HEDONIC DAMAGES

The purpose of this paper is to provide a synopsis of the current case law on hedonic damages followed by analysis and recommendations for the current systems. Presently all courts allow plaintiffs to recover hedonic damages. However, differences arise over permissible arguments to the jury and permissible jury instructions.

Introduction to Non-Economic Damages

The primary goal of compensatory tort damages is to make the plaintiff whole. See, e.g., Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950) ("the objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money"). To achieve this goal, courts award damages to plaintiffs for both economic and non-pecuniary losses. Economic losses include medical expenses, lost wages, and damages to property. Non-pecuniary losses include pain and suffering, although the definition and scope of pain and suffering varies depending on jurisdiction. For many jurisdictions, pain and suffering encompasses all forms of non-economic loss, other jurisdictions provide separate categories for different types of non-economic loss. Randall R. Bovjerg et. al., Valuing Life and Limb In Tort: Scheduling Pain and Suffering 83 NW.U.L.Rev. 908, note 22 (1989). See Illinois Pattern Jury Instruction 30.04.01 (2000) which split non-pecuniary losses into categories such as-loss of enjoyment, pain and suffering, disfigurement.

Because non-pecuniary damages by definition have no set economic value, courts usually do not provide jurors with a method for determining them. See Steel v. Bemis, 431 A.2d 113, 116 (N.H. 1981) (stating that "no one to our knowledge has been able to devise a formula by
which compensation for pain and suffering can be determined with precision. Pain and suffering are too subjective to lend themselves to such exactness”).

Hedonic Damages

Hedonic damages (also called loss of enjoyment of life) are a form of non-economic damages. They serve to compensate the plaintiff for the pain he suffers from watching life's pleasures pass him by. Crowe, The Semantical Bifurcation of Noneconomic Loss, 75 Iowa L. Rev. 1275, 1277 (1990). Academics have classified two types of hedonic damages. Hedonic damages include losses that an average person would sustain from the injury—such lost sense of smell or taste (Purdy v. Swift & Co., 94 P. 2d 389, 390 (1939)) and inability to engage in recreational activities (Downie v. United States Lines Co., 359 F.2d 344, 347 (3d. Cir. 1966)—and unique losses, such as the inability to dye one's hair to cover grayness (Grenawalt v. Nyhuis, 55 N.W.2d 736, 741 (1952)), inability to continue musical pursuits (Scally v. W.T. Garrat & Co. 104 P. 325 328 (1909)), and the inability to donate one's free time to charity. Crowe, 75 Iowa L. Rev. at 460. Although distinctions between unique and ordinary losses help define hedonic damages, they have no legal significance. Still, these categories may have a practical significance. Losses that an average person would sustain are probably easier to prove because there is little question about whether the plaintiff had any enjoyment to lose, and because jurors can more easily identify with the loss.

Hedonic damages were not always compensable in all jurisdictions. For example, in Hogan v. Santa Fe Trail Transportation Co., the Kansas Supreme Court held that damages to the plaintiff for loss of enjoyment from her inability to play the violin were "too conjectural and speculative in their nature . . . to form a substantial basis for recovery." 85 P. 2d 28, 34 (1938).
Another court held that loss of enjoyment of life was not compensable because neither be
demonstrated nor measured. City of Columbus v. Strassner, 25 N.E. 65 (Indiana, 1890).

Additionally, the Delaware Supreme Court prohibited damages for loss of enjoyment of life,
holding that such a remedy would provide the plaintiff with a double recovery. See Winter v.
Pennsylvania R. Co. 68 A.2d 513 (Del. 1949). Kentucky, Colorado, New York, and Texas also
held that hedonic damages were not compensable.

But, these holdings have been either reversed or limited. For example, in 1989 the
Kansas Supreme Court limited the Hogan holding. The court held that juries can consider loss of
enjoyment of life as an element of pain and suffering, and stated that "the argument that such
damages are too speculative and conjectural could also be asserted to any area of nonpecuniary
damages, such as pain and suffering." Lieker By and Through Lieker v. Gafford, 778 P.2d 823,
833 (Kan. 1989). Lieker allows plaintiffs to recover for loss of enjoyment if they can show they
have an actual loss. Id. The reversals in these jurisdictions indicate that all jurisdictions allow
plaintiffs to recover for hedonic damages in personal injury suits.

The defendant's lawyer in Sherrod argued that because one cannot place a precise value
on damages for the loss of enjoyment of life, these damages were not recoverable at all. 827 F.
2d at 204. However, as the court stated, "the rule against recovery of "speculative damages"
applies [only] where it is uncertain whether the defendant caused the damages, or whether the
damages flowed from his act." Id. Thus, once the plaintiff proves that the defendant caused his
loss of enjoyment, he may recover, even if the amount is speculative. See also Brown v. Moore,
286 N.C. 664, 673, 213 S.E.2d 342, 394 (1975) (stating that a plaintiff may recover damages
which "defy any precise mathematical computation"); Shumacher v. Cooper, 850 F. Supp. 438
Although hedonic damages are compensable in all jurisdictions, courts still differ over whether they provide a special instruction for hedonic damages, and whether hedonic damages are recognized as a separate category or as a part of pain and suffering. By mentioning loss of enjoyment in his instructions to the jury, a judge could encourage the jury to focus on hedonic damages. Although the plaintiff is generally free to argue for hedonic damages, and thus encourage the jury to award these damages, judicial approval of such an argument may enhance its validity. The pattern jury instructions and case law of different jurisdictions indicate whether the jurisdiction typically provides a separate instruction for pain and suffering.

New York does not have a specific instruction for hedonic damages. New York Pattern Jury Instruction 2:280 (2001). Moreover, the New York Appellate Division of the Supreme Court has stated that a judge may not instruct the jury to consider damages for loss of enjoyment of life separately from pain and suffering. McDougald v. Garber, 73 N.Y.2d 246 (1989). Because it is difficult to place a dollar amount on human suffering, and because breaking non-pecuniary loss into component parts does not help the jury to quantify the plaintiff's loss, New York does not separate pain and suffering and loss of enjoyment. Id. at 247. Through his argument to the jury, the plaintiff's lawyer will ensure that jurors do not ignore the plaintiff's non-economic losses. See Lamot v. Gondek, 163 A.D.2d 678 (NYS 1990) (stating that it is improper to instruct a jury to itemize its awards for nonpecuniary loss, and that loss of enjoyment is a component of pain
and suffering, not a separate factor); Nussbaum v. Gibstein, 73 N.Y.2d 912 (1989) (stating that a judge cannot provide separate instructions for pain and suffering and loss of enjoyment).

North Carolina's personal injury pattern jury instruction provides separate categories for "medical expenses, loss of earnings, pain and suffering, scars and disfigurement, (partial) loss of (use of) part of the body, permanent injury, and any other injury supported by the evidence." N.C.P.I. 810.02 (2000). Without further instruction, the permanent injury instruction appears to be only a hedonic damages instruction. But, the permanent injury instruction also allows the plaintiff to recover for "medical expenses, loss of earnings, pain and suffering, scars and disfigurement, and (partial) loss (use of) of part of the body." N.C.P.I. 810.14 (2000).

The pattern jury instructions can lead to substantial double recovery despite the requirement that jurors award damages in a lump sum (King v. Britt, 267 N.C. 594, 597, 148 S.E. 2d 594, 597 (1966)). The instructions separately categorize pain and suffering and permanent injury. This can lead to double recovery by allowing plaintiffs to collect separately for pain and suffering, and for pain and suffering caused by loss of enjoyment. Furthermore, jury is instructed to award the plaintiff damages for medical expenses, loss of earnings, pain and suffering, scars and disfigurement, and (partial) loss of (use of) part of the body. The jury is then instructed to award the plaintiff these damages under the permanent injury instruction. If the jury follows these instructions, the plaintiff will recover several times for the same injury.

Illinois recognizes hedonic damages as loss distinct from pain and suffering. Illinois Pattern Jury Instruction 30.04.01 (2000). See Smith v. City of Evanston (Ill. 1994) (approving the jury instruction and stating that loss of enjoyment is a damage distinct from pain and suffering); Zuder v. Gibson, 680 N.E.2d 483 (Ill. 1987). Illinois also permits jurors to itemize the plaintiff's
non-economic and economic losses, awarding specific amounts for loss of enjoyment, pain and suffering, disfigurement, lost wages, and other categories. See id. The case law of several other jurisdictions indicates their willingness to allow separate jury instructions for hedonic damages. Both Michigan and the Fifth Circuit recognize loss of enjoyment as an element of pain and suffering. Michigan Pattern Jury Instruction 50.02 (1999), 5th Circuit Pattern Jury Instruction 15.4 (2000). States like Michigan which allow the judge to instruct the jury about hedonic damages differ from states like New York in which the plaintiff's lawyer, not the judge, may inform the jury about hedonic damages. Michigan is similar to states like Illinois which allow the judge to instruct the jury that hedonic damages are distinct from damages for pain and suffering. Instructions in both Michigan and Illinois provide for judicial sanction of hedonic damages. The primary between Michigan and Illinois is that Illinois allows jurors to itemize the plaintiff's losses and thus to provide distinct awards for pain and suffering and loss of enjoyment. Because non-economic losses are difficult to quantify, requiring jurors to itemize a plaintiff's damages will not help them determine his loss, and may make their awards more speculative. Garber, 73 N.Y.2d at 247. The Michigan jury instruction states that hedonic losses are a factor in determining the plaintiff's pain and suffering, and thus hedonic losses cannot be separately itemized. Because the Michigan jury instructions do not allow hedonic losses to be itemized, they may be preferable to the Illinois jury instructions.

Another difference between a Michigan-type jurisdiction and an Illinois-type jurisdiction is that recognizing hedonic damages as a category separate from pain and suffering might grant the plaintiff a double recovery-allowing him to collect for pain and suffering, and to separately collect for the pain and suffering caused by his loss of enjoyment of life. See, e.g., Loth v.
Truck-a-Way Corp., 70 Cal. Rptr.2d 571, 577 (1998) (stating that "Separate instructions on pain and suffering and loss of enjoyment of life are prohibited because they could mislead a jury to award double damages for the same injury").

Some courts have stated that separate instructions for loss of enjoyment or permanent injury and loss of enjoyment do not create the risk of double recovery. For example, in Thompson v. National Railroad Passenger Corp., 621 F. 2d 814 (6th Cir.1980), the court stated: [C]onceptually, these categories of intangible damages are distinct ... [p]ain and suffering, permanent injury, and loss of enjoyment of life each represent separate losses which the victim incurs. Permanent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury. 621 F.2d at 824.


The best method is to instruct the jury that hedonic damages are a category of pain and
suffering. By mentioning hedonic damages in jury instructions, courts show the jury that hedonic damages are a credible element of damages. However, jury instructions like New York's (N.C.P.I. § 810.02), which do not mention hedonic damages, are still effective. In states like New York, the plaintiff's lawyer may argue for hedonic damages. Even if a judge does not explicitly sanction hedonic damages, he gives he implicitly approves them by allowing the plaintiff's lawyer to argue for them.

Jurisdictions like Illinois (Illinois Pattern Jury Instruction 30.04.01) that recognize hedonic losses as a category distinct from pain and suffering explicitly sanction hedonic damages. But, this instruction creates a risk of double recovery. Hedonic losses compensate the plaintiff for the pain he suffers from watching life's pleasures pass him by. See, e.g. Crowe, 75 Iowa L. Rev. at 1275. Pain and suffering damages compensate a plaintiff for pain and suffering in general. Therefore, if the jury awards the plaintiff for both of these damages, the plaintiff might recover his hedonic damages twice.

Courts that recognize hedonic damages as a separate category have stated that hedonic damages are different from pain and suffering. For example, in Ogden, the Arizona Court of Appeals stated that pain and suffering compensate the plaintiff for "physical discomfort and the emotional response to the sensation of pain caused by the injury itself," while loss of enjoyment compensates the plaintiff for his inability "to participate in and derive pleasure from . . . activities of daily life." 2001 WL 579805. While this distinction may be valid, it is not obvious from the jury instruction. A juror who is instructed about pain and suffering without further explanation will not automatically assume that pain and suffering only applies to "the sensation of pain caused by the injury itself." Id. If such an assumption were true, jurisdictions which only allow
plaintiffs to recover for pain and suffering generally would not allow plaintiffs to recover for
hedonic damages. Therefore, states which have separate categories for pain and suffering and
hedonic damages should explain to the jury that the pain and suffering award is only for physical
sensations caused by the injury.

Proving Hedonic Damages

Regardless of whether hedonic damages are a separate category, the plaintiff must prove
he had such a loss. In McAlister v. Carl, the Maryland Supreme Court upheld the trial court's
finding that the plaintiff failed to present sufficient evidence to the jury regarding the plaintiff's
loss of enjoyment of teaching physical education. The plaintiff had not yet begun teaching
physical education, and she failed to provide any direct evidence that her enjoyment of life
would be lessened in this respect. Thus, she could not recover for this loss. 197 A.2d 140 (Md.
1964).

Courts often allow plaintiffs to use a "Day in the Life" film to show the plaintiff's loss.
Whether a court admits this evidence depends on whether it finds the evidence relevant (see Fed.
R. Evid. 401 (stating that evidence is admissible if it is relevant), and whether it finds that the
probative value outweighs the likelihood of a prejudicial effect (see Fed. R. Evid. 403 (stating
that relevant evidence may be excluded if it's prejudicial value outweighs its probative value).
Jones v. City of Los Angeles, 24 Cal.Rptr.2d 528 (1993). Courts that admit this evidence usually
find that it "uniquely demonstrates the nature and extent of" decedent's injuries. Id. at 531. In
Jones, the plaintiff was hit by a truck, causing her to become a paraplegic. Id. at 528. The court
admitted a video showing the plaintiff's activities in a wheelchair, finding that the video helped
the jury understand the plaintiff's injury. Id. at 531.
Courts also allow the defendant to introduce a video showing that the plaintiff’s injuries are not as serious as she claims they are. See, e.g., Wal-Mart Stores, Inc. v. Hoke, 2001 WL 931658 (Tex. Ct. App. Aug 16, 2001). In Wal-Mart, the court allowed the defendant to introduce a surveillance video showing the plaintiff pumping gas, in an effort to show that she could still perform daily activities. Id. at 14. As the court stated in Wal-Mart, "it is well settled that a party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he himself introduced the same evidence or evidence of a similar character." Id.

When courts prohibit these videos, or parts of these videos, it is usually because the activity portrayed is not a typical daily activity, and therefore does not help the jury understand the nature and scope of the plaintiff's injury. For example, in Grimes v. Employers Mut. Liability Ins. Co. of Wisconsin, the court allowed scenes of the plaintiff performing daily functions, including clinical tests, stating that "the films illustrate, better than words, the impact the injury has had on the plaintiff's life in terms of pain and suffering and loss of enjoyment of life." 73 F.R.D. 607, 610 (D. Alaska 1977). However, the court held that scenes of the plaintiff hugging his sister and placing a cigarette in his quadriplegic brother's mouth were inadmissible because they "serve[d] little purpose other than to create sympathy for the plaintiff," and thus their prejudicial effect outweighed their probative value. Id.

A court may prohibit the use of a day-in-the-life videotape even if it is representative of the plaintiff's daily activities. See Thomas v. C .G. Tate Construction Co., 465 F.Supp. 566 (S.C. 1979). To do so, the prejudicial value of the tape must outweigh its probative value. Id. at 14. In Thomas, the court stated that, because of the novelty of the videotape and the proportion of trial time it would consume, the tape could have a greater weight on the jury than other evidence.
Id. at 15. Because the plaintiff had other evidence available to prove his pain and suffering, such as his testimony, and the testimony of witnesses, the prejudicial value of the tape outweighed its probative value. Id.

Whether a plaintiff's "day-in-the-life" videotape should be admissible depends on whether it complies with the rules of evidence. Under the Federal Rules of Evidence, such a tape is admissible if it is relevant. See Fed. Rule Evid. 401. But, the court may exclude it if it deems that the prejudicial value of the tape outweighs its probative value. See Fed. Rule Evid. 403. Therefore, the trial judge may use his discretion when deciding whether to admit a videotape.

If the "day-in-the-life" videotape is an accurate reflection of the plaintiff’s daily activities, the court should find it relevant. The trial judge may refuse to admit portions of the videotape that are not an accurate reflection of the plaintiff's daily activities. See, e.g., Grimes, 73 F.R.D. at 610. Whether a tape is overly prejudicial should generally be left to the trial court's discretion.

Because these tapes can uniquely demonstrate the plaintiff's daily activities, a judge should use caution before he determines that they are overly prejudicial.

Valuing Non-Economic Damages

Once a plaintiff's attorney proves the existence of hedonic damages, he must then attempt to convince the jury of the hedonic damages' value. Plaintiffs' attorneys usually cannot recommend a method to the jury for determining a plaintiff's non-economic losses. See, e.g., Jeffrey C. Dobbins, The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages, 43 Duke L.J. 879, 890 (1994). For example, a plaintiff's attorney cannot ask jurors to value the pain and suffering at a price they would have accepted to endure such an injury. See Dunlap v. Lee, 257 N.C. 447, 126 S.E.2d 580 (1963); see also 2 Dan B.

In Dunlap, the court held that asking jurors to value pain and suffering at a price they would have paid to endure it was prejudicial for several reasons. Id. The court held that such arguments encourage verdicts based on sympathy. Id. at 257 N.C. 452, 126 S.E.2d 62. The court also stated that these arguments require the jury to collectively place themselves in the plaintiff's position, which is impractical, and that an attempt to do so individually "would be an insuperable bar to an unanimous verdict." Id. (quoting Paschall v. Williams, 11 N.C. 292, 293 (1826)).

Courts are right to prohibit plaintiffs' lawyers from asking the jury to value pain and suffering at a price they would have accepted to endure such an injury. Because pain and suffering have no market value, plaintiffs' lawyers should be prohibited from making market-based arguments. Moreover, these arguments are impractical because they require the jury to collectively place themselves in the plaintiff's position, which is impractical. See Dunlap at 257 N.C. 452, 126 S.E.2d 66 (stating that an attempt to do so individually "would be an insuperable bar to an unanimous verdict." (quoting Paschall v. Williams, 11 N.C. 292, 293 (1826))).

In some states, a plaintiff's attorney may suggest that the jury use a per diem approach. (See Bovjerg et. al., 83 NW.U.L.Rev. at 916 note 55). "A per diem argument is an argument to the jury to award damages for pain and suffering at a certain rate per day, hour, or minute of pain and suffering." Thompson v. Kyles, 48 N.C.App. 420, 269 S.E. 2d 231, 232 (1980). Although the value of the pain and suffering remains subjective, the amount the plaintiff asks for seems
relatively small because it is allocated over a period of time. Bovjerg et. al., 83 NW.U.L.Rev. at 914. Thus the per diem argument might increase the likelihood that the plaintiff will receive a large award for pain and suffering.

Counsel has also made the per diem argument in reverse-valuuing the pain and suffering, and showing that this value is relatively small when apportioned over the period of time. 3 A.L.R. 4th 940, 949 (1981). But courts have often held that the reverse per diem argument is not a per diem argument. Id. For example, when an attorney argued that his client's pain and suffering was "surely worth $36,500 over 22 years," the Kansas Supreme Court held that counsel argued for a "total monetary award," and did not make a per diem argument. Huxol v. Nickell, 473 P.2d 90, 96 (1970).

Courts generally take one of four approaches to the per diem argument. 3 A.L.R. 4th 940. They either allow counsel to make a per diem argument (see, e.g., Howle v. PYA/Monarch, Inc. (S.C. App. 1986) 344 S.E.2d 157; Cafferty v. Monson 360 N.W.2d 414 (Minn. App. 1985)), prohibit counsel from making such an argument, (see, e.g., Ramirez v. City of Chicago, 740 N.E.2d 1190 (Conn. App. Ct. 1st Dist. 2000); Pool v Bell 551 A.2d 1254 (1989))allow counsel to make such an argument provided the trial court gives cautionary instructions, or leave it up to the trial court's discretion (see, e.g., Weeks v. Holsclaw, 360 N.C. 655, 295 S.E.2d 596 (1982); Eastern Shore Public Service Co. v. Corbett, 177 A.2d 701 (1962).

Courts that allow counsel to make per diem arguments usually find that these arguments "aid the jury in performing their duty [of] evaluating damages for pain and suffering." Worsley v. Corcelli, 377 A.2d 215, 219 (1977). Thus, counsel is drawing an inference from the evidence and offering the jurors one method to determine damages. See Grossnickle v. Germantown,
209 N.E. 2d 442 (1965 Ohio). He is not presenting evidence. Id.

There is "no precise or exact measuring stick" with which to determine pain and suffering damages. Taken Alive v. Litzau, 551 F.2d 196, 198 (8th Cir. 1977). However, the jury should attempt to make a reasonable estimate of damages. Id. Because a per diem approach is a reasonable method for determining pain and suffering, some courts allow counsel make such an argument. Id.

Jurisdictions that prohibit per diem arguments do so because they are an improper appeal to jurors' sympathy. See Arnold v. Eastern Air Lines, Inc. 681 F.2d 186 (C.A.N.C. 1982) (holding that, although a per diem argument is improper, in this case it was not so prejudicial as to require a new trial). See also Leathers v. General Motors Corp. 546 F.2d 1083 (C.A. Va. 1976) (holding that a per diem calculation is a subjective standard for measuring damages). Courts have also prohibited per diem arguments for other reasons. For example, in Henne v Balick, 146 A.2d 394 (Del. 1958), the court stated that allowing an attorney to use of a per diem argument would be comparable to allowing him to testify about otherwise inadmissible evidence about whether the amount of damages was reasonable. The court also stated that a per diem argument is "merely speculation . . . unsupported by evidence. Id. at 378.

Courts should allow plaintiffs' attorneys to make per diem arguments. Lawyers may argue anything to the jury so long as their argument is in good faith (see Fed. Rule Civ. P. 11), and so long as they are not testifying. ** A per diem argument is not testimony. Rather, it is a method of rationalizing damages. Through a per diem argument, the lawyer explains to the jury that a large award may be relatively small when apportioned on a daily basis.

Because plaintiff's lawyers may not introduce evidence of the value of hedonic damages, there is
little chance that the jury will mistake a per diem argument for evidence. Still, the trial judge should caution the per diem argument is not evidence. A cautionary instruction will ensure that the jury does not view the per diem argument.

Economists have suggested that loss of enjoyment of life can be valued based on "willingness-to-pay" methodology. Viscusi, The New Hedonics Primer for Economists and Attorneys, 52. This methodology values human life based on how individuals adjust their wage demands to reflect risk of death or serious injury. Id. For example, an average blue-collar worker receives an extra $600 in wages for a death risk of 1/10,000. Id.

According to Dr. Michael Brookshire, who co-authored Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys with Stan Smith, the best estimate of the value of human life in 1998 was 3 and ½ million dollars. Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426 (Ohio App. 1998). Brookshire determined this figure by taking samples of Americans with risky jobs and Americans with non-risky jobs at government agencies. Id. Therefore, the statistical value his life is $6 million. These values include economic losses, such as loss of wages they should replace both non-economic and economic losses, but one can determine the hedonic value of life by subtracting the economic value of life from the overall value of life. Economists also place a value on the loss of enjoyment of life for nonfatal injuries by interviewing the plaintiff and thereby estimating a percentage of the plaintiff's loss of enjoyment. See McGuire v. City of Santa Fe, 954 F.Supp. 230 (N.M. 1996). To determine the plaintiff's total loss of enjoyment, an economist then multiplies the value of life by the percentage of the plaintiff's loss of enjoyment. Id. at 232.

Stanley Smith, a professional economist has testified, and attempted to testify in many tort suits
about the hedonic value of life. See, e.g., Mercado v. Ahmed, 974 F.2d 863 (Ill. 1992). Smith consults with a medical expert to determine a range of percentages of enjoyment a person has lost. Smith and the medical expert look to an individual's impairment in four areas in order to determine diminished capacity: occupational, practical functioning, emotional, and social functioning. Id. at 869. For example, in Mercado, he determined that the plaintiff, who was struck by a taxicab, had a range diminished capacity from 66% to 83%. Id.

In McGuire, the court held that the expert testimony was inadmissible under Daubert. 954 F.Supp. 230. Daubert allows the court to admit scientific evidence if it is relevant and if it helps the jury. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Factors in whether the testimony is admissible include: whether the theory or technique at issue can be tested, whether it has been subject to peer review, whether there is a known error rate, and whether the theory has been generally accepted. Id. In McGuire, the court found that the economic testimony failed to meet any of these categories. The economist stated McGuire's loss of enjoyment was between $1,430,000 and $2,300,000. McGuire at 232. The court held that although the theory is arguably testable, the parameters for such a test are so wide as to not constitute a test at all. Id. The court also held that the economist's method was subject to negative peer review, was only more reliable than chance, and is not generally accepted by courts. Therefore the court rejected use of economic testimony to prove hedonic damages.

Prior to Daubert, the seventh circuit held that economic testimony was admissible to prove hedonic damages. Sherrod v. Berry, 827 F.2d 195 (Ill. 1985), rev. on other grounds Sherrod v. Berry, 856 F.2d 802 (7th Cir. Aug 22, 1988). The court provided little rationale for the admissibility of the testimony, merely stating that the testimony was "invaluable to the jury in
enabling it to . . . estimate . . . damages."  Id. at 205.  However, in 1992 the seventh circuit essentially overruled its ruling in Sherrod.  Mercado, 974 F.2d).  In Mercado, Smith, the same economist who testified about the hedonic value of life in Sherrod, was denied the opportunity to testify similarly.  Id.  The court of appeals held that the district court's decision was not reversible error.  Id. at 871.  The court of appeals' statements that no one person can "achiev[e] unique knowledge of the value of life," and that [a] witness who knows no more than the average person is not an expert" (id. at 870-871) indicate that the seventh circuit will no longer allow experts to testify about the economic value of hedonic damages.

Furthermore, although the seventh circuit has not dealt with the admissibility of expert testimony on hedonic damages since Daubert, numerous cases in other jurisdictions have found such testimony inadmissible under Daubert.  See Wilt v. Buracker, 443 S.E.2d 196, 206  (W.Va. 1993) (stating that Mercado "in effect overruled Sherrod); and footnote 7, supra.  See also Fetzer v. Wood, 569 N.E.2d 1237, (1991) (stating that damages for loss of enjoyment of life are not ""amenable to such analytic precision" as comes from expert testimony, and that "Smith's (the economist's) testimony would be "overly speculative" and "invade the province of the jury.").

Courts should prohibit economists from testifying about the hedonic value of life.  Economic testimony does not meet the standards the Supreme Court laid out in Daubert.  509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469.  Moreover, economic values of life are based on the idea that people are motivated solely by money.  The values assume that people working at risky jobs do so because they get paid more.  But, people often work at risky jobs because they enjoy them, or because there is no alternative.

Economic values are inaccurate even if one assumes people are motivated by money.  For
example, economist Stanley Smith argues that a person who buys a $100 smoke detector to reduce his chance of dying in fire by one thousandth values that reduction at $100. Barrett, "Price of Pleasure" Wall Street Journal Dec. 12, 1988. But, "this does not imply that the same person would surrender his life for $100,000 . . . The same person who would pay $100 to lower his risk of death by .001 is unlikely to play Russian Roulette with a thousand guns (one loaded) for $100." Id.

Analysis/Recommendations

Should Hedonic Damages be Compensable in Personal Injury Suits?

Hedonic damages should be compensable. The primary goal of compensatory tort damages is to make the plaintiff whole. Phillips, 213 N.C. 566, 58 S.E.2d 343. To make a plaintiff whole, the defendant must compensate him for all his losses, not just those that have a market value.

Some critics have suggested eliminating all non-pecuniary losses from tort recovery. See Alan Schwartz, Proposals for Product Liability Reform: A Theoretical Synthesis, 97 Yale L.J. 353, 364-67 (1988) (stating that individuals probably would not choose to insure themselves against non-pecuniary loss). But see Bovjerg et. al., 83 NW.U.L.Rev. at 933 (stating that failure to purchase insurance for non-economic losses does not indicate that we should not compensate these losses. At most it indicates that people are willing to assume non-economic losses when others are not legally responsible).

Other commentators have stated that because awards for pain and suffering do not help end
plaintiff's pain and suffering, charging the defendant "creates two harms where only one previously existed." Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Cal. L. Rev. 772, 774 (1985). But, by its nature, the tort system assumes that money compensates all injuries. Allowing a defendant to harm a plaintiff without fully compensating her would provide a windfall to the defendant.

Additionally, some commentators have philosophical concerns about compensating pain and suffering. See Ingber, 73 Cal. L. Rev. at 780 (stating that "Translating [injuries such as emotional distress] into dollars and cents . . . only demeans and trivializes interests at stake." Nevertheless, "[c]ompensation for these awards forces society to acknowledge them," and therefore does not demean the plaintiff's interests. Dobbins, 43 Duke L.J. at 80. Furthermore, even assuming that such compensation demeans plaintiffs' interests, these interests could only be further demeaned if he were denied any compensation for them.

Moreover, a system that allows plaintiffs to recover for non-economic losses is "much less regressive in its distributive effects [than is a system based wholly on] economic award[s]." Id. at 84. Awards for pain and suffering of someone who is not working, or who is working at a low-paying job, are similar to awards to plaintiffs with high-paying jobs, compared to pecuniary awards that are higher for plaintiffs with high-paying jobs.

Does the current system need reform?

The current tort system attempts to make plaintiffs whole through economic compensation. Because plaintiffs suffer both economic and non-economic harm, the system is inherently flawed. Although economists have tried, it is impossible to place an exact value on non-economic losses, which have no market value.
Presently, jurors are told to place an economic value on hedonic losses (and all non-economic losses in general), but are given no method for doing so. Because they are not given a method, the value of the losses is left to the jury's discretion and is "open-ended and unpredictable."

Bovjerg et. al., 83 NW.U.L.Rev. at 908; see Id. for a statistical analysis of the variability of non-economic damages. In addition, some critics have suggested that the arbitrariness of the awards inhibits tort law's deterrence function. Id.

Theoretically, there are four ways to make hedonic compensation more predictable. The ideal approach would be to discover a method for valuing non-economic losses. As stated above, economists have unsuccessfully tried to do so. Moreover, there is little hope that anyone could successfully devise such a method. A second approach would be to eliminate hedonic damages altogether. But, as stated above, eliminating hedonic damages would provide a windfall to the defendant and would provide an inadequate recovery for the plaintiff.

A third approach provides a compensation schedule similar to workman's compensation. This approach fails to decrease the arbitrariness of non-economic awards. Rather, it generalizes non-economic damages and places a value on them; replacing a somewhat-arbitrary jury award with an arbitrary statutory award. The statutory award remains arbitrary because it is not, and cannot be, based on market value. The value placed on non-economic damages is determined by statute instead of by a jury on a case-by-case basis. Bovjerg et. al., 83 NW.U.L.Rev. page 938 suggest a compensation schedule based on a matrix of the severity of the injury and the life expectancy of the plaintiff. Ideally a compensation schedule would be based on individual losses of enjoyment as well as life expectancy. If a plaintiff lost the ability to play tennis and the ability to smell roses, the system would place a set value on these losses based on the plaintiff's life
expectancy. But, individual losses of enjoyment vary by infinite degrees, making it impossible to factor them into a compensation schedule.

A compensation schedule has substantial drawbacks. It fails to consider unique losses of enjoyment. A plaintiff who was active in sports receives no special compensation for this loss of enjoyment. Thus, a compensation schedule defies the primary purpose of compensation by failing to make plaintiffs whole. Additionally, because unique losses are not taken into consideration, a plaintiff with no or few unique losses will be overcompensated.

A fourth approach places statutory limits on the total amount plaintiffs may recover for non-economic harms. This approach under-compensates plaintiffs by limiting their recovery. Similar to a compensation scheme, the primary benefit is prevention of open-ended liability.

The predictability of either statutory limits on recovery or a compensation schedule benefits defendants who fear open-ended awards. It should also lower insurance premiums. But, predictability harms plaintiffs by severely limiting their claims. Bovjerg et. al. argue that the certainty brought about by a compensation scheme enhances the deterrence function of the tort system. 83 NW.U.L.Rev. at 908. But this proposition lacks merit because it assumes that defendants know a compensation scheme exists and alter their behavior because of it. This proposition is especially flawed in the case of unintentional torts where the defendant has little or no control over his harmful behavior.

The alternatives to the current system have more drawbacks than benefits. While they help defendants by limiting their liability, the alternatives hurt plaintiffs by preventing full recovery. As many common law cases have stated, a person should not be allowed to profit from his own wrong. See, e.g., Evans v. Diaz, 333 N.C. 774, 430 S.E.2d 244 (1993). By not paying a full
recovery to the plaintiff, the defendant has taken something from the plaintiff without paying for it, and hence received a profit. Therefore, the current system, which prevents the defendant from profiting from his own wrong is better than the alternatives.