to exist; the plaintiff-tenant recovered lost profits and expenses incurred during the shut-down.

These exceptions expose the hopeless artificiality of the per se rule against recovery for purely economic losses. When the plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by defendant's negligence, and liability can be limited fairly, courts have endeavored to create exceptions to allow recovery. The scope and number of exceptions, while independently justified on various grounds, have nonetheless created lasting doubt as to the wisdom of the per se rule of nonrecovery for purely economic losses. Indeed, it has been fashionable for commentators to state that the rule has been giving way for nearly fifty years, although the cases have not always kept pace with the hypothesis. . . .

We hold therefore that a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.

We stress that an identifiable class of plaintiffs is not simply a foreseeable class of plaintiffs. For example, members of the general public, or invitees such as sales and service persons at a particular plaintiff's business premises, or persons travelling on a highway near the scene of a negligently-caused accident, such as the one at bar, who are delayed in the conduct of their affairs and suffer varied economic losses, are certainly a foreseeable class of plaintiffs. Yet their presence within the area would be fortuitous, and the particular type of economic injury that could be suffered by such persons would be hopelessly unpredictable and not realistically foreseeable. Thus, the class itself would not be sufficiently ascertainable. An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted. . . .

Liability depends not only on the breach of a standard of care but also on a proximate causal relationship between the breach of the duty of care and resultant losses. . . . The standard of particular foreseeability may be successfully employed to determine whether the economic injury was proximately caused, i.e., whether the particular harm that occurred is compensable, just as it informs the question whether a duty exists. . . .

We conclude therefore that a defendant who has breached his duty of care to avoid the risk of economic injury to particularly foreseeable plaintiffs may be held liable for actual economic losses that are proximately caused by its breach of duty. In this context, those economic losses are recoverable as damages when they are the natural and probable consequence of a defendant's negligence in the sense that they are reasonably to be anticipated in view of defendant's capacity to have foreseen that the particular plaintiff or identifiable class of plaintiffs . . . is demonstrably within the risk created by defendant's negligence.

We are satisfied that our holding today is fully applicable to the facts that we have considered on this appeal. . . . Among the facts that persuade us that a cause of action has been established is the close proximity of the North Terminal and People Express Airlines to the Conrail freight yard; the obvious nature of the plaintiff's operations and

particular foreseeability of economic losses resulting from an accident and evacuation; the defendants' actual or constructive knowledge of the volatile properties of ethylene oxide; and the existence of an emergency response plan prepared by some of the defendants . . . which apparently called for the nearby area to be evacuated to avoid the risk of harm in case of an explosion. We do not mean to suggest by our recitation of these facts that actual knowledge of the eventual economic losses is necessary to the cause of action; rather, particular foreseeability will suffice. . . .

We appreciate that there will arise many similar cases that cannot be resolved by our decision today. The cause of action we recognize, however, is one that most appropriately should be allowed to evolve on a case-by-case basis in the context of actual adjudications. . . . We perceive no reason, however, why our decision today should be applied only prospectively. . . .

Accordingly, the judgment of the Appellate Division is modified, and, as modified, affirmed. The case is remanded for proceedings consistent with this opinion.

NOTES TO PEOPLE EXPRESS AIRLINES, INC. v. CONSOLIDATED RAIL CORP.

1. *Influence of People Express.* The opinion in *People Express* is widely known for its adoption of the "particular foreseeability" rule to substitute for the general rule of no recovery for economic harms alone. This rule reflects the same types of considerations present in the *Dillon* rule for recovery of emotional harm unaccompanied by physical harm. While often cited by New Jersey courts, this rule has not been generally followed elsewhere. One exception is the Supreme Court of Alaska, which followed the particular foreseeability rule in Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987). In that case, the court held that an employer stated a claim for negligently caused economic loss of income and profits when a trench in which his employees were working collapsed on and injured the employees.

2. *Exceptions to the Economic Harm Rule.* The *People Express* opinion summarizes generally recognized exceptions to the economic damages rule. These exceptions are based on special noncontractual relationships between the parties that make the plaintiffs particularly foreseeable and on private actions for public nuisance in which the plaintiffs' use of the natural resource made them particularly foreseeable. A related exception applies to groups for whom the law has traditionally shown great solicitude. In Carbone v. Ursich, 209 F.2d 128 (9th Cir. 1953), the court allowed the crew of a fishing vessel to recover economic damages from the owner of another ship when the other boat fouled the fishing boat's nets, requiring the crew to stand idle for three days while repairs were made. Are sailors and seamen "particularly foreseeable" plaintiffs under the *People Express* rule?

3. *Linking Losses to Defendants' Conduct.* The nature of the plaintiff's business may have made it especially easy to claim that the defendants' conduct caused losses. Airline seats are a perishable commodity. Reservations not made during the time period that the plaintiff's reservations center was closed may well have been made on other airlines; alternatively, individuals who could not make reservations during that period may have chosen not to fly at all. Would a passenger with reservations on a cancelled *People Express* flight to Chicago who missed a meeting and an opportunity to close a $1 million business deal be able to collect damages under the particular foreseeability rule?

C. "Wrongful Pregnancy," "Wrongful Birth," and "Wrongful Life"

Standard tort principles apply when a physician makes errors during a patient's sterilization procedure and the patient suffers physical injury. Similarly, traditional tort principles govern cases where a physician treats a pregnant woman or a fetus and injures the woman or the fetus. Other types of recurring cases involving pregnancy and birth have sometimes been difficult for tort law.

Applying typical tort doctrines has been problematic where a failed sterilization procedure leads to the birth of a normal child. Can the birth of a child be treated as a harm? Cases of this kind have been called *wrongful pregnancy* cases. They seek to treat the occurrence of conception as a harm.

In other cases, errors in genetic counseling or prenatal diagnoses can lead to the birth of a child with birth defects. In actions called *wrongful birth,* parents claim that they would have aborted the pregnancy if they had received accurate genetic or diagnostic information. An action brought in these circumstances by the child who was born is called a *wrongful life* claim. Wrongful birth and wrongful life claims seek to treat the birth as a harm. Greco v. United States represents the mainstream approach to many of the issues involved in wrongful pregnancy, wrongful birth, and wrongful life claims.

GRECO v. UNITED STATES

893 P.2d 345 (Nev. 1995)

SPRINGER, J.

In this case we certify to the United States District Court for the District of Maryland that a mother has a tort claim in negligent malpractice against professionals who negligently fail to make a timely diagnosis of gross and disabling fetal defects, thereby denying the mother her right to terminate the pregnancy. We further certify that the child born to this mother has no personal cause of action for what is sometimes called "wrongful life." . . .

In July 1989, appellant, Sundi A. Greco, mother of co-appellant Joshua Greco, ("Joshua") filed suit individually, and on Joshua's behalf, against respondent, the United States of America. Sundi Greco and Joshua alleged that Sundi Greco's doctors at the Nellis Air Force Base in Nevada committed several acts of negligence in connection with Sundi Greco's prenatal care and delivery and that, as a result, both Sundi and Joshua are entitled to recover money damages.[2] The United States moved to dismiss the suit on the ground that the complaint failed to state a cause of action.

On July 20, 1993, the United States District Court for the District of Maryland filed a certification order with this court pursuant to NRAP 5, requesting that this court

[2] According to the facts as certified by the United States District Court, Joshua "was born with congenital myelomeningocele (spina bifida), congenital macro/hydrocephaly, bilateral talipes varus deformity, and Arnold Chiari malformation, type two. Joshua required placement of a ventriculoperitoneal shunt for hydrocephalus. He has paraplegia with no sensation from the hips down and suffers permanent fine and gross motor retardation and mental retardation."

answer certain questions relating to the negligently caused unwanted birth of a child suffering from birth defects.

The Grecos, mother and child, in this case seek to recover damages from the United States arising out of the negligence of physicians who, they claim, negligently failed to make a timely diagnosis of physical defects and anomalies afflicting the child when it was still in the mother's womb. Sundi Greco asserts that the physicians' negligence denied her the opportunity to terminate her pregnancy and thereby caused damages attendant to the avoidable birth of an unwanted and severely deformed child. On Joshua's behalf, Sundi Greco avers that the physicians' negligence and the resultant denial of Joshua's mother's right to terminate her pregnancy caused Joshua to be born into a grossly abnormal life of pain and deprivation.

These kinds of tort claims have been termed "wrongful birth" when brought by a parent and "wrongful life" when brought on behalf of the child for the harm suffered by being born deformed.

We decline to recognize any action by a child for defects claimed to have been caused to the child by negligent diagnosis or treatment of the child's mother. The Grecos' argument is conditional and narrowly put, so: if this court does not allow Sundi Greco to recover damages for Joshua's care past the age of majority, it should allow Joshua to recover those damages by recognizing claims for "wrongful life." Implicit in this argument is the assumption that the child would be better off had he never been born. These kinds of judgments are very difficult, if not impossible, to make. Indeed, most courts considering the question have denied this cause of action for precisely this reason. Recognizing this kind of claim on behalf of the child would require us to weigh the harms suffered by virtue of the child's having been born with severe handicaps against "the utter void of nonexistence"; this is a calculation the courts are incapable of performing. The New York Court of Appeals framed the problem this way:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895 (N.Y. 1978). We conclude that Nevada does not recognize a claim by a child for harms the child claims to have suffered by virtue of having been born.

With regard to Sundi Greco's claim against her physician for negligent diagnosis or treatment during pregnancy, we see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name of "wrongful birth." Sundi Greco either does or does not state a claim for medical malpractice; and we conclude that she does.

Medical malpractice, like other forms of negligence, involves a breach of duty which causes injury. To be tortiously liable a physician must have departed from the accepted standard of medical care in a manner that results in injury to a patient. In the case before us, we must accept as fact that Sundi Greco's physicians negligently failed to perform prenatal medical tests or performed or interpreted those tests in a

negligent fashion and that they thereby negligently failed to discover and reveal that Sundi Greco was carrying a severely deformed fetus. As a result of such negligence Sundi Greco claims that she was denied the opportunity to terminate her pregnancy and that this denial resulted in her giving birth to a severely deformed child.

It is difficult to formulate any sound reason for denying recovery to Sundi Greco in the case at hand. Sundi Greco is saying, in effect, to her doctors: "If you had done what you were supposed to do, I would have known early in my pregnancy that I was carrying a severely deformed baby. I would have then terminated the pregnancy and would not have had to go through the mental and physical agony of delivering this child, nor would I have had to bear the emotional suffering attendant to the birth and nurture of the child, nor the extraordinary expense necessary to care for a child suffering from such extreme deformity and disability."

The United States advances two reasons for denying Sundi Greco's claim: first, it argues that she has suffered no injury and that, therefore, the damage element of negligent tort liability is not fulfilled; second, the United States argues that even if Sundi Greco has sustained injury and damages, the damages were not caused by her physicians. To support its first argument, the United States points out that in Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986), this court held that the mother of a normal, healthy child could not recover in tort from a physician who negligently performed her sterilization operation because the birth of a normal, healthy child is not a legally cognizable injury. The United States argues that no distinction can be made between a mother who gives birth to a healthy child and a mother who gives birth to a child with severe deformities and that, therefore, *Szekeres* bars recovery.

Szekeres can be distinguished from the instant case. Unlike the birth of a normal child, the birth of a severely deformed baby of the kind described here is necessarily an unpleasant and aversive event and the cause of inordinate financial burden that would not attend the birth of a normal child. The child in this case will unavoidably and necessarily require the expenditure of extraordinary medical, therapeutic and custodial care expenses by the family, not to mention the additional reserves of physical, mental and emotional strength that will be required of all concerned. Those who do not wish to undertake the many burdens associated with the birth and continued care of such a child have the legal right, under Roe v. Wade and codified by the voters of this state, to terminate their pregnancies. NRS 442.250 (codifying by referendum the conditions under which abortion is permitted in this state). Sundi Greco has certainly suffered money damages as a result of her physician's malpractice.

We also reject the United States' second argument that Sundi Greco's physicians did not cause any of the injuries that Sundi Greco might have suffered. We note that the mother is not claiming that her child's defects were caused by her physicians' negligence; rather, she claims that her physicians' negligence kept her ignorant of those defects and that it was this negligence which caused her to lose her right to choose whether to carry the child to term. The damage Sundi Greco has sustained is indeed causally related to her physicians' malpractice. . . .

The certified question requires us to decide specifically what types of damages the mother may recover if she succeeds in proving her claim. Courts in these cases have struggled with what items of damages are recoverable because, unlike the typical malpractice claim, claims such as Sundi Greco's do not involve a physical injury to the patient's person. We consider each of Sundi Greco's claimed items of damage separately.

This claim for damages relates to the medical, therapeutic and custodial costs associated with caring for a severely handicapped child. There is nothing exceptional in allowing this item of damage. It is a recognized principle of tort law to "afford compensation for injuries sustained by one person as the result of the conduct of another." Extraordinary care expenses are a foreseeable result of the negligence alleged in this case, and Sundi Greco should be allowed to recover those expenses if she can prove them. This leads us to the question of how to compensate for these kinds of injuries.

Sundi Greco correctly observes that Nevada law requires the parents of a handicapped child to support that child beyond the age of majority if the child cannot support itself. Nevada recognizes the right of a parent to recover from a tortfeasor any expenses the parent was required to pay because of the injury to his or her minor child. Accordingly, Sundi Greco claims the right to recover damages for these extraordinary costs for a period equal to Joshua's life expectancy. Other states which require parents to care for handicapped children past the age of majority allow plaintiffs to recover these types of damages for the lifetime of the child or until such time as the child is no longer dependent on her or his parents. We agree with these authorities and conclude that Sundi Greco may recover extraordinary medical and custodial expenses associated with caring for Joshua for whatever period of time it is established that Joshua will be dependent upon her to provide such care.

The United States contends that if this court allows the mother to recover such extraordinary medical and custodial expenses, then it should require the district court to offset any such award by the amount it would cost to raise a non-handicapped child. To do otherwise, argues the United States, would be to grant the mother a windfall.

The offset rule has its origins in two doctrines: the "avoidable consequences rule," which requires plaintiffs to mitigate their damages in tort cases, and the expectancy rule of damages employed in contract cases, which seeks to place the plaintiff in the position he or she would have been in had the contract been performed. We conclude that neither of these doctrines is applicable to the case at bar. To enforce the "avoidable consequences" rule in the instant case would impose unreasonable burdens upon the mother such as, perhaps, putting Joshua up for adoption or otherwise seeking to terminate her parental obligations.

With regard to the expectancy rule, it would unnecessarily complicate and limit recovery for patients in other malpractice cases if we were to begin intruding contract damage principles upon our malpractice jurisprudence. The rule for compensatory damages in negligence cases is clear and workable, and we decline to depart from it.

Sundi Greco asserts that she is suffering and will continue to suffer tremendous mental and emotional pain as a result of the birth of Joshua. Several jurisdictions allow plaintiffs such as Sundi Greco to recover such damages. In line with these cases, we agree that it is reasonably foreseeable that a mother who is denied her right to abort a severely deformed fetus will suffer emotional distress, not just when the child is delivered, but for the rest of the child's life. Consequently, we conclude that the mother in this case should have the opportunity to prove that she suffered and will continue to suffer emotional distress as a result of the birth of her child.

We reject the United States' argument that this court should follow an "offset" rule with regard to damages for emotional distress. Cf. Blake v. Cruz, 108 Idaho 253, 698 P.2d 315, 320 (Idaho 1984) (requiring damages for emotional distress to be offset by "the countervailing emotional benefits attributable to the birth of the child").

Any emotional benefits are simply too speculative to be considered by a jury in awarding emotional distress damages. As Dean Prosser observes:

> In the case of the wrongful birth of a severely impaired child, it would appear that the usual joys of parenthood would often be substantially overshadowed by the emotional trauma of caring for the child in such a condition, so that application of the benefit rule would appear inappropriate in this context.

Prosser and Keeton on the Law of Torts, supra, §55 at 371 n.48 (citations omitted). . . . Moreover, it would unduly complicate the jury's task to require it to weigh one intangible harm against another intangible benefit, not because of mental distress occasioned by an injury to Joshua.

We conclude that a mother may maintain a medical malpractice action under Nevada law based on her physicians' failure properly to perform or interpret prenatal examinations when that failure results in the mother losing the opportunity to abort a severely deformed fetus. Sundi Greco should be given the right to prove that she has suffered and will continue to suffer damages in the form of emotional or mental distress and that she has incurred and will continue to incur extraordinary medical and custodial care expenses associated with raising Joshua. We decline to recognize the tort sometimes called "wrongful life."

[Dissenting opinion omitted.]

NOTES TO GRECO v. UNITED STATES

1. ***Special Care Expenses During and After Childhood.*** The main impetus for "wrongful life" cases — claims brought on behalf of a child born with birth defects — has been the desire of the child's parents to obtain a supply of money that will provide care for the child throughout the child's lifetime. A claim by parents for their own expenses might be limited to expenses anticipated up to the time the child becomes an adult. In *Greco,* the court referred to Nevada law that imposes a requirement on parents to support children with disabilities even after those children reach adult age. How did the existence of that statute simplify the court's analysis? Would the court have rejected the wrongful life claim in the absence of such a statute?

2. ***Wrongful Birth Damages.*** Does the court distinguish this case adequately from its earlier *Szekeres* decision? Is it possible that *Szekeres* was decided wrongly? A minority view treats the birth of an unwanted child, after a negligently performed sterilization procedure, as a basis for damages, including the cost of child-rearing. See Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990).

3. ***Offset Rule and the Benefit Principle.*** The defendant in *Greco* argued that damages for the expenses to raise the child with birth defects should be offset by the expenses necessary to raise a normal child, because those costs would have been incurred anyway. A related damage rule, the benefit principle, requires costs imposed by the defendant's act to be offset by benefits the defendant has bestowed. The benefit rule has led some courts to hold that damages should be rejected in wrongful birth cases where the child is normal. These courts reason that the benefits of having a normal child are so great that they offset any costs of child-raising, even if the mother did not want to become pregnant. A weaker form of the argument is that courts should avoid comparing the benefits and costs of raising a normal child.

Statute: WRONGFUL BIRTH CLAIMS, WRONGFUL LIFE

Mich. Stat. Ann. §600.2971 (2002)

(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.

(2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.

(3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

(4) The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code.

Statute: WRONGFUL BIRTH; WRONGFUL LIFE

24 Me. Rev. Stat. Ann. §2931 (2001)

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.

2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.

NOTES TO STATUTES

1. ***Statutory Approaches.*** State statutes dealing with recovery for wrongful birth, life, and pregnancy take different approaches to the standard of care applicable and to whether recovery is permitted at all. The damages for which compensation may be obtained also differ.

2. ***Problem: Wrongful Pregnancy, Life, and Birth.*** For personal and socio-economic reasons, Mr. and Mrs. Coleman arranged for Mrs. Coleman to receive a sterilization procedure called a bilateral tubal ligation after giving birth to their fourth child. Subsequent to the operation, Mrs. Coleman became pregnant and gave birth to a fifth child. The Colemans sued the doctors, claiming negligence in performing

the procedure and claiming as damages: (1) pain, suffering, and discomfort of Mrs. Coleman as a result of the last pregnancy, (2) the cost of the tubal ligation, (3) the loss to Mr. Coleman of the comfort, companionship, services, and consortium of Mrs. Coleman, (4) the deprivation to the other four children of the care and support they would have received had the fifth child not been born, (5) medical expenses incurred by the Colemans as a result of the fifth pregnancy, and (6) care and maintenance for the fifth child. Under the two statutes above, which of these claims would be allowed? If the child had been born with birth defects, would the additional costs of raising a child with those defects have been recoverable? See Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974).

Perspective: Wrongful Life and Birth and Defensive Medicine

Potential liability for wrongful life and wrongful birth compounds the complaints of physicians concerned with the threat of lawsuits.

> [T]he wrongful birth cause of action imposes liability on physicians not previously existing at common law. . . . This, in turn, creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particularly cautious physician. The incentive is simply to avoid liability and, where there may be no liability, to avoid the costs of frivolous litigation. For example, when New York recognized the wrongful birth action, a prediction was made that legal implications would lead to the use of amniocentesis in all pregnancies. A year later, doctors were reporting use of amniocentesis on women below the age of thirty-five even though amniocentesis was not medically indicated. Fear of legal liability was a major factor cited for promoting the procedure.
>
> The financial incentive is not only to recommend prenatal screening, but also to recommend abortion where diagnostic results are borderline, or where the physician is "cautious." Similarly, the financial incentive would lead to recommendations to abort where genetic screening has not been performed, and possibly not even medically indicated, when the physician becomes concerned that his failure to conduct such testing or recommend such procedures could expose him to eventual liability.

James Bopp, Jr., Barry A. Bostrom & Donald A. McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 486-487 (1989).

How should consideration of the possibility of overdeterrence affect tort policy? Is this concern limited to physicians alone?

IV. Primary Assumption of Risk

The *primary assumption of risk* doctrine protects defendants from liability in some circumstances where risks either cannot be eliminated or would be too costly to

eliminate and where those risks are typically obvious to the people who encounter them. Clover v. Snowbird Ski Resort interprets a statute that incorporates that doctrine in the context of a skiing accident. Jones v. Three Rivers Management Corp. analyzes the care owed by the operator of a baseball stadium with respect to the risk that patrons may be hit by batted balls.

CLOVER v. SNOWBIRD SKI RESORT

808 P.2d 1037 (Utah 1991)

HALL, C.J.

Plaintiff Margaret Clover sought to recover damages for injuries sustained as the result of a ski accident in which Chris Zulliger, an employee of defendant Snowbird Corporation ("Snowbird"), collided with her. From the entry of summary judgment in favor of defendants, Clover appeals.

Many of the facts underlying Clover's claims are in dispute. Review of an order granting summary judgment requires that the facts be viewed in a light most favorable to the party opposing summary judgment. At the time of the accident, Chris Zulliger was employed by Snowbird as a chef at the Plaza Restaurant. . . .

[After inspecting a restaurant, Zulliger skied four runs prior to beginning work at another restaurant on the mountain. He] took a route that was often taken by Snowbird employees to travel from the top of the mountain to the Plaza. About mid-way down the mountain, at a point above the Mid-Gad, Zulliger decided to take a jump off a crest on the side of an intermediate run. He had taken this jump many times before. A skier moving relatively quickly is able to become airborne at that point because of the steep drop off on the downhill side of the crest. Due to this drop off, it is impossible for skiers above the crest to see skiers below the crest. The jump was well known to Snowbird. In fact, the Snowbird ski patrol often instructed people not to jump off the crest. There was also a sign instructing skiers to ski slowly at this point in the run. Zulliger, however, ignored the sign and skied over the crest at a significant speed. Clover, who had just entered the same ski run from a point below the crest, either had stopped or was traveling slowly below the crest. When Zulliger went over the jump, he collided with Clover, who was hit in the head and severely injured.

Clover brought claims against Zulliger and Snowbird, alleging [among other claims that] Snowbird negligently designed and maintained its ski runs. . . . Zulliger settled separately with Clover. Under two separate motions for summary judgment, the trial judge dismissed Clover's claims against Snowbird [holding that] Utah's Inherent Risk of Skiing Statute, Utah Code Ann. §§78-27-51 to -54 (Supp. 1986), bars plaintiff's claim of negligent design and maintenance. . . .

. . . This ruling was based on the trial court's findings that "Clover was injured as a result of a collision with another skier, and/or the variation of steepness in terrain." Apparently, the trial court reasoned that regardless of a ski resort's culpability, the resort is not liable for an injury occasioned by one or more of the dangers listed in section 78-27-52(1). This reasoning, however, is based on an incorrect interpretation of sections 78-27-51 to -54.

Utah Code Ann. §§78-27-51 and -52(1) read in part:

INHERENT RISKS OF SKIING—PUBLIC POLICY

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state.

> . . . It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, and to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

INHERENT RISK OF SKIING—DEFINITIONS

As used in this act:

> (1) "Inherent risk of skiing" means those dangers or conditions which are an integral part of the sport of skiing, including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski within his own ability.

Section 78-27-53 states that notwithstanding anything to the contrary in Utah's comparative fault statute, a skier cannot recover from a ski area operator for an injury caused by an inherent risk of skiing. Section 78-27-54 requires ski area operators to "post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing and the limitations on liability of ski area operators as defined in this act."

It is clear that sections 78-27-51 to -54 protect ski area operators from suits initiated by their patrons who seek recovery for injuries caused by an inherent risk of skiing. The statute, however, does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers. While the general parameters of the act are clear, application of the statute to specific circumstances is less certain. In the instant case, both parties urge different interpretations of the act. Snowbird claims that any injury occasioned by one or more of the dangers listed in section 78-27-52(1) is barred by the statute because, as a matter of law, such an accident is caused by an inherent risk of skiing. Clover, on the other hand, argues that a ski area operator's negligence is not an inherent risk of skiing and that if the resort's negligence causes a collision between skiers, a suit arising from that collision is not barred by sections 78-27-51 to -54.

Although the trial court apparently agreed with Snowbird, we decline to adopt such an interpretation. The basis of Snowbird's argument is that the language of section 78-27-52(1) stating that "'[i]nherent risk of skiing' means those dangers or conditions which are an integral part of the sport of skiing, including but not limited to: . . . collision with other skiers" must be read as defining all collisions between skiers as inherent risks. The wording of the statute does not compel such a reading. To the contrary, the dangers listed in section 78-27-52(1) are modified by the term "integral part of the sport of skiing." Therefore, ski area operators are protected from suits to recover for injuries caused by one or more of the dangers listed in section 78-27-52(1)

only to the extent that those dangers, under the facts of each case, are integral aspects of the sport of skiing. Indeed, the list of dangers in section 78-27-52(1) is expressly nonexclusive. The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis, using the entire statute, not solely the list provided in section 78-27-52(1).

Furthermore, when the act is read in its entirety, no portion thereof is rendered meaningless. When reading section 78-27-52(1) in connection with section 78-27-54, it becomes clear that the relevance of section 78-27-52(1) is in insuring that ski area operators provide skiers with sufficient notice of the risks they face when participating in the sport of skiing, as well as ski area operators' liability in connection with these risks. It should also be noted that the interpretation urged by Snowbird would result in a wide range of absurd consequences. For example, if a skier loses control and falls by reason of the negligence of an operator, recovery for injury would depend on whether, in the fall, the skier collides with a danger listed in section 78-27-52(1). Such a result is entirely arbitrary. . . .

In construing the statute . . . a helpful first step is to note that sections 78-27-51 to -54 limit the liability of ski area operators by defining the duty they owe to their patrons. The express purpose of the statute, codified in section 78-27-51, is "to clarify the law in relation to skiing injuries and the risk inherent in the sport . . . and to establish [that] . . . no person shall recover from a ski operator for injuries resulting from those inherent risks." Inasmuch as the purpose of the statute is to "clarify the law," not to radically alter ski resort liability, it is necessary to briefly examine the relevant law at the time the statute was enacted. Although there is limited Utah case law on point, when the statute was enacted the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing. Terms utilized in the statute such as "inherent risk of skiing" and "assumes the risk" are the same terms relied upon in such cases. This language suggests that the statute is meant to achieve the same results achieved under the doctrine of primary assumption of risk. In fact, commentators suggest that the statute was passed in reaction to a perceived erosion in the protection ski area operators traditionally enjoyed under the common law doctrine of primary assumption of risk.

As we have noted in the past, the single term "assumption of risk" has been used to refer to several different, and occasionally overlapping, concepts. One concept, primary assumption of risk, is simply "an alternative expression for the proposition that the defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty." This suggests that the statute, in clarifying the "confusion as to whether a skier assumes the risks inherent in the sport of skiing," operates to define the duty ski resorts owe to their patrons.

Section 78-27-53 also supports the notion that the ski statute operates to define the duty of a ski resort. This section exempts injuries caused by the inherent risks of skiing from the operation of Utah's comparative fault statute, which was enacted to avoid the harsh results of the all-or-nothing nature of the former law by limiting a party's liability by the degree of that party's fault. Comparative principles have been applied in cases dealing with contributory negligence, secondary assumption of risk, and strict liability. Exempting suits concerning injuries caused by an inherent risk of skiing from the comparative fault statute is consistent with the assertion that the ski area operators are not at fault in such situations — that is, ski area operators have no duty to protect a skier from the inherent risks of skiing.

Finally, it is to be noted that without a duty, there can be no negligence. Such an interpretation, therefore, harmonizes the express purpose of the statute, protecting ski area operators from suits arising out of injuries caused by the inherent risks of skiing, with the fact that the statute does not purport to abrogate a skier's traditional right to recover for injuries caused by ski area operators' negligence.

A similar analysis leads to the conclusion that the duties sections 78-27-51 to -54 impose on ski resorts are the duty to use reasonable care for the protection of its patrons and, under section 78-27-54, the duty to warn its patrons of the inherent risks of skiing. Beyond the general warning prescribed by section 78-27-54, however, a ski area operator is under no duty to protect its patrons from the inherent risks of skiing. The inherent risks of skiing are those dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator.

As noted above, the purpose of the statute is to prohibit suits seeking recovery for injuries caused by an inherent risk of skiing. The term "inherent risk of skiing," using the ordinary and accepted meaning of the term "inherent," refers to those risks that are essential characteristics of skiing — risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks. Generally, these risks can be divided into two categories. The first category of risks consists of those risks, such as steep grades, powder, and mogul runs, which skiers wish to confront as an essential characteristic of skiing. Under sections 78-27-51 to -54, a ski area operator is under no duty to make all of its runs as safe as possible by eliminating the type of dangers that skiers wish to confront as an integral part of skiing.

The second category of risks consists of those hazards which no one wishes to confront but cannot be alleviated by the use of reasonable care on the part of a ski resort. It is without question that skiing is a dangerous activity. Hazards may exist in locations where they are not readily discoverable. Weather and snow conditions can suddenly change and, without warning, create new hazards where no hazard previously existed. Hence, it is clearly foreseeable that a skier, without skiing recklessly, may momentarily lose control or fall in an unexpected manner. Ski area operators cannot alleviate these risks, and under sections 78-27-51 to -54, they are not liable for injuries caused by such risks. The only duty ski area operators have in regard to these risks is the requirement set out in section 78-27-54 that they warn their patrons, in the manner prescribed in the statute, of the general dangers patrons must confront when participating in the sport of skiing. This does not mean, however, that a ski area operator is under no duty to use ordinary care to protect its patrons. In fact, if an injury was caused by an unnecessary hazard that could have been eliminated by the use of ordinary care, such a hazard is not, in the ordinary sense of the term, an inherent risk of skiing and would fall outside of sections 78-27-51 to -54. . . .

Having established the proper interpretation of sections 78-27-51 to -54, the next step is to determine whether, given this interpretation, there is a genuine issue of material fact in regard to Clover's claim. First, the existence of a blind jump with a landing area located at a point where skiers enter the run is not an essential characteristic of an intermediate run. Therefore, Clover may recover if she can prove that Snowbird could have prevented the accident through the use of ordinary care. It is to be noted that Clover's negligent design and maintenance claim is not based solely on the allegation that Snowbird allowed conditions to exist on an intermediate hill which caused blind spots and allowed skiers to jump. Rather, Clover presents evidence that Snowbird was

aware that its patrons regularly took the jump, that the jump created an unreasonable hazard to skiers below the jump, and that Snowbird did not take reasonable measures to eliminate the hazard. This evidence is sufficient to raise a genuine issue of material fact in regard to Clover's negligent design and maintenance claim. . . .

In light of the genuine issues of material fact . . . summary judgment was inappropriate.

Reversed and remanded for further proceedings.

NOTES TO CLOVER v. SNOWBIRD SKI RESORT

1. ***Terminology.*** "Primary assumption of risk," as the *Clover* court states, is usually used to mean that a defendant either owed no duty or did not breach any duty. The doctrine of *primary assumption of risk* is simply a name for a type of argument a defendant may use to rebut a plaintiff's claim or evidence of duty or breach. A court may find there is *no duty* because the harm is unforeseeable (because the plaintiff can avoid obvious dangers, perhaps by choosing not to engage in the activity) or no duty because public policy favors protecting suppliers of athletic facilities (such as ski areas that bring tourist revenues to the state). A court may find *no breach of duty* on the ground that the inherent risks are "necessary" to the sport — that is, cannot be avoided without sacrificing valuable characteristics of the sport.

2. ***Inherent Risks in Other Sports.*** The *Clover* court identifies particular risks of skiing as "inherent." Some of these are risks skiers wish to confront, and some are risks no one would wish to confront if skiing could reasonably be conducted without them. The common features of inherent risks are that people generally know about them, and the risks cannot be eliminated by using reasonable care. As a matter of common law, should the doctrine of primary assumption of risk lead to a conclusion that there is no duty of the operator of the following sports facilities to protect the participant from the accident that occurs?

A. A bobsled run ends in an "exit chute" that is designed with an opening so that sleds can be moved out of it quickly during competitions. A competitor's sled slides out of that exit at a high rate of speed and the competitor is injured.

B. A karate student injures his back while attempting to perform a tumbling technique known as a "jump roll" over an obstacle.

C. A tennis player snags his foot in a torn vinyl hem at the bottom of a net dividing two indoor tennis courts.

See Morgan v. State, 685 N.E.2d 202 (N.Y. 1997).

3. ***Problem: Primary Assumption of Risk.*** The plaintiff was skiing on a sunny day. He skied roughly 30 feet on a moderately steep slope toward a natural ridge. As he came over the ridge, he noticed a trail that cut directly across the run he was on. He had been unable to see the trail earlier because it fell within a blind spot created by the ridge. The last thing he remembers about this incident is attempting to make an evasive maneuver to his left, apparently to avoid the trail.

The trail that he saw as he came over the ridge had been formed earlier in the season by novice skiers traversing the slope to negotiate an easier route down the mountain. To prevent it from becoming too rough, the operator of the ski area occasionally smoothed the trail with its snow-grooming equipment. Such trails are commonly called "cat tracks."

A witness was skiing on the cat track as the plaintiff came down on his trail. She testified that she heard someone on the trail above her and, as she looked up, saw the plaintiff in the air roughly 10 to 15 feet ahead of her. She stated that he was upright and seemed to be in control as he passed over the cat track but gradually rotated backward as he flew through the air. He landed on his neck and upper back approximately 50 feet below the cat track. He was severely injured.

In a suit by the plaintiff against the operator of the ski area, claiming that the defendant negligently designed and maintained the cat track and claiming that the area should have warned skiers about the cat track, how might a court in Utah respond to a defendant's motion for summary judgment? See White v. Deseelhorst, 879 P.2d 1371 (Utah 1994).

Statute: ACCEPTANCE OF INHERENT RISKS

12 Vt. Stat. §1037 (2002)

§1037. Notwithstanding the provisions of section 1036 of this title [referring to comparative negligence as a defense], a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.

Statute: SKIERS' AND TRAMWAY PASSENGERS' RESPONSIBILITIES

Me. Stat. tit. 32 §15217(A) (2002)

A. "Inherent risks of skiing" means those dangers or conditions that are an integral part of the sport of skiing, including, but not limited to: existing and changing weather conditions; existing and changing snow conditions, such as ice, hardpack, powder, packed powder, slush and granular, corn, crust, cut-up and machine-made snow; surface or subsurface conditions, such as dirt, grass, bare spots, forest growth, rocks, stumps, trees and other natural objects and collisions with or falls resulting from such natural objects; lift towers, lights, signs, posts, fences, mazes or enclosures, hydrants, water or air pipes, snowmaking and snow-grooming equipment, marked or lit trail maintenance vehicles and snowmobiles, and other man-made structures or objects and their components, and collisions with or falls resulting from such man-made objects; variations in steepness or terrain, whether natural or as a result of slope design; snowmaking or snow-grooming operations, including, but not limited to, ski jumps, roads and catwalks or other terrain modifications; the presence of and collisions with other skiers; and the failure of skiers to ski safely, in control or within their own abilities.

Statute: DUTIES AND RESPONSIBILITIES OF EACH SKIER

Ga. Stat. §43-43A-7(1) (2002)

Any other provision of law to the contrary notwithstanding:

(1) Each individual skier has the responsibility for knowing the range of his or her own ability to negotiate any ski slope or trail or any portion thereof and must ski within the limits of his or her ability. Each skier expressly accepts and assumes the risk of any

injury or death or damage to property resulting from any of the inherent dangers and risks of skiing, as set forth in this chapter; provided, however, that injuries sustained in a collision with another skier are not an inherent risk of the sport for purposes of this Code section.

Statute: LEGISLATIVE PURPOSE

Idaho Stat. §6-1101 (2002)

The legislature finds that the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery.

Statute: SPORT SHOOTING PARTICIPANTS, ACCEPTANCE OF OBVIOUS AND INHERENT RISKS

Mich. Stat. §691.1544(4) (2002)

Each person who participates in sport shooting at a sport shooting range that conforms to generally accepted operation practices accepts the risks associated with the sport to the extent the risks are obvious and inherent. Those risks include, but are not limited to, injuries that may result from noise, discharge of a projectile or shot, malfunction of sport shooting equipment not owned by the shooting range, natural variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, and other forms of natural growth or debris.

NOTES TO STATUTES

1. *Objective Test for "Obvious" and "Necessary."* These primary assumption of risk statutes illustrate different approaches to defining inherent risks. All are consistent with the common law in treating the test for the obviousness of a risk as an objective test. Rather than referring to the specific knowledge of the plaintiff, the skiing statutes either describe the risks in great detail (see the Maine statute), hold the plaintiff responsible for the risks the plaintiffs "should" understand (see the Idaho statute), or simply state that plaintiffs accept obvious and necessary risks as a matter of law (see the Vermont statute).

2. *Inherent Risks.* Where inherent risks are enumerated, there are differences among the states. Observe that Maine's treatment of collisions between skiers differs from Utah's common law interpretation in *Clover* and Georgia's statutory enumeration. States have similar statutes for a few other sports (see, for instance, Michigan's shooting statute). Do the statutorily enumerated risks all fit within the common law test for whether the risk is obvious and necessary?

JONES v. THREE RIVERS MANAGEMENT CORP.

394 A.2d 546 (Pa. 1978)

ROBERTS, J.

Appellant Evelyn M. Jones brought an action of trespass in the Court of Common Pleas of Allegheny County against appellee Pittsburgh Athletic Company, Inc., holder of the Pittsburgh Pirates baseball franchise, and appellee Three Rivers Management Corporation, a wholly owned subsidiary of the Pittsburgh Athletic Company, Inc., which manages Three Rivers Stadium. A jury found appellees negligent and awarded appellant damages of $125,000. The Superior Court held that appellant failed to establish a prima facie case and reversed and remanded for entry of judgment notwithstanding the verdict as to both appellees. We granted allowance of appeal and now reverse.

Appellant was injured at Three Rivers Stadium, Pittsburgh, on July 16, 1970, the sport facility's inaugural day. Two interior concourses, or walkways, encircle the stadium on its second level. One concourse, at the outer circumference of the stadium and away from the playing field, houses concessions and restrooms. The other, located behind the seating and scoreboard areas, runs, in part, directly behind and above "right field." Built into the concourse wall above right field, are large openings through which pedestrians may look out over the field and stands. Ramps lead patrons from this second walkway to the seating areas overlooking the field of play. Appellant was standing in this second walkway in the vicinity of one of the large right field openings when she was struck in the eye by a ball hit during batting practice.

Appellant's evidence established that the stadium's structure requires pedestrians interested in looking out onto the playing field to stop or to divert their attention away from the path of the concourse. Appellant testified that as she entered the right field area of the concourse, she directed her attention away from the walkway, approached one of the right field openings and scanned the playing field. She testified that, although she saw some activity on the field, she was not aware that batting practice had begun and did not see home plate. After this stop, she decided not to continue around the walkway, but to walk back to get some food in the "concession" concourse. Appellant turned away from the field of play, started back, and almost immediately heard a cry of "Watch!" As she turned, again, toward the field, she was struck in the eye by a batted ball. . . .

In response to appellant's case, appellees presented no evidence. Instead, they moved for both nonsuits and directed verdicts. The trial court denied the motions and submitted the case to the jury. After the jury's verdict for appellant, the trial court denied appellees' motions for judgments notwithstanding the verdict.

On appeal, a majority of the Superior Court held that appellant failed to meet her burden of proving negligence and that the trial court erred in denying the motions for judgments n.o.v. . . .

This Court has never considered the liability of a baseball stadium operator for damages incurred by a patron in the grandstand or bleachers, struck by a batted ball. There are, however, settled principles which apply to all cases involving a place of amusement for which admission is charged. An operator of such an establishment is not an insurer of his patrons. E.g., Taylor v. Churchill Valley Country Club, 425 Pa. 266, 269, 228 A.2d 768, 769 (1967). Rather, he will be liable for injuries to his patrons

only where he fails to "use reasonable care in the construction, maintenance, and management of [the facility], having regard to the character of the exhibitions given and the customary conduct of patrons invited." Id. . . .

The Superior Court has applied these principles to two baseball cases in which spectators seated in the stands during games have been struck by batted balls. In Iervolino v. Pittsburgh Athletic Co., 212 Pa. Super. 330, 243 A.2d 490 (1968) (allocatur refused), Superior Court directed entry of a judgment n.o.v. where plaintiff contended it was negligent "to invite a patron to a sports event and view a baseball game from a position where she was exposed to a hard projectile traveling 94½ feet in a split second," but did not go on to also establish that exposure to this risk resulted from any deviation from established custom in a baseball stadium. . . .

Although courts are in agreement that a ballpark patron must establish more than injury by a batted ball while in the stands to avoid a dismissal or a directed verdict, they variously describe the rationale for this result. In Brown v. San Francisco Baseball Club, 99 Cal. App. 2d 484, 487, 222 P.2d 19, 20 (1950), a California court stated:

> In baseball . . . the patron participates in the sport as a spectator and in doing so subjects himself to certain risks necessarily and usually incident to and inherent in the game; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence, but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks inherent in and incident to the game. . . .

Although "assumption of the risk" language is used, the issue is not one of the plaintiff's subjective consent to assume the risks of defendant's negligent conditions, but rather whether defendant was negligent in failing to protect plaintiff from certain risks. . . .

Movies must be seen in a darkened room, roller coasters must accelerate and decelerate rapidly and players will bat balls into the grandstand. But even in a "place of amusement" not every risk is reasonably expected. The rationale behind the rule that the standard of reasonable care does not impose a duty to protect from risks associated with baseball, naturally limits its application to those injuries incurred as a result of risks any baseball spectator must and will be held to anticipate. . . .

Thus, "no-duty" rules, apply only to risks which are "common, frequent and expected," and in no way affect the duty of theatres, amusement parks and sports facilities to protect patrons from foreseeably dangerous conditions not inherent in the amusement activity. Patrons of baseball stadiums have recovered when injured by a swinging gate while in their grandstand seats, Murray v. Pittsburgh Athletic Co., 324 Pa. 486, 188 A. 190 (1936), by tripping over a beam at the top of a grandstand stairway, Martin v. Angel City Baseball Assn., 3 Cal. App. 2d 586, 40 P.2d 287 (1935), and by falling into a hole in a walkway, under a grandstand, used to reach refreshment stands, Louisville Baseball Club v. Butler, 298 Ky. 785, 160 S.W.2d 141 (1942). In these cases, just as in the "flying baseball bat" case, Ratcliff v. San Diego Baseball Club, 27 Cal. App. 2d 733, 81 P.2d 625 (1938), the occurrence causing injury was not "a common, frequent and expected" part of the game of baseball. Therefore, there is no bar to finding the defendant negligent. . . .

The central question, then, is whether appellant's case is governed by the "no-duty" rule applicable to common, frequent and expected risks of baseball or by

the ordinary rules applicable to all other risks which may be present in a baseball stadium. To settle this question, we must determine whether one who attends a baseball game as a spectator can properly be charged with anticipating as inherent to baseball the risk of being struck by a baseball while properly using an interior walkway.

The openings built into the wall over right field are an architectural feature of Three Rivers Stadium which are not an inherent feature of the spectator sport of baseball. They are not compelled by or associated with the ordinary manner in which baseball is played or viewed. The principles underlying our rules barring recovery in amusement facility cases extend to the kind of risk of harm claimed present here. Like the swinging gate, the dangerous grandstand stairway, and the hole in the floor of the stadium walkway, these concourse openings simply cannot be characterized as "part of the spectator sport of baseball." It, therefore, cannot be concluded that recovery is foreclosed to appellant who was struck while standing in an interior walkway of Three Rivers Stadium. The Superior Court was in error when it extended to appellant, standing in this walkway, the no-duty rule applicable to patrons in the stands. The no-duty rule was improperly applied.

To determine whether the jury's verdict may stand, it is still necessary to ascertain whether appellant has established that appellees breached the standard of care owed appellant, and that the breach was the proximate cause of appellant's injury. . . .

Appellant, as the verdict winner is entitled to have her evidence viewed on appeal in the light most favorable to her; she must be given the benefit of every fact and every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in her favor.

Appellant established, inter alia, that she was injured in an interior walkway and that its structure required patrons to turn their attention away from any activity on the field in order to safely navigate the concourse. Plaintiff further testified that when she stopped to look out into the field of play, she saw some activity on the field, but was not aware that batting practice had begun and did not see home plate. It was for the jury to determine the question of appellees' negligence. On this appeal, taking the evidence in the light most favorable to the appellant, as we must, we cannot disturb the jury's verdict.

Order of the Superior Court reversed and judgment for appellant reinstated.

NOTE TO JONES v. THREE RIVERS MANAGEMENT CORP.

Background Facts. A decision that as a matter of law a certain risk is inherent in the conduct of an amusement enterprise naturally reflects a court's sense of what is typical in our culture. The opinion's reference to darkness in movie theaters is an example of this use of a court's own knowledge. The California Supreme Court has written that it is common for baseball spectators to be exposed to the risk of being hit by batted balls and that it is uncommon for spectators to be exposed to the risk of being hit by a bat. See Goade v. Benevolent and Protective Order of Elks, 213 Cal. 2d 183, 28 Cal. Rptr. 669 (1963). The court stated:

> In baseball, a sport often referred to as our "national pastime," it has been held that the spectator as a matter of law assumes the risk of being hit by a fly ball. But when a spectator is hit by a flying baseball bat the doctrine of assumption of the risk is not applied. The difference in the treatment of these two baseball spectators is explained by the fact that it is a matter of "common knowledge" that fly balls are a common,

frequent and expected occurrence in this well-known sport, and it is not a matter of "common knowledge" that flying baseball bats are common, frequent or expected.

The reference to "common, frequent, and expected" risks explains how recovery against a stadium owner for being hit by a ball depends on the part of the stadium where the accident occurred. What reasoning supported recovery by the plaintiff in *Jones?*

Statute: COLORADO BASEBALL SPECTATOR SAFETY ACT

Colo. Rev. Stat. §13-21-120 (2002)

(1) This section shall be known and may be cited as the "Colorado Baseball Spectator Safety Act of 1993."

(2) The general assembly recognizes that persons who attend professional baseball games may incur injuries as a result of the risks involved in being a spectator at such baseball games. However, the general assembly also finds that attendance at such professional baseball games provides a wholesome and healthy family activity which should be encouraged. The general assembly further finds that the state will derive economic benefit from spectators attending professional baseball games. It is therefore the intent of the general assembly to encourage attendance at professional baseball games. Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable. . . .

(4)(a) Spectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary. These risks include, but are not limited to, injuries which result from being struck by a baseball or a baseball bat.

(b) Except as provided in subsection (5) of this section, the assumption of risk set forth in this subsection (4) shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks, notwithstanding the provisions of sections 13-21-111 and 13-21-111.5. Except as provided in subsection (5) of this section, an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and, except as provided in subsection (5) of this section, no spectator nor spectator's representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent risks of attending a professional baseball game.

(c) Nothing in this section shall preclude a spectator from suing another spectator for any injury to person or property resulting from such other spectator's acts or omissions.

(5) Nothing in subsection (4) of this section shall prevent or limit the liability of an owner who:

(a) Fails to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball; [or]

(b) Intentionally injures a spectator. . . .

Statute: LIMITED LIABILITY FOR BASEBALL FACILITIES

Ariz. Rev. Stat. §12-554 (2002)

A. An owner is not liable for injuries to spectators who are struck by baseballs, baseball bats or other equipment used by players during a baseball game unless the owner either:

1. Does not provide protective seating that is reasonably sufficient to satisfy expected requests.
2. Intentionally injures a spectator.

B. This section does not prevent or limit the liability of an owner who fails to maintain the premises of the baseball stadium in a reasonably safe condition.

NOTES TO STATUTES

1. ***Limitations on Coverage.*** Although the Colorado statute states that a spectator is barred from recovering damages suffered by being hit by a bat or a ball, it also states that this prohibition is subject to the owner's obligation to make a reasonable effort to maintain the premises in reasonably safe condition. Do those reasonableness obligations weaken the protections the statute offers to owners? How would it apply to the facts of Jones v. Three Rivers Management Company?

2. ***Limitations on Liability.*** The Colorado statute includes among its purposes "limiting the civil liability of those who own professional baseball teams" with the aim of "keeping ticket prices more affordable." The other policy justifications in that same section may support the idea of injured patrons subsidizing ticket purchasers and team owners, but does the statute provide more protection than the common law doctrine of primary assumption of risk would do? Given that the existence of a duty is a question of law for the judge, does the statute keep more cases from the jury than the common law doctrine does?

3. ***Problem.*** Suppose a plaintiff is injured by a batted ball at a baseball field. Suppose also that the plaintiff claims that the operator of the field had been negligent because, even though there was screening behind home plate, many people had previously been hit by batted balls in an area that was not protected and the operator had not taken any measures to protect additional areas. How would this claim be affected by the Colorado and Arizona statutes?

Perspective: Utility of Primary Assumption of Risk Doctrine

Because primary assumption of risk is not a defense (in contrast to secondary assumption of risk), even when a state ceases to recognize it as a formal doctrine, its underlying logic for proving duty and breach survives.

> In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. The doctrine of primary implied assumption of risk "technically is not a defense, but rather a legal theory which relieves a defendant of the duty which he might otherwise owe to the plaintiff with respect to particular risks."

Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case by failing to establish that a duty exists. . . .

We agree with those states that have abandoned all categories of implied assumption of risk, as well as the traditional assumption of risk terminology, in the wake of judicial or statutory adoption of a scheme of comparative fault. The types of issues raised by implied assumption of risk are readily susceptible to analysis in terms of the common-law concept of duty and the principles of comparative negligence law.

Perez v. McConkey, 872 S.W.2d 897, 902, 905 (Tenn. 1994).

Would abolishing the doctrine of primary assumption of risk change the jury's verdict in any case if they properly understood the concepts of duty and reasonable care?

CHAPTER 12

DAMAGES

I. Introduction

The goal of most plaintiffs is to win a judgment ordering the defendant to pay money to the plaintiff. In a small number of cases, plaintiffs seek other remedies, but money damages are the main focus of tort law. In analyzing monetary damages, courts generally refer to three categories: compensatory, punitive, and nominal damages.

Compensatory damages are meant to equal the value of actual harm caused by the defendant. They are available under all legal theories. Punitive damages serve to punish or provide extra deterrence to a defendant. They are recoverable if the defendant acted with a bad motive, such as ill will or a desire to harm, typically in intentional or recklessness cases. Their value varies according to the gravity of the defendant's conduct and the amount of money thought necessary to have the intended effect on the defendant. Nominal damages are token amounts signifying that the defendant committed an intentional tort.

This chapter covers compensatory and punitive damages, and explores how these types of damages are measured and many of the doctrines that control their use. Nominal damages, those associated with intentional torts, are discussed in Chapter 2.

II. Compensatory Damages

A. Introduction

Because damages are so important in litigation, detailed doctrines control them. Compensatory damages can be either "general" or "special." They can be based on past or anticipated future harm. In cases where a victim has died, they can be "survival" or "wrongful death" damages.

General damages, also called "noneconomic" damages, are for consequences like pain and suffering that are difficult to quantify in terms of money. Special damages, also known as "economic" damages, are for readily calculable types of expenses that are

idiosyncratic to a particular plaintiff, such as medical expenses, funeral expenses, or lost earnings.

A defendant may be liable for past damages, which are for harms that have occurred up to the time of the verdict. A defendant may also be liable for future damages, which are for harms that are predicted (by a preponderance of the evidence) to occur after the verdict.

When a defendant has caused a plaintiff's death, two important types of statutes govern damages. "Survival" statutes allow a plaintiff's estate to sue on his or her behalf, as if the plaintiff had survived, to assert the plaintiff's rights. "Wrongful death" statutes allow people who have suffered losses as a result of another's tortiously caused death to recover damages. These statutes allow the children and spouse of the decedent, for instance, to recover for the loss of financial and emotional support the decedent would have provided. Plaintiffs are entitled to survival damages and wrongful death damages only under statutes, not because of common law precedents.

Cases in this section introduce the types of compensatory damages and the rules governing their recovery. Gunn v. Robertson illustrates the various types of damages and shows how a court might adjust jury awards in each category. Jordon v. Baptist Three Rivers Hospital involves the interpretation of a statute that combines typical survival and wrongful death provisions. *Jordan* also discusses damages for *loss of consortium.*

GUNN v. ROBERTSON

801 So. 2d 555 (La. Ct. App. 2001)

GOTHARD, J.

On October 19, 1998, Randall Gunn, individually and on behalf of his minor children, and his wife Tammy Gunn, filed suit for damages arising out of an automobile accident on April 1, 1998. Gunn sought general damages plus past and future medicals and wages, and loss of earning capacity. His wife and children sought loss of consortium. Named as defendants were James Robertson and State Farm Mutual Automobile Ins. Co., Robertson's automobile liability insurance carrier. . . .

Trial by jury was held on May 15-19, 2000. At its conclusion, the jury rendered a verdict in favor of the plaintiffs, finding that James Robertson was 70% at fault in the cause of the accident. The jury assessed damages as follows: $1,000.00 physical pain and suffering, $1,700.00 past medical expenses and $5,400.00 in past lost wages. . . .

In this appeal, plaintiffs present eleven allegations of error in three categories. Plaintiffs allege that the jury committed manifest error in its findings of comparative fault, in its award of general and special damages . . .

Our jurisprudence has consistently held that in the assessment of damages, much discretion is left to the judge or jury, and upon appellate review such awards will be disturbed only when there has been a clear abuse of that discretion, And, "[i]t is only after articulated analysis of the facts discloses an abuse of discretion, that the award may on appellate review be considered either excessive or insufficient," Reck v. Stevens, 373 So. 2d 498, 501 (La. 1979). Appellate courts review the evidence in the light which most favorably supports the judgment to determine whether the trier of fact was clearly wrong in its conclusions. Before an appellate court can disturb the quantum of an award, the record must clearly reveal that the jury abused its discretion.

In order to make this determination, the reviewing court looks first to the individual circumstances of the injured plaintiff. Only after analysis of the facts and circumstances peculiar to the particular case and plaintiff may an appellate court conclude that the award is inadequate.

> Prior awards under similar circumstances serve only as a general guide. If the appellate court determines that an abuse of discretion has been committed, it is then appropriate to resort to a review of prior awards, to determine the appropriate modification of the award. In such review, the test is whether the present award is greatly disproportionate to the mass of past awards for truly similar injuries. In instances where the appellate court is compelled to modify awards, the award will only be disturbed to the extent of lowering or raising an award to the highest or lowest point which is reasonably within the discretion afforded the trial court.

Theriot v. Allstate Ins. Co., 625 So. 2d 1337, 1340 (La. 1993).

We have reviewed the record in this case, and we find that the award for pain and suffering is below that which a reasonable trier of fact could assess. The testimony at trial showed that Mr. Gunn was a thirty-two year old self-employed metal worker. He had a pre-existing spinal defect, which was asymptomatic prior to the accident. Since the accident, plaintiff has been in pain, and his treating physician has testified that he will not have relief until he undergoes surgery. Defendants argue that the award of $1,000.00 [for] past pain and suffering is adequate because the jury could have found that Mr. Gunn suffered no injury as a result of the automobile accident, and that his back pain and need for surgery was caused, not by the accident, but by his pre-existing spondylolisthesis.

It is a well settled rule of law that a defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortious conduct. When the tortfeasor's conduct aggravates a pre-existing condition, the tortfeasor must compensate the victim for the full extent of the aggravation. . . .

We have conducted a review of prior awards for past pain and suffering to determine the appropriate modification of this award, and have found the following cases.

In Manuel v. St. John the Baptist School Bd., 98-1265 (La. App. 5 Cir. 3/30/99), 734 So. 2d 766, *writ denied,* 99-1193 (La. 6/4/99) 744 So. 2d 632, this court affirmed a general damage award of $52,000.00. Plaintiff had a pre-existing disc herniation, which was exacerbated by an automobile accident, and caused the severe pain necessitating surgery.

In Lapeyrouse v. Wal-Mart Stores, Inc., 98-547 (La. App. 5 Cir. 12/16/98), 725 So. 2d 61, *writ denied,* 99-0140 (La. 3/12/99) 739 So. 2d 209, this court affirmed a general damage award of $45,000.00 to a plaintiff with a pre-existing cervical condition who suffered two herniated discs which will eventually require surgery as a result of a slip and fall.

In Alfonso v. Piccadilly Cafeteria, 95-279 (La. App. 5 Cir. 11/28/95), 665 So. 2d 589, *writ denied,* 95-3119 (La. 2/16/96) 667 So. 2d 1060, this court raised a general damages award from $11,000.00 to $25,000.00 where plaintiff suffered from pre-existing spondylolisthesis, where plaintiff was engaged in heavy manual labor and had been involved in one accident prior and one subsequent to the accident at issue, and plaintiff underwent spinal fusion surgery with "fair" results.

In this case, plaintiff was an iron worker, engaged in heavy manual labor who had a pre-existing spondylolisthesis prior to the automobile accident, and who suffers a

herniated disc requiring surgery. We find that the lowest point which is reasonable within the discretion of the trier of fact is $25,000.00. Accordingly, we amend the judgment of the trial court to award to plaintiffs $25,000.00 in general damages.

Plaintiffs next challenge the award for past and future medical expenses. Plaintiffs allege that the jury erred in failing to award past medical expenses of $13,942.19 and in failing to award future medical expenses.

> A tortfeasor is required to pay for medical treatment of his victim, even over treatment or unnecessary treatment, unless such treatment was incurred by the victim in bad faith. A trier of fact is in error for failing to award the full amount of medical expenses proven by the victim. A jury errs by not awarding the full amount of medical expenses incurred as a result of injuries caused by the accident when the record demonstrates that the victim has proven them by a preponderance of the evidence.

Lombas v. Southern Foods, Inc., 00-26 (La. App. 5 Cir. 5/30/00), 760 So. 2d 1282, 1289-1290.

In this case, plaintiffs introduced evidence to support past medical expenses of $13,942.19. The defendants do not dispute the amount of medical expenses claimed. Accordingly, we amend the award for past medical expenses to award the total medical expenses of $13,942.19 awarded at trial.

Plaintiffs also allege that the jury erred in failing to award any amount for future medical expenses.

> In order to recover future medical benefits, the plaintiff must prove that these expenses will be necessary and inevitable. Future medical expenses must be established with some degree of certainty and must be supported with medical testimony and estimation of probable costs.

Hopstetter v. Nichols, 98-185 (La. App. 5 Cir. 7/28/98), 716 So. 2d 458, 462, *writ denied,* 98-2288 (La. 11/13/98) 731 So. 2d 263.

Here, the plaintiff established the need for surgery at a cost of $59,915.00. Again, defendant does not dispute the amount claimed, but only that the accident created the need for the surgery. Accordingly, we amend the judgment to award future medical expenses of $59,915.00.

Plaintiff next contends that the jury erred in failing to award the full amount of past lost wages, and in failing to award damages for future lost wages and for loss of earning capacity.

> To recover for actual wage loss, a plaintiff must prove the length of time missed from work due to the tort and must prove past lost earnings. Past lost earnings are susceptible of mathematical calculation from evidence offered at trial. An award for past lost earnings requires evidence as reasonably establishes the claim, which may consist of the plaintiff's own testimony. An award for past lost earnings is not subject to the much-discretion rule when it is susceptible of mathematical calculation from documentary proof. The plaintiff's uncorroborated, self-serving testimony will not be sufficient to support an award if it is shown that corroborative evidence was available and was not produced. To obtain an award for future loss of earning capacity, a plaintiff must present medical evidence that indicates with reasonable certainty that a residual disability causally related to the accident exists. Future loss of earnings, which are inherently speculative, must be proven with a reasonable degree of certainty, and purely conjectural or uncertain future loss of earnings will not be allowed.

Wehbe v. Waguespack, 98-475 (La. App. 5 Cir. 10/28/98), 720 So. 2d 1267, 1276, *writ denied*, 98-2907, 98-2970 (La. 1/15/99), 736 So. 2d 211, 213; citing Mathews v. Dousay, 96-858 (La. App. 3 Cir. 1/15/97), 689 So. 2d 503, 720 So. 2d 1267.

In this case, the jury awarded past lost wages of $7,500.00 [sic: $5,400.00?] and failed to award any amount for future lost wages. We cannot say the jury was manifestly erroneous in this regard. While Mr. Gunn presented evidence to show that he had placed a bid on a construction job shortly after the accident, there is no evidence to show that the bid would have been accepted. Accordingly, plaintiff did not prove by a preponderance of the evidence his claim for past lost wages.

In addition, plaintiff failed to prove his claim for future lost wages. While plaintiffs' vocational expert testified that Mr. Gunn was incapable of gainful employment, defendant's vocational expert testified that Mr. Gunn had no cognitive defects and was employable at a variety of light and medium duty jobs. He further testified that Mr. Gunn was capable of upward mobility and that his potential earning capability would increase. Accordingly we find that the trier of fact did not err in failing to award further loss of earnings. . . .

For the above discussed reasons, the judgment of the district court is amended to award to plaintiff general damages of $25,000.00, along with special damages of $13,942.19 for past medical expenses, $59,915.00 for future medical expenses and $7,500.00 for past lost wages, subject to a 30% reduction for plaintiff's fault. The assessment of costs against plaintiffs is reversed and we find that defendants are liable for all costs of trial and for those incurred in this appeal.

NOTES TO GUNN v. ROBERTSON

1. *Types of Compensatory Damages.* The court in *Gunn* considered the adequacy of the jury's award of the three types of compensatory damages that are most common: general damages (pain and suffering), past and future medical expenses, and past and future lost wages. The court increased the jury award for all but the last type. What were the court's justifications for each modification? On what evidence did the court rely?

2. *Procedural Note: Additur and Remittitur.* When the court increases a jury award for any type of damages, the process is called *additur*. Federal judges and some states' judges do not have the power to use additur. All judges, however, have the power to reduce excessive jury verdicts, the power of *remittitur*.

Increases in the jury awards are usually a response to a plaintiff's request for a new trial on the grounds that the award was too low. The defendant is given a choice to accept the increase or face a new trial. Decreases are handled the same way. They usually result from a defendant's motion for a new trial on the grounds that the award was too high. If the court agrees, the plaintiff is given a choice to accept a decrease or face a new trial.

Statute: REMITTITUR OR ADDITUR AS ALTERNATIVE TO NEW TRIAL; REFORMATION OF VERDICT

La. Rev. Stat. 38:383 (2002)

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his

attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

NOTE TO STATUTE

Reformation of Verdicts by Appellate and Trial Courts. The Louisiana statute applies to trial courts. In Louisiana, the jurisdiction in which *Gunn* was decided, appellate courts may also review the award to determine whether the jury has acted unreasonably in its award of damages:

> The trier of fact is given much discretion in awarding damages. The appellate court in reviewing an award to determine if there has been an abuse of this "much discretion" must look first to the facts and circumstances surrounding the particular case. If it is determined that the award is either excessive or inadequate, the court may then use prior awards to aid it in fixing an appropriate award. The reviewing court may then amend the award such that it is lowered to the highest or raised to the lowest point which is reasonable within the discretion afforded the trier of fact.

See Prevost v. Cowan, 431 So. 2d 1063, 1067 (La. Ct. App. 1983).

Perspective: Contract and Tort Damages

The underlying damage principle for breaches of tort or contractual duties is *full compensation.* But many assert that what "full" means is different in contracts and torts. One principle in contracts, the *reliance principle,* is to return the injured party to her *pre-contractual state* by awarding damages equal to the costs she has incurred. An alternative principle in contracts, the *expectation principle,* is to award enough damages so the injured party will be just as well off as if the other had performed. This second principle usually results in a greater damage award because the injured person gets damages equal to the costs she has incurred plus any profit she would have earned from the breaching person's performance.

Some claim that full compensation in torts is similar to the first contract principle, the reliance principle, because tort law awards compensation sufficient to return the injured party to the position she would have been in if there had been no accident. Tort awards that include compensation for medical expenses, for pain and suffering, for repairs to damaged property are just like the contract damages for costs incurred. But tort law also compensates for lost future earnings—similar to the award of lost profits under the expectation measure. By allowing recovery for past and future losses, full compensation under tort is really based on the same idea as contract law—ensure that the injured person realizes all of the benefits she would have realized if there had been no breach of tort or contractual duties. See Michael B. Kelly, *The Phantom Reliance Interest in Tort Damages,* 38 San Diego L. Rev. 169 (2001).

JORDAN v. BAPTIST THREE RIVERS HOSPITAL

984 S.W.2d 593 (Tenn. 1999)

HOLDER, J. . . .

This cause of action arises out of the death of Mary Sue Douglas ("decedent"). The plaintiff, Martha P. Jordan, is a surviving child of the decedent and the administratrix of the decedent's estate. The plaintiff, on behalf of the decedent's estate, filed a medical malpractice action against the defendants, Baptist Three Rivers Hospital, Mark W. Anderson, M.D., Noel Dominguez, M.D., and Patrick Murphy, M.D. The plaintiff has alleged that the defendants' negligence caused the decedent's death.

The plaintiff's complaint sought damages for loss of consortium. . . . The defendants filed a motion to strike and a motion for judgment on the pleadings asserting that Tennessee law does not permit recovery for loss of parental consortium. . . .

The trial court granted the defendants' motion to strike. . . . We granted appeal to determine whether claims for loss of spousal and parental consortium in wrongful death cases are viable in Tennessee. . . .

A wrongful death cause of action did not exist at common law. Pursuant to the common law, actions for personal injuries that resulted in death terminated at the victim's death because "in a civil court the death of a human being could not be complained of as an injury." W. Page Keeton et al., Prosser and Keeton on the Law of Torts §127, at 945 (5th ed. 1984) ("Prosser"). "The [legal] result was that it was cheaper for the defendant to kill the plaintiff than to injure him, and that the most grievous of all injuries left the bereaved family of the victim . . . without a remedy." Id. This rule of non-liability for wrongful death was previously the prevailing view in both England and in the United States. . . .

The majority of states have enacted "survival statutes." These statutes permit the victim's cause of action to survive the death, so that the victim, through the victim's estate, recovers damages that would have been recovered *by the victim* had the victim survived. Survival statutes do not create a new cause of action; rather, the cause of action vested in the victim at the time of death is transferred to the person designated in the statutory scheme to pursue it, and the action is enlarged to include damages for the death itself. Prosser, §126, at 942-43. "[T]he recovery is the same one the decedent would have been entitled to at death, and thus included such items as wages lost after injury and before death, medical expenses incurred, and pain and suffering," and other appropriate compensatory damages suffered by the victim from the time of injury to the time of death. Id. at 943.

In contrast to survival statutes, "pure wrongful death statutes" create a *new* cause of action in favor of the survivors of the victim for *their* loss occasioned by the death. These statutes proceed "on the theory of compensating the individual beneficiaries for the loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of [the decedent's] lifetime if [the decedent] had not been killed." Prosser, §127, at 949. Hence, most wrongful death jurisdictions have adopted a "pecuniary loss" standard of recovery, allowing damages for economic contributions the deceased would have made to the survivors had death not occurred and for the economic value of the services the deceased would have rendered to the survivors but for the death. . . .

The plain language of Tenn. Code Ann. §20-5-113 reveals that it may be classified as a survival statute because it preserves whatever cause of action was vested in the victim at the time of death. The survival character of the statute is evidenced by the language "the party suing shall have the right to recover [damages] resulting to the deceased from the personal injuries." Tennessee courts have declared that the purpose of this language is to provide "for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in [survivors]." Whaley v. Catlett, 103 Tenn. 347, 53 S.W. 131, 133 (Tenn. 1899). Accordingly, Tenn. Code Ann. §20-5-113 "in theory, preserve[s] the right of action which the deceased himself would have had, and . . . [has] basically been construed as falling within the survival type of . . . statutes for over a century" because it continues that cause of action by permitting recovery of damages for the death itself.

Notwithstanding the accurate, technical characterization of Tenn. Code Ann. §20-5-113 as survival legislation, the statute also creates a cause of action that compensates survivors for their losses. The statute provides that damages may be recovered *"resulting to the parties for whose use and benefit the right of action survives from the death."* Id. (emphasis added). Hence, survivors of the deceased may recover damages for *their* losses suffered as a result of the death as well as damages sustained by the deceased from the time of injury to the time of death. Our inquiry shall focus on whether survivors should be permitted to recover consortium losses. . . .

Damages under our wrongful death statute can be delineated into two distinct classifications. The first classification permits recovery for injuries sustained by the deceased from the time of injury to the time of death. Damages under the first classification include medical expenses, physical and mental pain and suffering, funeral expenses, lost wages, and loss of earning capacity.

The second classification of damages permits recovery of incidental damages suffered by the decedent's next of kin. Incidental damages have been judicially defined to *include* the pecuniary value of the decedent's life. Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943 (Tenn. 1994). Pecuniary value has been judicially defined to include "the expectancy of life, the age, condition of health and strength, capacity for labor and earning money through skill, any art, trade, profession and occupation or business, and personal habits as to sobriety and industry." Id. Pecuniary value also takes into account the decedent's probable living expenses had the decedent lived.

The wrongful death statute neither explicitly precludes consortium damages nor reflects an intention to preclude consortium damages. The statute's language does not limit recovery to purely economic losses. To the contrary, the statute's plain language appears to encompass consortium damages. Indeed, this Court has recognized that pecuniary value cannot be defined to a mathematical certainty as such a definition "would overlook the value of the [spouse's] personal interest in the affairs of the home and the economy incident to [the spouse's] services." *Thrailkill*, 879 S.W.2d at 841. We further believe that the pecuniary value of a human life is a compound of many elements. An individual family member has value to others as part of a functioning social and economic unit. This value necessarily includes the value of mutual society and protection, i.e, human companionship. Human companionship has a definite, substantial and ascertainable pecuniary value, and its loss forms a part of the value of the life we seek to ascertain. While uncertainties may arise in proof when defining the value of human companionship, the one committing the wrongful act causing the death of a human being should not be permitted to seek protection behind the

uncertainties inherent in the very situation his wrongful act has created. Moreover, it seems illogical and absurd to believe that the legislature would intend the anomaly of permitting recovery of consortium losses when a spouse is injured and survives but not when the very same act causes a spouse's death. . . .

A basis for placing an economic value on parental consortium is that the education and training which a child may reasonably expect to receive from a parent are of actual and commercial value to the child. Accordingly, a child sustains a pecuniary injury for the loss of parental education and training when a defendant tortiously causes the death of the child's parent. Moreover, we recognize that:

> normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise.

Still by Erlandson v. Baptist Hosp., 755 S.W.2d 807, 812 (Tenn. App. 1988).

The additional considerations employed for spousal consortium may be applicable to parental consortium claims. We agree with the observation of one court that "companionship, comfort, society, guidance, solace, and protection . . . go into the vase of family happiness [and] are the things for which a wrongdoer must pay when he shatters the vase." Spangler v. Helm's New York-Pittsburgh Motor Exp., 153 A.2d 490 (Penn. 1959).

Adult children may be too attenuated from their parents in some cases to proffer sufficient evidence of consortium losses. Similarly, if the deceased did not have a close relationship with any of the statutory beneficiaries, the statutory beneficiaries will not likely sustain compensable consortium losses or their consortium losses will be nominal. The age of the child does not, in and of itself, preclude consideration of parental consortium damages. The adult child inquiry shall take into consideration factors such as closeness of the relationship and dependence (i.e., of a handicapped adult child, assistance with day care, etc.).

We hold that consortium-type damages may be considered when calculating the pecuniary value of a deceased's life. This holding does not create a new cause of action but merely refines the term "pecuniary value." Consortium losses are not limited to spousal claims but also necessarily encompass a child's loss, whether minor or adult. Loss of consortium consists of several elements, encompassing not only tangible services provided by a family member, but also intangible benefits each family member receives from the continued existence of other family members. Such benefits include attention, guidance, care, protection, training, companionship, cooperation, affection, love, and in the case of a spouse, sexual relations. Our holding conforms with the plain language of the wrongful death statutes, the trend of modern authority, and the social and economic reality of modern society. . . .

NOTES TO JORDAN v. BAPTIST THREE RIVERS HOSPITAL

1. ***Wrongful Death and Survival Statutes.*** Under the common law, a person's right to sue in tort died when the person died. The person's estate could not seek damages on the deceased's behalf, and the person's dependents could not recover for their losses. As the opinion in *Jordan* indicates, wrongful death and survival statutes changed that common law rule. Survival and wrongful death actions (1) arise at

different times, (2) permit recovery by different plaintiffs, and (3) apply to different harms. A survival action arises at the time of the negligence for the benefit of the deceased person's estate (which may not be deceased's dependents) for harms caused to the deceased. The wrongful death action arises at the time of that death for the benefit of statutorily enumerated dependents for harms caused to those dependents.

To determine which of these types of statutes is relevant in a particular case, one must identify whether the person bringing suit is suing on behalf of the estate of the decedent or on his or her own behalf. Statutes describe, with a greatly varying degree of detail, the types of losses for which damages are recoverable. Were the plaintiffs in *Jordan* seeking survival damages or wrongful death damages? Why do the damages they seek fit into that category?

2. ***Loss of Consortium.*** The plaintiffs in *Jordan* sought loss of consortium damages. Such damages are also allowed in tort cases not involving death. Why was there any issue about whether loss of consortium damages were recoverable in this death case?

Statute: WRONGFUL DEATH; DAMAGES

Tenn. Code §20-5-113 (2002)

Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages [by a surviving spouse or child or personal representative], the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

Statute: SURVIVAL OF ACTIONS; DEATH OF PARTY

Tenn. Code §20-5-102 (2002)

No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in §20-5-106.

Statute: ACTION FOR WRONGFUL DEATH

Alaska Stat. §09.55.580(a)-(c) (2001)

(a) Except as provided under (f) of this section, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. . . .

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

NOTES TO STATUTES

1. ***Wrongful Death and Survival Statutes Compared.*** The court in *Jordan* refers to Tennessee Code §20-5-113, reproduced above. How does the language in this paragraph include both wrongful death and survival rights? Tennessee Statutes §20-5-102 describes the nature of the survival rights.

2. ***Damages Recoverable for Wrongful Death.*** A comparison of the Tennessee and Alaska wrongful death statutes illustrates the varying degrees of specificity with which recoverable damages are described and why the court in *Jordan* found the Tennessee statute silent on the recoverability of consortium damages. Are the types of damages enumerated in the Alaska statute losses suffered by the deceased or losses suffered by the family of the deceased?

B. General Damages

1. In General

Consequences of an injury that are real but cannot be evaluated in terms of typical monetary transactions are called *general damages.* These damages, sometimes called *non-economic damages*, typically result from any injury. General damages may include such subjective, non-monetary losses as pain, suffering, inconvenience, mental anguish, disability, or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

2. Pain and Suffering

Some courts use two categories for analyzing claims for pain and suffering: some *objective injuries* are likely to cause pain and suffering for anyone who sustains them. Other "subjective" situations are cases where a plaintiff claims to have pain

and suffering but it is not generally understood that anyone who had incurred the underlying injury would also feel that type of pain. The majority opinion in Rael v. F & S Co. applies this distinction to a plaintiff who complains of headaches following his injury due to the sudden explosion of a firework. The dissenting opinion describes how pain and suffering can be proved and measured.

The nebulous and nonquantifiable nature of pain and suffering leads lawyers to adopt various strategies when arguing about how much money should be awarded for it. Giant Food Inc. v. Satterfield discusses *per diem arguments*, one method plaintiffs' lawyers use to help juries quantify general damages.

RAEL v. F & S CO.

612 P.2d 1318 (N.M. Ct. App. 1979)

ANDREWS, J.

. . . Twelve year old Everett Rael was injured by a sudden explosion of a firework. His father filed this action against the fireworks supplier, Onda Enterprises, Ltd. (Onda), and the seller, F & S Company, Inc. (F & S). After the court dismissed cross-claims filed by both defendants in which each sought indemnity from the other, the jury returned a verdict for $7,000 for Everett and $339 for his father against both defendants jointly and severally. [F & S appealed.]

The Supreme Court of South Dakota, in Klein v. W. Hodgman and Sons, Inc., 77 S.D. 64, 85 N.W.2d 289 (1957), adopted the following two-pronged approach for proof of future pain and suffering:

> There are two rules by which the question of future pain and suffering may be submitted to the jury: If the injury is objective, and it is plainly apparent, from the very nature of the injury, that the injured person must of necessity undergo pain and suffering in the future then most certainly the Plaintiff would not be required to prove a fact so plainly evident, and upon making proof of such an objective injury, the jury may infer pain and suffering in the future. . . . Where the injury is subjective, and of such a nature that laymen cannot, with reasonable certainty know whether or not there will be future pain and suffering, then, in order to warrant an instruction on that point, and to authorize the jury to return a verdict for future pain and suffering, there must be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proved.

We find such reasoning to be persuasive. In the instant case, the only conceivable inference of ongoing pain suffered by Everett was his claim of headaches in the back of his head. By the above standard, this would be characterized a "subjective" complaint of the plaintiff. It certainly cannot be deemed to be a matter of common knowledge that one who suffers an eye injury will also suffer headaches in the back of his head. Therefore, to justify an instruction for future pain and suffering it was necessary for the plaintiff to present evidence by a medical expert that these headaches were caused by the accident and that they would continue into the future, and for the expert to present some reasonably certain proof as to the severity and duration with which they would occur. No such testimony was presented. The record is clear that the trial court, over

the objection of F & S, instructed the jury that they could award damages for future pain and suffering. This instruction is reversible error since there was no evidence to support it.

Since it is impossible to look behind the general verdict of the jury to determine how much, if any, of the award was intended to be compensation for future pain and suffering, the case is reversed and remanded for a new trial on the issue of damages alone.

SUTIN, J. (concurs in part and dissents in part). [Judge Sutin dissents with respect to the part of the ruling related to the award of damages for pain and suffering.]

The meaning of "pain and suffering" and the rules of law applicable thereto are matters of first impression.

> Perhaps one of the most nebulous yet oft-employed concepts in modern law is that of "pain and suffering." Consequently, it is rather remarkable to note that one will search in vain for any extensive judicial analysis of its essential components. While most courts, like our own, recognize that pain and suffering constitute a legitimate element of damages in certain cases, they are seemingly unanimous in silently adhering to the view that the concept is a self-evident one, neither requiring, nor capable of, precise definition or analysis. (p.93)
>
> [T]he courts apparently seek to compensate the individual for any unwarranted invasion of, or interference with, his ordinary, peaceful mental process and pursuits. Pain and suffering are, after all, but two sides of the same coin. Pain, as such, arises from some direct injury to the body which jangles the nerves into transmitting coded signals to the brain, stimulating it into an awareness of consciousness of serious bodily hurt. Mental suffering, on the other hand, seemingly refers to the individual's worry or apprehension concerning the extent of the injury, for example, the fear of resulting death. Mental suffering would also appear broad enough to include anxiety, shock, fright, humiliation, and other forms of emotional disturbance and mental distress whether or not accompanied by direct physical injury. Both pain and suffering, then, can be resolved in terms of abnormal, unpleasant mental reactions. . . . (pp.93-94)
>
> . . . Pain and suffering are mental processes which obviously cannot be seen, heard, weighed, or measured. Proving their existence in a particular case is essentially a question of proving other facts from which the trier may logically conclude that they do in fact exist in the case before him. . . . (p.95)
>
> [S]uch damages are incapable of any exact mathematical computation, and that the amount to be awarded is peculiarly within the discretion of the trier. The only standard or guide, so-called, which the trier may use in the assessment of damages is his own common sense that is, whatever he reasonably determines is fair compensation. . . . The only time the decision as to damages will be reversed is when the appellate court finds that the award is grossly divergent from what it deems to be fair compensation. . . . [T]he appeal court employs the self-same "standard" or "guide" utilized by the trial court — that of common sense. . . . "[T]he only trouble with common-sense is that it is none too common." Be that as it may, it does seem rather harsh, nonetheless, to criticize jurors expressly or implicitly, for mis-using rules and tools which were never given to them. (pp.97-98) McLoughlin, *Pain and Suffering Under Connecticut Law,* 33 Conn. Bar. J. 93 (1959).

The *McLoughlin* definition and analysis is supported by and added to by analysis in Herb v. Hollowell, 304 Pa. 128, 154 A. 582, 584-5 (1931) in which the court said:

> The nature of pain and suffering is such that no legal yardstick can be fashioned to measure accurately reasonable compensation for it. No one can measure another's

> pain and suffering; only the person suffering knows how much he is suffering, and even he could not accurately say what would be reasonable pecuniary compensation for it. Earning power and dollars are interchangeable; suffering and dollars are not. Two persons apparently suffering the same pain from the same kind of injury might in fact be suffering respectively pains differing much in acuteness, depending on the nervous sensibility of the sufferer. Two persons suffering exactly the same pain would doubtless differ as to what reasonable compensation for that pain would be. This being true, it follows that jurors would probably differ widely as to what is reasonable compensation for another's pain and suffering, no matter how specific the court's instructions might be. All this is merely suggestive of the practical difficulties confronting a trial judge who is about to instruct the jury as to the measure of damages for pain and suffering. It is, of course, the duty of the trial judge to make it clear to the jury that, in awarding damages for pain and suffering, the award must be limited "to compensation and compensation alone.". . . . Jurors may differ widely in their conception of the word "compensation." One juror might hold that no amount of money could justly compensate one for acute pain and suffering; another might hold that even a small sum of money would be just compensation in such a case. . . .

In the case before us, the trial judge said: "There is no fixed standard as to any amount to allow for pain and suffering. That is to be guided by your judgment." This was in effect an instruction that there was no infallible objective standard with which to measure damages for these subjective elements but that they were to use good common sense in assessing damages for them. . . .

In New Mexico, the measure of damages "is the enlightened conscience of impartial jurors." Braddock v. Seaboard Air Line Railroad Company, 80 So. 2d 662 (Fla. 1955). This guide is the equivalent of "common sense and good judgment." Pain and suffering has no market price. Even the most experienced and learned physician finds no method of measuring it.

As a result, a verdict of the jury will not be disturbed unless it appears that it was influenced by partiality, prejudice, corruption of the jury, shocking in amount, or by some mistaken view of the evidence. . . .

In the instant case, the jury awarded Everett $7,000 in damages for "the nature, extent and duration of the injury," and for "the pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injury."

Everett suffered forms of emotional disturbance and mental stress when a firecracker exploded in his face. Shock, fright, anxiety and trauma followed. He worried that he might be permanently blind. For four years thereafter, from time to time, up to the date of trial, he suffered headaches. We cannot, by the exercise of "common sense" say that the verdict was not the result of "the enlightened conscience of impartial jurors."

GIANT FOOD INC. v. SATTERFIELD

603 A.2d 877 (Md. App. 1992)

FISCHER, J.

Giant Food, Incorporated (Giant) appeals an adverse ruling entered in the Circuit Court for Baltimore County. Regina E. Satterfield cross-appeals the court's decision. This dispute stems from Ms. Satterfield's slip and fall which occurred in Giant Store Number 77 on July 6, 1987. Ms. Satterfield filed a complaint against Giant alleging that

she sustained injuries as a result of the accident. . . . The case proceeded, and the jury found Giant negligent and awarded Ms. Satterfield $2,500 for past medical expenses and $40,000 in non-economic compensatory damages. . . .

Giant avers that the trial court committed reversible error by denying Giant's request for a particular jury instruction. Giant's request followed a statement made by Ms. Satterfield's counsel during closing argument. Ms. Satterfield's counsel suggested that the jury use a per diem calculation to award pain and suffering damages:

> I suggest that for your consideration — is fair compensation to be in pain, to suffer, to have permanent injuries, to have lost your right to enjoyment of life and have lost your ability to participate in the things that you enjoyed so much? Seven dollars and fifty cents a day is two thousand seven hundred dollars a year. You multiply that by 43 and you will have a significant number that is about one hundred and thirteen thousand dollars. And it is a large gross number. But I want you to think about each and every day that is involved in those 43 years and see if that is a reasonable number. I suggest that to you for your consideration. Obviously you are free to make whatever decision that you deem appropriate. . . .

Giant contends that the use of a specific dollar amount per unit of time and reference to a predicted life expectancy constitutes a per diem damages argument. Most states have deemed the use of a mathematical formula in determining an award for pain and suffering to be a per diem argument. They have distinguished, however, arguments which only include a lump sum payment that is not derived from multiplication of a unit of time and a dollar amount. . . . Ms. Satterfield's counsel broke down Ms. Satterfield's predicted life expectancy from years into days and arbitrarily assigned a dollar amount to be associated with her daily pain and suffering. Her counsel even went so far as to multiply the days and the dollar amount and then suggested to the jury that this product should equal the amount awarded. Clearly, this formula meets the definition of a per diem argument.

There are numerous arguments both in favor and against the use of per diem arguments. The reasons against allowing the use of per diem argument include: the lack of an evidentiary basis for converting pain and suffering into monetary terms; suggestion of monetary equivalents for pain and suffering amounts to the giving of testimony or to the expression of opinions not disclosed by the evidence; juries are frequently misled into making larger awards; admonitions of the trial court that the argument is not evidence do not erase the prejudice; the defendant is disadvantaged by being required to rebut an argument that has no basis in evidence. The arguments in support of a per diem argument include: the jury should be guided by some reasonable and practical considerations; the trier of fact should not be led to make a guess; the absence of any evidentiary yardstick makes it unlikely that counsel's argument will mislead the jury; the argument only suggests one method for the trier of fact to employ in its estimation of damages; the argument is merely suggestive and is not meant as evidence particularly when accompanied by a jury instruction to that effect; when counsel for one side has made such an argument, the opposing counsel is equally free to suggest his own amounts.

The propriety and legality of the per diem argument has been greatly debated in the courts. Many states support the view that it is wholly improper for counsel to suggest a per diem argument to the jury and that such an argument will not be allowed as a matter of law. [Citing cases from Connecticut, Delaware, Illinois, New Hampshire,

New Jersey, New York, and West Virginia.] To the contrary, other states have decided that the argument is wholly appropriate and may be used by counsel at any time. [Citing cases from California, Kentucky, Louisiana, Minnesota, and New Mexico.] Still other states have decided that the use of the per diem argument by counsel is within the sole discretion of the trial court judge. [Citing cases from Arkansas, Montana, and Nevada.] . . .

[I]t is clear that per diem arguments are permissible in this State. It is also apparent that, upon request or when the trial judge sua sponte deems it appropriate, the jury must be instructed that the per diem argument made by counsel is not evidence but is merely a method suggested by a party for the purposes of calculating damages. The jury must further be instructed that an award for pain and suffering is to be based upon the jurors' independent judgment. . . .

NOTES TO RAEL v. F & S CO. AND GIANT FOOD INC. v. SATTERFIELD

1. ***Objective and Subjective Complaints of Pain and Suffering.*** The opinions in *Rael* described when supporting evidence is needed to establish a case for future pain and suffering damages. In the following cases, would the injury be classified as objective or subjective? Should the plaintiff be entitled to future pain and suffering damages without supporting evidence?

   A. Slip and fall in dining room causes shoulder injury with resulting demonstrable, permanent limited range of shoulder movement. See Paul v. Imperial Palace, Inc., 908 P.2d 226, 229 (Nev. 1995).

   B. Fall from ladder results in broken ankle with implanted plate and screws. See Krause Inc. v. Little, 34 P.3d 566 (Nev. 2001).

   C. After a car accident, the plaintiff complains of continuing pain in both arms, a tingling sensation, problems with concentration, and hair loss. See Hyler v. Boyter, 823 S.W.2d 425, 426-427 (Tex. Ct. App. 1992).

   D. Plaintiff has ten stitches in his head from a construction accident and complains about headaches, backaches, and sexual dysfunction. See Thompson v. Port Authority of New York, 728 N.Y.S.2d 15, 16 (N.Y. App. Div. 2001).

2. ***Per Diem and Golden Rule Arguments.*** As the opinion in *Giant Foods* indicates, courts are split on whether per diem arguments for pain and suffering amounts are permissible and whether they need to be accompanied by proper instructions to the jury from the judge. Another method for attempting to quantify pain and suffering damages is the *Golden Rule argument*. Golden Rule arguments are those in which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would "charge" to undergo equivalent pain and suffering." Would the court in *Giant Foods* allow such arguments? See Beagle v. Vasold, 417 P.2d 673 (Cal. 1966) (saying per diem arguments are permissible but not golden rule arguments).

3. ***Problem.—Plaintiff's counsel presented the following argument to the jury:***

> What award will it take to tell Grand Union what accountability means and that this is what the people in Bennington County think a human life and human suffering is worth[?] Now, let's just take one element. We have talked about pain and suffering. What would be fair compensation for pain and suffering? *Entirely up to you.*

> I have a suggestion. If you think about what it is like for Susanne to go through one day with the pain that she has and think about what would be fair compensation for that one day, what do you think it would be? Would it be $100 to go through that in a day? Would it be $75? Would it be $50, $40?
>
> Ladies and gentlemen, we want to be scrupulously fair about our request to you. So I am going to suggest to you that you award Susanne $30 a day for the loss of those three elements: pain and suffering, mental anguish, and loss of enjoyment of life. That is $10 a day for each one. *I put it to you for your consideration to follow that through.*
>
> You would do it this way, there are 365 days a year. I am just going to put here pain and suffering, mental anguish, loss of enjoyment of life. Now there are 365 days in a year. And Susanne's six years she has already suffered in these ways and 29 more, that is 35 years total that she should be compensated for. And if you multiply 35 times 365, there are 12,775 days. And if you multiply that figure by the $30 per day I just suggested, it comes out to $383,250.
>
> Now, another way of thinking of that is if you divide 35 years into this figure of $383,250 it comes out to slightly under $11,000 a year. Maybe that would be a help to think for you $11,000 a year to live the way she lives, to lose what she has lost. *Perhaps that would be a help for you; I don't know.*

Are the counsel's reminders, italicized above, that it is the jury's job to decide the proper amount sufficient to avoid the difficulties associated with the per diem argument? See Debus v. Grand Union Stores of Vermont, 621 A.2d 1288 (Vt. 1993). Chief Justice Allen, dissenting in that case, which allowed the argument without special instructions to the jury, stated,

> I believe the better answer is to permit counsel to argue to the trier of fact the appropriateness of employing a time-unit calculation technique for fixing damages for pain and suffering, but to prohibit any suggestion by counsel of specific monetary amounts either on a lump sum or time-unit basis. This approach was suggested in King v. Railway Express Agency, 107 N.W.2d 509, 517 (N.D. 1961), and adopted by rule in New Jersey Rule 1:7-1(b), New Jersey Rules of Court.

Lawyers have also used "per hour" arguments:

> If it were just a little bitty job to assess for non-economic damages, we'll just pick an hour. Now, it's going to be an hour when he's at work, or it's going to be an hour when he's in the courtroom, or it's going to be in the middle of the night, maybe he's asleep and maybe he's rolling around in pain. Whatever hour it is, folks, you on the jury just have to assess damages for an hour.
>
> If someone said $3.00. Oh, my, that's outrageous. I don't think so. But in this case, you see, you have to assess it for a lifetime. And there will be some hours in his life when he's relatively comfortable. And there will be some hours in his life when he's extremely uncomfortable. But his life expectancy, as I calculate it, is 325,872 hours. And we believe that a fair sum for that amount of time is $950,000.00. We think if you award that sum for thirty-seven years and two months, 325,872 hours, it should be a no greater than awarding Marty $3.00 just for an hour.

See Meyers v. Southern Builders, Inc., 7 S.W.3d 507 (Mo. Ct. App. 1999).

3. Hedonic Damages

The term *hedonic damages* describes a second type of general damage, loss of enjoyment of life's pleasures. Plaintiffs sometimes try to distinguish this loss from pain and

suffering. Some courts treat hedonic damages as included in the damage award for pain and suffering. Other courts characterize hedonic losses differently from pain and suffering. They treat pain and suffering as losses that the plaintiff actually experiences, while hedonic losses are pleasures that the plaintiff never gets to experience because of injuries. Regardless of whether pain and suffering and hedonic losses are separate injuries, the appropriate amount of compensatory damages is difficult to quantify. For both types of harm, however, the amount must be calibrated to the detriment the particular plaintiff in the case is likely to have suffered. Loth v. Truck-A-Way Corp. describes what evidence will be admissible to establish the harm the particular plaintiff suffered. It analyzes three methods economists offer to quantify hedonic damages. Consider what evidence in *Loth* is admissible and what is not.

LOTH v. TRUCK-A-WAY CORP.

70 Cal. Rptr. 2d 571 (Cal. Ct. App. 1998)

ORTEGA, Acting Presiding Justice. . . .

On June 29, 1994, plaintiff Shereen Loth was on a business trip driving north on Interstate 5. Plaintiff's small car was struck by a 24-wheel tractor-trailer rig owned by defendant Truck-A-Way. The collision occurred as plaintiff's car, which was in the slow lane, was passing on the truck's right. The truck made an unsafe lane change into plaintiff's lane, and its front end hit plaintiff's car's left rear. Plaintiff's car spun in front of the truck and was pushed sideways across three lanes of traffic. Plaintiff's car eventually separated from the truck, but was struck by another vehicle before it stopped on the shoulder, facing the wrong way. . . .

Plaintiff sued Truck-A-Way and its employee driver for personal injuries, property damage, and lost earnings. Defendants conceded liability at trial, and the only issue for the jury was damages.

Plaintiff asked the jury for $208,479 in special damages, comprised of medical damages (past and future) of $27,635, temporary lost earnings of $147,675, and property damage and miscellaneous expenses of $3,507. (Those figures do not total $208,479, but that is what the jury was told both orally and in writing.)

As for pain and suffering, plaintiff asked for an unspecified amount of damages, including compensation for loss of enjoyment of life. Plaintiff, who was 27 when the accident occurred, was a star high school varsity athlete in volleyball, softball, and basketball. Before the accident, she worked 10 to 11-hour days (including a night shift as a cocktail waitress), played softball and volleyball three nights a week, and exercised at the gym every day. After the accident, she could not sit at a sewing machine for longer than an hour without pain, could not function as a cocktail waitress, could not play organized sports, and could no longer water or snow ski, jog, or golf. Her social life, which had previously revolved around her athletic activities, was severely impaired. Driving a car now causes her jaw to hurt. To prevent her jaw from clenching, she must drive with her mouth agape. She has constant lower back pain that increases with activity and sometimes shoots down her leg. She had hoped to get married and have children, but her condition has made her fearful of having children and her "sexual spontaneity is gone."

Over defendants' objection, plaintiff's expert economist Stanley V. Smith testified he had computed the basic economic value of life (apart from one's earnings from

employment). Smith relied upon three types of studies of: (1) the amount society is willing to pay per capita on protective devices such as seat belts, smoke detectors, etc., (2) the risk premiums employers pay to induce workers to perform hazardous jobs, and (3) the cost/benefit analyses of federally mandated safety projects and programs. Based on those studies, Smith calculated the value of an average person's remaining 44-year life expectancy at $2.3 million, which he described as a baseline figure. Smith adjusted the baseline figure to account for plaintiff's longer than average remaining life expectancy of 53 years. He multiplied the adjusted baseline figure by various percentages reflecting plaintiff's possible degrees of disability to calculate various possible hedonic damage awards. For example, Smith told the jury that in plaintiff's case, a 33 percent loss of enjoyment would be worth $1,684,000, a 10 percent loss of enjoyment would be worth $510,000, and a 5 percent loss of enjoyment would be worth $255,000. Smith gave the jury a table to assist it in making its mathematical calculations. . . .

The jury returned a general verdict for plaintiff for $890,000. After the trial court denied defendants' motion for new trial or remittitur, defendants appealed from the judgment.

Defendants contend Smith's testimony on hedonic damages was inadmissible and the amount of the judgment was unsupported by the record.

In California, a pain and suffering award may include compensation for the plaintiff's loss of enjoyment of life. Loss of enjoyment of life, however, is only one component of a general damage award for pain and suffering. It is not calculated as a separate award.

"California case law recognizes, as one component of general damage, physical impairment which limits the plaintiff's capacity to share in the amenities of life. The California decisions rarely employ the 'enjoyment of life' rubric, yet achieve a result consistent with it. No California rule restricts a plaintiff's attorney from arguing this element to a jury. Damage for mental suffering supplies an analogue. A majority of American jurisdictions recognize the compensability of loss of enjoyment of life, some as a component of the pain and suffering award, others as a distinct item of damage." (Huff v. Tracy, 57 Cal. App. 3d at [939], 943, 129 Cal. Rptr. 551.)[6]

There is "[n]o definite standard or method of calculation . . . prescribed by law by which to fix reasonable compensation for pain and suffering." (BAJI No. 14.13 (8th ed. 1994), original brackets omitted.) As our Supreme Court stated, "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. In a

[6] "There are four views as to the recovery of damages for loss of enjoyment of life (hedonic damages): (1) such damages are not recoverable; (2) such damages are recoverable as a part of the damages for pain and suffering; (3) such damages are recoverable as an element of the permanency of injury; and (4) such damages are recoverable as a separate element of damages." (3 J. Stein, Stein on Personal Injury Damages (1992) Mental Anguish, §3:18:1, p.283, fn. omitted.) Much of the debate has focused on whether the plaintiff must have been conscious or aware of the injury to recover hedonic damages. The Supreme Court of Ohio held that hedonic damages are not available to a plaintiff who was injured either in utero or at birth. In New York, the highest state court held that hedonic damages are not recoverable independently of pain and suffering damages and reversed an award of hedonic damages to a comatose plaintiff. But a New Jersey court held in Eyoma v. Falco (A.D. 1991) 589 A.2d 653, that pain and suffering damages may be awarded where the patient was comatose.

very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy. As one writer on the subject has said, 'Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. . . . The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury. . . . ' (McCormick on Damages, §88, pp. 318-319.)"

The jury must impartially determine pain and suffering damages based upon evidence specific to the plaintiff, as opposed to statistical data concerning the public at large. The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant. It is improper, for example, for an attorney to ask jurors how much "they would 'charge' to undergo equivalent pain and suffering." "This so-called 'golden rule' argument is impermissible." (Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 860, 139 Cal. Rptr. 888.) . . .

In this case, plaintiff did not make an impermissible "golden rule" argument, but she did something similar. She asked the jury to accept $2.3 million as the baseline value of life and to give her a percentage of that figure (adjusted for her age) as hedonic damages. The baseline figure, however, is not based upon an analysis of any particular individual's life. It is based upon benchmark figures such as the amount society spends per capita on selected safety devices, or the amount employers pay to induce workers to perform high risk jobs. We perceive no meaningful relationship between those arbitrarily selected benchmark spending figures and the value of an individual person's life. Moreover, our Supreme Court has rejected the notion that pain and suffering damages may be computed by some mathematical formula. Smith's hedonic damages formula, however, purports to do just that.

Defendants objected to Smith's testimony on several grounds. One objection was based on the prohibition against separately instructing the jury on general damages for pain and suffering and damages for loss of enjoyment of life. 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. Defendants argued below that Smith's testimony was inadmissible as a matter of law because of its potential for misleading the jury to award double damages. We find the objection was valid and we conclude, as a matter of law, Smith's testimony should have been excluded on that ground.

Our conclusion is consistent with that of other courts. " 'One of the strongest arguments that has been advanced as a reason for not recognizing loss of enjoyment of life as a separate category of damages is that it duplicates or overlaps other categories of damages, such as permanent disability or pain and suffering.' Leiker v. Gafford (1989) 245 Kan. 325, 339, 778 P.2d 823, 834. . . ."

In addition, Smith's testimony should have been excluded for another reason. . . . A plaintiff's loss of enjoyment of life is not "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[.]" (Evid. Code, §801, subd. (a).) No amount of expert testimony on the value of life could possibly help a jury decide that difficult question. A life is not a stock, car, home, or other such item bought and sold in some marketplace.

Smith's impersonal method of valuing life assumes that for the most part, all lives have the same basic value. That has democratic appeal, but Smith used no democratic processes in reaching that conclusion or selecting which benchmark figures to consider in setting the baseline figure. There is no statute Smith could have turned to for guidance. Our Legislature has not decreed that all injured plaintiffs of the same age and with the same degree of disability should recover the same hedonic damages; nor has it assigned set values in tort cases for the loss of an eye, ear, limb, or life. Moreover, our judicial law prohibits trial counsel from referring to the amounts of jury verdicts in other cases. Because counsel may not ask the jury to give the same amount of damages as in another case, it would be inconsistent to permit an expert witness to do so.

The figures Smith included in his baseline calculation have nothing to do with this particular plaintiff's injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life. The studies Smith used may help explain how much consumers will pay for safer products, or how much society should pay for government-mandated safety programs, but they shed no light on how to value this particular plaintiff's pain and suffering following the automobile accident. It is speculative, at best, to say the amount society is willing to spend on seat belts or air bags has any relationship to the intrinsic value of a person's life or the value of an injured plaintiff's pain and suffering. By urging the jury to rely upon a baseline value supported by factors having nothing to do with this plaintiff's individual condition, Smith's testimony created the possibility of a runaway jury verdict.

Our present system of requiring the jury to determine, without the benefit of a mathematical formula, the amount of a general damages award is not without its faults. But unless and until the Legislature devises a method for computing pain and suffering damages, a plaintiff may not supply, through expert testimony or otherwise, her own formula for computing such damages. Just as no judge may give the jury a standard for determining pain and suffering damages, no expert may supply a formula for computing the value of life and, by extrapolation, the value of the loss of enjoyment of life. That calculation, at present, must be left to the sound discretion of the jury. . . .

While the judge correctly instructed the jury there is no single mathematical formula for computing pain and suffering damages, the instruction was insufficient to cure the error of admitting Smith's testimony. Plaintiff's counsel's argument that Smith's testimony was unrefuted rendered the instruction a mere wink and a nod. It is reasonably probable and almost a certainty the jury awarded a double recovery. Accordingly, the admission of Smith's testimony was prejudicial.

We reverse the judgment and remand for a new trial on damages. Defendants are awarded costs on appeal.

NOTES TO LOTH v. TRUCK-A-WAY CORP.

1. *Valuing the Joy of Living.* The three economic models on which expert testimony about the value of life in *Loth* was based are often subject to criticism. The first is based on consumer purchases of safety devices:

> "From the price differential between a safer product and one less safe, and the reduction of risk of dying supposedly consequent therefrom, an extrapolation is made to arrive at the hedonic value of life." Hein v. Merck & Co., Inc., 868 F. Supp. at 234. However, such reasoning is flawed because it fails to take into consideration the numerous factors that go into a consumer purchase and whether a consumer actually

> and accurately perceives the risk in making a purchase of one product rather than another.

See Anderson v. Nebraska Dept. of Social Services, 538 N.W.2d 732 (Neb. 1995). Spending on safety items may be greatly influenced by advertising and marketing and government-mandated safety requirements as well as people's preferences for accepting and avoiding risk.

A second economic approach is based on wage differentials for high risk and low risk jobs. Three questionable assumptions underlie this model: that workers have free choice in choosing jobs, that workers are aware of the risks, and that workers accurate evaluate the risks. Workers may accept jobs because they are the only ones available where they live (e.g., coal mines) or for which they are trained.

A third approach is based on the cost-benefit analysis conducted by government agencies in deciding whether to adopt a regulation. The criticisms of this approach reflect the political reality of government decision-making:

> [G]overnment calculations about how much to spend (or force others to spend) on health and safety regulations are motivated by a host of considerations other than the value of life: is it an election year? how large is the budget deficit? on which constituents will the burden of the regulations fall? what influence and pressure have lobbyists brought to bear? what is the view of interested constituents? And so on.

See Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992). See also Ayers v. Robinson, 887 F. Supp. 1049, 1061 n.4 (N.D. Ill. 1995):

> "The Occupational Safety and Health Administration's (OSHA's) use of risk reduction values in regulatory analysis led the agency into a major conflict with the Office of Management and Budget (OMB) in 1985. OSHA initially attempted to use a value of $3,000,000 per anonymous life saved. The OMB decided that this value was too high and suggested that OSHA use a value of $1,000,000. Eventually, OMB and OSHA reached a compromise of $2,000,000 per life saved." . . . "Although they do not always reveal their methodologies, federal agencies have set life values as low as $70,000 and as high as $132 million per life."

2. Day-in-the-Life Videos. Another approach lawyers use to show the plaintiff's pain and suffering and loss of enjoyment of life's pleasures is to show the jury a "day in the life" videotape. The court in Jones v. City of Los Angeles, 24 Cal. Rptr. 2d 528, 534 (Cal. App. 1993), viewed this approach with favor:

> The videotape best describes the problems Ms. Jones encounters on a daily basis in a way mere oral testimony may not convey to the jurors. The videotape also best demonstrates the everyday problems a person with paraplegia encounters as a result of an injury of this kind. Moreover, the videotape is the most effective way to explain to the jury the extent of the assistance and medical attention required as a result of being rendered a paraplegic.

3. Property Damage and Miscellaneous Expenses. The court awarded Loth $3,507 for property damage and miscellaneous expenses. We are not told what the miscellaneous expenses are in Loth v. Truck-A-Way Corp., but the property damages are quite likely to have been damages to the plaintiff's car. These damages are recoverable as special damages. Generally, the formula for recovery of property damage is the *difference in fair market value* of the property before and after the traumatic event. One alternative formulation is the *cost of repair*, which is the cost to restore the

property to its pre-accident condition. Cost of repair is generally recoverable as an alternative only if it is less than the difference in fair market value. A combination of these two approaches is used where the property is repaired but is not as good as new. In addition to one of these alternatives, the plaintiff is entitled to recover the value of the loss of use of the property. See Restatement 2d of Torts §928.

4. ***Problem: Fair Market Value or Cost of Repair.*** Wiese owned and operated an automobile dealership in Kokomo, Indiana. On August 22, 1989, Wells was driving his automobile and collided with a van owned by Wiese that was parked on Wiese's lot. The van had a fair market value of $29,000. Wiese had purchased the van in October 1988 for $15,000 from the General Motors Corporation and converted the van to a luxury camper vehicle for an additional cost of $12,000. General Motors paid Wiese a $1,000 rebate on the purchase price as part of a special promotion. An expert testified that the converted camper was totally useless after the accident and it would cost an additional $6,000 to restore the van to the condition in which it was received from General Motors. After the accident, without making repairs, Wiese sold the van to Al Meyer, a wholesale car dealer, for $16,000. What is the appropriate damage recovery for Wiese? Would the damage amount be different if Wiese had been in the business of renting his vans and lost $1,000 in rentals before he could replace the damaged vehicle? See Wiese-GMC, Inc. v. Wells, 626 N.E.2d 595 (Ind. Ct. App. 1993).

Perspective: Hedonic Damages

People do not live solely to earn money. They live to enjoy life. We can be confident that this is generally true because people do not typically choose to spend all their waking hours at work. Many people earn less money than they could because, after they work a 40-hour week, they find that they gain more utility (more "hedonic" pleasure) from using their time for leisure activities instead of working. Others choose lower-paying jobs they enjoy over higher-paid positions that are more unpleasant or stressful. Does the amount of income an individual forgoes in order to have leisure time provide an accurate individualized measure of that individual's enjoyment of life's pleasures? Does this correctly measure the relative enjoyment of life by highly and poorly paid people?

C. Special Damages

Objectively verifiable monetary losses caused by the defendant's conduct are called *special damages* or *economic damages*. Special damages may include medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities. Special damages must be tailored to the circumstances of the plaintiff, and must be supported with evidence showing their type and amount. This contrasts with the requirements for general damages. General damages must also be related to the plaintiff's circumstances, but some courts do not require detailed evidence about them.

Receipts or canceled checks may enable a plaintiff to prove some special damages, such as past medical expenses, repairs made to property, or funeral expenses. For other special damages, such as past and future wage loss and future medical expenses, the factfinder must extrapolate from evidence about the plaintiff's particular circumstances.

The plaintiff in Moody v. Blanchard Place Apartments sought damages equal to past medical expenses and past and future wage loss. The focus of the opinion is on the conflicting evidence of expert witnesses calculating the plaintiff's wage losses. Many factors go into projecting lost earning capacity, and experts may use varied methodologies. The experts in *Moody* both took inflation into account when projecting lost wages, because wages tend to rise even within the same job and even if the worker does not become more skilled. They also *discounted* the projected future wages to their *present value. Discounting* is a mathematical process by which the law adjusts damage awards for future losses. Discounting adjusts for the fact that damages are often paid as a *lump sum*, which the plaintiff receives after the judgment in his or her favor. Had there been no accident, the plaintiff would not have received those amounts, for lost future wages, for instance, until some time in the future. Getting the payment of damages now, the plaintiff can put the money in the bank or some other investment and earn interest on the money. After earning interest, the plaintiff will have more money at that future time than he or she would have had if there had been no accident. Discounting adjusts for this potential inaccuracy in damage awards.

Both the potential for future wage inflation and for earning interest on damage awards must be considered in devising rules governing awards for future damages. Kaczkowski v. Boubasz discusses the three dominant approaches to discounting future losses to the present value. This case also systematically identifies factors that influence future wage increases.

MOODY v. BLANCHARD PLACE APARTMENTS

793 So. 2d 281 (La. Ct. App. 2001)

PEATROSS, J.

This appeal arises from a personal injury suit filed by Robert E. Moody, individually and as tutor on behalf of his two minor daughters, Leah Nicole Moody and Lacy Brooke Moody, against Defendants, Blanchard Place Apartments; its manager, Calhoun Property Management, Inc.; and their insurance carrier, Clarendon National Insurance Company; for injuries he sustained when he suffered an electric shock from a stove in an apartment he rented from Blanchard Place Apartments. . . . After trial on the merits, judgment was cast against Defendants. . . .

"Special damages" are those which either must be specially pled or have a ready market value, that is, the amount of the damages supposedly can be determined with relative certainty, such as the plaintiff's medical expenses incurred as a result of the tort.

In regard to Mr. Moody's past medical expenses, having found that his neck injury was related to the electric shock which he suffered from the Stove[sic], any related medical expenses are recoverable as well as those expenses specifically associated with treatment he received in relation to the electric shock. We, therefore, will not disturb the $32,611 which the jury awarded for his past medical expenses.

As to Mr. Moody's lost past and future wages, Dr. Luvonia Casperson, an economist, testified on behalf of Plaintiffs; and Dr. Kenneth Boudreaux, an economist,

testified on behalf of Defendants. Awards for past lost wages are not susceptible to the great discretion given the factfinder, because past lost income is susceptible to mathematical calculation. Past lost income can be computed on an amount the plaintiff would, in all probability, have been earning at the time of trial; and damages for loss of past income are not necessarily limited to a multiplier of the amount earned at the time of injury.

Despite the relative certainty of mathematical calculations, however, we are faced with differing sums from each economist. The jury has awarded Mr. Moody a sum which is between the two economists' calculations, but closer to Dr. Casperson's.

Dr. Casperson has a Ph.D. in economics with a minor in accounting and finance. She has taught at Louisiana State University-Shreveport for 24 years, chairing the economics department for 7 or 8 years. Dr. Casperson testified that past lost wages are those wages, inclusive of fringe benefits, from the date of injury to the date of trial. This figure is then subjected to a discount rate which takes into consideration inflation and other economic factors. A person's previous earning capacity is also taken into consideration.

Dr. Casperson stated that, in calculating Mr. Moody's past lost income, she used 3.96 years, the amount of time from the date of injury to the date of trial. Dr. Casperson determined that Mr. Moody was receiving approximately 21.4 percent of his salary in additional fringe benefits at the time he was injured. She lowered this figure, however, to 12 percent because she determined that the fringe benefits Mr. Moody was receiving while at ResourceNet were well above average in the industry in which Mr. Moody was employed. She, therefore, used the more conservative figure of 12 percent.

Dr. Casperson used $12 per hour to calculate Mr. Moody's actual lost wages and took into account those wages Mr. Moody earned from the time of injury to trial. Mr. Moody continued working at ResourceNet for a few months following the incident, returned to iron working for a few months and, after a year of not working, found jobs in the restaurant industry as a dishwasher, busboy and counterman. Mr. Moody's wage was $8.50 per hour when he left ResourceNet in August 1997 and $12 per hour at JJ Erectors, where he did iron work until January 1998. Dr. Casperson included these wages, using earnings by Mr. Moody as reflected in his tax returns. Dr. Casperson also increased Mr. Moody's expected wage by three percent per annum after 1997 to reflect inflation. Using these sums and averages, Dr. Casperson calculated Mr. Moody's lost wages to be $60,283 and his lost fringe benefits to be $7,234.

Dr. Boudreaux, who also holds a Ph.D. in economics, and has been a professor of economics at Tulane University for over 30 years, based his calculations on Mr. Moody's wages at ResourceNet of $8.50 per hour. Dr. Boudreaux increased this amount by an inflation rate of three percent per annum, arriving at a post tax figure of $61,877 in lost wages from May 30, 1996, to the date of trial, exclusive of any actual wages earned. Dr. Boudreaux then subtracted from this figure the income which Mr. Moody earned during that period of time according to his W2s, arriving at an amount of $35,242. Dr. Boudreaux did not include loss of past fringe benefits in his calculations.

When asked if the figure would be different if he had considered Mr. Moody's last wage of $12 per hour as an iron worker, Dr. Boudreaux stated that, in his opinion, it would not be significantly different. In explaining his opinion, he stated that he figured the $8.50 wage in terms of a 40 hour week, 52 week per year job. He further stated, however, that in the construction industry, that is rarely the case since work is generally

found to be per job and is dependent on weather conditions. Since iron working is a construction related occupation, Dr. Boudreaux opined that, using $12 per hour in calculating the earnings of a job which is active only about three fourths of a year, would not change the overall economic outcome.

The jury awarded a sum of $60,000 in past lost wages. This sum is between the figures given by each economist. Although the jury is not afforded as much deference when a sum is susceptible to a mathematical calculation, we cannot say that the jury was incorrect in arriving at this sum. Each economist presented plausible calculations, neither of which can be said to be wrong. We, therefore, will not disturb the jury's award of lost past wages.

Awards for loss of future income or future earning capacity, however, are inherently speculative and insusceptible of calculation with mathematical certainty. We conclude, therefore, that a greater deference is to be afforded a jury's conclusion. The factors to be considered in determining future lost income include the plaintiff's physical condition before and after his injury, his past work record and the consistency thereof, the amount the plaintiff probably would have earned absent the injury complained of and the probability that he would have continued to earn wages over the balance of his working life. A loss of future income award is not really predicated upon the difference between the plaintiff's earnings before and after a disabling injury. Such an award is predicated, more strictly considered, upon the difference between the plaintiff's earning capacity before and after a disabling injury.

In calculating Mr. Moody's lost future wages, Dr. Casperson estimated his life expectancy to be 35.1 years from the date of injury, or 75.99 years of age using the Statistical Abstract of the United States, a commonly accepted statistical source. In accordance with the Bureau of Labor Statistics, Mr. Moody's work life expectancy would be 61.09 years of age, 20.2 years from the date of injury or 16.24 years from the date of trial. She further determined that, if Mr. Moody were to work to the full Social Security retirement age of 66.17, he would work 21.32 years from the date of trial.

Dr. Casperson determined Mr. Moody's earning capacity to be $12 per hour based on his work as an iron worker, both before his injury and for a brief time following his injury. Dr. Casperson also called local steel erectors to determine the current wage and availability of work. The three percent annual increase was added to this $12 figure. Finally, Dr. Casperson calculated Mr. Moody's future wages for both 61.09 years of age and 66.17 years of age.

Including the 12 percent lost fringe benefits and a discount rate of 1.5 percent, Dr. Casperson estimated Mr. Moody's lost future earnings to age 60.9 [sic—61.09?] to be $437,382. Using the same figures, Mr. Moody's earning capacity to age 66.17 would be $553,858. These figures were then offset by the minimum wage which totaled $265,607 for age 61.09 and $336,341 for age 66.17. Dr. Casperson testified that she felt Mr. Moody would retire from the work force at some time between the ages of 61.09 and 66.17. She stated an average of $300,974 would be reasonable.

Dr. Boudreaux, instead, determined that Mr. Moody's work life expectancy was 17.64 years from trial based on the Legal Economics tables which are derived from the census and the U.S. Bureau of Labor. He further determined that Mr. Moody's average annual income would be approximately $19,000. This amount was calculated out for an additional 17.64 years, increased at three percent per annum and discounted by

approximately six percent for present value. Dr. Boudreaux explained that this figure of $181,579, which was after taxes, was the amount which Mr. Moody would have to currently place in a safe investment in order to receive about $19,000 per annum if he were totally disabled.

Assuming Mr. Moody could earn at least minimum wage in a 40 hour a week, 52 week job for that period of time, Mr. Moody would need $79,072 after taxes to supplement his income to reach $19,000 per year. Finally, Dr. Boudreaux considered the opinion of Dr. Lenora Maatouk, a vocational rehabilitation specialist, that Mr. Moody was capable of, and [had] expressed desire to become a journeyman. He would require 21-24 months of training and, upon completion, could earn an estimated $25,000 per year. Based on these figures, Dr. Boudreaux calculated Mr. Moody would only need to be compensated for the time he was being trained, which Dr. Boudreaux assumed for his calculations as 24 months. His calculations derived a sum of $27,012.

These calculations were all post-tax and did not include any loss of fringe benefits. Dr. Boudreaux explained that, because lump sum recoveries are not taxable, he was asked to include taxes. He also stated that, if Mr. Moody were able to work steadily at a full time job, even earning only minimum wage, he would likely be provided at least with group health insurance, which is the largest percentage of the cost of fringe benefits. He, therefore, did not use any such figures in his calculations.

Again, we are faced with an award by the jury which is between Dr. Casperson's figures and above Dr. Boudreaux's lowest figure. Since we do not have the benefit of the motivation which powered the jury's decision-making process and the final award in between the given figures, we cannot say that the jury erred in awarding Mr. Moody $100,000 in lost future wages. Neither of the mathematical equations can be said to be unreasonable. Further, since we are to give great deference to the jury in awarding future lost income, we will not disturb this award. . . .

NOTE TO MOODY v. BLANCHARD PLACE APARTMENTS

Lost Earning Capacity. Because damages are based on lost future earning capacity, as opposed to lost wages, a plaintiff not currently in the workforce may recover such damages. In Richmond v. Zimbrick Logging, Inc., 863 P.2d 520 (Or. Ct. App. 1993), for instance, the plaintiff was a homemaker and minister's wife. When she was injured by a logging truck, the jury awarded her $30,000 for impaired earning capacity. The appellate court affirmed the verdict:

> [P]laintiff is not required to prove that she has worked in the past or intended to do so in the future. Oregon, like most jurisdictions, recognizes that the impairment of a person's earning capacity is an injury distinct from a loss of earnings.
>
> > "In determining past and future loss of earning capacity the question is not whether plaintiff would have worked, by choice. A person is entitled to compensation for the lost *capacity* to earn, whether he would have chosen to exercise it or not." Harper, James and Gray, *The Law of Torts* 549, §25.8 (2d ed 1986).
>
> That point was held to have particular relevance for lost earning capacity claims by homemakers in Earl v. Bouchard Transp. Co., Inc., 735 F. Supp. 1167, 1172 (E.D.N.Y. 1990):
>
> > "Regardless of whether or not a plaintiff would have exercised the choice to work as long as he could have, he or she is entitled to damages 'measured by

the extent to which [plaintiff's] capacity for earnings has been reduced.' Restatement (Second) of Torts §924, comment c. In effect, the 'economic horizon of the [plaintiff] has been shortened because of the injuries.' Burke v. United States, 605 F. Supp. 981, 999 (D. Md. 1985)."

KACZKOWSKI v. BOLUBASZ

421 A.2d 1027 (Pa. 1980)

NIX, J.

Appellant instituted a complaint in trespass in Allegheny County Court of Common Pleas. The suit arose from an automobile accident in which the decedent, Eric K. Kaczkowski, was riding as a passenger in a vehicle operated by appellee. At the original trial of this matter, the jury established the liability of the appellee. Upon appellant's Motion For a New Trial, the case was returned to the trial court for a retrial on the issue of damages.

. . . [T]he plaintiff relied upon the trial court's charge of impairment of future earning power for the guidance of the jury. The lower court charged the jury to consider the decedent's personal characteristics to: calculate the potential gross earnings of the decedent for the period of decedent's work life expectancy; to determine the maintenance costs of the decedent for the period of decedent's work life expectancy; to deduct the personal maintenance costs from the gross earnings to produce net earnings; and to discount the net earnings to present value by six percent (6%) simple interest. Based upon the judge's instructions, the jury returned a verdict of $30,000. on behalf of the estate of Eric K. Kaczowski. . . .

The issue raised by appellant is whether the trial court erred in excluding reliable economic testimony showing the impact of inflation[4] and increased productivity[5] on decedent's future earning power. . . .

In this Commonwealth, we have consistently held that damages are to be compensatory to the full extent of the injury sustained. The rule "is to give actual compensation, by graduating the amount of damages exactly to the extent of the loss."

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[4] Inflation is "the increase in the volume of money and credit relative to available goods resulting in a substantial and continuing rise in the general price level." Websters, Third International Dictionary (1965). Inflation gains are measured in terms of what the average person refers to as "cost of living increases." An example of inflation evidencing an increase in prices unrelated to an increase in intrinsic value is that the juice content of oranges has not increased in years, but their price continues to rise.

The presence of inflation plays two distinct roles in an award for prospective damages. The first role is determining the impact of inflation on the future earnings of the victim. The second place in which inflation plays a part is in determining the appropriate interest rate to discount the future damage award to its present value.

[5] Economists recognize that there are at least four major elements which influence the rate of increase of an employee's income. These factors are: (1) the educational attainment of the participant prior to his entry into the labor market; (2) the influence of age upon the earnings of participants over their life cycle; (3) the significance of productivity and growth; and (4) the impact of inflation. Henderson, *The Consideration of Increased Productivity and Discounting of Future Earnings to Present Value,* 20 S.D. L. Rev. 307 (1976). In our analysis, we will isolate the inflation element from the other three factors, collectively called "merit" increases, which are consumed in productivity. We recognize that merit increases are controlled by different variables than the inflationary factor, and deserve separate consideration.