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Hocus Pocus:
Plaintiff's Lawyers Double Dipping Damages from the Non-Economic and Economic Well

I. Introduction Traditional View of Damages- Economic and Non-economic

A. Traditional Categories

1. **Economic damages** refers to compensation for objectively verifiable monetary losses such as past and future medical expenses, loss of past and future earnings, loss of use of property, costs of repair or replacement, the economic value of domestic services, and loss of employment or business opportunities.

2. **Non-economic damages** refers to "pain and suffering" and has been utilized to encompass all items of general, non-economic damages, see CPLR 4111(d), (e), (f); *McDougald v Garber*, 73 NY2d 246 (1989); *Lamot v Gondek*, 163 AD2d 678 (3d Dept 1990); Comments to PJI 2:151, 2:301; see also *Bartoli v Asto Const. Corp*., 22 AD3d 437 (2d Dept 2005) (disfigurement is aspect of pain and suffering not separate element of damages). An award for pain and suffering should include compensation to an injured person for the physical and emotional consequences of the injury. It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, *Eaton v Comprehensive Care America, Inc*., 233 AD2d 875 (4th Dept 1996). In determining the amount to be awarded plaintiff for non-economic damages, the jury may properly consider the effect of the injuries on plaintiff's capacity to lead a normal life, *McDougald v Garber*, supra. However, while the loss of the enjoyment of life may be considered in fixing the amount awarded plaintiff for pain and suffering, the loss of enjoyment of life does not, by itself, constitute a separate and distinct item of damages, *McDougald v Garber*, supra; see *Kavanaugh v Nussbaum*, 129 AD2d 559 (2d Dept 1987), aff'd as mod on other grounds, 71 NY2d 535 (1988); *Golden v Manhasset Condominium*, 2 AD3d 345 (1st Dept 2003); *Ledogar v Giordano*, 122 AD2d 834 (2d Dept 1986) (both treating loss of enjoyment of life as permissible component of pain and suffering award). In *Nussbaum v Gibstein*, 73 NY2d 912 (1989), decided simultaneously with *McDougald v Garber*, supra, the Court stated that "loss of enjoyment of life is not a separate element of damages deserving a distinct award but is, instead, only a

factor to be considered by the jury in assessing damages for conscious pain and suffering." Likewise, "mental suffering" is not an item of damage distinct from "pain and suffering," *Lamot v Gondek*, supra.

Loss of enjoyment of life, as well as other factors in determining the amount of damages for conscious pain and suffering, may be considered only if plaintiff has "some cognitive awareness" of the loss, *McDougald v Garber*, supra; see *Ramos v Shah*, 293 AD2d 459 (2d Dept 2002). An award for the loss of enjoyment of life would serve no compensatory purpose where plaintiff has no awareness of the loss. The jury is not required to sort out varying degrees of cognition and to determine the level at which a particular deprivation may be fully appreciated. It is sufficient if the jury is instructed that there must be "some level of awareness" in order for plaintiff to recover, *McDougald v Garber*, supra; *Ramos v Shah*, supra.

B. Damages in Wrongful Death Cases

1. Pecuniary Loss

The more traditional jurisdictions, including New York, hold the measure of damages in a cause of action for wrongful death is pecuniary loss to the next of kin (distributes). It may include claims for loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death. In *Gonzalez v. New York City Housing Authority*, 77 NY2d 663 (1991), the Court of Appeals stated that the pecuniary loss arising from the death of a wage earner may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees. In the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, from the increased expenditures required to continue the services provided by the decedent.

2. Care and Guidance

The court in Gonzalez further stated that pecuniary loss may also include compensable losses of a personal nature, such as loss of guidance. However, it does not include recovery for grief, loss of society, affection, conjugal fellowship and consortium. *Liff v. Schildrout*, 49 NY 2d 622 (1980). The calculation of the precise amount to be awarded for pecuniary loss is a question for the jury. *Parilis v. Feinstein*, 49 NY2d 984 (1980). Distinguishing a compensable claim for loss of guidance from a claim for loss of companionship or consortium, which is not compensable in New York, has been extensively examined by the courts.

Pecuniary loss is not limited to financial support and loss of compensable services. The New York courts have recognized that pecuniary advantage results from parental guidance and care, as well as physical, moral and intellectual training. The loss of those benefits may be considered in the calculation of pecuniary injury, frequently with respect to infants. However, loss of parental companionship is not compensable. *Kenavan v. City of New York*, 120 AD2d 24 (2d Dept 1986), affd 70 NY2d 558.

Loss of parental guidance as a compensable element of pecuniary loss can result in significant recoveries. For example, in *Bogen v. State*, 5 AD3d 521 (2d Dept 2004), the award was $1.25 million for past and future loss of parental care and guidance.

Compensation to self-supporting adult distributees for pecuniary loss may also include loss of guidance. One of the most significant decisions on this issue was *Gonzalez v. New York City Housing Authority*, 77 NY 663 (1991). In this wrongful death action arising from the murder of plaintiffs' grandmother, the Court of Appeals held that plaintiffs' status as adult financially independent grandchildren did not preclude recovery of pecuniary damages. As distributees of the decedent, they were members of the class permitted to maintain an action for pecuniary loss which would include loss of parental guidance. Their recovery was not barred solely because they were self-supporting adults at the time of their grandmother's death.

Decedent had raised both grandchildren due to the death of her son and the mental illness of her daughter in-law. Although decedent had retired from work several years before her death, she remained active. She prepared meals for her ill daughter-in-law as well as for her grandchildren. She also helped her granddaughter in other ways. When the granddaughter was having marital problems, she lived with decedent. At the time of decedent's murder, the granddaughter was pregnant, and it was intended that decedent would care for the child while she returned to school.

In *Clark v. Weinstein*, 23 AD3d 1054 (4th Dept 2005), decedent was survived by his wife, his daughter, and his daughter's two children. He and his wife had cared for their grandchildren since birth and been awarded custody. He provided them with full financial support until his death. During that time, the children had only minimal contact with their mother, who provided no financial support for them. The issue was whether decedent's daughter, a distributee, had a claim resulting from the pecuniary loss of support provided by decedent to her children. The court held that decedent's daughter was legally obligated to provide support for her children despite the fact that her parents had been awarded custody. Thus, the loss of decedent's voluntary support to the grandchildren resulted in a direct loss to her as she would have to replace the support that he previously provided.

The Gonzalez decision, despite its sweeping statement that an adult distributee can state a claim for pecuniary injuries based on the loss of a parent's guidance, has left an ambiguity unresolved. Although the Court of Appeals did not specifically address the issue of whether an adult distributee must demonstrate a proven loss of "compensable services" in order to recover for loss of guidance, it made specific reference to *Bumpurs v. New York City Housing Auth*., 139 AD2d 438 (1st Dept 1988). *Bumpurs* was cited by defendants to support their contention that an adult distributee could not claim pecuniary injury for loss of parental guidance.

In *Bumpurs*, the Appellate Division held that minor children could allege a pecuniary injury from the premature loss of parental educational training, instruction and guidance because that loss could have a financial effect on their future well-being, but stated this would not be so with adult children. However, the rejected claim in *Bumpurs* was not for loss of guidance but for the "loss of companionship, comfort and assistance."

Rather than addressing the validity of the premise upon which *Bumpurs* was decided, the Gonzalez court merely distinguished the facts in *Bumpurs* from those in *Gonzalez* by stating that the decedent in *Bumpurs* had provided no services to her adult children. However, the claim in Bumpurs was different from that in *Gonzalez*. The court in *Bumpurs* addressed a claim for loss of companionship, comfort and assistance was which was more akin to a loss of nurture claim, which the court held was not compensable.

II. Advice/Counsel/ Companionship and Tutelage Damages

Many jurisdictions have expanded economic damages to include such categories of the loss arising from the loss of advice, counsel, companionship and tutelage. See *Green v. Bittner*, 85 N.J. 1 (1980), see also, *Rettger v. UPMC Shadside*, 99 A3d 927 (PA. 2014). While several courts in various jurisdictions have allowed for the inclusion of such economic damages, there has been limited to no guidance as to the permissible calculations of such damages. Given the Courts limited guidance on this broad topic of damages, plaintiffs and plaintiff economists have been allowed to run rampant on these damages calculations. The main issues that have to be examined in these calculations include the daily/weekly hourly allocation of such services and the replacement labor rate being applied by the plaintiff economist. Often times plaintiff economists will employ a market labor rate for a variety of services while the decedent lacked any specific training, education or work experience in such categories, which results in a substantial "over" replacement value.

III. Hedonic Damages

A. The Rise of Hedonic Damages

Hedonic damages are not a new idea. Prior to the mid- to late-1980s, courts did not refer to hedonic damages, but instead awarded damages for "loss of enjoyment of life." These damages were usually part of damages for pain and suffering or a general damage award. Today, however, with increasing frequency in personal injury and wrongful death actions, plaintiffs' lawyers are attempting to introduce expert testimony on hedonic damages and requesting that courts provide juries with a separate instruction and verdict form for lost enjoyment of life.

The term "hedonic damages" made its debut in the 1980s when economists began using the term to explain the non-pecuniary damages available in any given case. Dr. Stanley V. Smith, an economist and financial consultant, coined the phrase in a § 1983 federal civil rights lawsuit, *Sherrod v. Berry*. In that case, the decedent, an innocent African- American male who unknowingly offered a ride to a man who had just robbed a florist, was shot by police after being pulled over in a white Illinois suburb. Subsequently, the decedent's father, as administrator of his son's estate, brought a wrongful death action under 42 U.S.C. § 1983 against the city, its police chief, and the police officer. The court found that "the loss of life means more than being deprived of the right to exist, or of the ability to earn a living; it includes deprivation of the pleasures of life."" It then permitted the testimony of Dr. Smith, who

explained that "hedonic value" refers to "the larger value of life . . . including economic, including moral, including philosophical, including all the value with which you might hold life."

The trial resulted in a jury verdict for $300,000 in compensatory damages and $850,000 in hedonic damages. The US Court of Appeals for the Seventh Circuit upheld the admission of Dr. Smith's expert testimony, found that the award did not violate the rule against "speculative damages," and did not require remittitur.

Most jurisdictions appear to regard hedonic damages as an element of pain and suffering or disability. The highest courts of Kansas, Nebraska, New York, Ohio, Pennsylvania, and appellate-level decisions in California, Minnesota, and Texas, support this position. Other states, including Maryland, New Mexico, South Carolina, and Wyoming, allow recovery of hedonic damages as a separate element of damages. Some courts appear to allow recovery of hedonic damages in some situations, such as to compensate for the loss of a specific skill, but not in other situations, such as wrongful death and survival actions. Most courts do agree, however, that "expert" testimony on hedonic damages has no place in the courtroom and that hedonic damages are not available in wrongful death or survival actions.

1. Calculating Hedonic Damages- Emotion versus Reason

The notion of hedonic damages implies that every positive life experience can and should be converted into a cash equivalent, and asks the jury to do so.

Juries have two ways of arriving at an economic value for the lost enjoyment of life or the loss of life itself. The first method involves a measure similar to the one used for pain and suffering. This method asks jurors to use their own life experience and judgment to arrive at an award based on how much enjoyment of life they feel the injured party has lost. The jury may rely on testimony from people who knew the injured party, combined with their own values, to determine the plaintiffs lost enjoyment of life.

The second approach calculates hedonic damages according to a supposedly scientific formula, derived from government studies and models of consumer behavior and worker risk avoidance. This formula incorporates expert testimony, including that of economists and psychologists. This method for valuating hedonic damages is flawed because it is highly subjective and incapable of meaningful judicial review. Examples are supposedly economic calculations for Advice/Counsel/Companionship; Night-time security services and On-call services.

2. Double Counting Redundancy

Most states permit the jury to consider hedonic damages, but only as a component of general damages, pain and suffering, or disability. In one of the first cases to face the issue, *Huff v. Tracy*, a California appellate court found that a trial court erred in an automobile accident case when it instructed the jury on both general damages and loss of enjoyment of life. The court explained:

> The standard pain-and-suffering instruction... describes a unitary concept of recovery not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock,

humiliation, indignity, embarrassment, apprehension, terror or ordeal. A separate enjoyment-of-life instruction only repeats what is effectively communicated by the pain-and-suffering instruction.

The enjoyment-of-life instruction opens the possibility of double compensation. A trial court errs when it follows the pain-and-suffering instruction by another which tells the jurors that they may also, that is, additionally, award damages for injury to the enjoyment of life. Plaintiff's lawyers now try to hide this double counting under the guise of an economic calculation

The Supreme Court of Kansas took the more realistic approach that, as a general rule, the loss of enjoyment of the pleasurable things in life is inextricably included within the more traditional areas of damages for disability and pain and suffering. While it is true that a person may recover from the physical pain of a permanent injury, the resultant inability to carry on one's normal activities would appear to fall within the broad category of disability.

In the majority of cases, loss of enjoyment of life as a separate category of damages would result in a duplication or overlapping of damages.

A minority of courts permit hedonic damages as a separate and distinct award. Some examples include South Carolina, Maryland, New Mexico, Washington, and Wyoming, as well as the United States Court of Appeals for the Sixth Circuit as it interpreted Tennessee law.

Courts permitting recovery for hedonic loss as a separate element of damages attempt to draw technical distinctions between the concepts of pain and suffering, disability, and lost enjoyment of life. For instance, in *Kirk v. Washington State University*, a twenty-year-old cheerleader who permanently injured her elbow during practice sued the university, claiming damages to compensate for the inability to become a professional dancer. The Washington Supreme Court rejected the defendant's argument that damages for pain and suffering and for disability and disfigurement already encompassed hedonic damages. In that case, the court distinguished pain and suffering as compensating for "physical and mental discomfort," disability as compensating for the "inability to lead a normal life," and recovery for lost wages or earning capacity as compensating for economic loss. In the court's analysis, such measures did not reach the noneconomic rewards of being a dancer. It would appear, however, that if the cheerleader was able to continue to lead a normal life, her loss stemmed from the heartache caused by accepting that she is unlikely to achieve her personal and professional goal of becoming a dancer. This emotion is properly considered by a jury as a part of pain and suffering.

Prior to the rise of hedonic damages, courts addressed a similar question with respect to damages for "pain" and damages for "suffering."" Although the two concepts are analytically distinguishable, courts recognized pain and suffering to be a single element of damages because of the rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal.

As an analytical matter, "pleasure" and "pain" are related words of opposite meaning.' Awarding damages both for "lost pleasure" and "pain and suffering" appears entirely redundant. Furthermore, to the extent that hedonic damages compensate a victim for the lost ability to undertake a physical activity, those damages are already provided for as disability.

For instance, the Supreme Court of Pennsylvania explained the interrelatedness of pain and suffering and loss of enjoyment of life in *Corcoran v. McNeal*:

> The loss of well-being is as much a loss as an amputation. The inability to enjoy what one has heretofore keenly appreciated is a pain which can be equated with the infliction of a positive hurt. The conscious loss of a benefit to which one is entitled hurts as much as a festering wound.

Apart from the analytical murkiness, there is a problem of application. The subjective nature of lost enjoyment of life enhances the potential for excessive awards in personal injury cases. This is especially so because alongside pain and suffering damages, juries are asked to decide a second subjective award. As early as 1938, the Kansas Supreme Court did not permit an accomplished sixty-three-year-old violinist to recover for her loss of enjoyment of life when an injury prevented her from playing the violin. In that case, the majority held that "loss of enjoyment **...** is too speculative and conjectural to form a sound basis for the assessment of damages." Juries must perform an even more subjective determination of hedonic damages when the case does not involve the lost enjoyment of some specific and valuable skill, but rather the loss of a general enjoyment of life or the loss of life itself.

In sum, hedonic damages pose the risk of double counting for two major reasons. First, the standard is quite conceptually similar to both pain and suffering and disability, especially when one considers that pain and suffering may continue after its physical dimension passes, and that disability necessarily must continue into the future. But even if there is an analytical distinction, the problem of application remains. Given that hedonic damages, like pain and suffering, cannot be measured against a concrete economic baseline, there is no way for a jury to keep the categories distinct in their calculations.

B. Circumventing Limitations on Damages

Hedonic damages pose additional risks different from double counting but with the similar effect of inappropriately aggravating jury awards.

Couching non-economic damages as if they were calculable economic damages provide opportunities for escaping various liability limitations, namely, the cognitive awareness requirement for compensatory, non-economic damages, and the scope of remedies for wrongful death.

1. Escaping the Cognitive Awareness Requirement of Non-Economic Damages

Hedonic damages also provide an opportunity to shortcut an important check on non-economic damages generally: the cognitive awareness requirement.

A predicate for noneconomic damages has always been a showing that the plaintiff has actually or will actually experience that item of damages in the future. Traditional tort law requires that the plaintiff have a "cognitive awareness" of his or her loss to ensure that he or she receives compensation only for the injuries actually suffered.

Plaintiffs' lawyers have argued that the cognitive awareness requirement does not apply to hedonic damages, seeking to recover essentially compensatory damages when such damages would otherwise not be available. Importantly, this decoupling can occur both in states that permit consideration of hedonic damages as an element of pain and suffering or disability, and those that allow recovery for lost enjoyment of life as a separate element of damages. Damages resulting in such cases

can only be described as compensating for either the loss of life in the total abstract or punishing the defendant for its actions, but serving no real compensatory purpose.

For example, in *Gregory v. Carey*, a plaintiff who had suffered catastrophic brain damage while being prepared for knee surgery brought a medical malpractice action against his doctor and the hospital. The trial court did not allow the plaintiff's attorney to argue that the decedent suffered mental anguish or disfigurement, finding the evidence insufficient to show that the patient was ever aware of his injury. Over the defendant's objections, however, the trial court permitted the plaintiff to argue that he suffered a loss of enjoyment of life as an element of pain, suffering, and disability, because the court found that such damages did not require cognitive awareness. The jury returned a verdict of $6.3 million, including seventy thousand dollars for past pain and suffering, $930,000 for future pain and suffering, forty-five thousand for past disability, and $900,000 for future disability, plus lost income and medical expenses. The Supreme Court of Kansas upheld the award, holding that the court properly permitted the jury to consider loss of enjoyment of life as an element of pain and suffering and disability, and properly refused to require cognitive awareness of the loss of enjoyment of life.

In order to promote consistency and the general goals of compensation in tort law, the court held that cognitive awareness is a prerequisite to recovery of any aspect of nonpecuniary loss.

A California appellate court recently reached the same conclusion in a medical malpractice action in which the plaintiff, a newborn baby, experienced profound brain damage shortly after birth. In that case, the appellate court ruled that the trial judge properly denied a request to instruct the jury on loss of enjoyment of life as a separate element of damages. In addition to expressing concern about the potential for duplicative damages, the court found that an award for injuries for which the plaintiff is unaware is not compensatory but punitive in nature, requiring Legislative authority.

A cognitive awareness requirement for the recovery of pain and suffering is a necessary prerequisite if noneconomic damage awards are to serve some compensatory function. In sum, unless the plaintiff shows that he actually felt the claimed pain and suffering, such an award becomes not only a "legal fiction," but can only be understood as a means of punishment or as reallocation of wealth without regard to actual harm.

2. Thwarting Wrongful Death and Survival Statutes

Wrongful death and survival actions generally permit the survivors of the deceased to recover only pecuniary loss. Since the applicable law typically permits neither pain and suffering damages nor punitive awards, plaintiffs have turned to economists to reintroduce damages which are non-economic as if they were economic so as to dramatically increase recovery.

Like wrongful death statutes, survival statutes generally abrogate the common law rule that once a person dies, his or her cause of action dies as well. Thus, under a survival action, once a cause of action vests in the victim of a tort, it is not extinguished at death. The executor or administrator of the victim's estate may sue to recover that which the victim would have recovered, and is subject to the same defenses that would have applied had the victim lived. This means that under a survival action, the estate may recover for pain and suffering, loss of earnings, and any other injury the victim incurred, up until the date of his or her death.

The overly subjective and unwieldy aspect of hedonic damages that would arise if they were given to a living person are geometrically magnified if awarded in either survival or wrongful death claims, where the injured party cannot even attempt to describe the injury, and jurors cannot measure the difference between the life before and after the injury in order to come to their own conclusions.

The overwhelming majority of courts and legislatures has recognized these facts and rejected such claims.

C. Valuing Models of Hedonic Damages:

What is the total value of the pleasure of life or of life itself? Many purported hedonic experts, including Dr. Stanley Smith, who literally wrote the book on hedonic damages, use what is called the "willingness to pay" (WTP) approach. The WTP approach measures the value of a human life by examining what we pay to prevent the loss of life, or what we pay for life-saving measures. This approach considers three models to quantify the value of life for the jury: (1) consumer willingness to purchase safety devices; (2) worker willingness to accept higher compensation for a greater risk of death; and (3) the government's willingness to impose safety regulations on private industry and the cost of such regulation."'

Each of these models attempts to quantify how much a person would be willing to pay to avoid death. While these models may have theoretic or academic value, they have little applicability when used in a courtroom to determine the value a particular individual placed on life for compensatory purposes.

IV. Plaintiff's Expansion/Modification of Hedonics

With many courts restricting or precluding "full hedonic" damages valuations and presentations, many plaintiff economists have turned to modified categories of hedonic damages. The first category is Nighttime Security Services. Nighttime security services are being defined as the lost presence of the decedent. Economists are measuring these damages for a period in evening, whether the decedent would be awake or sleeping. The Damages are measured based upon replacement of a Home Health Aide, run through life expectancy and have no deduction for personal maintenance. The second category is called On-Call Services. This claim for "economic" damages is being defined as the loss of the 24 hour potential opportunity to have access to parents/loved ones for advice. It is important to note that this category of damages is not the actual service of providing advice or a service just the missed opportunity. Damages are measured at 24 hour Customer Services rate from Bureau of Labor Statistics, Occupational Employment Statistics. These services can create an economic loss for 24 hours of the day, 365 days a year and run through the decedent's life expectancy.

V. Economist, Counsel and Carriers Response

An expert retained by the defense can show the false premises in the calculations and point out the duplicate categories for each. An economist retained by the defense can easily refute the premises and conclusions in the various models presented and guide the defense in the necessary discovery

needed to refute such claims and help prepare and support the needed motions in Limine and exclusionary motions.

1. Active and Relentless Discovery and Investigation

As a California appellate court observed, the figures [Dr. Stanley] Smith included in his baseline calculation have nothing to do with this particular plaintiffs injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life.... 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.

Thus, early investigation and aggressive discovery is critical in removing all variability in the factors used to calculate damages. Plaintiffs must be exhaustively quizzed on the number of each item of damage and the quantum for each item. (How much of what kind and over what period of time) Getting the fact witnesses and foundation documents to lock into hard arithmetic leaves very little variability in plaintiff's attorney's ability to calculate based on broader and more favorable assumptions.

Moreover, the testimony of an economist does not aid the jury in determining a person's lost enjoyment of life because an economist is no more expert at valuing the pleasure of life than the average juror. Courts also reject expert testimony using the WTP approach because the calculations are based on assumptions that appear to controvert logic and good sense. If the plaintiff's economist is faced with hard detailed evidence to limit plaintiff's claim for damages, it is a very hard credibility argument for the expert to relate some very inflated claim to the jury.

2. Motions in Limine- Daubert

An audit of cases for the last 10 years shows the absolute value of making motions in limine to preclude plaintiff's experts from offering testimony in the nature of making economic calculations for non-economic loss. The motions will very often be granted, if you have retained an economic expert to lay bear the deficiencies in plaintiff's economists professional rigor, reproducibility, general acceptance in peer groups, measurability of tests populations and results, and/or applicability to the facts developed in the particular case at hand.