

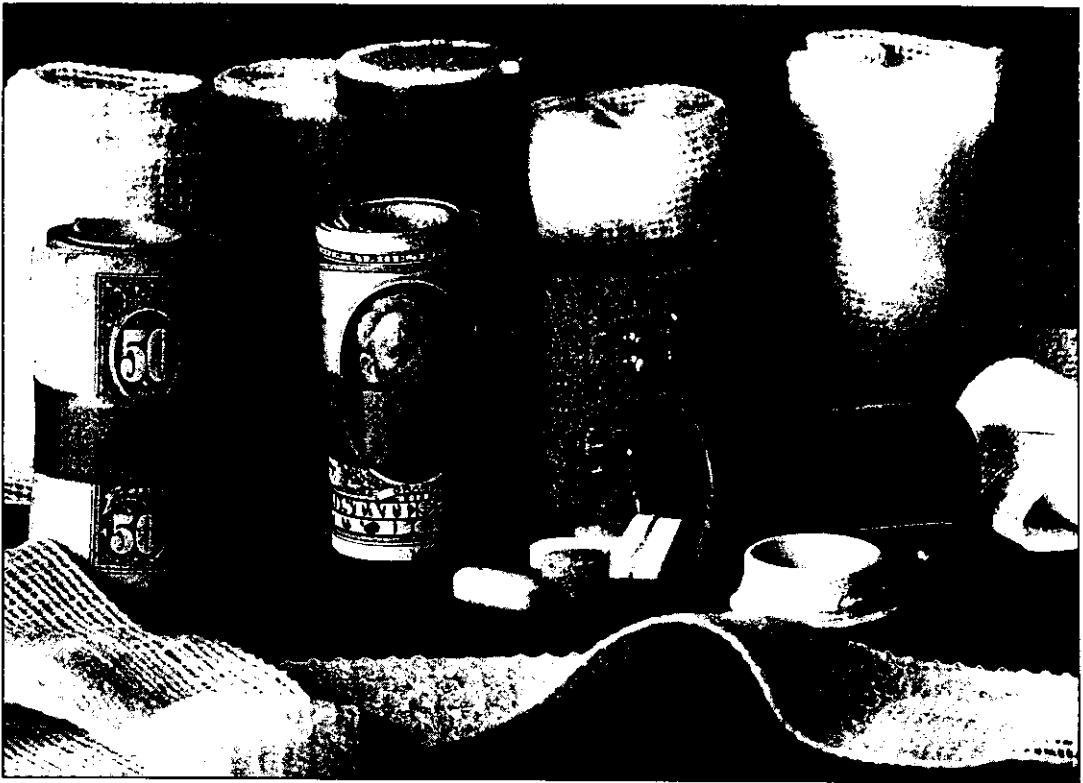
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Hedonic damages • Offers of judgment



Jos. Palmieri

Hedonic Damages

Recoverability, proof and valuation in personal injury, survival and wrongful death actions in Wisconsin

Gary A. Magnarini &
Stan V. Smith

Hedonic damages,¹ a provocative phrase, is a new label for an established concept, but it has stirred considerable controversy in the legal press.² The term first was coined by an economist when testifying in the section 1983 wrongful death case of *Sherrod v. Berry*³ as to the damages for the decedent's "lost value of life." More generally, however, it refers to damages for the "loss of enjoyment of life" (LOEL), which are recoverable in personal injury and survival actions often under the rubric of "pain and suffering."⁴

The exact nature and recoverability of hedonic or LOEL damages, therefore, turns on the cause of action involved. Whether state or federal law governs the action also can affect their recoverability. Perhaps the most current and hotly debated issue with hedonic damages is the appropriateness of using expert economic testimony to monetarily value them.

The mathematical quantification of damages, which heretofore were considered nonpecuniary or noneconomic⁵ has the legal community buzzing.⁶

Wisconsin case law has not addressed many of the key issues surrounding hedonic or LOEL damages. Considering that these damages conceivably could constitute a substantial if not predominant portion of various jury awards, personal injury attorneys should familiarize themselves with the issues involved. This article broadly examines the issues of recoverability, proof and valuation in personal injury, survival and wrongful death actions in Wisconsin.

Personal injury actions

Separateness of damage award. In the majority of jurisdictions, including Wisconsin, plaintiffs who are unable to engage in the same activities after an injury as before may be awarded damages for their "loss of capacity to enjoy life," or LOEL.⁷ An important issue that divides the courts, however, is whether an award for these damages can be made separate

and apart from damages for "pain and suffering." In other words, the issue is whether a separate verdict question can be submitted to the jury.⁸

Numerous courts believe that LOEL is conceptually distinct from pain and suffering and that separate verdict questions do not lead to jury confusion or a duplication of damage awards.⁹ LOEL refers to what was taken away from the injured plaintiff and may be proven by objective evidence establishing the curtailment of any of the plaintiff's activities (for example, recreational, household, daily living). Pain and suffering refers to what was inflicted on the plaintiff and is proven by more subjective evidence establishing the physical discomfort and mental anguish sensed by the plaintiff.¹⁰ These courts contend that the difference between LOEL and pain and suffering is a problem of definition only, and carefully worded jury instructions can minimize any possibility of jury confusion or duplication.¹¹ Separate awards should contribute to greater accuracy, moreover, and facilitate judicial review for excessiveness.¹²

A large number of courts are against submitting a separate verdict question on LOEL on grounds that a duplication of damages might result.¹³ These courts rationalize that LOEL is merely a subelement of pain and suffering (or "pain, suffering and disability") because the two types of noneconomic damages generally consider the same evidentiary circumstances.¹⁴ It is even contended that LOEL is nothing more than the mental anguish component of pain and suffering; an injured party who is unable to engage in various activities is frustrated and grieves over that fact.¹⁵

Wisconsin courts have not clearly addressed

For other damage issues, see also *The Law of Damages in Wisconsin*, a two-volume practice handbook from State Bar CLE Books.

Gary A. Magnarini (left) received his J.D., cum laude, from Marquette University; and his LL.M., with distinction, from the University of Cambridge, England. Magnarini co-authored this article while a research attorney with



Warshafsky, Rotter, Tarnoff, Gesler, Reinhardt & Bloch S.C. He currently is the law clerk to Chief Justice Nathan S. Heffernan, Supreme Court of Wisconsin.

Stan V. Smith is an adjunct professor at

DePaul University College of Law and president of Corporate Financial Group, a litigation support firm in Chicago. Trained as an economist at the University of Chicago, Smith first introduced testimony on hedonic damages in *Sherrod v. Berry*. He is co-author of *Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys* published in spring 1990 by Anderson, Cincinnati.

the separateness issue. To be sure, trial practitioners normally only submit verdict questions to the jury for the determination of the plaintiff's past and future "pain, suffering and disability."¹⁶ However, LOEL was not always an element to be considered under the rubric of pain, suffering and disability. In early cases, juries were clearly instructed to consider the plaintiff's LOEL apart from pain and suffering.¹⁷

Over time, it appears that the two damage awards were lumped together and the term "disability" inserted into the general category of "pain and suffering."¹⁸ Although some courts have tried to distinguish "disability" or "permanent injury" from LOEL,¹⁹ it is fair to say that these terms generally can be equated in Wisconsin.²⁰ On that point it is essential to note that Wisconsin courts have required varying degrees of proof for the more subjective pain and suffering and objective disability/permanent injury.²¹ Overall, there is clear legal authority to support a separate award of LOEL damages if the courts were pressed to decide the issue.

Awareness/consciousness requirement.—Another key issue that divides the courts is whether injured plaintiffs must be mentally aware of their LOEL in order to recover damages. Plaintiffs who become comatose or whose intelligence is reduced greatly as a result of a brain-damaging injury usually are unable to engage in their normal activities. To be sure, all courts hold that plaintiffs must be conscious of their pain and suffering before recovering those damages.²² The issue is whether LOEL damages stand in a different position.

Following the lead of the English House of Lords,²³ several American courts have held that awareness is an irrelevant consideration with LOEL.²⁴ While plaintiffs who do not sense any physical or mental pain and suffering obviously sustain no loss, the inability to engage in pleasurable activities is considered an objective loss that is not dependent on plaintiffs' mental perception.²⁵ The goal of tort damages is to provide compensation, and plaintiffs who lose part or all of their senses have suffered a definite objective loss. Awarding LOEL damages to a comatose plaintiff accordingly is not punitive.²⁶ The utility of the damages to the plaintiff furthermore is wholly irrelevant.²⁷ For example, a decedent's estate commonly is entitled to predeath pain and suffering damages in survival actions.²⁸

Conversely, other courts scale the amount of LOEL damages according to the plaintiff's awareness of the loss. "Some level of cognitive awareness" is required because damages must have a utility or meaning to the injured party.²⁹ These courts have reasoned that LOEL damages do not provide consolation, ease any burden or directly benefit a comatose plaintiff and hence are deterrent or punitive in nature.³⁰ Alternatively, because LOEL is no more than a species of mental anguish, a person who lacks awareness of any diminished capacity to enjoy life has suffered no loss.³¹

Wisconsin courts have yet to tackle the awareness issue with LOEL damages. Although Wisconsin, like all other jurisdictions, requires conscious pain and suffering as a prerequisite to recovering those damages,³² that does not resolve the LOEL issue. The

awareness and separateness issues obviously are tied together. To the extent Wisconsin courts would consider LOEL to be nothing more than mental anguish, a plaintiff's consciousness would be a relevant factor.³³ Furthermore, while the utility argument has found favor with the court in the analogous situation of denying hedonic or LOEL damages in wrongful death actions,³⁴ Wisconsin does allow for the recovery of predeath pain and suffering damages in survival actions³⁵ where the injured party is dead and obviously has no utility with the money whatsoever.

Federal law distinctions. It should be noted that personal injury actions based on federal statutes such as the Federal Tort Claims Act (FTCA), Federal Employers' Liability Act (FELA) or section 1983 might require a different analysis. As to the issue of separate LOEL damage awards, the applicable state law might control.³⁶ However, as to the awareness issue a substantive federal standard might govern the matter. Under the FTCA, for example, punitive damages are prohibited statutorily.³⁷ Several federal courts faced with the awareness issue in an FTCA action have denied or reduced LOEL damages, reasoning that such an award as a matter of federal law would be punitive and not compensatory.³⁸ Other courts expressly have rejected the punitive argument and have found a plaintiff's awareness to be irrelevant under the applicable state law.³⁹

Survival actions

State law. A decedent's estate generally is allowed to recover damages for predeath injuries in a statutory survival action.⁴⁰ Like wrongful death actions, survival actions are "creatures of the legislature"; at common law, all actions ceased with the death of the plaintiff.⁴¹ The class of beneficiaries, types of actions and nature and amount of damages allowed are all defined statutorily.

Under Wisconsin's survival statute, Wis. Stat. section 895.01, a decedent's estate may recover in tort for "other damage to the person."⁴² While the statutory language is extremely broad and really does not place any limitation "as to the nature of damages,"⁴³ the courts only have allowed for the recovery of predeath damages.⁴⁴ Postdeath pecuniary or nonpecuniary losses, such as future lost income and, most relevantly, hedonic or loss of life damages, are not recoverable by the decedent's estate.⁴⁵ Like most states, Wisconsin does allow for the recovery of predeath conscious pain and suffering.⁴⁶ Under this rubric, therefore, it would appear that predeath LOEL damages would be recoverable⁴⁷ although "shortened life expectancy" damages have been excluded.⁴⁸ It further would appear that the separateness and awareness issues would be controlled by the same factors as in personal injury actions.

Federal law distinctions. Causes of action for predeath injuries based on federal law such as section

1983 or the FTCA again may call for a different analysis. In section 1983 survival actions based on the wrongful death of a party, for example, the courts generally have allowed the decedent's estate to re-

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cover both predeath LOEL and postdeath hedonic or loss of life damages even though the latter were not recoverable under the applicable state statute.⁴⁹ In *Bell v. City of Milwaukee*,⁵⁰ the Seventh Circuit Court of Appeals specifically held that the denial of hedonic damages to the decedent's estate under Wisconsin's survival statute was in conflict with the deterrence and compensation policies of section 1983.⁵¹ In survival actions based on the FTCA, on the other hand, it appears that the courts inconsistently would hold that predeath LOEL damages are compensatory and recoverable but that postdeath hedonic or loss of life damages are punitive and nonrecoverable.⁵²

Wrongful death actions

State law. Wrongful death actions also are "creatures of the legislature" and did not exist at common law.⁵³ The class of beneficiaries and type and amount of damages allowed are defined statutorily. The majority of states do not allow either survivors or the decedent's estate to recover postdeath hedonic or loss of life damages.⁵⁴ Wisconsin has followed suit with our courts surmising that hedonic damages were excluded under sections 895.03-.04 of the Wisconsin Statutes because they would not have any utility to the decedent.⁵⁵ However, a minority of states expressly do allow for the recovery of hedonic or loss of life damages.⁵⁶ In support of their recovery the courts have cited the policy of full compensation in tort law and inferentially have rejected any utility requirement.

Federal law distinctions. Wrongful death actions premised on federal laws such as section 1983 or the FTCA also might require a different analysis. In section 1983 wrongful death actions, for example, the courts generally have allowed the decedent's estate to recover postdeath hedonic or loss of life damages even though the applicable state law would not have allowed it.⁵⁷ In order to further the deterrence and compensation policies of section 1983, state law has had to give way.⁵⁸ In wrongful death actions based on the FTCA, on the other hand, the statutory ban on punitive damages might affect any potential recovery of postdeath hedonic damages.⁵⁹

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Proof and valuation

Lay testimony. Trial practitioners are accustomed to proving hedonic/LOEL damages in personal injury or survival actions simply by presenting evidence on the inability of the plaintiff to engage in various activities after the injury.⁶⁰ Testimony from the plaintiffs themselves or others close to them generally is utilized to demonstrate the effect of the injury on a plaintiff's lifestyle.⁶¹ In wrongful death actions where hedonic damages are allowed, on the other hand, the decedent obviously has sustained a total and permanent LOEL and hence a before/after analysis need only be made if the loss of life is valued according to its effects on the survivors.⁶²

While lay testimony is submitted to establish the extent of the plaintiff's LOEL, these witnesses are not allowed to quantify or monetarily value the damages. The courts traditionally have only allowed attorneys to suggest a lump sum award for hedonic/LOEL damages to the jury in closing argument.⁶³ Regarding the general category of pain, suffering and disability damages, "per diem" arguments are all (from

owed in federal courts⁶⁴ but not in Wisconsin and many other state courts.⁶⁵

Expert testimony. Courtroom evidence about the loss of the value of life can take several forms. Evidence might be produced as to what it costs to save the lives of specifically known individuals trapped in life-threatening situations; the costs of maintaining prisoners serving life sentences without parole; the costs of maintaining hospital patients who are irreversibly brain dead; and even the costs of saving whales. These latter estimates may have jury appeal but are a subjective measure of what we routinely are willing to pay to save lives. They do not reflect the ordinary process and price of living any more than the price of a movie (\$3 per hour) reflects our enjoyment of life. Economists could argue for the additional capacity to earn if a decedent were faced with certain death as an alternative.

The most appropriate approach is to base the value of life on a wide body of literature measuring the cost/benefit of lifesaving reflected in, for example, consumer purchases of lifesaving devices, the value of life implied by the risk premium paid for hazardous jobs or, more controversially, the value of life

implied by government regulations.⁶⁶ In the main these surveys conclude that life routinely is valued in the several million dollar range.⁶⁷

In wrongful death actions, these life values must be reduced by lost earnings and other factors to produce a net hedonic value. The net value then can be tailored to the specific individual in various ways.⁶⁸ In personal injury and survival actions, the diminishment of the capacity to enjoy life can be quantified through an interdisciplinary approach using a psychosocial loss scale and an economic valuation.⁶⁹ More research on this methodology is forthcoming.

Admissibility of expert testimony. In *Sherrod v. Berry*, a section 1983 wrongful death case, expert testimony on hedonic damages was allowed into evidence for the first time because it was neither irrelevant nor speculative but rather "invaluable to the jury" in determining the hedonic value of the decedent's lost life.⁷⁰ In a more recent publicized personal injury case that settled, expert testimony similarly was introduced to value a plaintiff's LOEL damages.⁷¹ The "value of life" model also has been admitted to quantify the loss of society and companionship.

There is no catalog of states where testimony on hedonic damages has been provided at the trial court level, but the authors personally are aware that testimony has been admitted in numerous states including Alaska, California, Florida, Illinois, Indiana, Mississippi, Ohio and Texas.⁷² Testimony currently is pending in more than a dozen other states. Further, in section 1983 actions, such testimony was admitted in federal courts in Illinois and Ohio. Counting testimony by other economists, the list may be longer.

While no appellate court has ruled against the admissibility of such testimony, trial courts in some states, including Wisconsin, Missouri and Michigan, have not allowed it. The arguments against its introduction into evidence are that it is irrelevant,⁷³ speculative,⁷⁴ an improper mathematical computation,⁷⁵ or an intrusion on the jury's discretion to calculate pain, suffering and disability damages.⁷⁶ The countervailing arguments in favor of its introduction, however, are that it is evidence that is indeed relevant,⁷⁷ nonspeculative,⁷⁸ and well accepted in the field and will assist the trier of fact.⁷⁹ Moreover, it has been argued that hedonic valuation can reduce the variability of awards and thus fundamentally be fairer to both defendants and plaintiffs at trial.⁸⁰

Conclusion

It is apparent from the degree of legal and economic interest in this topic that presentation of testimony on hedonic damages in courts will continue to expand. To the extent that significant social issues are raised by the new approach to quantification, state legislatures may take an interest in more precisely delineating intangible elements of damage and rights to recoverability in wrongful death, survival and personal injury actions.

Endnotes

¹The word "hedonic" is defined as "[o]f or relating to pleasure." VII *Oxford English Dictionary* 98 (2d ed. 1989).

²See Blum, *More Suing Over Loss of Life*, 11 Nat'l L.J. 1 (April 17, 1989); Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 78 Geo. L.J. 1687 (1990).

³629 F. Supp. 159, 162-63 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195, 205-06 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

⁴See, e.g., *Leiker by and through Leiker v. Gafford*, 778 P.2d 823, 834 (Kan. 1989).

⁵Because numerous states place statutory limitations on the recovery of noneconomic damages, it is important to determine whether hedonic/LOEL damages should be considered economic. See Wis. Stat. §§ 655.017; 893.55. To be sure, most states label them as noneconomic or noneconomic. See, e.g., *Nemmers v. United States*, 681 F. Supp. 567, 573 (C.D. Ill. 1988), *vacated*, 795 F.2d 628 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989); cf. Wis. Stat. § 893.55(4)(a). To the extent they can be "rendered reasonably certain monetarily by a mathematical figure or calculation" by a forensic economist, however, they could be deemed pecuniary or economic. See *Flannery v. United States*, 297 S.E.2d 433, 435 (W. Va. 1982); *Black's Law Dictionary* 206 (5th ed. 1983).

⁶See Barrett, *New Legal Theorists Attach a Dollar Value to the Joys of Living*, Wall St. J., Dec. 12, 1988, at A1, col. 1; A6, col. 2; Note, *Hedonic Damages*, 59 Miss. L.J. 495 (1989).

⁷See, e.g., *Kramer v. Chicago, M., St. P. & P. R. Co.*, 226 Wis. 118, 133, 276 N.W. 113 (1937). In personal injury actions, the courts employ a variety of terms and concepts to refer to hedonic/LOEL damages, e.g., disability, permanent injury, loss of amenity. See *Willinger v. Mercy Catholic Med. Ctr.*, 393 A.2d 1188, 1190 (Pa. 1978).

⁸Some courts believe that a separate verdict question would lead to an increase in overall damage awards. See *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 941 (1989). See generally Fearon, *Hedonic Damages: A Separate Element in Tort Recoveries?*, 56 Def. Couns. J. 436 (1989).

⁹See, e.g., *Kirk v. Washington State Univ.*, 109 Wash. 2d 448, 746 P.2d 285, 293 (1987); *Rufino v. United States*, 829 F.2d 354, 359-62 (2d Cir. 1987). See generally Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293, § 4 (1984); 22 Am.Jur. 2d *Damages* § 272 (1988).

¹⁰See Moore, *Loss of Enjoyment of Life*, 25 Trial 58, 59 (Sept. 1989).

- ¹¹See *Andrews v. Mosley Well Service*, 514 So. 2d 491, 497-99 (La. App. 1987); *Mariner v. Marsden*, 610 P.2d 6, 17 (Wyo. 1980) (J. Rooney, concurring).
- ¹²See *McDougald v. Garber*, 135 A.D.2d 80, 524 N.Y.S.2d 192, 198 (1988), modified, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 942-43 (1989) (J. Titone, dissenting); see also Note, *Loss of Enjoyment of Life as an Element of Damages*, 73 Dick. L. Rev. 639, 645-46 (1969).
- ¹³See, e.g., *Canfield v. Sandock*, 546 N.E.2d 1237, 1239 (Ind. App. 1989); *Stroud v. Stroud*, 385 S.E.2d 205, 206 (S.C. App. 1989); see generally, Anno., 34 A.L.R. 4th 293 at § 3.
- ¹⁴See Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac. L.J. 965, 973 (1981).
- ¹⁵See, e.g., *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 940-41 (1989); cf. *Judd v. Rowley's Cherry Hill Orchards Inc.*, 611 P.2d 1216, 1221 (Utah 1980); *Hermes, Loss of Enjoyment of Life - Duplication of Damages versus Full Compensation*, 63 N.D.L. Rev. 561, 589 (1987).
- ¹⁶See Wis. J.I. 1750, 1750A.
- ¹⁷See *Bassett v. Milwaukee N.R. Co.*, 169 Wis. 152, 157-59, 170 N.W. 944 (1919); *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 30, 132 N.W. 633 (1911); but see *Stewart v. City of Ripon*, 38 Wis. 584, 587-88 (1875).
- ¹⁸See *Ballard v. Lumberman's Mut. Cas. Co.*, 33 Wis. 2d 601, 604-12, 148 N.W.2d 65 (1967); *Kincannon v. Nat'l Indem. Co.*, 5 Wis. 2d 231, 233-36, 92 N.W.2d 884 (1958); *Kramer v. Chicago, M., St. P. & P. R. Co.*, 226 Wis. 118, 133, 276 N.W. 113 (1937).
- ¹⁹See *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980), cert. denied, 449 U.S. 1035 (1980).
- ²⁰But see *Law of Damages in Wisconsin* 7-3 to 7-15 (1989).
- ²¹See *Hack v. State Farm Mut. Auto. Ins. Co.*, 37 Wis. 2d 1, 6-10, 154 N.W.2d 320 (1967); *DuCate v. Brighton*, 133 Wis. 628, 632, 114 N.W. 103 (1907).
- ²²See 22 Am. Jur. 2d *Damages* § 241 (1988). At least one neurologist, however, believes that "vegetative" patients may feel pain. See *Culotta, Feeling No Pain? Neurologist Bucks Official Stand on Vegetative Patients*, *Milw. J.*, July 25, 1990, at 1, col. 3.
- ²³See *H. West & Son Ltd. v. Shephard* [1963] 2 All E.R. 625, 633-34, 642-46 (H.L.).
- ²⁴See *Flannery v. United States*, 297 S.E.2d 433, 438-39 (W. Va. 1982). See generally Note, *Non-pecuniary Damages for Comatose Tort Victims*, 61 Geo. L.J. 1547 (1971).
- ²⁵See, e.g., *H. West & Son Ltd. v. Shephard* [1963] 2 All E.R. 625, 633-34 (L. Morris).
- ²⁶See, e.g., *Rufino v. United States*, 829 F.2d 354, 361 (2d Cir. 1987); *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 942-44 (1989) (J. Titone, dissenting).
- ²⁷See, e.g., *Lim v. Camden Health Auth.* [1980] A.C. 174, 188 (H.L.) (L. Scarman); *Croke v. Wiseman* [1981] 3 All E.R. 852, 862-63 (J. Shaw).
- ²⁸See *Kalavry v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); S. Speiser, *Recovery for Wrongful Death* § 14.8 (2d ed. 1975).
- ²⁹See *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 940-41 (1989); cf. *Gregory v. Carey*, 791 P.2d 1329, 1334-36 (Kan. 1990).
- ³⁰See *Flannery for Flannery v. United States*, 718 F.2d 108, 110-11 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Andrulon v. United States*, 724 F. Supp. 1421, 1524-25 (N.D. N.Y. 1989); *Nemmers v. United States*, 681 F. Supp.
- 567, 575-76 (C.D. Ill. 1988), vacated, 795 F.2d 628 (7th Cir. 1986), aff'd, 870 F.2d 426 (7th Cir. 1989).
- ³¹See, e.g., *H. West & Son Ltd. v. Shephard* [1963] 2 All E.R. 625, 628-29, 636-37 (H.L.) (L. Reid and L. Devlin, dissenting); cf. *Leiker by and through Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823, 835-38 (1989).
- ³²See, e.g., *Leibel v. St. Mary's Hosp. of Milwaukee*, 57 Wis. 2d 227, 232-33, 203 N.W.2d 715 (1973); Wis. J.I. 1755. See generally Ghiardi, *Personal Injury Damages in Wisconsin* 66-67 (1964).
- ³³Cf. *Stewart v. City of Ripon*, 38 Wis. 584, 587-88 (1875).
- ³⁴See *Weiss v. Regent Properties Ltd.*, 118 Wis. 2d 225, 234, 346 N.W.2d 766 (1984); *Prunty v. Schwantes*, 40 Wis. 2d 418, 424, 162 N.W.2d 34 (1968).
- ³⁵See *Weiss v. Waukesha Milk Co.*, 190 Wis. 52, 56-57, 208 N.W. 901 (1926); Wis. J.I. 1855.
- ³⁶State law generally controls in FTCA actions on the issue of damages. See 28 U.S.C. § 2674; *Fraysier v. United States*, 566 F. Supp. 1085, 1090 (S.D. Fla. 1983), aff'd, 766 F.2d 478 (11th Cir. 1985). Federal law may control the issue in FEOLA actions, however. See *Dugas v. Kansas City S. Ry. Lines*, 473 F.2d 821, 827 (5th Cir. 1973), reh'g denied, 475 F.2d 1404 (5th Cir. 1973), cert. denied, 414 U.S. 823 (1973) (holding LOEL is not a separate element from pain and suffering).
- ³⁷See 28 U.S.C. § 2674. See also *Felder v. United States*, 543 F.2d 657, 669 (9th Cir. 1976).
- ³⁸See *Flannery for Flannery v. United States*, 718 F.2d 108, 110-11 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Nemmers v. United States*, 681 F. Supp. 567, 575-76 (C.D. Ill. 1988), vacated, 795 F.2d 628 (7th Cir. 1986), aff'd, 870 F.2d 426 (7th Cir. 1989); *Reilly v. United States*,

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665 F. Supp. 976, 984-85 (D. R.I. 1987), *modified*, 863 F.2d 149 (1st Cir. 1988).

³⁹See *Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987); *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *cf. Yako v. United States*, 891 F.2d 738, 745-46 (9th Cir. 1989); *Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987) (issue of "how to value pain and suffering" has nothing to do with punitive damages in FTCA actions).

⁴⁰See, e.g., *Nussbaum v. Gibstein*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289, 290 (1989). See generally *Law of Damages in Wisconsin* Ch. 16 (1989).

⁴¹See *Baker v. Bolton* (1808) 1 Camp. 493, 170 Eng. Rep. 1033. See also *Woodward v. Chicago & N.W. Rys. Co.*, 23 Wis. 400, 405-06 (1868).

⁴²It is interesting to note that personal torts did not survive under Wisconsin's original survival statute. See, e.g., *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 149-50, 11 N.W. 419 (1882).

⁴³See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 310, 294 N.W.2d 437 (1980).

⁴⁴See, e.g., *Tidmarsh v. Chicago, M. & St. P. R. Co.*, 149 Wis. 590, 598-99, 136 N.W. 337 (1912); *Nemecek v. Filer and Stowell Co.*, 126 Wis. 71, 72, 105 N.W. 225 (1905).

⁴⁵See *Weiss v. Regent Properties Ltd.*, 118 Wis. 2d 225, 233, 346 N.W.2d 766 (1984); *Prunty v. Schwantes*, 40 Wis. 2d 418, 424, 162 N.W.2d 34 (1968); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1235-36 (7th Cir. 1984).

⁴⁶See, e.g., *Klawes v. Firestone Tire & Rubber Co.*, 572 F. Supp. 116, 119-20 (E.D. Wis. 1983); *Blaisdell v. Allstate Ins. Co.*, 1 Wis. 2d 19, 24-26, 82 N.W.2d 86 (1957). The statutory schemes in some jurisdictions, however, apparently do not allow for the recovery of pain and suffering or noneconomic damages in survival actions. See *Guyton v. Phillips*, 532 F. Supp. 1154, 1164 (N.D. Cal. 1981), *aff'd*, 606 F.2d 248 (9th Cir. 1979). See generally S. Speizer, *Recovery for Wrongful Death* § 14.8 (2d ed. 1975).

⁴⁷*Cf.* Wis. J.I. 1855. See generally Minzer, Nates, Kimball, Axelrod and Goldstein, *Damages in Tort Actions* § 8.03, 8-22 (1984). LOEL damages typically would be sustained over a very short time period in survival actions, however. See *Stern v. Wesley College Inc.*, 747 F. Supp. 263, 273 (Del. 1990).

⁴⁸See *Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir. 1966); 22 Am. Jur. 2d *Damages* § 276 (1988). Even the English, who historically awarded "loss of expectation of life" damages, have now statutorily abolished the award in both survival and wrongful death actions. See Administration of Justice Act 1982, *discussed in* 13 *Halsbury's Statutes* 542 (4th ed. 1985).

⁴⁹See, e.g., *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1189-90 (7th Cir. 1985); *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1253-57 (E.D. Wash. 1987), *aff'd*, 869 F.2d 1230 (9th Cir. 1989); *Guyton v. Phillips*, 532 F. Supp. 1154, 1164-68 (N.D. Cal. 1981), *aff'd*, 606 F.2d 248 (9th Cir. 1979).

⁵⁰746 F.2d 1205 (7th Cir. 1984).

⁵¹*Id.* at 1235-40. It should be noted that postdeath hedonic damages obviously were awarded separately from any predeath pain and suffering and not dependent on any awareness, consciousness or utility requirements.

⁵²Compare *Berger v. Winter Sportswear Inc.*, 394 F. Supp. 1110, 1115 (S.D. N.Y. 1975) (predeath pain and suffering damages are not punitive under FTCA) with *D'Ambra v. United States*, 481 F.2d 14, 16-20 (1st Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973) (Rhode Island survivor-type wrongful death act which looks at economic

loss to decedent is punitive under FTCA).

⁵³It appears that most states patterned their wrongful death statutes after Lord Campbell's Act passed by the English legislature in 1846. See generally *Brown v. Chicago & N.W.R. Co.*, 102 Wis. 137, 77 N.W. 748 (1899); Minzer *et al.*, *Damages in Tort Actions* § 8.03 (1984).

⁵⁴See, e.g., *Willinger v. Mercy Catholic Med. Ctr.*, 393 A.2d 1188, 1190-91 (Pa. 1978). See also Goldstein, *Hedonic Damages: Awards for Loss of Life and its Pleasures*, 30 *For the Defense* 6 (Nov. 1988); Note, *Wrongful Death Damages in California: On the Brink of Full Compensation*, 24 S.D.L. Rev. 1003, 1019-21 (1987). In discussing the recoverability of such damages, it should be noted that some courts use other terms such as "full value of the plaintiff," "loss of amenities" or "loss of expectation of life."

⁵⁵See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205, 1235-40 (7th Cir. 1984); *Prunty v. Schwantes*, 40 Wis. 2d 418, 424, 162 N.W.2d 34 (1968).

⁵⁶See, e.g., *Katsetos (Estate of Katsetos) v. Nolan*, 170 Conn. 637, 368 A.2d 172, 183 (1976); *McQuirter v. City of Atlanta*, 572 F. Supp. 1401, 1421-22 (N.D. Ga. 1983); *cf. McGowan v. Estate of Wright*, 524 So. 2d 308, 312 (Miss. 1988) (J. Robertson, dissenting from denial of petition for rehearing).

⁵⁷See *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1985, 1104-06 (7th Cir. 1990). See also *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir. 1989); *Davis v. City of Ellensburg*, 651 F. Supp. 1248 (E.D. Wash. 1987), *aff'd*, 869 F.2d 1230 (9th Cir. 1989). See generally Murrari, *Hedonic Damages: Properly A Factor within Pain and Suffering under 42 U.S.C. Section 1983*, 10 N. Ill. U. L. Rev. 37 (1989).

⁵⁸See, e.g., *Strandel v. Jackson County*, 634 F. Supp. 824, 832 (S.D. Ill. 1986), *modified*, 648 F. Supp. 126 (S.D. Ill. 1986). See generally Note, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, Wash. & Lee L. Rev. 321 (1987).

⁵⁹Various federal courts have characterized state wrongful death statutes as punitive to the extent that damages are determined according to the "lost value of life" or "economic loss" to the decedent. See *D'Ambra v. United States*, 481 F.2d 14, 16-20 (1st Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973); *Hartz v. United States*, 415 F.2d 259, 263-64 (5th Cir. 1969); see also Note, *Defining Punitive Damages under the Federal Tort Claims Act*, 53 U.Cin. L. Rev. 251 (1984). In that event, the provisions of the FTCA allow for the recovery of "actual or compensatory" damages to the beneficiaries. See 28 U.S.C.A. § 2674; 35 Am. Jur. 2d *F.T.C.A.* at § 105; *Hoyt v. United States*, 286 F.2d 356, 358 (5th Cir. 1961).

Other courts reject such a narrow view of punitive damages, however, and do not look at the direct or out-of-pocket losses of living beneficiaries. See *Kalavity v. United States*, 584 F.2d 809, 810-11 (6th Cir. 1978); Annotation, *Measure of Damages for Wrongful Death of Child under Federal Tort Claims Act*, 25 A.L.R. Fed. 179, at § 5 (1975 & 1989 Supp.) (citing cases allowing for recovery of prospective earnings by decedent's estate). See generally Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act*, 27 Wm. & Mary L. Rev. 245 (1986).

⁶⁰See *Ballard v. Lumberman's Mut. Cas. Co.*, 33 Wis. 2d 601, 610-12, 148 N.W.2d 65 (1967); Wis. J.I. 1750, 1750A. Because the injured plaintiff's ability to engage in activities frequently is diminished because of pain, proof of physical and mental pain and suffering often is presented at the same time. See *Davis v. Allstate Ins. Co.*, 55 Wis. 2d 56, 58-59, 197 N.W.2d 734 (1972); *Kincannon v. National Indem. Co.*, 5 Wis. 2d 231, 234-

36, 92 N.W.2d 884 (1958).

⁶¹See *Law of Damages in Wisconsin* 7-10 (1989).

⁶²See *McQuirter v. City of Atlanta*, 572 F. Supp. 1401, 1421-22 (N.D. Ga. 1983); Minzer, *et al.*, *Damages in Tort Actions*, § 8.03 (1984).

⁶³See Ghiardi, *Personal Injury Damages in Wisconsin* 79-81 (1964). Some commentators, however, have criticized attorneys' use of "naive formula[s]" such as arguing that "pain and suffering losses are two- or three-times earnings loss." See Berla, Brookshire and Smith, *Hedonic Damages and Personal Injury: A Conceptual Approach*, 3(1) J. Forensic Econ. 1-8 (1990).

⁶⁴See, e.g., *Waldron v. Hardwick*, 406 F.2d 86, 89 (7th Cir. 1969).

⁶⁵See, e.g., *Affett v. Milwaukee & S.T. Corp.*, 11 Wis. 2d 604, 612-14, 106 N.W.2d 274 (1960). See generally T. Warshafsky, *Trial Handbook for Wisconsin Lawyers*, § 400 (1981).

⁶⁶See Fisher, Chestnut and Violette, *The Value of Reducing Risks of Death: A Note on New Evidence*, 8 J. Pol'y Analysis and Mgmt. 87, 88-100 (1989).

⁶⁷See Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70-73 (Sept. 1988).

⁶⁸See M. Brookshire and S. Smith, *Economic Hedonic Damages: A Practice Manual for Plaintiff and Defense Attorneys*, ch. 9, Anderson Publ. Co., Cincinnati, Ohio (1990).

⁶⁹See Berla, Brookshire and Smith, *Hedonic Damages and Personal Injury: A Conceptual Approach*, 3(1) J. Forensic Econ. 1-8 (1990).

⁷⁰629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195, 206 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988) (en banc). It should be noted that while the Seventh Circuit's first decision was vacated, on rehearing the court sitting en banc specifically left standing its ruling on the admissibility of expert testimony. See *Sherrod*, 856 F.2d at 807.

⁷¹See *Ferguson v. Vest*, 87-L-207 (3d Jud. Cir., Madison City, Ill.), *discussed in* Marcotte, *Last Pleasure Suit*, 76 A.B.A. J. 30 (April 1990). See also Smith, *The Hedonic Value of Life: Economic Expert Witness Testimony in Injury and Wrongful Death*, Expert Evid. Rep. 4 (Sept. 1989).

⁷²See Smith, *Hedonic Damages in the Courtroom Setting: A Bridge over Troubled Waters*, 3(3) J. Forensic Econ. (1990) (forthcoming).

⁷³See Gillen & Olson, *Economic and Legal Defenses Against Claims for Hedonic Damages*, 33 *For the Defense* 18 (Jan. 1991); Miller, *The Price of Life*, 8 Reader 9, The Chicago Reader Inc. (Sept. 22, 1989).

⁷⁴See Staller, *Placing a Value on the Enjoyment of Life*, 31 *For the Defense* 8, 9-10 (June 1989).

⁷⁵See *Affett v. Milwaukee & S.T. Corp.*, 11 Wis. 2d 604, 612-15, 106 N.W.2d 274 (1960).

⁷⁶See *Helleckson v. Loiselle*, 87 Wis. 2d 423, 430, 155 N.W.2d 45 (1967). See generally Olson, *Defense Considerations in Defeating Claims for Hedonic Damages*, Expert Evid. Rep. 32 (Oct. 1989).

⁷⁷See Wis. Stat. § 904.01; *Sherrod*, 629 F. Supp. at 162 (N.D. Ill. 1985).

⁷⁸See *Sherrod*, 629 F. Supp. at 164; *Essock v. Mawhinney*, 3 Wis. 2d 258, 270, 88 N.W.2d 659 (1958) ("rule against recovery of 'speculative damages' is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent").

⁷⁹See Wis. Stat. §§ 907.02, 907.03; Miller, *Willingness to Pay Comes of Age: Will the System Survive?*, 83 Nw. U.L. Rev. 876, 879 (1989).

⁸⁰See Bobbjerg, Sloan and Blumstein, *Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering'*, 83 Nw. U.L. Rev. 908, 924 (1989). ■