Pattern Jury Instructions: The Prospect of over or Undercompensation in Damage Awards for Personal Injuries

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To determine damage awards for the personal injury plaintiff, the Pattern Jury Instructions now used by several states itemize the compensable elements of damage. Application of such elements often leads to exclusion of appropriate elements or to duplication of appropriate elements with the inequitable result of overcompensation or undercompensation. To combat this, Professor Graham provides a viable framework for analyzing the elements which measure the damages suffered. He proposes a set of pattern jury instructions which incorporates the compensable elements and facilitates jury deliberation. Finally he illustrates the improved instructions by applying them to a hypothetical plaintiff.

Damage awards in personal injury actions attempt to compensate the plaintiff for the damages caused by the negligence or wrongful conduct of the defendant. The primary goal is to make the plaintiff as nearly whole as possible by an award of money.1 Punitive damages are awarded only when a defendant's action constitutes a wrong more flagrant than ordinary negligence.2 In these cases, the goal is deterrence or vindication rather than compensation.3 Thus, in the typical personal injury action, the law attempts to equate the damage award with the amount of the damages suffered.4

To assist the jury in determining the amount of damages to be awarded common law courts began to suggest possible compensable elements of damage. Such elements have now been incorporated into the pattern jury instructions employed in various jurisdictions. While such pattern jury instructions usually announce the principle of “compensation,”5 an examination of

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1. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, §§ 20, 137 (1935) [hereinafter cited as McCormick]; James, Damages in Accident Cases, 41 CORNELL L.Q. 582, 583 (1956) [hereinafter cited as James]. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973) [hereinafter cited as Dobbs]; A. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed. 1912); J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES (4th ed. 1916) [hereinafter cited as Sutherland]. This Article deals only with personal injury actions in which the victim survives until a verdict is returned. In many states, if the victim dies before the verdict, wrongful death statutes create a new cause of action in the name of the victim's survivors. See, e.g., ILL. REV. STAT. ch. 70, §§ 1, 2 (1975).
2. James, supra note 1, at 582.
3. MCCORMICK, supra note 1, at §§ 77-85.
4. See RESTATEMENT OF TORTS § 903, comment a (1939); James, supra note 1, at 583.
5. See, e.g., D. WRIGHT, 1 CONNECTICUT JURY INSTRUCTIONS-CIVIL § 226 (1970); MISSOURI APPROVED JURY INSTRUCTION § 4.01 (1969).
these instructions reveals that there is a serious possibility of both over and under compensation. This is particularly true with respect to non-pecuniary damages.

This Article will explore those elements of damage frequently employed in pattern jury instructions with a view toward exposing those elements which potentially lead to improper compensation of the personal injury plaintiff. Also, the importance of understanding the difference between an injury itself, guidelines in measuring an injury, and an element of damage arising from an injury is explained. Finally, a proposed pattern jury instruction is delineated.6

THE APPROACH OF PATTERN JURY INSTRUCTIONS

When faced with the task of instructing a jury to make the plaintiff as nearly whole as may be achieved by an award of money, a court could instruct the jury to compensate the plaintiff for his entire injury. Under such circumstances, the jury is simply being instructed in general terms to return the sum of money which would fairly and reasonably compensate the plaintiff for the injuries resulting from the defendant's negligent or culpable conduct. Such an instruction in effect says to the jury, here is the plaintiff with only one arm; compensate him or her for the loss of that arm.

Alternatively, the court could instruct the jury more specifically as to the consequences of the injury inflicted upon the plaintiff to the extent supported by the evidence. In pattern jury instructions the consequences of the injury to the plaintiff are referred to as elements of damage. The aggregate of all such elements of damage, each separately compensable by the jury, is equivalent to compensating the plaintiff for the entire injury. Since the elements of damage (the consequences of the injury) comprise the effect of the injury on the life of the plaintiff, the total award received constitutes compensation designed to make the plaintiff as whole a person as can be accomplished through an award of money.

The alternative of instructing the jury in general terms to compensate the plaintiff for injuries sustained was adopted in Power v. City of Augusta.7 In Power, rather than itemizing all of the possible effects of a permanent injury, the court concluded that the jury was best left on its own to decide what elements of damage the injury had produced. The court reasoned that if the instructions itemized the possible damages that could arise from the injury, it could have a "harrowing" and "baneful" effect upon the jury.8 Like the

6. The scope of this Article is limited to developing a pattern set of jury instructions aimed at compensating the personal injury plaintiff for those damages which may be recoverable pursuant to the applicable substantive law. Accordingly, analysis of various questions of substantive law will not be undertaken.
7. 191 F. 647 (E.D. Ken. 1911).
8. Id. at 655. The court explained:

The jury should be allowed to take into consideration the effect of the permanent injury otherwise than on the power to earn or make money. And it seems to me
instruction in *Power*, the Missouri jury instructions do not itemize the elements of personal injury damage. In Missouri, the court instructs the jury to compensate the plaintiff for any damages they believe the plaintiff has suffered, without suggesting to the jury what elements could comprise those damages.\(^9\) In justification of the instruction, the Committee Comment states that the rule is easily understood and that, because no items of damages are set, there is no risk that the jury will be instructed on items of damage not supported by the record.\(^10\)

However, if the court in its instructions fails to itemize the elements of damage arising from the injury, the jury might not realize what compensable elements of damage the plaintiff suffered. Thus, the plaintiff would be undercompensated if he suffered an element of damage that the jury did not perceive. This danger is obviated by instructing the jury as to those elements of damage that are supported by the evidence.\(^11\)

An instruction in general terms to compensate the plaintiff for the injury received creates a risk of overcompensation as well as one of undercompensation. A jury given no criteria might award damages for a consequence of an injury when insufficient evidence was introduced to support such an award. Similarly, the court’s failure to itemize the instructions makes it more difficult for opposing counsel and the court to confine argument by counsel for the injured party on the question of damages to those elements supported by the evidence. For these reasons, it is not surprising that an examination of the jury instructions in thirty states\(^12\) reveals that in all those states except Missouri, the courts attempt to guide the jury’s assessment of personal injury damages by itemizing the elements of damage.

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\(^9\) Missouri Supreme Court Committee on Jury Instructions, *Missouri Approved Jury Instructions*, § 4.01 (1969): If you find the issues in favor of the plaintiff, then you must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence.

\(^10\) Committee Comment, *Missouri Approved Jury Instructions*, § 4.01 (1969). The comment also points out, however, that the elements of damage are suggested to the jury during the arguments of the attorneys. *Id.*

\(^11\) In *Lexington Ry. v. Herring*, 30 Ky. 269, *petition for rehearing denied* 97 S.W. 1127 (1906), the trial court instructed the jury to compensate the plaintiff for “such further sum as will fairly compensate her for the loss of her foot.” In rejecting this instruction, the appellate court stated that it “would . . . in effect . . . give the jury no criterion of damages, and is equivalent to an instruction to them to find for the plaintiff such a sum as they deemed right, considering the injury she had received.” *Id.*

\(^12\) *See Appendix infra* for a complete listing of the thirty states.
Although approved jury instructions itemize the elements of damage resulting from the injury, the list of elements differs by jurisdiction.\footnote{13} Some elements appear in every jurisdiction that itemizes damages. For example, all thirty of the jurisdictions studied compensate plaintiffs for lost earnings,\footnote{14} medical expense,\footnote{15} and pain.\footnote{16} The instructions differ in substance principally on the itemization of the non-pain and non-pecuniary elements of damage. In many jurisdictions, disfigurement,\footnote{17} disability,\footnote{18} and the nature, extent, and duration\footnote{19} of the injury are recognized as elements of damage. Moreover, at least one of the jurisdictions under consideration employs each of the following terms: embarrassment, suffering, mental suffering, physical suffering, emotional distress, impairment of facilities, effect upon normal use of facilities, pursuit of normal life, humiliation, physical pain, mental anguish, fright, shock, mortification, denial of social pleasures and enjoyments, health, inconvenience, discomfort, fear, apprehension, anxiety and aggravation of pre-existing ailment or condition.\footnote{20} Thus, jury instructions currently employed vary in their methods of denoting compensable elements of personal injury damages. As a result, there is an obvious risk that a compensable item of damage might fall outside those elements included in the jury instructions of a particular jurisdiction.

Likewise, in the instructions currently used, one element of damage frequently may overlap another element. Since courts instruct juries to compensate the plaintiff for each element of damage supportable by the evidence,\footnote{21} a danger of overcompensation exists in many jurisdictions. This

\footnote{13. The South Dakota Instructions, which are based on the Illinois Pattern Jury Instructions, provide an unusual instance of relative congruity of elements.}

\footnote{14. See text and accompanying notes 26-37 infra.}

\footnote{15. See text and accompanying notes 38-43 infra.}

\footnote{16. See text and accompanying notes 52-54 infra.}

\footnote{17. See, e.g., ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL § 22.08 (2d ed. 1974); FLORIDA STANDARD JURY INSTRUCTIONS § 6.2(a) (Hein 1967); ILLINOIS PATTERN JURY INSTRUCTIONS-CIVIL § 30.04 (B. Smith 1961 and Supp. 1965); INDIANA PATTERN JURY INSTRUCTIONS § 9.01(g) (Bobbs-Merrill 1966); MICHIGAN STANDARD JURY INSTRUCTIONS-CIVIL § 30.03 (Hall 1970); MINNESOTA JURY INSTRUCTION GUIDES-CIVIL § 155 (1963); SOUTH DAKOTA JURY INSTRUCTIONS § 30.04 (1971); 2 VIRGINIA JURY INSTRUCTIONS § 23.01 (Doubles, Emroch & Merhige 1964); 2 INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA §§ 39-114 (Abbott and Solomon ed. 1962); WASHINGTON PATTERN JURY INSTRUCTIONS-CIVIL § 30.04 (1967).}

\footnote{18. See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS-CIVIL, supra note 17, at § 30.04; IOWA PATTERN JURY INSTRUCTIONS § 3.9; MICHIGAN STANDARD JURY INSTRUCTIONS, supra note 17, at § 30.03; MINNESOTA JURY INSTRUCTION GUIDES-CIVIL, supra note 17, at § 155; SOUTH DAKOTA JURY INSTRUCTIONS § 30.04 (1971); 2 INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA, supra note 17, at §§ 39-114; WISCONSIN JURY INSTRUCTIONS-CIVIL- Part II § 30.04 (1967).}

\footnote{19. See, e.g., ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL, supra note 17, at 22.02; ILLINOIS PATTERN JURY INSTRUCTIONS-CIVIL, supra note 17, at § 30.02; INDIANA PATTERN JURY INSTRUCTIONS, supra note 17, at § 59.01(a); NEW MEXICO UNIFORM JURY INSTRUCTIONS-CIVIL § 14.3 (1966); WASHINGTON PATTERN JURY INSTRUCTIONS-CIVIL, supra note 17, at § 30.02.}

\footnote{20. See generally Appendix infra.}

\footnote{21. See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS, supra note 17, at § 30.01; INDIANA PATTERN JURY INSTRUCTIONS, supra note 17, at § 9.01; MICHIGAN STANDARD JURY INSTRUCTIONS, supra note 17, at § 30.00.}
danger is accentuated where a "blackboard" argument, approved in cases such as Caley v. Manicke,22 is employed. In Caley, the trial court permitted plaintiff's counsel to show the jury a chart that listed the compensable elements of damage and to assign a suggested dollar recovery to each element.23 The appellate court rejected defendant's argument that the use of the chart was improper because it might be construed as evidence, stating that the plaintiff's chart was simply a tool used in argument and that the chart was not admitted into evidence.24 According to the appellate court, problems in addition "almost by definition are better delineated on paper. To be meaningful, they should be seen and heard, not just heard."25 A jury presented with a "blackboard" argument is more likely to compensate the plaintiff separately for each element of damage. This increases the danger of overcompensation where there is an overlap of either the elements of damage or the arguments of counsel concerning the elements of damage.

**COMPENSABLE ELEMENTS OF DAMAGE**

**Pecuniary Elements of Damage**

**A. Lost Earnings**

In general, plaintiffs are entitled to compensation for earnings lost prior to the jury's verdict as well as the present value of earnings reasonably certain

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23. At 29 Ill. App. 2d at 333, 173 N.E.2d at 214, the chart appears exactly as follows:

1. Nature and Extent $50,140.90 $10,000.00
2. Pain and Suffering
   April 16, 1956
   11, 680 hours 11,680.10
   510 days 5,100.00
3. Future Pain 8,760.00
4. Hospital and Medical
   $873.00 + $415.90 1,288.90
5. Lost Earnings 2,432.00 2,880.00 5,312.00
6. Permanency 8,000.00

7. Workability

24. Id. at 340, 173 N.E.2d at 217. The court noted further that the chart does not go to the jury room. Id.

25. Id. On appeal, the Illinois Supreme Court approved the portion of the appellate court's opinion concerning the use of the chart. Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962). The supreme court, however, held that the mathematical argument concerning damages for pain and suffering was improper. Id. at 392, 182 N.E.2d at 208. See also text and accompanying notes 90-95 infra.
to be lost in the future. If the plaintiff is not working at the time of the injury, the defendant must still compensate the plaintiff for the fair market value of his time, even if the plaintiff would never have earned any wages. Similarly, a housewife is entitled to recover for the market value of lost earning capacity whether or not she planned to enter the workforce.

Personal injury plaintiffs are not always forced to accept an estimate of the market value of their time as the measure of their damages for lost earning capacity. If the plaintiff actually was employed at the time of the injury, he or she may recover for wages actually lost, rather than for the market value of the time. In such a situation, actual wage loss constitutes evidence of lost earning capacity.

Specific lost opportunities also may be shown as evidence of lost earning capacity. If the plaintiff has suffered only partial incapacity, the defendant need not compensate the plaintiff for any amount that the plaintiff earns or reasonably could earn. Under the collateral source rule, however, the defendant must compensate the plaintiff for lost earning capacity whether or not the plaintiff receives compensation for lost earnings from another source.

If an injury shortens the plaintiff's life expectancy, most American courts compute future earnings loss on the basis of the life expectancy the plaintiff

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26. See ILLINOIS PATTERN JURY INSTRUCTIONS, supra note 17, at § 30.07; INDIANA PATTERN JURY INSTRUCTIONS, supra note 17, at § 9.01(d); VIRGINIA JURY INSTRUCTIONS 23.01 (Doubles, Emroch & Merhige 1964); James, supra note 1, at 598.

27. DOBBS, supra note 1, at § 8.0. See also McLaughlin v. Chicago M. & S.P. & P. Ry., 31 Wis. 2d 378, 143 N.W.2d 32 (1966). In McLaughlin the plaintiff was a priest who had taken a vow of poverty and thus would never earn a salary. Nevertheless, because the plaintiff's injury reduced his earning capacity, he was entitled to compensation from the negligent defendant. Id. at 393-95, 143 N.W.2d at 39-40.

28. See Davis v. Renton, 113 Cal. App. 561, 298 P. 834 (1931); James, supra note 1, at 600.

29. DOBBS, supra note 1, at 541.


32. In Gooch v. Lake, 327 S.W.2d 132 (Mo. Sup. Ct. 1959), for example, a student's injury prevented him from playing football during his senior year of school. The court permitted the student to show that his inability to play football affected his starting salary as a football coach the following year. Also, in Complete Auto Transit, Inc. v. Reese, 425 P.2d 465 (Okl. Sup. Ct. 1967), the court permitted evidence that the injury prevented the plaintiff from completing a course that would have increased her earnings. See also DOBBS, supra note 1, at 541.

33. See James, supra note 1, at 598; MCCORMICK, supra note 1, at §§ 86, 87.

34. For example, the plaintiff may not suffer any wage loss if his employer does not discontinue his salary or the plaintiff receives disability benefits. Note that the New York Jury Instructions eliminate the collateral source rule. COMMITTEE ON PATTERN JURY INSTRUCTIONS, 1 NEW YORK PATTERN JURY INSTRUCTIONS-CIVIL, § 2:300 (1965):

If, in determining the amount of damage sustained by the plaintiff, you determine that the plaintiff did not actually suffer loss of his entire (wages, salary) but did in fact receive part of his (wages, salary) from (state source, e.g.,) his employer, you will award the plaintiff as damages for loss of (wages, salary) only the amount that he actually lost.
would have had if the injury had not been suffered. One commentator suggested that this rule overcompensates plaintiffs because no deduction is made for living expenses that the plaintiff would have incurred between the time of death and the time he would have died if he had not been injured. Still, the contrary rule leads to undercompensation because the plaintiffs dependents will suffer a loss of support during the plaintiff's "lost years."

B. Medical and Other Expenses

The plaintiff can recover the reasonable cost of all medical and hospital expenses incurred as a result of the injury. Recovery is permitted both for expenses incurred prior to the jury's verdict, and for the present value of the expenses reasonably certain to be incurred in the future. As in the case of lost earnings, the "collateral source" rule may entitle the plaintiff to compensation for medical expenses, even if those expenses have been reimbursed by a medical or accident insurance plan. In addition to the recovery for medical expenses, the personal injury plaintiff may be entitled to recover for other expenses that are reasonably related to the injury. The

35. See Prairie Creek Coal Co. v. Kittrel, 106 Ark. 138, 153 S.W. 89 (1912); West v. Boston & M.R.R., 81 N.H. 522, 129 A. 768 (1925); James, supra note 1, at 599 n.109; McCORMICK, supra note 1, at § 86 n.20, 21. See also Crecelius v. Gamble Skogmo, Inc., 144 Neb. 394, 395, 13 N.W.2d 627, 629 (1944), wherein it was noted:

In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition.

36. James, supra note 1, at 599 n. 109.

37. Id. See also Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 CAL. L. REV. 598 (1962) [hereinafter cited as Fleming], who suggested that awarding recovery for lost earning capacity during the "lost years" produces a windfall to the victim at the expense of the rights of his dependents. Id. at 608. Fleming also asserted that courts should reconsider the traditional rule in light of the continuing advances in diagnostic and clinical skills. Id. at 598. Fleming concluded that the dependent's interest in support should not be extinguished by the victim's prior recovery for lost earning capacity during the "lost years." Id. at 605.

The rule concerning lost wages differs from the rule concerning non-pecuniary losses where the plaintiffs are not permitted to recover for their "lost years." See text and accompanying notes 82-89 infra. Also, the payment for future pecuniary loss is discounted to present value. See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS, supra note 17, at §§ 30.07, 34.02; James, supra note 1, at 599.

38. See INDIANA PATTERN JURY INSTRUCTIONS, supra note 17, at §§ 30.07, 34.02; James, supra note 1, at 599; MINNESOTA JURY INSTRUCTION GUIDES, supra note 17, at § 159.

39. Rigley v. Prior, 290 Mo. 10, 233 S.W. 828 (1921); James, supra note 1, at 602.


plaintiff, for example, may be able to recover the cost of hiring a house-
keeper in the home or the expense of a trip that is necessary to safeguard
health.

Non-Pecuniary Elements of Damage

The problem of over and undercompensation is most acute with respect to
delay instructions relating to non-pecuniary elements of damage. Overcom-
pensation is fostered by two factors: a lack of mutually exclusive denomina-
tions of compensable elements; and the inclusion of items as consequent
elments of damage which actually represent statements of the injuries
themselves or guidelines in measuring an injury. Undercompensation may
occur when an element of damage that is properly compensable is either not
charged at all or charged in an ambiguous manner. The current Illinois pat-
tern jury instructions relating to non-pecuniary damages exemplify the sig-
nificant dangers of both under and overcompensation.

Combining only those elements relating to non-pecuniary damages, the
Illinois jury would receive the following instruction:

If you decide for the plaintiff on the question of liability, you must then
fix the amount of money which will reasonably and fairly compensate him
for any of the following elements of damage proved by the evidence to
have resulted from the negligence [wrongful conduct] of the defendant:

(1) The pain and suffering experienced [and reasonably certain to be
experienced in the future] as a result of the injuries.
(2) The [disability] [and] [disfigurement] resulting from the injury.
(3) The nature, extent and duration of the injury.
(4) The aggravation of any pre-existing ailment or condition.

Whether any of these elements of damages has been proved by the
evidence is for you to determine.

A. Pain and Suffering

The elements of pain and suffering employed in the instant jury instruc-
tion incorporate many distinct concepts. These concepts, consisting of pain,
physical suffering, inconvenience, mental suffering, and humiliation and embarrassment, are treated as separate elements of damage in many of the other pattern jury instructions reviewed. Each of these concepts will be examined in turn.

In its broadest sense, pain has been defined as a hurt experienced in the body because of an injury. McCormick characterized this sensation more precisely as the “immediate felt effect upon the nerves and brain of some lesion or injury to a part of the body.” Obviously, for pain as well as suffering to be compensable, the plaintiff must experience the effect; he or she must be conscious when the unpleasant experience occurs.

The plaintiff also may endure physical suffering, as distinct from pain, as a result of the defendant’s negligence. Physical suffering may immediately accompany the injury, or it may be an incident of medical treatment, such

51. See note 17 supra.
52. J. Stein, Damages and Recovery-Personal Injury and Death Actions § 9 (1972); [hereinafter cited as Stein], O’Quinn, Common Elements of Recovery in Personal Injury Cases, 18 S. Tex. L.J. 179, 182 (1977) [hereinafter cited as O’Quinn]. Dr. Yale Koskoff concluded that pain “is a sensation or a sensory experience like touch, but more varied and complex.” Koskoff, The Nature of Pain and Suffering, 13 Trial (July 1977) No. 7 at 22 [hereinafter cited as Koskoff]. Dr. Koskoff continued:

Like touch the impulses are conducted by pathways in the spinal cord to the thalamus—head station for sensory pathways. Both touch and pain project nerve fibers to the cerebral cortex. Pain appears to reach consciousness at the thalamic level—where it is experienced as “what hurts.” Touch is perceived and analyzed at the cortical level. For touch, the model of the telephone wire bringing messages to the brain is appropriate. For pain, the telephone line is inadequate. The private line model does not explain the variations in pain perception among individuals, nor in a given individual during varying conditions. It does not take into account chronic pain states, the effect of emotional disturbance, the relief afforded by procedures which do not follow known anatomical lines carrying pain messages—acupuncture, for example.

There is a new model to guide us toward a better understanding of the pain experience. . . . It proposes a mechanism whereby impulses bearing pain are modulated before they gain access to the brain. The modulation is accomplished by the fibers carrying touch messages. These fibers which are larger than the pain fibers exert the modulating influence within the gray matter of the spinal cord. As a result the amount of impulses bearing pain messages are determined not only by the extent and duration of stimulation of pain fibers but by the activity of the touch fibers. Touch fibers act as a “gate control system.” When they are active, the “gate” is more difficult to open. If “open,” it may be “closed” by activity of the fibers bearing touch messages. The brain sends impulses to affect the action of the gate. Anxiety opens the gate. Pleasurable stimulation closes it.

Id. at 22-23.
53. McCormick, supra note 1, at § 88.
55. See generally Stein, supra note 52, at §§ 9, 10; Olender, Proof and Evaluation of Pain and Suffering in Personal Injury Litigation, 1962 Duke L.J. 344; Plant, supra note 54, at 200.
as that arising from being placed in traction, a surgical operation for skin graft, or the Pasteur treatment for rabies. Physical suffering also may occur during the rehabilitation stage, for example, as accompanying physical therapy. The foregoing is only illustrative, for the variety of physical suffering that a person may be required to endure is almost endless. So long as plaintiff sustains physical agony or severe discomfort, plaintiff has suffered physically. Thus, everything from the agony suffered by the burn victim, to bed sores, to the aches of a person forced to use crutches may comprise compensable physical suffering.

Aside from the compensation for the pain and physical suffering that an injury causes, plaintiffs also should be permitted to collect for the inconvenience resulting from the injury. For example, in *Braddock v. Seaboard Airline R.R.*, an eight year old boy was returning home from school when he was run over by a locomotive. He suffered the loss of his left leg. The court permitted the plaintiff to recover for the annoyance and inconvenience involved in bi-weekly visits to a physician that would be necessary to adjust the plaintiff's prosthetic equipment over his fifty-six year life expectancy. Obviously, this was an inconvenience in the plaintiff's life which was not present prior to the injury. To the extent established by the evidence, the plaintiff in *Braddock* should also be able to recover for the inconvenience involved in all aspects of the use of the equipment, including putting it on, removing it, and maintenance. In short, the injured plaintiff should be compensated for inconvenience to the degree that he is required to spend more time, exert more energy, or pay more attention in conducting an activity as the result of his injury. Lack of a specific pattern jury instruction relating to inconvenience could lead to undercompensation.

The concept of mental suffering as an element of damage is neither easily defined nor described. Mental suffering includes immediate emotional responses to perceived events, such as fear or worry, as well as those less immediate feelings associated with the concepts of anxiety and depression. Dr. Yale Koskoff concluded that suffering "embraces those distressful experi-

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58. See *Lane v. Southern By.*, 192 N.C. 287, 134 S.E. 855 (1926).
59. See *Serio v. American Brewing Co.*, 141 La. 290, 74 So. 998 (1917).
63. 80 So. 2d 662 (Fla. Sup. Ct. 1955).
64. For example, consider the situation where the plaintiff wets his bed, takes two hours to eat a meal, or can only sit five minutes at a time.
ences which go beyond pain." He also noted that anxiety and depression are at the core of mental suffering.

Anxiety, the feeling of uneasiness and distress often derived from the anticipation of danger, is augmented by a feeling of helplessness. Anxiety may cause physical symptoms such as awkwardness in movement, nausea, or pain. Also, it is the cause of serious behavioral disturbances and the basis of personality changes associated with chronic somatic disorders. Depression,

65. Koskoff, supra note 52, at 25. See also Koskoff, Proving Suffering, 14 Trial (July 1978) No. 7 at 46.
66. Koskoff, supra note 52, at 23. Dr. Koskoff summarized the difference between pain (a sensation) and mental suffering (a mood) as follows:
1. Pain as a result of impact is experienced by all (for the most part) to the same degree under given circumstances depending on the nature and extent of bodily injury.
2. Pain experience does not vary significantly with the vulnerability of an individual in his life situation—nor with his adaptive capacities.
3. Suffering takes time to develop, except for the brief periods following unsustained painful trauma—and then suffering is minimal.
4. Suffering depends on the "memory" capacity of the nervous system.
5. Suffering is experienced to a different degree in different people following similar traumatic situations.
6. Suffering depends to a greater degree and with greater frequency on the circumstances of the trauma which may be without physical impact.
7. Suffering will vary in accordance with the patients’ vulnerability in his life situation and his adaptive capacities. In this light suffering may be considered an exacerbation of pre-existing anxiety/depression to the degree that it interferes with the person’s life-in-action.
8. Prolonged suffering will produce pain symptoms as one of the adverse effects of body function. Such maladaptive disturbances will augment suffering.

Thus a vicious cycle is established wherein pain produces suffering and suffering produces pain.

Id. at 24.

67. Koskoff, supra note 52, at 23. Dr. Koskoff stated the following:

Physical manifestations of anxiety—its behavioral patterns—are well known. There is increased muscle tension, tremor, increased tendon reflexes, awkwardness in movement, facial tics, tightening of the throat, unsteadiness. Cardiovascular manifestations of anxiety include precordial pain, tachycardia, overbreathing, nausea, cramps, and diarrhea.

The behavioral patterns of anxiety may be categorized in accordance with the degree of distress: (1) alertness, akin to vigilance in animals; (2) apprehension resulting from anticipation of a stressful experience with many of the symptoms described above; (3) "face" anxiety previously noted; and (4) panic, catastrophic anxiety attacks characterized by unrealistic behavior, fatigue states with impaired consciousness, and visceral dysfunction. Aggressive anti-social behavior may occur. [Footnotes omitted].

Id.
the mood most consistently associated with anxiety, is characterized by apathy, a sense of futility and loss of self worth.\textsuperscript{68}

In addition to the mood of anxiety or depression, mental suffering also includes the more temporal emotional reactions of fear, worry, fright, and shock. Finally, plaintiff's awareness of the elements of damage is also compensable as part of mental suffering. A plaintiff, for example, aware that he will experience future pain and loss of earnings because of an injury, might suffer mentally. In arguing for the recovery of damages for mental suffering, the plaintiff's attorney may not only point out the plaintiff's fright at the time of the injury\textsuperscript{69} and extreme anxiety and depression,\textsuperscript{70} but also fear of the consequences of the injury.\textsuperscript{71}

As is readily apparent, the concept of mental suffering as an element of damage is closely intertwined with the concept of mental condition as an injury. Sometimes the distinction between the two is not readily apparent. Fortunately, the determinative factor for purposes of analysis is a practical one: does the mental condition under discussion give rise to any element of damage other than mental suffering? If it does, the mental condition must be described as an injury; if it does not, it may be treated solely as the element of damage referred to as mental suffering.

\textsuperscript{68} Dr. Koskoff described the manifestations of suffering:

Suffering in the child is manifested as nightmares, enuresis, interference with appetite, regressive behavior in relation to parents and siblings, and poor school performance.

Suffering in the adolescent is manifested as increased volatile and rebellious behavior and increased concern with life and death and his own identity. Following trauma, hostility and guilt are prominent.

Suffering in the adult is also manifested by increased concern for maintenance of economic independence and for the ability to continue adequate job performance. Sexual dysfunction is almost invariable. This may be impotence or hypersexuality, frigidity or nymphomania. Somatic symptoms described previously are prominent. Interference with work, play, and social activity are characteristic.

Id.\textsuperscript{69}

\textsuperscript{69} See Illinois Cent. R.R. Co. v. Nelson, 212 F. 69 (8th Cir. 1914); Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); Plant, supra note 54, at 200.

\textsuperscript{70} See Redick v. Peterson, 99 Wash. 368, 169 P. 804 (1918); Plant, supra note 54, at 200.

\textsuperscript{71} See Halloran v. New England T. & T. Co., 95 Vt. 273, 115 A.143 (1921); James, supra note 1, at 604.

In Figlar v. Gordon, 133 Conn. 577, 53 A. 645 (1947), for example, the plaintiff was permitted to recover for her fear of developing epilepsy from a brain injury, even though the evidence was insufficient to prove that epilepsy would in fact develop.

Also, in Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905), the defendant injured the plaintiff when bits of glass were negligently included in a soft drink that the plaintiff consumed. The court stated that in swallowing several bits of glass, the plaintiff reasonably could entertain "a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury." Id. at 125, 52 S.E. at 153.

The plaintiff may attempt to recover damages both for injuries that already exist and for injuries that will develop in the future. See Lambert, Rheingold & Joost, Comments on Recent Important Personal Injury (Tort) Cases, 29 NACCA L.J. 46, 198 (1963) [hereinafter cited as
To illustrate, if the plaintiff is frightened by the sight of an oncoming car, the plaintiff's temporary fright is solely an element of damage—assuming it does not also give rise to another element of damage. If, however, as a result of the ensuing accident, the plaintiff becomes so apprehensive as to experience pain and is emotionally unable to ride again in an automobile, plaintiff's mental condition is best described as an injury giving rise to various elements of damage, one of which is mental suffering. Recognition of the foregoing distinction takes on practical importance in connection with the process of assuring that plaintiff's counsel does not request compensation twice for the same consequential damage.

Humiliation and embarrassment are two other aspects of mental suffering sometimes referred to separately in jury instructions regarding non-pecuniary damages. The presence of a separate instruction derives from the fact that humiliation and embarrassment are aspects of mental suffering usually associated solely with disfigurement. Occasionally, humiliation and embarrassment arising from a plaintiff's disfigurement has been held not to be a compensable element of damage in a personal injury action. The rationale for this minority rule was stated by the court in Southern Pac. Co. v. Hetzer. In Hetzer, the plaintiff's leg had been amputated above the knee due to the defendant railroad's negligence. According to the court, the humiliation that the person felt because of his disfigurement was too remote and indefinite to constitute an element of damages. Furthermore, evidence of humiliation was incapable of being tested at trial because the evidence rested "entirely in the belief of the sufferer." Thus, the court held that the plaintiff could not recover for humiliation or embarrassment.

Lambert. The NACCA Law Journal is a publication of the National Association of Claimant's Counsel of America.

The plaintiff can recover the elements of damage that a future injury will produce if he can meet his burden of proof that the future injury and consequent damages are reasonably certain to occur. See Kiker v. Davis, 103 Ga. App. 289, 118 S.E.2d 861 (1961) (plaintiff's lip would become depressed if damaged teeth were replaced with artificial ones); Schwarting v. Orgam, 123 Neb. 76, 242 N.W. 273 (1932) (epilepsy and insanity could develop); Lorenc v. Chemical Corp., 37 N.J. 56, 179 A.2d 401 (1962) (plaintiff required to accept an operation only if a reasonable prospect of restoration and relief from disability would result).

72. See, e.g., Southern P. Co. v. Hetzer, 135 F. 272 (8th Cir. 1905); Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 P. 922 (1907); Indianapolis & St. Louis R.R. Co. v. Stables, 62 Ill. 313, 321 (1872).

73. 135 F. 272 (8th Cir. 1905).

74. Id. at 274. The court further articulated the following:

But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case and evidence of it is inadmissible. . . . Mental pain of this character, the suffering from injured feelings, is intangible, incapable of test or trial. The evidence of it, like that which converted the alleged witches, rests entirely in the belief of the sufferer, and it is not susceptible of contradiction or rebuttal. Many other causes, the education, temperament, and sentiment of the sufferer, the mental attitude, the acts and
Most courts, however, have rejected the Hetzer rationale. Mental suffering which is reasonably certain to be endured in the future may be considered in assessing a personal injury plaintiff's damages. There is no more reason to ignore humiliation than there is to ignore other forms of mental suffering. The cause of humiliation is neither uncertain nor more difficult to prove than any other form of mental suffering. Adopting this rationale, most courts correctly permit plaintiffs to recover for the humiliation and embarrassment caused by an injury.

The comments to the various pattern jury instructions under review do not attempt to distinguish between the concepts of embarrassment and humiliation. The Restatement of Torts defines humiliation as "a feeling of degradation or inferiority or a feeling that other people will regard one with aversion or dislike." This author suggests the following distinction: embarrassment refers to the individual's own perception of himself, that is, feelings of degradation or inferiority; while humiliation refers to the individual's feelings in reaction to how he perceives others will regard him. In other words, embarrassment is a solitary state of mental suffering, while humiliation is a reaction to how the individual perceives others actually responding to him. While this distinction may be helpful for purposes of guiding arguments of counsel, it seems preferable to follow the lead of the Restatement.

words of his friends and acquaintances, concur with the accident to cause this mental distress in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant. And the amount of mental pain caused by any disfigurement necessarily varies so with the character, temperament, and circumstances of the injured person that no just measure of damages from it can be found. Such mental suffering is too remote, intangible, and unmeasureable to form the basis of any just adjudication. . . . Id.

75. Erie R.R. Co. v. Collins, 253 U.S. 77 (1920); Cunningham v. Pennsylvania R.R., 55 F. Supp. 1012 (E.D.N.Y. 1944); Patterson v. Blatti, 133 Minn. 23, 157 N.W. 717 (1916); James, supra note 1, at 604; Plant, supra note 54, at 201.

If the plaintiff has suffered a scar, instead of going out in public and thereby experiencing humiliation, the plaintiff may decide to stay at home. In such a case, the plaintiff also should recover not only for embarassment but also for loss of a normal life. The same is true to the extent that the plaintiff emotionally can no longer engage in non-economic activities. Of course, the plaintiff must satisfy his burden of proof that the scar caused these damages.


78. RESTATEMENT OF TORTS § 905(d) (Tent. Draft No. 19, 1973). To "humiliate" means "to reduce to a lower position in one's own eyes, or in the eyes of others; to injure the self-respect of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1101 (3rd ed. unabridged 1961). To embarrass means to "disconcert." Id. at 739.
and instruct the jury by including both concepts as part of that element of damage simply denominated as "humiliation."

Personal injury plaintiffs can recover for the "pain and suffering" elements of damage that are reasonably certain to occur in the future as well as those that occur prior to the jury's verdict. Unlike the award of future pecuniary damages, an award of future non-pecuniary damage is not reduced to present value. If an injury shortens the plaintiff's life, he may recover pecuniary damages for his "lost years." However, the majority of courts refuse to permit recovery for non-pecuniary damages for the "lost years."
Representing the minority approach, the Third Circuit Court of Appeals recognized, in part, a right of recovery for non-pecuniary damages for lost years. While English courts, for example, base recovery on proof of "loss of life expectancy" alone, recovery for non-pecuniary damages for the "lost years" was based solely on probable components of damages, such as lost ability to dance, bowl, or swim. Although in most American jurisdictions the rule remains that non-pecuniary damages for the "lost years" are not recoverable, it seems highly unlikely that many defense counsel would voluntarily introduce evidence of the plaintiff's shortened life expectancy to obtain the benefit of this substantive rule. On the contrary, it is suggested that neither the plaintiff nor the defendant generally introduces such evidence. In such an event, compensation for pain and suffering is based upon life expectancy set forth in mortality tables.

In arguing for the recovery of "pain and suffering" damages, attorneys frequently will argue that a certain period of time, such as an hour, is worth a certain amount of money. Some courts have held that attorneys cannot use mathematical formulae to argue "pain and suffering." In support of their refusal to permit the mathematical or per diem argument, some courts state that the argument is not grounded on the evidence. Others apparently fear that the jury will be unduly impressed by the apparent reliability of the mathematical calculations. Most courts, however, have rejected these arguments and permit counsel to use the mathematical approach.

In American courts, where a plaintiff is aware of his reduced life expectancy, mental suffering has been held compensable. Rhone v. Fisher, 224 Md. 223, 167 A.2d 773 (1961); Choicener v. Walters Amusement Agency, 269 Mass. 341, 168 N.E. 918 (1929). See also Dobbs, supra note 1, at 549.

86. Dobbs, supra note 1, at 549.
87. 359 F.2d at 347 n.3. The Court of Appeals remanded the Downie case because the trial court's instructions did not properly specify the factors that the jury should consider in awarding damages based on loss of life expectancy.
88. See note 84 supra.
89. See note 82 supra.
90. Dobbs, supra note 1, at 546 noted:
   If the calculation is put on the basis of an hour, and a figure of $1 per hour is used for 16 hours a day, the resulting figure is $5840 per year. On this basis a pain and suffering award for a plaintiff who will have permanent pain over a 20-year lifespan is $116,800. The figure can easily be manipulated by focusing on narrower time segments. For instance, "5 cents per minute" is three times the above figure, though it might impress many a juror as a modest sum for the pain plaintiff will suffer.
94. See Baron Tube Co. v. Transp. Ins. Co., 365 F.2d 858 (5th Cir. 1966).
reasoning that the mathematical argument does not purport to be evidentiary, but is simply an illustrative way of helping the jury to understand the extent of the plaintiff’s injuries.\footnote{See Dobbs, supra note 1, at 546, citing Beagle v. Vasold, 65 Cal. 2d 166, 53 Cal. Rptr. 129, 417 P.2d 673 (1966). That opinion stated that “[i]f the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation ... there is no justification for prohibiting counsel for making a similar deduction in argument.” \textit{Id.} at 176, 53 Cal. Rptr. at 134, 417 P.2d at 678.}

\textbf{B. Disability and Disfigurement}

An instruction treating disfigurement as a separate element of damage creates a definite likelihood of plaintiff overcompensation. Problems associated with the term disfigurement arise chiefly from the fact that disfigurement is sometimes characterized as an element of damage. Rather, disfigurement should be considered an injury, which like other injuries, can cause several elements of damage. For example, assume that plaintiff is disfigured from a permanent scar which is the result of a facial cut sustained in an automobile accident. As a result of this injury, plaintiff may suffer pain, humiliation, mental suffering, loss of normal life and any other compensable element of damage. Thus, if plaintiff happens to be employed as a model, loss of earning capacity also will be an element of damage. Of course, expenses for medical services are compensable. Where disfigurement is treated as an element of damage rather than an injury, counsel may argue, “How much is it worth for this young gal to go through life with a scar on her face?” If counsel also asks for separate compensation for other resulting elements of damage—such as mental suffering, humiliation or loss of normal life—the damages may overlap, resulting in overcompensation to the plaintiff.

In \textit{Houston Transit Co. v. Felder},\footnote{Id. at 434, 208 S.W.2d at 883. The court reasoned as follows: “the jury’s consideration of ... [damages] must be appraised in the light of ordinary reason and everyday experience. Distinctions which are too fine are apt to lead to needless perplexities and purely legalistic results.” \textit{Id. Compare} International-Great, N.R. v. King, 41 S.W.2d 234 (Tex. Comm’n App. 1931), with the cases cited therein indicating that if separate answer lines are provided for each element, the instruction would be found improper. In \textit{King}, the court held that separate answer lines for “bodily injuries,” “bodily inconveniences,” “physical pain and suffering” and “decreased earning capacity” permitted double recovery and were calculated to confuse and mis-} the Texas Supreme Court faced the argument that recovery for disfigurement overlaps recovery for other elements of damage. In \textit{Felder}, an assault and battery action, the trial court instructed the jury to compensate the plaintiff independently for pain, mental anguish and disfigurement. The supreme court implicitly recognized the inherent danger of overlapping damages, yet concluded that the instruction would not lead to double recovery for mental anguish. The court apparently reached this conclusion on the ground that the jury was instructed to give only one answer for the total of plaintiff’s damages.\footnote{146 Tex. 428, 208 S.W.2d 880 (1948).} The weakness of this
rationale is that the danger of overcompensation exists whether or not the jury is instructed to give a separate answer for each element of damage. Overcompensation is precisely the intrinsic danger in an instruction to consider mental anguish as a separate element of damage when it also comprises an element of damage arising from the disfiguring injury.

Similarly, overcompensation may arise from recognition of disability as an element of damage. In such cases, counsel may argue that plaintiff is no longer a whole human being because he or she will have to go through life with only one arm. How much is that worth? Such an argument equates the element of disability with a statement of injury. Following such an argument, the juror might consider the instruction to compensate the plaintiff for the entire injury, with no criterion of damage. Thus, with respect to a hypothetical plaintiff who has lost an arm, the jury might view the loss of the arm as the disability and the instruction to compensate the plaintiff for "disability" as an instruction to compensate for the loss of the arm. The jury, however, also will be instructed to award several other elements of damage for the loss of the arm. Accordingly, the plaintiff's recovery for disability actually may overlap recovery for other elements of damage, such as pain, inconvenience, physical suffering, humiliation, and most importantly, mental suffering.

The concepts of disability and disfigurement also include the element of diminished ability to lead a normal life. Recovery for diminished ability to lead a normal life compensates plaintiff for those non-pecuniary aspects of damage relating to plaintiff’s inability to pursue or obtain the pleasurable aspects of life, such as recreation, hobbies, enjoyment of one's senses, marriage and children. The majority view permits compensation for the loss of a normal life.

lead the jury. The Felder court stated that its holding did not run counter to King. 146 Tex. 434, 208 S.W.2d 883. See also O'Quinn, supra note 52, at 206, citing International-Great N.R. v. King, 41 S.W.2d 234, (Tex. Comm'n App. 1931) wherein it was noted that "[t]he humiliation of disfigurement is part of mental anguish; and if because of separate answer lines, the jury is called upon to give a full award for disfigurement, there can be a danger of double recovery such that an instruction may be necessary." Id. at 237.

98. See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS, supra note 17, at § 30.04; MINNESOTA JURY INSTRUCTION GUIDES-CIVIL, § 155 (1963); SOUTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL, supra note 17, at § 30.04 and other states listed in note 17 supra.

99. Of those jurisdictions studied, only Florida has a separate instruction for loss of normal life:

If you find that the plaintiff has been permanently injured to any extent, or will continue to suffer therefrom, you may take into consideration his future pain and suffering, and the effect the same may have upon his normal life; and any impairment of his earning capacity, and his future loss of earnings as a direct and proximate result of his injuries.

USSERY, INSTRUCTIONS FOR FLORIDA, § 417 at 352 (1954).

100. Adkins v. Kelley, 244 Ark. 199, 204, 424 S.W.2d 373, 375 (1968); Lambert, supra note 71, at 198 and cases cited therein. See also cases cited in notes 102 & 103, infra.

101. See Pierce v. New York Cent. R.R. Co., 409 F.2d 1392 (6th Cir. 1969); McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964); DOBBS, supra note 1, at 548-49; Comment, Loss of
Damage awards based on the loss of ability to lead a normal life have been approved in many situations, including one’s diminished prospects of marriage and inability to bear children.\textsuperscript{102} In arguing for recovery for loss of a normal life, plaintiff’s counsel should, where supported by the evidence, request compensation for plaintiff’s inability to engage in non-economic recreational activities as part of plaintiff’s loss of normal life.\textsuperscript{103}

Furthermore, most courts have held that recovery for loss of a normal life is independent of consideration of recovery for lost earning capacity or for pain and suffering.\textsuperscript{104} A minority of courts, however, have denied recovery for loss of a normal life altogether.\textsuperscript{105}

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\textbf{Enjoyment of Life—Should it be a Compensable Element of Personal Injury Damages?} 11 Wake Forest L. Rev. 459, 466 (1975) [hereinafter cited as Comment].

\textsuperscript{102} See Riggs v. Metcalf, 315 S.W.2d 791 (Mo. Sup. Ct. 1958) (plaintiff was unable to swim, dance, or be a housewife); Davis v. Zucker, 106 N.E.2d 169 (Ohio App. 1951) (woman suffered diminished prospects of marriage). Damages also would be appropriate for loss of ability to have children. See Denver & Rio Grande Ry. v. Harris, 122 U.S. 597 (1887) wherein the Court noted:

One of the consequences of the wound received by the plaintiff at the hands of defendant's servants was the loss of the power to have offspring—a loss resulting directly and proximately from the nature of the wound. Evidence of this fact was, therefore, admissible, although the declaration does not, in terms, specify such loss as one of the results of the wound. The court very properly instructed the jury that such impotency, if caused by the defendant's wrong, might be considered in estimating any compensatory damages to which the plaintiff might be found, under all the evidence, to be entitled.

\textit{Id.} at 608.

\textsuperscript{103} In Honecutt v. Wabash R.R. Co., 337 S.W.2d 50 (Mo. Sup. Ct. 1960), for example, the court upheld the award of damages for the following consequences of the plaintiff’s injury: he was forced to forego playing ball, engaging in scouting activities, and playing pinochle with his wife. \textit{Id.} at 52.

One commentator noted that in awarding damages for loss of a normal life, courts have considered the following factors: "loss of the sense of smell or taste; and inability to dance, bowl, swim, or engage in other recreational activities; an ability to engage in usual family activities; or even a diminished capacity to enjoy old age." Comment, supra note 101, at 459. See also cases cited in Lambert, supra note 71, at 198-99.

Whether or not a plaintiff suffered a reduction in earning capacity, a forced change in occupation also might lead to recovery for diminished capacity to enjoy life. See McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964). In \textit{McAlister}, the court stated that although evidence of a forced change in occupation was admissible to show loss of enjoyment of life, the plaintiff's evidence was not substantial. \textit{Id.} at 457-58, 197 A.2d at 146.

A change in personality is also an injury that justifies compensation for such elements as mental suffering and loss of a normal life. See SUTHERLAND, supra note 1, at 4469:

When a healthy person is thus made permanently an invalid; deprived largely of his capacity to enjoy life; suddenly transformed from a mental state of cheerfulness and hope to another of melancholy by day and unrest and bad dreams by night, is he not entitled to some compensation for this physical and psychical alteration in himself.

\textsuperscript{104} For example, in Shebester, Inc. v. Ford, 361 P.2d 200 (Okla. Sup. Ct. 1961), the court approved an instruction that allowed the jury to compensate the plaintiff for loss of earning capacity, pain and suffering, and "permanent loss of health and detriment to his body as a whole." \textit{Id.} at 201. The \textit{Shebester} court held that recovery for loss of health was equivalent to a recovery for permanent impairment. \textit{Id.} at 203. This resulted in a reduction of the plaintiff's
In denying recovery for diminished ability to lead a normal life, some minority view courts have noted the difficulty in measuring the recovery.\textsuperscript{106} However, difficulty in measurement does not indicate that a right to recovery should not exist.\textsuperscript{107} The general rule is that when the cause and existence of damages are established, courts will not deny recovery because the damages are difficult to ascertain.\textsuperscript{108} Furthermore, a recovery for pain, mental suffering, or humiliation is arguably as speculative as a recovery for the diminished capacity to enjoy life.\textsuperscript{109} Accepting these arguments, most courts rightly reject in whole or in part the view that recovery is too speculative.\textsuperscript{110}

capacity to pursue the course of life that she might have otherwise pursued. \textit{Id.} at 204, quoting \textit{Enid City Ry. Co. v. Reynolds}, 34 Okla. 405, 410, 126 P.2d 193, 195 (1912). Moreover, such impairment was distinct from her recovery for lost earning capacity. \textit{Id.} at 203.

See cases cited in note 102 \textit{supra}. Some courts have held that damages for loss of enjoyment of life are an aspect of damages for pain and suffering. See \textit{District of Columbia v. Woodbury}, 136 U.S. 450, 459 (1890); Comment, \textit{supra} note 101, at 468. In any event, recovery for diminished capacity to enjoy life is compensable in addition to plaintiff's mental suffering over the loss of enjoyment of life. Loss of normal life also is distinct from the element of inconvenience.

105. For example, in \textit{Hogan v. Sante Fe Trail Transp. Co.}, 148 Kan. 720, 85 P.2d 28 (1938), the plaintiff's little finger was injured, preventing her from playing the violin. Although the plaintiff earned relatively little as a musician, she was an accomplished violinist and playing the violin was important to her. \textit{Id.} at 726, 85 P.2d at 31. The plaintiff testified that the violin "was my life work. It is just part of me. Every place I go, if I don't have my violin why I wonder where it is." \textit{Id.} The jury awarded the plaintiff four thousand dollars for loss of enjoyment of playing the violin. On appeal, the Kansas Supreme Court held that the award was too speculative and that the verdict permitted double compensation because the jury had made a separate award for pain and suffering. See Comment, \textit{supra} note 101, at 461, for a discussion of the \textit{Hogan} case.

See also \textit{City of Columbus v. Strassner}, 124 Ind. 482, 25 N.E. 65 (1890); \textit{Locke v. International-Great N.R. 25 Tex. Civ. App.} 145, 60 S.W. 314 (1901); \textit{DOBBS, supra} note 1, at 548 n.58.


108. \textit{MCCORMICK, supra} note 1, at § 27.


\begin{quote}
Mental suffering differs in degree with individuals, with their sex, circumstances, positions in life. But so do men differ in sensing physical pain; so do they differ in the mental suffering occasioned by physical pain alone. \ldots Yet the law has scales by which it measures the compensation for suffering of this kind, and measures it, of course, in terms of money.
\end{quote}

110. \textit{See note 101 supra}. \textit{Powers v. City of Augusta}, 191 F. 647 (E.D. Ky. 1911), was decided prior to the United States Supreme Court's decision in \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938). In \textit{Powers}, a woman suffered a broken kneecap which permanently impaired the use of her leg. Rejecting the rule that damages for permanent injury should be limited to loss of earning capacity that was outlined in \textit{Lexington Ry. Co. v. Herring}, 29 Ky. 794, 798-99, 96 S.W. 558, 562 (1906), the \textit{Powers} court held that when the plaintiff is a wage-earner and the injury reduces her earning capacity, substantial justice might be done even if her recovery is limited to pain, suffering, and loss of earnings. 191 F. at 655.

However, when the plaintiff is not a wage-earner, or when the injury does not affect her ability to earn money, it would be unjust to limit her recovery to loss of earnings. The court
C. Nature, Extent and Duration

The jury instructions under consideration recognize “the nature, extent, and duration” of the plaintiff’s injury as a separate compensable element of damage. The Committee Notes following Illinois Pattern Jury Instruction 30.02 state that “[i]t is difficult to imagine an injury case in which this instruction will not be appropriate.”\(^{111}\) Thus, trial judges are required to instruct juries to compensate the plaintiff for the nature, extent, and duration of his injury in addition to the various elements of damage that resulted from the injury.

To analyze the recovery for the “nature, extent, and duration” of an injury, it will be helpful to return to our hypothetical plaintiff who is alleging in his personal injury action that the defendant’s negligence caused the loss of his arm. The nature of the injury is the loss of an arm. The extent of the injury is the complete loss of the arm. Finally, the duration of the injury is permanent. Thus, pursuant to a jury instruction of “nature, extent and duration,” the judge is instructing the jury to compensate the plaintiff for the complete and permanent loss of an arm. In addition, the judge also will instruct the jury to compensate the plaintiff for those elements of damage resulting from the complete and permanent loss of one arm.\(^{112}\) Therefore, the jury must assign a value to the plaintiff’s complete and permanent loss of an arm, with a separate value assigned to those elements of damage that flow from the loss of the arm.\(^{113}\) Where such dual recovery is awarded by the jury, the result must of necessity be overcompensation to the personal injury plaintiff.\(^{114}\) Although a few of the thirty states examined recognize “nature, extent and duration” as a separate element of damage,\(^{115}\) only the instructions in Illinois, South Dakota and Washington in fact suggest that “nature, extent and duration” should be treated as a separate element. Moreover, the cases cited in the comments to the Illinois instructions which list “nature,

\(^{111}\) ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL, supra note 17, at § 3.02, Notes on Use.
\(^{112}\) For a similar situation see text and accompanying notes 96-98 supra.
\(^{113}\) ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL, supra note 17, at § 30.04-30.07.
\(^{114}\) Overcompensation is particularly likely in light of the “blackboard” argument. See text and accompanying notes 22-25 supra.
\(^{115}\) See note 19 supra.
extent, and duration” as an element of damage, fail to support its treatment as a separate element.116

The better treatment of “nature, extent, and duration” appears in the jury instructions for Michigan, Wisconsin, Minnesota, and Colorado. In these states, the instructions treat the nature, extent, and duration of the injury as a measure of the other elements of damage and not as a separate compensable element.117 Pursuant to these instructions, the amount that the jury awards for the various compensable elements of damage that flow from an injury depends on the injury’s nature, extent, and duration. Thus, these

116. The comment to ILLINOIS PATTERN JURY INSTRUCTION—CIVIL, § 30.02 cites three cases as authority for the proposition that the nature, extent, and duration of an injury constitute a separate element of damage. In the first case, Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 N.E.857 (1907), a dynamite explosion at the defendant’s mine injured the plaintiff. The court’s only reference to “nature, extent, and duration” was a quotation from the trial judge’s instruction to the jury. The trial court had instructed the jury that, in assessing the plaintiff’s damages, the jury should “consider” the nature, extent, and duration of the plaintiff’s injury. Furthermore, in the same instruction, the judge stated that the jury should “consider” other factors, including: “all the facts and circumstances as proven by the evidence,” suffering, medical expenses, and lost earnings. Id. at 241, 81 N.E. at 860.

Although the Thil court approved the trial court’s instruction, the court did not discuss how the jury’s consideration of the nature, extent, and duration of the injury should enter into the computation of the plaintiff’s damages. Id. at 244, 81 N.E. at 861. Thus, Thil does not support the proposition that the nature, extent, and duration of the injury constitute a separate compensable element of damage.

In the second case, McDaniel v. Terminal R.R. Ass’n, 302 Ill. App. 332, 23 N.E.2d 785 (4th Dist. 1939), the plaintiff was injured when the defendant’s employees dropped a wooden girder off of a bridge where the employees were working. The trial court instructed the jury to “take into consideration” the duration of the plaintiff’s injuries. Id. at 350, 23 N.E.2d at 792. In addition to the duration of the injury, the trial judge also instructed the jury to consider the extent of the injuries caused by the employee’s negligence, the plaintiff’s past and future pain and anguish, and finally the extent to which the plaintiff was unable to pursue any occupation that he could have pursued prior to the injury. Id. at 349-51, 23 N.E.2d at 792. As in Thil, the McDaniel court neither stated that “nature, extent, and duration” was a compensable element of damage, nor discussed the proper consideration of the nature, extent, and duration of the injury.

Finally, in the third case, Sprickerhoff v. Baltimore & Ohio R.R. Co., 323 Ill. App. 340, 55 N.E.2d 532 (4th Dist. 1944), the trial court instructed the jury to consider the nature and extent of the plaintiff’s injuries. As in Thil, the Sprickerhoff court did not discuss whether the jury should consider “nature, extent, and duration” as a separate element of damage. Id. at 348-51, 55 N.E.2d at 536-37. Thus, the Illinois cases cited in the comment to § 30.02 do not support the proposition that “nature, extent, and duration” should be considered as a separate compensable element of damage in Illinois personal injury cases.

Furthermore, the Indiana cases on point also do not support the proposition that “nature, extent, and duration” should be considered a separate compensable element of damage. See McClure v. Miller, 229 Ind. 422, 435, 98 N.E.2d 498, 503-504 (1951); City of Goshen v. England, 119 Ind. 368, 378, 21 N.E. 977, 981 (1889).

117. See MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL, § 30.01 (Supp. 1972):

If you decide that the plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates him for
instructions avoid the problems that arise when the court instructs the jury to compensate the plaintiff once for the nature, extent, and duration of the injury and again for the various elements of damage that the injury produced.118

The view that the nature, extent, and duration of the injury should be considered a measure of the various elements of damage, on first blush would seem to have been rejected by the Arkansas Supreme Court in Adkins v. Kelley.119 In Adkins, the plaintiff was an employee of the defendant's restaurant, who sustained an eight-inch laceration of his neck. At trial, the plaintiff requested an instruction that included the nature, extent, duration, and permanency of the injury as a separate compensable element of dam-

each of the elements of damage which you decide has resulted from the negligence of the defendant, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:

[here insert the elements of damage by reading the applicable instructions, such as:

30.02 Pain and Suffering, etc.
30.03 Disability and Disfigurement
30.04 Aggravation of Pre-existing Ailment or Condition]

In Wisconsin, in compensating the plaintiff for past and future disability, the jury is instructed as follows:

[consider the nature of his injuries, the effect produced thereby in the past, and the effect which it is reasonably certain such injuries will produce in the future; bearing in mind his age, his prior mental and physical condition, and the probably duration of his life.

WISCONSIN JURY INSTRUCTIONS—CIVIL, § 1750 (1962). However, this instruction regarding the measurement of damages does not appear in the Wisconsin instructions concerning other elements of damage. Similarly, the instructions in Minnesota and Colorado state that the jury should consider the nature and extent of the injury in assessing the elements of damage. See MINNESOTA JURY INSTRUCTION GUIDES, supra note 17, at § 155; COLORADO JURY INSTRUCTIONS—CIVIL, § 6.1 (1969).

118. See text and accompanying notes 112-14 supra. The view that the nature, extent, and duration of the injury should be considered a measure of the various elements of damage was approved in Caley v. Manicke, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961) (Dove, J., dissenting):

Every juror is acquainted with pain and suffering and compensation for these elements of damage must rest in the discretion of the jury, guided by common sense. And it is proper to instruct the jury in cases of this character that it is their province to determine the damages plaintiff should recover, that in so doing they should fix an amount of money which will reasonably and fairly compensate the plaintiff for the elements of damage proven by the evidence including pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries the plaintiff sustained, that in determining the amount of plaintiff's damages the jury should take into consideration the nature, extent and duration of his injuries and their verdict must be based on evidence and not upon speculation, guess or conjecture.

Id. at 349, 173 N.E.2d at 221.

119. 244 Ark. 199, 424 S.W.2d 373 (1968).
The trial court, however, modified the plaintiff's instruction. The court instructed the jury to compensate the plaintiff for the various elements of damage that he suffered and to consider the nature, extent, duration, and permanency of the injury as a measure of the damages to assign to the elements.

On appeal, the Arkansas Supreme Court rejected the trial court's modification and concluded that the recovery for "permanency" of the injury compensated the plaintiff for "the non-pecuniary, non-pain aspects of the disabled condition, such as deprivation of a normal life and of a chance to pursue non-economic hobbies or recreation." The court cited Shebester.

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120. The plaintiff requested the following instruction:

If you find for the plaintiff, you must then fix the amount of money which you find will reasonably and fairly compensate him for any of the following elements of damages:

1. The nature, extent, duration and permanency of the injury.
2. The reasonable expense of any necessary medical care, treatment and services received.
3. Any pain, suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.
4. The value of any earning lost or reasonably certain to be lost in the future.
5. The present value of any loss of earning capacity or ability to earn in the future.
6. Any scars and disfigurement or visible results of his injury.

Id. at 202, 424 S.W.2d at 374.

121. The trial court instructed the jury:

If you find for the plaintiff, you must then fix the amount of money which you find will reasonably and fairly compensate him for any of the following elements of damages:

1. The reasonable expense of any necessary medical care, treatment and services received.
2. Any pain, suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.
3. The value of any earnings lost.
4. The present value of any loss of earning capacity or ability to earn in the future.
5. Any embarrassment or mental anguish suffered by reason of any scars and disfigurements or visible results of his injury.

In arriving at these amounts, you may take into consideration the nature, extent, duration and permanency of his injuries.

Whether any of these things have been proved is for you to decide.

Id. at 202-03, 424 S.W.2d at 374-75. In rejecting the plaintiff's request to treat "nature, extent, duration, and permanency" as a separate compensable element, the trial court failed to follow the ARKANSAS MODEL JURY INSTRUCTION—CIVIL, § 2202 (1974). The appellate court found this to be in error. Id. at 203, 424 S.W.2d at 375.

122. 224 Ark. at 204, 424 S.W.2d at 375, citing Lambert, supra note 71, at 198. In defining the element of "permanency," the court also cited Woods, Earnings and Earning Capacity as Elements of Damage in Personal Injury Litigation, 18 ARK. L. REV. 304 (1965) where it was noted:

Loss of earning capacity as an element of damages is sometimes confused with permanency of the injury, which is universally recognized as a separate element of damage. A lawyer or minister might lose an arm with no loss of earning capacity,
Inc. v. Ford, where the Oklahoma Supreme Court held that "permanent loss of health and detriment to [the] body as a whole" was compensable. As previously noted, the court in Shebester also concluded that recovery for permanent loss of health was independent of any recovery for pain, mental suffering and loss of earning capacity. Thus, adopting the principles articulated in Shebester, the Adkins court held that the nature, extent, duration and permanency of an injury constituted a separate compensable element of damage.

The element, however, of damage which the Adkins court labeled as "nature, extent, duration, permanency," equivalent to recovery for diminished ability to lead a normal life, is usually recoverable under the rubric of disability. The trial court in Adkins, in accordance with the Arkansas jury instructions, did not instruct the jury to compensate the plaintiff separately for disability. The Arkansas approach is similar to that employed in Indiana, where disability is not an element but permanency is. However, in Illinois, Washington and South Dakota, three other states in which "nature, extent, and duration" constitutes a separate element of damage, courts also instruct the jury to compensate the plaintiff separately for disability. Unlike the plaintiff in Adkins, plaintiffs in Illinois, Washington and South Dakota can recover for diminished ability to lead a normal life without instructing the jury to award separate compensation for the nature, extent, duration and permanency of an injury. Thus, the Arkansas court's decision in

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124. Id. at 201.
125. 244 Ark. at 204-05, 424 S.W.2d at 375.
126. See notes 98-100 and accompanying text supra. The Shebester court stated the following: "It is a rule in personal-injury actions that recovery may be had for permanent injuries or lasting impairment of health—that is, for the loss resulting from complete or partial disability in health, mind, or person thereby occasioned." 361 P.2d at 203, citing 15 AM. JUR., DAMAGES § 75 (1938). Instructions in states which instruct juries to compensate the plaintiff for "permanency" do not also list "disability" as a separate compensable element of damage. See INDIANA PATTERN JURY INSTRUCTIONS, supra note 17, at 9.01(b); ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL, supra note 17, at § 2202.
127. "Disability" is not one of the compensable elements of damage in the ARKANSAS MODEL JURY INSTRUCTIONS.
128. See Appendix and note 126 supra.
129. ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL, supra note 17, at § 30.04; SOUTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL, § 30.04 (1968); WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL § 30.04 (1967).
Adkins does not support the view that "nature, extent, and duration" of an injury should constitute a separate compensable element of damage if either disability or loss of ability to lead a normal life is also included as a separate element. In summary, the nature, extent, and duration of an injury should be treated in a pattern jury instruction as a measure of the compensable elements of damage and not as an element of damage.

D. Aggravation of Pre-existing Ailment or Condition

If the plaintiff at the time of the accident was already suffering from an ailment or condition, a defendant must compensate the plaintiff only for the aggravation of such ailment or condition resulting from the negligence or wrongful conduct. Thus, as with nature, extent and duration, this element of damage, when properly understood, is merely a measure of compensable injuries. In other words, the defendant is responsible for compensating plaintiff for pre-existing ailments or conditions only to the degree that the negligence resulted in an alteration in either the nature, extent, or duration of the plaintiff’s ailment or condition. Any change in the plaintiff’s ailment or condition, being an injury in itself, is measured by its consequences to the plaintiff in the form of the appropriate elements of damage.

Proposed Jury Instructions

The jury instructions currently employed in the jurisdictions reviewed may be divided roughly into three categories. Many states employ jury instructions in which each element of damage is contained in a separate instruction, with no clear instruction given concerning how each element of damage should be measured in light of the injuries proven. In the second type of instruction, each of the various elements of damage, rather than being presented in separate instructions, are all contained in instructions dealing with disability and past damages. These instructions differ from those in most states in that they do attempt to guide the jury in assessing the elements of damage. They also are lengthy and the manner in which the

130. See, e.g., Alabama Pattern Jury Instructions—Civil § 11.04-11.11 (1974); Indiana Pattern Jury Instructions; supra note 17, at §§ 9.01(a)-9.01(h).
131. See, e.g., Wisconsin Jury Instructions—Civil, § 1750 (1962):

Personal Injuries: Past and Future Disability

Question—asks as to what sum of money will fairly and reasonably compensate the plaintiff for the personal injuries he sustained as a result of the accident.

You will answer this question by inserting such a sum of money as you are satisfied will fairly and reasonably compensate the plaintiff for such pain and suffering (disfigurement) and such impairment of his (mental and bodily) health, physical abilities and bodily functions as you are satisfied he has suffered to date and is reasonably certain to suffer in the future as a consequence of his injuries.
elements of damage are grouped may confuse the jury. The third type of instruction lists each element of damage which has a basis in the evidence separately within a single instruction. In addition, the jury also measures each element of damage by its nature, extent and duration.132

As has been demonstrated, the existing jury instructions contain certain overlapping elements of damage. Accordingly, attorneys may be arguing for recovery of the same loss under more than one label. In response to these problems, a viable proposal for jury instruction reform should include instructions to the jury as to each separate recoverable element of damage and as to guidelines in measuring an injury but not as to injuries themselves. This would enable courts and attorneys to counteract arguments likely to result in double recovery of compensable damages. In addition, such instructions should assist the jury in its deliberation so as to insure that no compensable items of damage are overlooked. Finally, the instructions must be comprehensible to the jury in light of the arguments presented by counsel.

The following proposed jury instructions conform to the third type discussed above. Only elements of damage and not characterizations of injuries are included. Finally, the amount of compensation for each element depends on the jury’s assessment of the injury’s nature, extent, and duration.

Proposed Instructions

Measure of Damages—General Instruction

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him

In arriving at your answer to this question you will consider the humiliation, embarrassment, worry and mental distress, if any, which the plaintiff has endured [sic] in the past and is reasonably certain to endure in the future; consider also to what extent his injuries have impaired and will impair his ability to enjoy the normal activities, pleasures and benefits of life. Take into consideration the nature of his injuries, the effect produced thereby in the past and the effect it is reasonably certain such injuries will produce in the future; bearing in mind his age, his prior mental and physical condition and the probably [sic] duration of his life.

If you are satisfied that the plaintiff has suffered an impairment of this future earning capacity as a natural consequence of his injuries, you will then include in your answer to Question such further sum as will fairly and reasonably compensate him for such impairment of earning capacity. The amount, if any, to be awarded by you as damages for impairment of his earning capacity is the difference between what the plaintiff will reasonably be able to earn in the future in view of his injuries, and what he would have been able to earn had he not been injured.

132. See ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL, supra note 17, at §§ 30.01-30.16; MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL, § 30.00-30.08 (1972); MICHIGAN STANDARD JURY INSTRUCTIONS, supra note 17, at § 30.01:

If you decide that the plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates him for each of the elements of damage which you decide resulted from the negligence of the defendant, taking into account the nature and extent of the injury.
for any of the following elements of damage proved by the evidence to
have resulted from the negligence [wrongful conduct] of the defendant:
[Here insert those elements of damage 1-9 which have a basis in the
evidence.]
Whether any of these elements of damage have been proved by the
evidence is for you to determine.
In fixing the amount of money to compensate the plaintiff for each,
proven element of damage, you should consider the nature, extent and
duration of the injury.

Elements of Damage

1. Loss of Earnings—Past and Future
   The value of [earnings] [profits] [salaries] lost [and the present cash
   value of the (earnings) (profits) (salaries) reasonably certain to be lost in
   the future].

2. Medical Expense—Past and Future
   The reasonable expense of necessary medical care, treatment, and
   services received [and the present cash value of the reasonable ex-
   penses of medical care, treatment and service reasonably certain to be
   received in the future].

3. Caretaking Expense
   The reasonable expense of necessary help in plaintiff’s home, which
   has been required as a result of his injury [and the present cash value
   of such expense reasonably certain to be required in the future].

4. Loss of a Normal Life
   Diminished ability to enjoy life that the plaintiff has experienced [and
diminished ability to enjoy life that the plaintiff is reasonably certain to
experience in the future].

5. Pain
   Pain that the plaintiff has experienced [and pain that the plaintiff is
reasonably certain to experience in the future].

6. Physical Suffering
   Physical suffering that the plaintiff has experienced [and physical suf-
   fering that the plaintiff is reasonably certain to experience in the
   future].

7. Inconvenience
   The inconvenience that the plaintiff has experienced [and the incon-
   venience that the plaintiff is reasonably certain to experience in the
   future].

8. Mental Suffering
   The mental suffering that the plaintiff has experienced [and the men-
   tal suffering that the plaintiff is reasonably certain to experience in the
   future].

9. Humiliation
   Humiliation that the plaintiff has experienced [and humiliation that
the plaintiff is reasonably certain to experience in the future].

In addition, instructions on probable life expectancy and present cash
value will be required if the jury is instructed as to damages arising in the
future. Where aggravation of pre-existing injury is supported by the evidence, the following instruction should also be given:

Aggravation of Pre-Existing Ailment or Condition

Plaintiff's compensable injuries include the aggravation of any pre-existing ailment or condition proved by the evidence to have resulted from the negligence [wrongful conduct] of the defendant.

APPLICATION OF THE PROPOSED JURY INSTRUCTIONS
TO A HYPOTHETICAL PLAINTIFF

To understand the application of the elements of damage, it will be helpful to consider the damages that a hypothetical personal injury plaintiff might recover. Suppose, for example, that the plaintiff is a thirty-five year old police officer who is injured in an automobile accident caused by the defendant's negligence. After three weeks in the hospital and nine months at home recovering, the plaintiff is still unable to return to his job as a police officer. However, he is able to assume a lower paying position as a security guard.

The plaintiff's injuries, which include the loss of two fingers and the impaired functioning of his legs, are permanent. The plaintiff has continuing pain in his legs, whose function can be expected to deteriorate in the future. Furthermore, he no longer can engage in strenuous recreational activities, although he once enjoyed swimming, playing tennis and baseball with his children. Many activities that once seemed simple to the plaintiff, such as getting in and out of his car, now have become inconvenient, physically tiring and time consuming. Finally, the injury has reduced the plaintiff's life expectancy by several years.

Plaintiff's injuries have resulted in several compensable elements of damage, the measure of which will depend upon the jury's assessment of the nature, extent, and duration of the injury. Although the plaintiff retains some earning capacity as a security guard, it is less than it would have been if he had continued his career as a police officer. Thus, the plaintiff can recover damages not only for the earnings he lost prior to the jury's verdict, but also for the reduction in his future earning capacity. The recovery for future earnings loss will be based on the life expectancy the plaintiff would have had if he had not been injured. In addition, the plaintiff can recover the medical expenses associated with the injury that he already has incurred and is reasonably certain to incur in the future. The recovery for such future pecuniary losses will be reduced to present value.

133. See text accompanying notes 35-37 supra.
134. See text accompanying notes 38-43 supra.
135. See text accompanying note 26 supra.
As non-pecuniary damages, the plaintiff can collect from the defendant for the loss of a normal life. In support of recovery for this element, plaintiff's counsel may argue that the plaintiff no longer can engage in the recreational activities that he once enjoyed. For example, his capacity to enjoy his children is now diminished. In addition, counsel can present evidence that the plaintiff's enjoyment of life in his job as a security guard is much less than it was in his career as a police officer.\(^{136}\)

Aside from compensation for diminished enjoyment of life, the plaintiff should be compensated for his past and future pain.\(^{137}\) Furthermore, because many activities have become difficult for the plaintiff, he will experience compensable physical suffering.\(^{138}\) The plaintiff also should be compensated for the inconveniences that arise as a result of the injury.\(^{139}\) In addition, the plaintiff may suffer compensable humiliation because of his disfigurement and the impairment in the use of his legs.\(^{140}\) Finally, the plaintiff should be compensated for mental suffering which has occurred and is reasonably certain to occur in the future.\(^{141}\) The plaintiff as a practical matter, although not as of right, probably will be allowed to recover non-pecuniary damages for his "lost years."\(^{142}\) His recovery of non-pecuniary damages will not be reduced to present value.\(^{143}\)

Based on the proposed jury instructions and the arguments of counsel, the jury should be able to understand that each element of damage is distinct. The recovery for future pain, for example, is independent of the recovery for the mental suffering that the plaintiff will endure because of the prospect of future pain. Similarly, the jury should comprehend that the plaintiff may independently recover for any mental suffering caused by his inability to lead a normal life.

**CONCLUSION**

In awarding damages for personal injury, the goal is fair and just compensation of the injured party. To guide the jury in assessing damages, most jurisdictions have developed instructions that itemize the elements of damage. In the jury instructions currently employed, however, the itemized elements of damage often overlap. Accordingly, attorneys may be arguing for recovery of the same element of damage under two separate labels, creating a danger of overcompensating the personal injury plaintiff. The danger of overcompensation is particularly acute in light of the "blackboard" argument, which permits attorneys to show the jury a list of the compensable elements

\(^{136}\) See text accompanying notes 102-104 supra.

\(^{137}\) See text accompanying notes 52-54 supra.

\(^{138}\) See text accompanying notes 55-61 supra.

\(^{139}\) See text accompanying notes 62-64 supra.

\(^{140}\) See text accompanying notes 72-78 supra.

\(^{141}\) See text accompanying notes 65-78 supra.

\(^{142}\) See text accompanying notes 84-89 supra.

\(^{143}\) See text accompanying note 81 supra.
of damage with a dollar recovery assigned to each element. The jury instructions now employed also may foster undercompensation by failing to isolate those elements of damage worthy of individual consideration by the trier of fact.

This Article has outlined a framework of personal injury damages so that both court and counsel can understand the elements of damage that properly are recoverable. In addition, a set of jury instructions in which the elements of damage are distinct has been proposed. Applying the framework of damages presented, plaintiffs should be compensated fairly for their damages and defendants protected from excessive awards caused by inaccurate jury instructions.
APPENDIX

CIVIL JURY INSTRUCTIONS*

Alabama


Arizona


Arkansas


California


Colorado


Connecticut

Wright, Douglass B., Connecticut Jury Instructions, 2d ed. Hartford, Conn.: Atlantic Law Book Co., 1970-1975. 3 v. in 4. (David B. Havanich is co-author of part 2 of v. 2 and of v. 3.)

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Nevada

*State Bar of Nevada. Pattern Civil Jury Instructions. Reno, Nev.: State Bar, 1966. (no longer used, being revised)

New Jersey

New Mexico


New York


North Carolina


North Dakota


Ohio


Oregon

South Dakota

Tennessee

Texas

Utah

Virginia

Virginia & West Virginia

Washington


West Virginia—see Virginia

*Book not available for verification of information
Wisconsin


District of Columbia


Federal
