain kind of damage award . . . is appropriate . . . in part because it is difficult to identify the particular circumstances in which these damages may be relevant." *Id.* To some, this is viewed as an advantage. *Id.* Vague award standards are flexible and can take into account "the individualized facts of a particular case." *Id.* However, the ambiguous directions may cause jurors to "subvert justice by relying on their biases, prejudices, and whims." *Id.* In addition, ambiguous directions may cause jurors to confuse their discussions on liability with those for damages. *Id.* ("[L]acking clear guidance on what evidence they can legitimately use to assess damages, jurors may factor elements of the evidence on liability into their calculation of damages.").

310. *See Damages — Loss of Enjoyment of Life*, *supra* note 271, at 816.

311. *See id.* Damages awarded to plaintiffs in persistent vegetative states may be improper because the awards go to the families of the victims and are not actually spent by the victims themselves. *See* McGee v. A C and S, Inc., 2005-1036, pp. 11–12 (La. 7/10/06); 933 So. 2d 770, 779 (holding that hedonic damages are recoverable by a tort victim "for the loss of enjoyment of life sustained during the victim's lifetime, [but are] not recoverable by the primary tort victim's family members who are eligible to recover for loss of consortium, service and society under La. C.C. art. 2315(B)"). However, withholding compensatory damages from comatose plaintiffs would encourage tortfeasors to place all of their victims in persistent vegetative states to avoid paying more damages. In

will not deter defendants from causing egregious harm by giving smaller awards to plaintiffs who suffer from the most serious injuries.[312] In addition, allowing for the recovery of loss of enjoyment of life damages provides an incentive for plaintiffs to sue,[313] which according to Judge Posner "is essential to the maintenance of the tort system as an effective deterrent to negligence."[314]

The *McDougald* standard to determine whether plaintiffs are entitled to certain damages will lead to an obvious injustice suffered by comatose plaintiffs.[315] In holding that the recovery of loss of enjoyment of life requires some quantity of cognitive awareness,[316] the majority ignored the fact that the plaintiff's loss of awareness, "including her inability to perceive anguish," is itself a significant loss that should be compensated.[317] The claim that personal injury damages must compensate recognizable injury usually allows for the recovery of subjective losses and objective losses.[318] A plaintiff in a persistent vegetative state, however, can recover only for objective losses because it is impossible to prove any subjective loss when a plaintiff is comatose.[319] The *McDougald* court incorrectly decided that loss of enjoyment of life damages are subjective.[320] Courts should recognize that plaintiffs in a persistent vegetative state remain alive, and their ability to live full lives has been reduced because they are unable to live as uninjured

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addition, although it is very unlikely, a plaintiff might emerge from a coma. *See* Susan Donaldson James, *Poised To Donate Organs, 21-Year-Old Emerges from Coma*, ABC NEWS (Dec. 22, 2011), http://abcnews.go.com/Health/arizona-accident-victim-emerges-coma-poised-donate-organs/story?id=15208351#.UU4V6JNetgs. Sam Schmid was hours away from being taken off life support when he emerged from his coma. *Id.* He is expected to make a full recovery. *Id.* If Sam were injured in an accident that would entitle him to damages from a tortfeasor, those damages would be very helpful in his road to recovery.

312. *See Damages — Loss of Enjoyment of Life*, *supra* note 271, at 816. The denial of loss of enjoyment of life damages "will provide a perverse incentive to physicians by rewarding them for a greater lapse of care." *Id.*

313. *See id.*

314. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 176 (3d ed. 1986). By limiting the damages available to comatose plaintiffs, courts "raise[] the possibility that comatose plaintiffs, their families, and their attorneys will pursue malpractice claims less vigorously than they have in the past. This disincentive to plaintiffs will in turn reduce the deterrent effect of malpractice claims on physicians and hospitals." *Damages — Loss of Enjoyment of Life*, *supra* note 271, at 816.

315. *See supra* notes 165, 175–76 and accompanying text.

316. *See* McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989).

317. *Damages — Loss of Enjoyment of Life*, *supra* note 271, at 815.

318. *See id.* at 814. Subjective losses include pain and suffering, and objective losses include lost wages. *Id.*

319. *See id.*

320. *See id.* The majority asserted that hedonic damages are "associated with a victim's decreased ability to enjoy her life" and therefore are part of pain and suffering and not an objective loss. *Id.* at 815.

people do.[321] The existence of "life'" should not be determined by the existence of consciousness.[322] The *McDougald* court based its decision on the "punitive nature" of hedonic damages recovered by comatose plaintiffs, without realizing that its holding adds "value judgments that have no place in the law of tort recovery."[323] The *McDougald* court's ruling is further flawed in that the majority failed to define what level of cognitive awareness is required to recover hedonic damages.[324] As stated by Judge Titone in his dissent in *McDougald*, the lack of clarity in the levels of "awareness" allows for the possibility that "a plaintiff might not have sufficient awareness to appreciate the meaning of the award," creating an "arbitrary" rule that is contrary to the tort system's goals.[325]

The *Eyoma* court logically concluded that a plaintiff in a persistent vegetative state is not able to carry on the plaintiff's normal activities and pursuits, which in turn causes loss or damage.[326] The court in *Eyoma* stated that "[t]he victim's inability to be presently aware of the loss may prevent further pain and suffering over those inabilities; however, it does not diminish the loss of enjoyment that the human being otherwise would have experienced."[327] Instead of creating a potential injustice simply because of a court's fear of the difficulty in measuring loss of joy, *Eyoma* accepts the challenge and puts faith in a jury's ability to understand and evaluate what a patient in a persistent vegetative state loses.[328]

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321. *See id.*

322. *See id.* Consciousness as a prerequisite to life has long been debated in the philosophical and scientific world. *Compare* KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY 47 (C.J. Arthur ed., Int'l Publishers 1970) ("Life is not determined by consciousness, but consciousness by life."), *with* Jenny Seneor, *Consciousness Determines Life*, THE GREAT REFUSAL (June 1, 2008), http://thegreatrefusal.wordpress.com/2008/06/01/conciousness-determines-life/ (stating that Pierre Bourdieu rejected Marx's theory and "subscribe[d] to the conception that our physical existence is structured by the prevailing ideologies (through a domination that exists in embodiment)").

323. *See* McDougald v. Garber, 536 N.E.2d 372, 378 (N.Y. 1989).

324. *See id.* at 375. "We do not go so far, however, as to require the fact finder to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated." *Id.*

325. *Damages — Loss of Enjoyment of Life*, *supra* note 271, at 814 (citing *McDougald*, 536 N.E.2d at 379 (Titone, J., dissenting)).

326. Eyoma v. Falco, 589 A.2d 653, 661–62 (N.J. Super. Ct. App. Div. 1991). "Surely part of what is lost is the real personal joy and pleasure that the comatose victim might otherwise have experienced." *Id.* at 662.

327. *Id.*

328. *See id.*

V. CONCLUSION

The purpose of the tort system is to compensate the victim, thereby making the plaintiff whole.[329] Because loss of enjoyment of life damages are distinct and separate from pain and suffering damages, courts should consider the two types of damages as separate categories and allow for their simultaneous recovery.[330] This will allow unconscious plaintiffs to recover loss of enjoyment of life damages, which will in turn give them the only available compensation for their loss and allow the law to make them as whole as possible.[331]

329. *See* Flannery v. United States (Flannery I), 297 S.E.2d 433, 435 (W. Va. 1982); Hubbard, *supra* note 41, at 440. "The basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained." *Flannery I*, 297 S.E.2d at 435.

330. *See supra* Part IV.A.

331. *See supra* Part IV.B.