

## **Damages for Loss of Enjoyment of Life**

Relatively recently, courts have begun awarding damages in certain cases for "loss of enjoyment of life," also called "hedonic damages," named for the ancient Greek school of philosophy called "Hedonists" who believed that life should focus on the pursuit of pleasure. The concept of a person being compensated for "loss of enjoyment of life" resulting from the wrongful act of another is not new. A Texas court that considered the concept in 1901 rejected it, finding it "too vague" to be a basis for damages.

### *Loss of Enjoyment Damages*

In the last decade of the 20th Century, however, courts in many states increasingly allowed recovery of hedonic damages. Most states now allow such damages to varying extents; however, such damages are considered "non-economic" damages, and therefore may be limited by "tort reform" statutes. One court explained the concept through the example of a person who loses a leg. There may be pain associated with the loss (plus the possibility of impaired earning power), but after the wound heals, the physical impairment remains, limiting the injured person's activities.

A 2000 New Hampshire Supreme Court case illustrates the concept of loss of enjoyment damages. In this case, Edward Bennett's car was rear-ended. He subsequently suffered headaches and pains in his neck and shoulder, requiring extended periods of therapy. At trial, Bennett, his spouse and their children testified that Edward could no longer engage in many activities, such as taking long vacations by car (his wife did not drive), visiting his children and grandchildren, lifting weights, wrestling with his grandchildren and coaching them in sports, and helping his children with home improvement projects. Hedonic damages had not been recoverable in New Hampshire, but the Court upheld such an award to Bennett. The Court also stated that such damages are separate and distinct from the pain and suffering damages that are often awarded in personal injury cases and other actions.

### *The Nature of Hedonic Damages*

Although the New Hampshire Supreme Court held that hedonic damages are not included in pain and suffering damages, but are a separate award, courts in other states have disagreed. Some courts feared that this separation of damages could lead to duplicative damage awards. In a 1998 decision, *Loth v. Truck-A-Way Corp.*, a California Court of Appeal held that compensation for loss of enjoyment of life is but one component of an award for pain and suffering.

A 2001 Mississippi Supreme Court Case upheld a separate award of hedonic damages, but the legislature evidently disagreed, passing a law effective January 1, 2003 stating "there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering." There remains a split among the states on this issue.

### *Setting a Value on Hedonic Damages*

In order to establish the amount of hedonic damages that should be awarded, claimants in many cases have employed expert witnesses. Basically, the expert establishes a credible value or plausible range of values for a person's enjoyment of life, based on studies, to guide the jury in its award. The methodology differs, but is commonly based on one of more of the following:

- What amount people are willing to pay to reduce their risk of death. The implied value of one's life is calculated by multiplying the cost of a safety device (such as a smoke alarm) by the probability that it will save a life. Most such testimony is based on government studies regarding safety.
- A calculation similar to the above, but based on consumer studies, i.e., asking people how much they are willing to spend for safety devices. This calculation, with the reduction in probability of death with the device, is then used as the basis for valuing a life.
- What people are willing to accept as wages for a more dangerous job. If the probability of death is greater in one job, or for the same job elsewhere (e.g., being a police officer in Los Angeles, as opposed to Provo, Utah), the increased amount of pay multiplied by the increased risk (a 2 in 5,000 chance of death on the job, as opposed to 1 in 5,000) implies the value put on life. Therefore, if a police officer receives \$250 more in Los Angeles, for an increased 1 in 5,000 chance of death, the implied value of a life is \$1,250,000.

When the claimant does not die, but receives a life-impairing injury, the expert will often assign a percentage to the impairment, such as 25%, i.e., the injured persons can only function 75% as well as before the injury. The award is then calculated by multiplying the life value times the percentage of impairment.

### *Rejection of Such Expert Testimony by Some Courts*

The value placed on life through the above methods usually ranges between \$1.5 and \$2.5 million, but sometimes reaches \$8.5 million or more. Many courts have allowed (and continue to allow) such testimony. As the use of such expert testimony became more prevalent, courts in many states began to scrutinize and question the calculations.

A landmark 1993 U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, mandated a preliminary review before allowing "scientific" expert testimony, to evaluate credibility before presentation to the jury. The courts are to consider such factors as whether the methodology has been tested; acceptance of it by the scientific community; potential error rates; whether there has been peer review; and other factors.

Some courts that applied the Daubert test have rejected expert testimony for hedonic damages. A federal court in Illinois found the methodology flawed and rejected its use. The court pointed out that the statistical data had little relation to the life of the specific claimant in that case and questioned the results, which it found subject to manipulation by the expert. Other experts have argued that the calculations based on wage differentials are completely erroneous.

In the above California case, *Loth*, the court held that the expert testimony must be excluded. The court stated that the judge and jury were as, or more, qualified to fix the amount of damages based on their life experiences. A Mississippi statute on hedonic damages also prohibits expert testimony on the subject. Other states, however, continue to allow expert testimony for hedonic damages.