

As Chair of the Massachusetts Academy of Trial Attorneys' Amicus Curia Committee, Attorney Conley has authored or co-authored numerous friend of the Court briefs for the Supreme Judicial Court and the Appeals Court.

The following brief addressing damages for loss of enjoyment of life was submitted in *Keene v. Brigham & Women's Hospital, Inc.* Supreme Judicial Court, No. 08894. The Court's 1993 decision did not reach the issue of damages.

STATEMENT OF THE AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys ("MATA"), amicus curiae, is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth of Massachusetts. The purpose of this organization is to uphold and defend the constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek legal redress for injury to person or property; to steadfastly resist efforts to unduly curtail the rights of injured individuals; and to help injured persons enforce their legal rights through the courts or tribunals in all fields of law. MATA offers its experience and perspective to this Honorable Court as amicus curiae to assist in the resolution of the important issues raised by this appeal.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

MATA agrees with the plaintiff-appellant's Statement of the Case and Prior Proceedings.

STATEMENT OF FACTS

MATA agrees with the plaintiff-appellant's Statement of Facts.

ARGUMENT

The purpose and intention of the tort system is to provide justice to catastrophically injured victims of negligence and other misconduct. Personal injury damages are awarded to make the injured party whole, to 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. *Kattar v. Demoulas*, 433 Mass. 1, 15 (2000); *G.E. Lothrop Theatres Co. v. Edison Elec. Illuminating Co.*, 290 Mass. 189 (1935). Thus, this Court has held that a person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act. *E.g.*, *Whalen v. City of Boston*, 304 Mass. 126 (1939). Loss of enjoyment of life, conceptually distinct from physical pain and mental suffering, is a proper subject of an award of compensatory damages, even in the absence of any awareness of that loss on the part of an injured plaintiff. Consequently, the decision of the trial court as affirmed by the Appeals Court -- to the effect that a wrongdoer whose misconduct obliterates a victim's cognition and ability to enjoy life is not accountable in damages for such harm -- should be repudiated.

"Loss of enjoyment of life damages 'connote the deprivation of certain pleasurable sensations and enjoyment through impairment or destruction of the capacity to engage in activities formerly enjoyed by the injured plaintiff.' *Fantozzi v. Sandusky Cement Products Co.*, 64 Ohio St.3d 601, 597 N.E.2d 474, 481 (1992). That such losses exist is beyond dispute." *Bennett v. Lembo*, 761 A. 2d 494, 498 (N.H. 2000). "The capacity to enjoy life -- by watching one's children grow, participating in recreational activities, and drinking in the many other pleasures that life has to offer -- is unquestionably an attribute of an ordinary healthy individual. The loss of that capacity as a result of another's negligent act is at least as serious an impairment as the permanent destruction of a physical function, which has always been treated as a compensable item under traditional

tort principles.” *McDougald v. Garber*, 73 N.Y.2d 246, 258-59 (1989), Titone, J., dissenting. Indeed, there can be “no physical loss that is more central to the quality of a tort victim's continuing life than the destruction of the capacity to enjoy that life to the fullest.” *Id.*

While damages for physical pain and mental suffering compensate for the infliction of negative experience, damages for loss of enjoyment of life compensate for deprivation of positive experience. Clearly, recovery of a damage item such as physical pain or mental suffering requires a showing of some degree of cognitive capacity for the simple reason that physical pain and mental suffering are wholly subjective concepts that cannot exist separate and apart from the human consciousness that experiences them. In contrast, the impairment or destruction of an individual's capacity to enjoy life is an objective fact, the identification of which does not necessitate establishing the victim's awareness of the loss. Moreover, in the most catastrophic cases the destruction of the victim's precious ability to comprehend and experience is precisely the injury that demands to be compensated. The loss of pleasure and enjoyment, which as a natural and direct consequence accompanies that incapacity, is a loss that is inseparable from it and is not dependent on the ability to appreciate one's own restrictions. Thus, a plaintiff who has been comatose or sustained a significant brain injury should, as part of disability and impairment, be compensated for the loss caused by existing in such a state including the resultant loss of enjoyment of normal activities. *Eyoma v. Falco*, 247 N.J. Super. 435, 452, 589 A.2d 653, 662 (1991).

In deciding to the contrary, the trial court adopted the reasoning of New York's Court of Appeals in *McDougald v. Garber*, 73 N.Y.2d 246, 258-59 (1989), a decision that was rightly characterized by a dissenting judge as arbitrary, fundamentally unsound, and grossly unfair. *McDougald v. Garber*, 73 N.Y.2d 246, 261 (1989), Titone, J., dissenting. See 103 Harvard Law Review 811, 814 (1990) (*McDougald* court adopted “incoherent approach” to damages for loss of enjoyment of life). At the core of the *McDougald* reasoning and that of the lower courts here is the fallacious conclusion that because a victim's cognitive injury renders him unable to enjoy his damages, that such damages “would not ... compensate in any meaningful sense, but would serve only to punish the defendant.” (App. Vol. III, p. 1013).

Under the lower courts' formulations, the victim must be aware of the loss because, in addition to being compensatory, the award must have meaning or

utility to the injured person to constitute compensatory damages.” This additional requirement, injecting an entirely new and foreign element into the damages equation, has no foundation in law or logic. “Meaning” and “utility” are subjective value judgments that have no place in the law of tort recovery, where the primary goal is to find ways of quantifying, to the extent possible, the worth of various forms of human tragedy. *McDougald v. Garber*, 73 N.Y.2d 246, 258-59 (1989), Titone, J., dissenting.¹ Every effort must be made to avoid arbitrary lines which “unnecessarily produce incongruous and indefensible results.” The focus should be on underlying principles. *Dziokonski v. Babineau*, 375 Mass. 555, 568 (1978).

Both the trial court and the *McDougald* Court described as “paradoxical” the reality stemming from their rulings that “the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages.” Such a result is not a mere “paradox,” it is a manifest injustice that is antithetical to the fundamental principles of tort damages. In accepting the result, the New York court expressly declined to succumb to “the temptation to achieve a balance between injury and damages.” *McDougald*, 73 N.Y.2d at 254. In Massachusetts, achieving such a balance is not a temptation, but represents the basic goal of the law of tort damages. “It is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained.” *Rockwood v. Allen*, 7 Mass. 254 (1811). “The rule of damages ... against a tort-feasor is that the plaintiff shall recover an amount commensurate with the wrong done him.” *Nash v. Minnesota Title, Insurance & Trust Co.*, 163 Mass. 574, 581, 40 N. E. 1039, 1041 (28 L. R. A. 753, 47 Am. St. Rep. 489).” *Lowrie v. Castle*, 225 Mass. 37 (1916).

¹ Moreover, this reasoning would apply equally to render punitive other general damage items, such as loss of earning capacity. See generally *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 804 and n. 16 (1987); *Doherty v. Ruiz*, 302 Mass. 145, 146-47 (1939) (discussions of loss of earning capacity as general damages). Similarly, the need for meaning and utility would also conceptually transform to punitive any general damages in a case in which the plaintiff has died and the tort claim is prosecuted by his or her estate.

Nevertheless, the lower courts determined that damages for loss of enjoyment of life could not serve any compensatory purpose and the provision of such damages would necessarily result in punitive and/or duplicative damage awards. The trial court also appeared to rely upon limitations on recovery set forth in the Wrongful Death Act, M.G.L. c. 229, § 6, as a basis for its findings.

A. DAMAGES FOR LOSS OF ENJOYMENT OF LIFE ARE COMPENSATORY AND NOT PUNITIVE

Simply, damages for loss of life's enjoyment are not punitive because their purpose is to compensate the victim rather than punish the tortfeasor. See *Molzof v. U.S.*, 502 U.S. 301, 306-308, 312 (1992)²; *CNA Insurance Cos. v. Sliski*, 433 Mass. 491, 493-95 (2001). The compensatory nature of a monetary award for loss of enjoyment of life is not altered or rendered punitive by the fact that the unaware injured plaintiff cannot experience the pleasure of having it or aware of the benefits received as a result of it. *McDougald v. Garber*, 73 N.Y.2d 246, 258-59 (1989), Titone, J., dissenting. "The fact that the compensation [for loss of enjoyment of life] may inure as a practical matter to third parties in a given case does not transform the nature of the damages." *Rufino v. United States*, 2nd Cir., 829 F.2d 354, 362 (2d Cir. 1987).

B. DAMAGES FOR LOSS OF ENJOYMENT OF LIFE ARE NOT DUPLICATIVE

Loss of life's enjoyment is a conceptually distinct damage item which is identifiable separate and apart from the award for physical pain and mental suffering. Allowing damages for loss of life's enjoyment to a victim whose cognitive abilities have been destroyed by a defendant's wrongdoing presents no appreciable risk of duplicative awards, and certainly no such risk additional to that which exists in less catastrophic cases.

² Significantly, the *Molzof* decision rejected and overruled the reasoning of *Flannery v. U.S.*, 718 F.2d 108, 111 (4th Cir. 1983), which is the case upon which the *McDougald* majority relied in characterizing these compensatory damages as punitive.

Massachusetts juries are routinely instructed, usually under the broad heading of pain and suffering, that a plaintiff is entitled to full compensation for any reduction in the enjoyment of life which the jury concludes has resulted or probably will result from the subject accident. See *MCLE, Massachusetts Superior Court Jury Instructions* s. 2.1 at 2-28.

While "pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; ... loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury", a distinctly objective loss. In other words, while the victim's "emotional response" and "frustration and anguish" are elements of the award for pain and suffering, the loss of joy and other positive experience and value of living a healthy life are recoverable under the "loss of enjoyment of life" rubric.

Ironically, the most extreme cases adversely affected by the lower courts' rulings – those involving comatose victims – in fact present the least risk of overlapping awards, for these victims may be experiencing no demonstrable pain or suffering, while they are deprived of all of life's pleasures. Thus, there is no real overlap, and no real basis for concern about potentially duplicative awards where there is a properly instructed jury. *McDougald v. Garber*, 73 N.Y.2d 246, 258-59 (1989), Titone, J., dissenting, citing *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980).

The Appeals Court has accurately summarized the differing approaches among courts to treating loss of life's enjoyment as a separate element of damages. Judicial concerns about duplication focus primarily on overlap with categories of damages labeled "disability" or "impairment" see, e.g., *Eyoma v. Falco*, 247 N.J. Super 435, 452, 589 A.2d 653, 662 (1991), neither of which is an established separate category of recovery in Massachusetts' courts. So long as the damages are available as a conceptually distinct objective item of damage, the question whether to label the item separately or to subsume it under a broad heading of disability, or even pain and suffering is an exercise in semantics.³ See *Flannery v. U.S.*, 171 W.Va. 27, 31, 297 S.E.2d 433, 437 (1982). After all, while

³ The recitation of precedent requiring that a victim actually suffer or experience the loss is similarly a semantical exercise. A catastrophically injured victim in fact suffers or experiences the absence of sensation and positive experience.

items of damage are appraised separately for convenience, the goal is to arrive at one award representing fair compensation for the entire injury. *Rodgers v. Boynton*, 315 Mass. 279 (1943).

C. COMMON LAW DAMAGES IN PERSONAL INJURY ACTIONS ARE NOT RESTRICTED BY OR LIMITED TO THE DAMAGES AVAILABLE UNDER THE WRONGFUL DEATH ACT

The lower courts' reliance upon the Massachusetts wrongful death act was misplaced for several reasons. M.G.L. c. 229, § 1 et seq. First and foremost is that Dylan Keene is a live human being and should have all rights in the tort system that inure to any other live human being. The fact that the Legislature has omitted to provide or permit certain damages in a wrongful death action is immaterial to the question of permitting damages to a live human being for destruction of his or her capacity to enjoy life.

Moreover, it is a mistake to view the "conscious suffering" language in G.L. c. 229, § 6 as a limitation on the nature of an action for personal injury on behalf of an estate. In fact, the right to recover for the personal injuries is the right which is given by the common law by reason of injury to the decedent before death. This action survives in its entirety pursuant to M.G.L. c. 228, § 1. The reference to an action for conscious suffering is simply shorthand used both by the Legislature and courts to describe action for personal injuries at common law when death has resulted. *Dermody v. Utley*, 328 Mass. 209, 210 (1952). Finally, even if the Legislature established a wrongful death scheme that was inconsistent with the rights of tort victims at common law, this would not present an occasion to limit the common law rights for living plaintiffs. This Court recognizes that there is no imperative to harmonize damage rules for wrongful death cases with the rules for personal injury cases. *Owen v. Meserve*, 381 Mass. 273, 276 (1980).

CONCLUSION

For all the foregoing reasons, the Massachusetts Academy of Trial Attorneys, amicus curiae, respectfully requests that this Court recognize loss of enjoyment of life as a separate and distinct component of general damages under Massachusetts tort law, including in cases in which a defendant's negligence has

deprived the victim-plaintiff of the ability or awareness to appreciate his or her loss.

Respectfully submitted,

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