

ASSESSING NONPECUNIARY DAMAGES

Fact Pattern:

Mrs. McDougald underwent a Caesarean section and tubal ligation. The surgery was performed by Dr. Garber. During surgery, Mrs. McDougald suffered oxygen deprivation that resulted in irreversible brain damage and left her in a permanent comatose condition. McDougald sued Garber and the anesthesiologists in a malpractice action and received a jury award of \$9,650,102.00.

The defendants appealed the amount of the damage award. Liability is not at issue.

Question:

Is awareness of one's condition relevant to a jury's consideration of damages to award a victim for loss of enjoyment of life, and should these damages be considered as part of damages for pain and suffering?

Rule

Some degree of cognitive awareness is a prerequisite to a plaintiff's recovery of damages for the loss of the enjoyment of life, and such damages should be treated as part of the plaintiff's recovery of damages for pain and suffering.

Discussion

This appeal raises fundamental questions about the nature and role of nonpecuniary damages in personal injury litigation. Nonpecuniary damages are 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 the ability to engage in certain activities. Pecuniary damages, on the other hand, compensate the victim for the economic consequences of the injury, such as medical expenses, lost earnings and the cost of custodial care.

The specific questions raised here deal with assessment of nonpecuniary damages and are (1) whether some degree of cognitive awareness is a prerequisite to recovery for loss of enjoyment of life and (2) whether a jury should be instructed to consider and award damages for loss of enjoyment of life separately from damages for pain and suffering.



(1) Is some degree of cognitive awareness a prerequisite to recovery for loss of enjoyment of life?

We know that the ultimate goal in determining awards for damages to a person injured due to the negligence of another is to compensate the victim, not to punish the wrongdoer. 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. 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.

Damages for nonpecuniary losses are among those that can be awarded as compensation to the victim. This aspect of damages, however, stands on less certain ground than does an award for pecuniary damages. An economic loss can be compensated in kind by an economic gain; but recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on "the legal fiction that money damages can compensate for a victim's injury." Money can never ease someone's pain or restore someone's abilities but is as close as the law can come in its effort to right the wrong. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace. When a person does not have cognitive awareness of the loss of enjoyment of life an award of money damages has no meaning or utility to the injured person. An award for the loss of enjoyment of life cannot provide any consolation or ease any burden.

Requiring some level of cognitive awareness as a prerequisite to recovery for loss of enjoyment of life may potentially result in a situation in which the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover. However, this argument has nothing to do with meaningful compensation for the victim and is instead, rooted in the desire to punish the defendant relative to the harm inflicted. This may have relevance in criminal law but has no place in the law of civil damages.

(2) Should a jury should be instructed to consider and award damages for loss of enjoyment of life separately from damages for pain and suffering?

The issue of whether loss of enjoyment of life and pain and suffering should be lumped together or separated into a distinct category of a plaintiff's compensable losses differs depending on the jurisdiction. Recently there has been an effort to segregate the suffering associated with physical pain from the mental anguish that stems from the inability to engage in certain activities, and to have juries provide a separate award for each. However, Some courts have resisted this effort, primarily on the grounds that duplicative and therefore excessive awards would result.

The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. Although this analytical approach works well when the subject is pecuniary damages, the estimation of nonpecuniary damages is not amenable to such analytical precision--translating human suffering into dollars and cents involves no such mathematical formula.