Conscious Pain and Suffering Is Not a Matter of Degree

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INTRODUCTION

Less than 24 hours after a 30-year-old New York City investment banker embarked on a routine, stress-relieving jog, the New York Times, April 21, 1989, newspaper blared: "Youths Rape and Beat Central Park Jogger."1 Her body temperature had dropped to 80 degrees while she lay in a pool of her own blood.2 She lost three-fourths of her body's blood before she was found,3 nearly four hours after the attempted murder.4 The victim was raped, punched, kicked, and knifed to unconsciousness.5 Eleven days after the senseless "wilding" attack, the investment banker regained consciousness with a prognosis of "some permanent brain damage."6

Inevitably, conflicts arise among members of any society.

In cases of conflict, cultures that we choose to call "primitive" determined who should prevail with sword and club: and there is recent melancholy evidence that law of the jungle is not yet departed from the affairs of nations. But in a civilized community, it is the law which is called upon to act as arbiter.7

The attack on the Central Park jogger raises a number of questions regarding a civil tort action for nonpecuniary damages. Is the Central Park jogger entitled to conscious pain and suffering damages during the eleven days of unconsciousness? If so, when does the calculation of damages begin and end? On what factual bases does the claim rest? This Comment will address these and related questions primarily in light of Wisconsin law, but

2. Id.
4. Wolff, supra note 1, at B1, col. 2.
will also draw upon the laws of other jurisdictions that have explored the nexus between legal and medical conscious pain and suffering concepts.

Section I of this Comment sets forth the doctrinal basis of nonpecuniary damages for pain and suffering, as well as the role of the jury and its expected approach to answering such damage questions. Section II examines what it means to "experience pain" and "suffering" from pathological and psychological perspectives. Section III sets forth the physiological underpinnings of consciousness as well as the interrelationships between consciousness, pain, and suffering. In addition, Section III discusses the causes of consciousness suppression and the evaluation of consciousness levels or levels of awareness in acute and chronic conditions.

Section IV presents an overview of the scope and requirements that courts have placed on plaintiffs' recovery for conscious pain and suffering damages. Specifically, this section addresses the approaches used to instruct juries on how to calculate pain and suffering awards. This section also surveys those jurisdictions that have discussed the relationship between degrees of consciousness or levels of awareness, and degrees of pain. Finally, Section V sets forth the proposition that, given the existence of certain facts, a special verdict question concerning conscious pain and suffering damages should not be presented to the jury as a matter of law. Included in this discussion are the policy reasons for and against such a proposition.

I. OVERVIEW OF PAIN AND SUFFERING DAMAGE AWARDS

The primary purpose of a civil tort action is to compensate the plaintiff, in the form of compensatory damages, for loss or harm sustained as a result of the negligent conduct of another. The specific goal of tort law is to place the injured party in the position that he or she would have been in absent the wrong. Damages awarded to an injured party take the form of compensatory damages for pecuniary harm, compensatory damages for

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8. Compensatory damages are the monies awarded to a person as compensation, indemnity, or restitution for harm sustained by the claimant. 1 M. MINZER, J. NATES, C. KIMBALL, D. AXELROD, AND R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 1.02 at 1-6 (1989) [hereinafter 1 M. MINZER].

9. PROSSER AND KEETON ON TORTS, supra note 7, § 2, at 7.

10. 1 M. MINZER, supra note 8, § 1.00, at 1-3. The purposes of these damages are to: (1) provide compensation, indemnity, or restitution for harms; (2) determine rights; (3) punish wrongdoers and deter wrongful conduct; and (4) vindicate parties and deter retaliations, violence, and unlawful self-help. RESTATEMENT (SECOND) OF TORTS § 901 (1965).

11. Pecuniary damages include harm to property, harm to earning capacity, and the creation of liabilities such as medical expenses. RESTATEMENT (SECOND) OF TORTS § 906 (1979).
nonpecuniary harm, and punitive damages. Given the scope of this Comment, pecuniary and punitive damages will not be addressed.

The entire concept of attempting to reposition a plaintiff to his pre-injury status with an economic award for noneconomic damages (pain and suffering) rests upon a questionable foundation. The precariousness of this foundation arises in instances where pain and suffering occurs prior to death or when the plaintiff is unconscious. Pain and suffering are not compensable "in any ordinary sense that they make the plaintiff whole or re-place what has been lost, since the damages are not pecuniary and since there is no market in pain and suffering by which the damages could be estimated." Nevertheless, the law clearly allows a plaintiff to recover a

12. Id. § 905. Nonpecuniary damages include bodily harm and emotional distress. Id. Wis. Stat. § 893.55(4)(a) (1987-88), Limitations in Tort Actions, defines noneconomic damages as:

Money [sic] intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

13. Restatement (Second) of Torts § 908 (1979). Punitive damages are levied against a person to punish her for outrageous conduct and to deter her and others like her from similar conduct in the future. Punitive damages may be awarded for conduct that is outrageous because of the defendant’s evil motive or reckless disregard for the rights of others. Id.


15. See generally Prosser and Keeton on Torts, supra note 7, § 2, at 9-15; C. McCormick, supra note 14, §§ 77-85; 1 M. Minzer, supra note 8, Chapter 40.


17. D. Dobbs, Handbook on the Law of Remedies § 8.1, at 545 (1973). "Not only can pain not be measured by a market, it is not to be measured by the 'Golden Rule' either — that is, the jury is not to be told to award an amount they would personally take to undergo the plaintiff's injuries." Id. The "Golden Rule" is also known as the "Golden Rule argument," which is most often employed during counsel's closing argument to the jury. This trial technique, however, is forbidden in many jurisdictions, including Wisconsin. See Leibl v. St. Mary's Hosp., 57 Wis.2d 227, 230, 203 N.W.2d 715, 717 (1973); see also 1 M. Minzer, supra note 8, § 4.72; Annotation, Instructions in a Personal Injury Action Which in Effect, Tell Jurors that in Assessing Damages They Should Put Themselves in Injured Person's Place, 96 A.L.R.2d 760 (1964); Annotation, Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position, 70 A.L.R.2d 935 (1960).

"The allusion is to the saying attributed to Jesus in the New Testament at Matthew 7:12 and Luke 6:31: 'As ye would that men should do to you, do ye also to them likewise'; see Leach v.
monetary damage award for pain and suffering directly resulting from the wrongful acts of the tortfeasor. The difficulty in establishing a basis for estimating the amount of damages has been the source of contention.

Conceptually, either a subjective or objective approach can be taken in calculating damages within either a specific category of nonpecuniary loss or one all-encompassing category.

Whether assessment is in relation to a sub-category of loss or overall damages, three fundamental bases which vary in their objective and subjective elements or combination of these, and which, consequently, may be regarded as cutting across an objective/subjective analysis, have been suggested: the functional approach, the conceptual approach, and the personal approach.

Under the functional approach, a jury is required to determine damages based upon the cost of “a reasonable solace for his misfortunes.” In other words, the jury must answer the question: “What would be the cost of a

Metzger, 241 Md. 533, 535, 217 A.2d 302, 303 n.1 (1966); or, in more modern parlance; ‘do unto others as you would have them do unto you’; see Beaumaster v. Crandall, 576 P.2d 988, 994 n.10 (Alaska, 1978).” 1 M. Minzer, supra note 8, § 4.71, at 293.

18. 22 Am. Jur. 2d Damages § 239, at 192 (1988). However, damages can be awarded even though no impairment of bodily functions results from the tortfeasor’s conduct. In some situations, a jury can award damages when the tortfeasor’s act is beneficial to the plaintiff. Restatement (Second) of Torts § 905 comment b, at 456 (1965).

19. See infra notes 137-70 and accompanying text.

20. Somerville, Pain and Suffering at Interfaces of Medicine and Law, 36 U. Toronto L.J. 286, 291 (1986). For example, one large category of damages could be titled “pain and suffering.” Included within this category are the subcategories of physically or mentally oriented harms; within these subcategories are numerous classifications of injuries. Physically oriented damages may include physical pain and suffering, aggravation of pre-existing disease, aggravation of a pre-existing physical condition, impairment of physical ability, disfigurement, dismemberment, loss of bodily function, inconvenience and discomfort, loss of earning capacity, temporary disability, partial permanent disability, and total permanent disability.

Mentally oriented damages may include mental anguish, impairment of mental ability, fright or shock, humiliation, indignity or insult, loss of enjoyment of life, loss of consortium (society and companionship), and worry about future consequences of the injury. The Defense Research Institute, Inc., Responsible Reform No.3, at 11 n.15 (1972). See generally Lewis, Psychic Injury: The Many Faces of Pain, 19 Trial, July 1983, at 58. But see infra notes 132-36 and accompanying text concerning the questionable medical distinctions between physical and mental harm.

21. Somerville, supra note 20, at 291. For example, it is possible to assess loss of enjoyment of life on a subjective basis and damages for the loss of a limb on an objective basis. Id. Loss of enjoyment of life injuries are “roughly composed of limitations on life style resulting from physical or mental injuries proximately caused by the tortfeasor.” 1 M. Minzer, supra note 8, § 4.12(2), at 27.

22. Somerville, supra note 20, at 291 (citation omitted).
substitute pleasure for the one no longer made possible due to the loss or injury?"  

"When the conceptual approach is used, damages for non-pecuniary loss are estimated on the objective basis of what a reasonable man's reaction to the loss the plaintiff has suffered would be in terms of pain and suffering experienced . . . ."  

"In comparison, the personal approach takes into account the plaintiff's subjective reaction to his or her situation of loss and pain and suffering and tries to estimate in monetary terms what the pain and suffering merit as damages for 'past, present and future loss of pleasure and happiness.'"  

It is unclear under which philosophical approach the Wisconsin civil jury instructions fall.

Wisconsin Civil Jury Instruction § 1755 on "Past Pain and Suffering" seems to adhere to the "conceptual approach" in evaluating pain and suffering. This model instruction states: "What sum of money would fairly and reasonably compensate [plaintiff] for past pain and suffering he sustained as a result of the accident." This proposed jury instruction essentially seeks the opinion of the jury as to what it thinks is a reasonable sum of money that would compensate the plaintiff.

At the same time, the Wisconsin jury instructions on pain and suffering could be construed to mean that a juror should examine the plaintiff's harm from the plaintiff's perspective. Pain is largely a subjective experience. In addition, the plaintiff need not support subjective past pain and suffering testimony with expert medical testimony. Therefore, the jury is left with no alternative other than to rely on the subjective complaints of the plaintiff, resulting in a subjective jury verdict. The instruction does not explicitly state that the jury is to calculate the compensation amount from the

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23. Id. "For example, a person who previously enjoyed physical activities, but whose injuries now prevent participation in sport, may be awarded the amount it would cost to install an expensive sound system in his or her home if this would provide substitute pleasure." Id.

24. Id.

25. Id. at 292 (citation omitted).


27. See infra notes 37-53 and accompanying text concerning a medical perspective of pain.

28. See infra note 144 and accompanying text.

29. The comment section of the Wis. J. I. Crv. § 1755 offers an expansion upon the meaning of "pain and suffering" when the loss of enjoyment of life results from the negligence of the tortfeasor. "When the proof shows curtailment of recreational activities to be of such substantial nature to warrant special mention, add a phrase to include impairment of his ability to enjoy his usual pleasurable activities of life." Wis. J. I. Crv. § 1755, Personal Injury: Past Pain and Suffering, comment, at 2 (1983) (emphasis added). Implicit in this jury instruction comment is a request of the jury to examine and consider plaintiff's "ability to enjoy his usual pleasurable activities of life" from the perspective of the plaintiff. Only the plaintiff truly knows what his pleasurable activities are and to what degree pleasure is derived from those activities.
subjective perspective of the plaintiff. However, such an interpretation of
the instruction would be contrary to the "reasonable person" standard upon
which the jury system is based.\textsuperscript{30}

The distinction between subjective and objective approaches to special
verdict questions is not crucial to a just deliberation of pain and suffering
damages when the evidence before the jury consists of both subjective plain-
tiff testimony and objective medical findings. The likelihood of a just delib-
eration, under these circumstances, exists because there is a balance of
subjective and objective evidence from which the jury can draw upon when
reaching its verdict. However, if the evidence at trial consists of a health
care provider's subjective observations of the plaintiff, such as moaning,
blinking, and reflexes, coupled with a disagreement between medical experts
as to whether a person experiences pain in a lethargic\textsuperscript{31} or obtundation\textsuperscript{32}
state of consciousness, such circumstances reintroduce the issue of "objec-
tive v. subjective approaches to verdict questions."\textsuperscript{33}

The focus of this Comment is whether a jury should even consider the
issue of conscious pain and suffering damages when portions of a plaintiff's
nervous system are not fully functioning, yet the plaintiff maintains objec-
tive signs of "consciousness."\textsuperscript{34} The following section will examine pain
and suffering from a medical perspective, drawing distinctions between the
evaluation of pain \textit{ex post} — an acute\textsuperscript{35} pain circumstance (past pain and
suffering analysis), and an \textit{ex ante} — a chronic\textsuperscript{36} pain circumstance (future
pain and suffering analysis).

\textsuperscript{30} See \textit{infra} notes 159 and accompanying text concerning a discussion of "suggested per
diem amounts" and "per hour compensation" for pain and suffering.

Wis. J. I. CIV. § 1750A, \textit{Pain and Future Pain and Suffering, and Disability} (1989) contains
nearly identical language as that of Wis. J. I. CIVIL § 1755. Section 1750A reads: "[W]hat sum of
money will fairly and reasonably compensate the plaintiff for the pain, suffering, and disability he
sustained as a result of the accident." The instruction also states that the jury should consider in
their deliberation the pain and suffering from the time of the accident "to date and is reasonably
certain to suffer in the future as a consequence of his injuries." Wis. J. I. CIV. § 1750A, Subdivi-

\textsuperscript{31} See \textit{infra} note 94 and accompanying text.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} "Objective" evidence itself can be misleading and subject to different interpretations by
medical doctors of equally impressive training and skill. See \textit{infra} notes 111-20 and accompanying
text on thermography and note 119 on CAT screening test interpretation.

\textsuperscript{34} Objective signs of consciousness would include, in part, sleep-wake cycles and reflex re-
sponses to pain stimuli.

\textsuperscript{35} "Acute" means rapid onset, sharp and severe symptoms of relatively short duration. \textit{Ta-
ber's Cyclopedic Medical Dictionary} 34, 474 (15th ed. 1988) [hereinafter \textit{TABER'S}].

\textsuperscript{36} "Chronic" means disease showing little change or of slow progression; long duration. \textit{Id.}
at 329.
II. PAIN AND SUFFERING: A MEDICAL PERSPECTIVE

A. Pain

Pain experienced by humans is a complex interrelationship between biological, psychological, socioeconomic, and cognitive factors. Factors that create the social dimension of pain include parents, education, ethnicity, financial status, vocational status, and society as a whole. The biological mechanisms of pain include neurons, nerve fibers, spinal cord, brain stem, and the cerebrum or cerebral cortex. "Pain is a central rather than a peripheral problem." 37


Experiencing pain is influenced by a great number of interacting physical, mental, biochemical, physiologic, psychologic, social, cultural and emotional factors. All of these interactions are dynamic and consistently changing. Thus, the pain that is perceived to be of a certain intensity or at one time may, at another time, be perceived as being either less or more intense, even though all other factors appear to be the same.

TABER'S, supra note 35, at 1206.


A comparison of responses between wounded French and British soldiers illustrates the impact that sociological, cultural, and ethnic backgrounds have on the experience of pain. The French soldier screams, yells, and winces even before a physical examination by the medical care provider. In contrast, the British soldier is conditioned to be stoic. "Biting his lips produces a new pain which raises the threshold of the perception of the wound pain. His prior traditional family and community experiences has [sic] conditioned him to 'bite the bullet.'" 23 AM. JUR. POF 2D § 3, at 12-13 (1980) (citation omitted).

Other evidence that cultural backgrounds influence acute pain has been demonstrated in studies which show that four specific ethnic groups, the Italian, Jewish, Irish, and old English, react to pain in different fashions. The pain threshold that each individual recognizes appears to be uniform among the various groups, but their tolerance to increasing levels of pain varies. The Italian and Jewish subgroups were not able to tolerate the levels of electric shock that their Irish or old English counterparts sustained. When Jewish and Italian members of the investigation were told of this differential finding the pain differential vanished upon repeat testing. Thus, a specific culture teaches its members to react to pain in various fashions and to seek help in various ways.


39. A neuron is a nerve whose sole function is to initiate and conduct electrical impulses.

40. Nerve fibers are elongated neurons which form the major portion of the white matter of the brain, spinal cord and all nerves. Id. at 1111.

41. All nerves to the trunk and limbs pass through the spinal cord. The spinal cord acts as the center for reflex action and contains the conducting paths to and from the brain. Id. at 1599.

42. The brain stem is a portion of the brain that connects the spinal cord with the cerebral hemispheres. The brain stem is comprised of the medulla, oblongata, pons, and the mid-brain. Id. at 226.

43. "The cerebrum is concerned with sensations or the interpretation of sensory impulses; and all voluntary muscular activities. It is the seat of consciousness and the center of the higher
than a peripherally determined event in the nervous system." Therefore, a cut on the bottom of one's foot does not, in and of itself, cause pain. It is the relationship between the stimulus to the nervous system and the registration of that stimulus in the brain that causes the experience of pain. Moreover, the psychological dimension of pain is a fundamental part of what it means to experience the "sensation of pain." Since the experience of pain is the result of a complex integration of physical, psychological, and environmental factors, the experience of pain is subjective and cannot be objectively quantified.

From a physiological and psychological perspective, pain is a combination of stimulus, perception, and feeling or emotion. A stimulation must provide the subject with specific information about the nature of her environment. The perception component is an interpretation of the stimulus. When a stimulus (including those stimuli originating from the body's senses) registers within the cerebral cortex, the stimulus is felt and a corre-

mental faculties, such as memory, learning, reasoning, judgment, intelligence and emotions." Id. at 300.

This list is not exhaustive in describing the brain and central nervous system. For a detailed description of the inner workings of the central nervous system, detailing the transfer of nervous impulses from the point of stimulation to the mid-brain, see 23 AM. JUR. POF 2D § 3, at 9-14 (1980).

44. Hirsh, supra note 38, at 2:51.
45. PAIN ANALYSIS: A GUIDE TO DIAGNOSIS 2 (R. Janzen ed. 1970) [hereinafter PAIN ANALYSIS]. If pain is solely the result of psychological factors, it is referred to as psychogenic pain. That is, the possibility of anatomical, physiological, and pathological factors as the origin of the sensation of pain are eliminated. In the case of psychogenic pain, the preferred method of treatment is where "the physician is the medicine." Id. at 1-2.
46. Brenna & Turk, supra note 37, at 123. "Pain is always a subjective, psychological state in the sense that it can only be perceived by the affected individual." Hirsh, supra note 38, at 2:51.
47. Interview with Lawrence P. Sullivan, M.D.; certified by the American Board of Psychiatry and Neurology; Clinical Faculty, Department of Neurology, Medical College of Wisconsin, Milwaukee, Wisconsin; Staff Neurologist, St. Joseph's Hospital; Milwaukee, Wisconsin (Feb. 2, 1990) [hereinafter Interview with L. Sullivan, M.D.].

Another word to describe the reacting emotion or feeling is "affect," i.e., a mental disposition. Id. One author, in describing pain in similar terms, stated that pain is a combination of sensation, feeling, and affect. PAIN ANALYSIS, supra note 45, at 3. However, the difficulty in using the concept of "sensation" implies an emotional component, a judgment on the part of the patient. Sensation is very distinct from "pure stimulus." Interview with L. Sullivan, M.D., supra note 47. "Pain includes not only the perception of an uncomfortable stimulus but also the response to that perception." TABER'S, supra note 35, at 1301.

48. PAIN ANALYSIS, supra note 45, at 3.
49. Interview with L. Sullivan, M.D., supra note 47. The degree to which stimulation affects emotions is the conscious phase of pain.

Emotions can either be passions characterized by physical changes in the body (such as an alteration in respiration rate or changes in muscle tone) or a mental state that is arising as a subject of reaction, as opposed to a conscious reaction (such as fear, love, anger, or joy). TABER'S, supra note 35, at 535-36.
sponding emotion can result. This distinction between stimulation and emotion is crucial to the understanding of pain. The stimulus and emotions together cause the effect, such as bodily movement away or toward the stimulus. However, reaction to stimulus can occur devoid of consciousness as in a reflex reaction. Therefore, "[p]ain is the experience or perception of the stimuli, not the sensation of the stimuli. One can only experience pain if he or she can interpret the stimuli and perceive it as pain."

For example, if a conscious patient with a fully functioning nervous system and cerebrum were to undergo an amputation of the right leg at the knee without a general anesthetic, the stimulations sent from the knee to the brain by way of the nervous system at the commencement of the amputation would result in pain. Pain exists in this scenario because of the existence of a stimulus (the incision) causing a sensation (a biochemical impulse generated at the nerve endings or "pain receptors on the skin") that travels from the incision to the cerebrum where it is interpreted, perceived, and results in a conscious emotional reaction (effect). If this same patient were to undergo the same surgery under a general anesthetic, sensations of the operation would still travel from the knee to the cerebrum. However, because the patient is unconscious, the brain's ability to perceive the stimulus is eliminated. Regardless of the cause of unconsciousness, be it an anesthetic, hypoxia (a deficiency of oxygen supply to the brain), or ischemia (a deprivation of blood supply to the brain), the brain's ability to perceive stimuli and subsequently experience pain is prohibited.

50. Interview with L. Sullivan, M.D., supra note 47.
51. Id.
52. Id. For example, the removal of a finger after touching a hot stove (the reaction) occurs before the stimulus reaches the cortex, before the perception of that stimulus, and before the emotional result of "ouch!
53. Id. "Pain may be defined as the body's awareness of unpleasant changes or activities that call attention to particular regions of the body. This definition is broad and describes a reaction to pain, rather than pain itself; the 'feeling' admits of no adequate verbal description." 3 AM. JUR. POF § 35, at 743 (1959).
54. The cerebrum is the seat of consciousness in the interpreter of sensory impulses. TABER'S, supra note 35, at 300; see also infra notes 75-77 and accompanying text for a detailed discussion of the brain and pain relationship.
55. A general anesthetic is a complete loss of consciousness. TABER'S, supra note 35, at 87. However, there are numerous types of anesthesia which affect different portions of the brain and nervous system, resulting in partial or complete loss of sensation with or without loss of consciousness. Id. at 86-88.
56. See PAIN ANALYSIS, supra note 45, at 2.
57. Interview with L. Sullivan, M.D., supra note 47.
58. TABER'S, supra note 35, at 814.
59. Id. at 877.
60. See supra note 56 and accompanying text.
In summary, the experience of pain requires a stimulus, a feeling or emotion, and an effect or result. The experience of pain consists of an intermingling of unquantifiable biological, psychological, socioeconomic, and cognitive factors.

B. Suffering

Suffering, as is the concept of pain, is a subjective experience. That is not to say that “suffering” is not definable. Dr. Yale David Koskoff posits that “[a]nxiety is at the core of suffering whether due to cancer or trauma — impact or non-impact trauma. To understand the nature of suffering it becomes necessary to understand the nature of anxiety.” Psychological studies which support this proposition identify anxiety, and not the painful stimuli as the basis of suffering.

61. 1 M. Minzer, supra note 8, § 4.13(1)(a).

However, this subjective aspect does not foreclose either the development of objective standards of evaluation or the ability of others, on the basis of their own experiences, to understand and assess the pain and suffering to which the plaintiff has been, is being, or may in the future be subjected. The latter, of course, is possible only where the injury alleged, and the subsidiary issues of causation, extent, and duration, are within the competency of the trier of fact, considered as an ordinary person.

Id. (citation omitted)

62. As of 1980, Yale David Koskoff, M.D., Ph.D., was a Senior Neurosurgeon at Montefiore Hospital, Pittsburgh, Pennsylvania, and Clinical Associate Professor of Neurology at the University of Pittsburgh.

63. Koskoff, The Nature of Pain and Suffering, 13 Trial, July 1977, at 21, 23, reprinted in 8 Law. Med. J. 207, 210 (1980). Dr. Koskoff relieved intractable pain from several cancer patients by performing frontal lobotomies (the process of severing the connections between the frontal lobes of the brain and the thalamus) on his subjects. The severing procedure did not cut any known pain pathways to the brain. Upon post-surgical examination, “it could be readily demonstrated that the patient’s sensitivity to painful stimulation was unchanged. When asked ‘Do you have pain?’ The patients replied ‘yes.’ Yet, they required no narcotics, whereas prior to surgery as much as one-half grain of morphine was needed every two to four hours.” Y. Koskoff, supra, at 23. The remarkable result of this study was that the patients continued to experience painful stimuli yet remained unconcerned; the future held no dread. The morphine used as medication was merely relieving anxiety and not the patients’ pain. Id.

64. Koskoff, supra note 63, at 23.

Anxiety is the feeling of uneasiness, often distress derived from the anticipation of danger. Awareness of helplessness augments anxiety. Unlike fear, which is an emotional response to a perceived danger, anxiety is the response to a threat often not recognized. Unlike fear which is abated when the danger is removed, anxiety persists, becoming chronic with periods of remission and exacerbation, often for no apparent reason.

Id.
Anxiety manifests itself in a number of ways, including behavioral disorders, personality changes associated with chronic somatic disorders, and depression.

Depression is the mood disturbance most consistently associated with anxiety. Depression characterized by apathy, a sense of futility, and low self worth may reveal itself in the form of explosive anxiety attacks. . . . Because of the almost inevitable presence of depression with anxiety, they may be considered for our purposes a composite entity — anxiety/depression. [Therefore,] suffering is a mood in which anxiety/depression predominates. There is no suffering without anxiety/depression.

Dr. Koskoff suggests that the reticular formation, which is the central core of tissue in the brain, is the neurophysiological location of suffering processes. Since the reticular formation has connections to the hypothalamic structures, which are the centers for the body's autonomic function, stimuli coming into the reticular formation may have emotional characteristics. Such stimuli would include the "uneasiness" distress associated with anxiety/depression. Thus, the brain's processing centers work as if they were a network of computers that share information to produce the result of suffering.

In short, a vicious cycle exists between pain and suffering. "Pain" and "suffering" are interdependent concepts: prolonged suffering will produce

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65. The behavioral [disorder] 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.

66. Id.

67. Id.

68. The reticular formation "awakens the brain to consciousness and keeps it alert; it directs the traffic of messages in the nervous system; it monitors the myriads of stimuli that beat upon our senses, accepting what we need to perceive and rejecting what is irrelevant; it tempers and refines our muscular activity and bodily movements." Id. (citation omitted).

69. Id.

70. Id.

Thus, bits of information brought to the computer are capable of sending messages to stations responsible for the affective content of the message, to the cerebral cortex where attention is maintained or heightened and where thought is made possible. Integration with other stations will involve the motor and vegetative activity described as patterns of suffering, which are the external manifestations of suffering.

Id. at 24.
physical symptoms in the form of pain, which in turn augments additional suffering.71

III. CONSCIOUSNESS/AWARENESS AS IT RELATES TO PAIN AND SUFFERING

To satisfactorily define consciousness is to exceed the existing medical and philosophical understanding of human beings.72 In a general sense, consciousness has been defined as an awareness of self or of the surrounding environment.73 At the heart of "personhood," as offered by two authors, are the moral, legal, and constitutional standards of consciousness.74 This

71. Id. Dr. Koskoff makes the following distinctions between pain and suffering:
   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 symptoms as one of the adverse effects of body function. Such maladaptive disturbances will augment suffering.

72. Cranford & Smith, Consciousness: The Most Critical Moral & (Constitutional) Standard for Human Personhood, 8 J. OF L. & MED. 233, 237 (1987) (the Cranford and Smith article addresses the essence of human personhood as it relates to individuals in a persistent vegetative state (PVS)). Persons in a PVS are awake but not aware of their environment; they have an eyes-open unconsciousness. Id.

73. Cranford, The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight), HASTINGS CENTER REPORT, Feb./Mar. 1988, at 28. Consciousness has also been defined as:

   A state of awareness. It implies an orientation to time, place, and person, i.e., the individual knows approximately the date, the nature of the environment, name and other pertinent personal data. The content of consciousness is a composite of memories and the comprehension of external reality; the emotional status and the individual's goals also enter. It is, then, a large part of what is described as "personality" in its largest sense.

74. Cranford & Smith, supra note 72, at 233.

In our view, consciousness is the most important characteristic that distinguishes humans from other forms of animal life, going beyond the vegetative functions of heartbeat and respiration. Thus, we believe that the permanent loss of all consciousness is just as significant as the loss of all cardiopulmonary functions (the cardiopulmonary standard for death)
subsection will briefly address the physiological underpinnings of consciousness and the methods of pain and consciousness assessment in acute and chronic pain circumstances.

The anatomical basis of consciousness is divided into two regions: the cerebral hemispheres and the reticular formation within the brain stem.75 The cerebral hemispheres are the basis of human intellectual existence and are the centers for awareness of self and environment.76 The reticular formation provides the nervous system with crude stimuli information originating from our senses.77 The cerebral hemispheres, namely the cerebral cortex, and the reticular formation, work together to create a conscious state of mind.78 “It is a fundamental fact of neuroanatomy and neurophysiology that consciousness and the capacity to experience pain and suffering are functions of the neocortex.”79

Absent cerebral functions, a fully functioning brain stem and reticular formation within the brain stem are capable of supporting a vegetative state.80 “In contrast, the cerebral hemispheres cannot function in the ab-

and all brain functions (the neurological standard for death), in determining the moral and legal status of a human being.

Id.

75. A. Reeves, E. Valenstein, J. Ochoa & J. Woodford, Disorders of the Nervous System 210 (1981) [hereinafter A. Reeves]. Each cerebral hemisphere consists of three parts: olfactory lobe (rhinencephalon), corpus striatum, and the cerebral cortex (pallium). Taber’s, supra note 35, at 299. The brain stem is “the stem like part of the brain that connects the cerebral hemispheres with the spinal cord. Comprises the medulla oblongata, the pons, and the midbrain.” Id. at 226. The reticular formation is groups of cells and fibers that network throughout the brain stem. This network is “important in controlling or influencing alertness, waking, sleeping, and various reflexes.” Id. at 1481.

76. A. Reeves, supra note 75, at 210.

77. Koskoff, supra note 63, at 23. The reticular formation monitors the myriad of stimulation originating from our senses, accepting what is necessary for purposes of formulation perceptions and rejecting that which is irrelevant. In addition, the reticular formation connects with the hypothalamic structures (centers for autonomic system functions) to temper and refine our muscular activity and body movements. Id.

78. See generally A. Reeves, supra note 75; Koskoff, supra note 63.

79. Cranford & Smith, supra note 72, at 237. The neocortex is a part of the cerebral cortex. Taber’s, supra note 35, at 1105-06.

80. A. Reeves, supra note 75, at 210.

[In cases of patients in a persistent vegetative state, the brain stem, including the ascending reticular activating system, is relatively intact. The brunt of neurological destruction is located in the cerebral hemispheres. This state often results when a patient suffers a cardiac or respiratory arrest with lack of blood flow (ischemia) or oxygen (hypoxia) to the brain for a matter of minutes. The cerebral cortex is the part of the brain most vulnerable to this deprivation because of its high metabolic rate, requiring a constant supply of oxygen, glucose, and blood. The brain stem, however, is fairly resistant to ischemia or hypoxia. It is commonly accepted in medicine that approximately four to six minutes of
sence of reticular activation."\(^{81}\) Loss of the reticular formation’s functions will terminate all perceiving capabilities of the cerebrum and prohibit the experience of pain.\(^{82}\)

A. Ex Post Analysis of Acute Conscious Pain and Suffering

Pain and suffering can be analyzed before (ex ante), after (ex post), or during the actual pain experience.\(^{83}\) In proving past pain and suffering, ex post reliance on the plaintiff’s memory and medical records helps prove the existence of pain and the degree of pain experienced. In determining whether pain exists in the first instance, the patient’s level of consciousness must be examined. Hence, an acute\(^{84}\) analysis of conscious pain and suffering occurs before the patient/plaintiff’s condition has stabilized.\(^{85}\)

There are two basic causes of the depression or suppression of consciousness: (1) brain stem reticular formation functional depression; and (2) bilateral cerebral depression and brain stem reticular depression together.\(^{86}\) Both the cerebral hemispheres and brain stem are affected in the second set of circumstances; however in the first instance, only the brain stem is affected. The distinction between these two causes and an understanding of their pathological processes\(^{87}\) should be observable to the treating physician.\(^{88}\) Through these observations, the physician should be able to classify the patient’s level of consciousness according to one of four categories (excluding awakeness): (1) persistent drowsiness, existing when strong external stimulation is lacking (this strong stimulation would otherwise induce awakeness);\(^{89}\) (2) deep stupor, demanding noxious (or extreme) stimulation to reach a level of depressed but appropriate responsiveness such as with-

81. A. Reeves, supra note 75, at 121.
82. Id.
84. Acute means rapid onset, sharp and severe symptoms of relatively short duration. TABER’S, supra note 35, at 34 & 474.
85. See generally Leebron, supra note 83, at 270-88.
86. A. Reeves, supra note 75, at 213.
87. Pathological processes are bodily function changes produced by disease. TABER’S, supra note 35, at 1241.
88. A. Reeves, supra note 75, at 213. Physician observations of the patient’s neurologic functions should consist of: “(1) level of consciousness itself, (2) respiratory rate and pattern, (3) pupillary function, (4) oculomotor - vestibular function, and (5) motor function.” Id.
89. Id. At a persistent drowsiness level, the upper diencephalon is affected. Id. The diencephalon is, in part, the center for appreciation of primitive sensations of pain, crude touch, and temperature. TABER’S, supra note 35, at 462, 1716.
drawal from stimulus or feeble attempts to remove stimulus;³⁰ (3) "light coma, noxious stimulation causing only reflex motor response (i.e., decorticate or decerebrate posturing . . . ),"³¹ and (4) deep coma, which exists when there is no response to noxious stimulation.³²

A consensus on consciousness classification and its definitions does not exist among neurophysiology experts. Other methods of evaluating consciousness in acute (short-term) instances include the Glasgow Coma Scale³³ and Dr. Plum and Dr. Posner's monograph on coma.³⁴

It is important to recognize that the various levels of consciousness discussed above are pathologically induced. The level of consciousness falling below "alert wakefulness" is a condition produced by disease or abnormal body states.³⁵ In contrast, "[s]leep is a nonpathologic depression of consciousness from which the subject can be aroused to persistent alert wakefulness with appropriate noxious stimuli."³⁶

In instances where noxious stimuli are applied to subjects with pathologically reduced consciousnesses, such stimuli generally will shift the subjects' consciousnesses up one level.³⁷ Noxious stimuli can also take the

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³⁰ A. Reeves, supra note 75, at 213. In a deep stupor, the lower diencephalon is affected. Noxious stimuli can take a variety of forms to illicit behavior in stuporous or comatose patients. "Most entail tissue-damaging maneuvers such as forcefully compressing a firm object such as a pen against the fingernail bed, pinching a nipple or testicle, or compressing the supraorbital nerve. More aesthetic and usually more effective is irritation of the nares with a cotton wisp."

³¹ Id. In a light coma, the upper mesencephalon (midbrain) is effected. Id.

³² Id.

³³ The Glasgow Coma Scale is a scale of three to fifteen for evaluating and quantitating the degree of coma by determining the best motor, verbal, and eye-opening responses to standardized stimuli. Coma is diagnosed by absence of motor and verbal responses and eye-opening. A score of 7 or less is classed as coma when this scale is used. A score of 9 or greater excludes the diagnosis of coma. Taber's, supra note 73, at 684.

³⁴ W. Fryse-Phillips & T. Murray, Essential Neurology 66 (1978). There are many loose and meaningless terms used to describe changes in consciousness, the most vague being the commonly used semi-conscious which has no specific meaning at all. The terms used by Plum and Posner in their excellent monograph on coma are: Alert wakefulness: The patient responds immediately, fully and appropriately to all stimuli. Lethargy: a state of drowsiness, inaction or indifference with delayed or incomplete responses; increased stimulation may be needed to get a response. Obtundation: an even duller state in which the patient maintains his wakefulness but little more. Stupor: a state in which the patient can be aroused only by vigorous stimuli. Coma: a state in which the psychological and motor responses and reflexes are lost altogether.

³⁵ Id.

³⁶ Id.

³⁷ Id.
form of tissue injuries, as in an automobile accident.\textsuperscript{98} In \textit{Helleckson v. Loiselle},\textsuperscript{99} the plaintiff suffered injuries that prevented him from restful sleep.\textsuperscript{100} The hospital medical records indicated that the plaintiff was restless and experienced only intermittent sleep "because he had so much pain."\textsuperscript{101} Given the facts of this case, it would be reasonable to conclude that the stimuli (tissue injuries) within this plaintiff shifted his consciousness level between persistent drowsiness and wakefulness. When the noxious stimuli were strong enough, the plaintiff would awaken from his pathologically depressed consciousness, at which time he experienced conscious pain and suffering.\textsuperscript{102} To a reasonable degree of medical certainty, pain cannot be experienced at the "persistent drowsiness" state because only strong noxious stimuli can elicit motor activity or arousal of the patient.\textsuperscript{103} In the absence of these strong stimuli, the patient does not experience pain.\textsuperscript{104}

\textbf{B. Ex Ante Analysis of Chronic Conscious Pain and Suffering}

In addition to evaluating conscious pain and suffering in an \textit{ex post} circumstance, an \textit{ex ante} analysis is used to determine future pain and suffering. An \textit{ex ante} evaluation is conducted when a patient has a stabilized medical condition so that a reasonable degree of medical certainty of future pain and suffering can be ascertained. Inherent in the patient’s medical stabilization is a fixed consciousness level.\textsuperscript{105} Therefore, no debate exists over

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\textsuperscript{98} See \textit{supra} note 90 and accompanying text concerning noxious stimuli.

\textsuperscript{99} 37 Wis. 2d 423, 155 N.W.2d 45 (1967).

\textsuperscript{100} \textit{Id.} at 428, 155 N.W.2d at 49.

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} The use of this case is for illustrative purposes only. The author does not intend to read into the record those facts which do not exist or are unknown. The actual determination of consciousness and the experience of pain hinges upon whether the upper diencephalon (center of crude stimulus processing) is damaged. \textit{See supra} note 89 and accompanying text; \textit{see also} interview with L. Sullivan, M.D., \textit{supra} note 47.

\textsuperscript{103} Interview with L. Sullivan, M.D., \textit{supra} note 47.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}
whether a patient in a chronic medical condition experiences "conscious pain and suffering."\textsuperscript{106} The scope of this Comment does not extend to issues of chronic pain and suffering nor to coma and persistent vegetative state levels of consciousness.\textsuperscript{108} However, medical evaluations of persons in states of permanent unconsciousness can provide objective evidence as to the extent of tissue damage to the cerebral cortex and brain stem.\textsuperscript{109} Such objective medical tests can also be used to evaluate patients in an acute medical condition.\textsuperscript{110}

An increasingly popular medical diagnostic test used in the courtroom as evidence of pain is Infrared Imaging Thermography (thermography).\textsuperscript{111} Thermography is an objective illustration of the physiologic equivalence of pain via a multi-colored picture of the body's skin surface.\textsuperscript{112}

\textsuperscript{106} Chronic means disease showing little change or of slow progression; long duration. TABER'S, supra note 35, at 329.

\textsuperscript{107} See generally Cranford, supra note 73; Leebron, supra note 83, at 270-88.

\textsuperscript{108} There are three major clinical types of permanently unconscious patients. The first, the prototype for this category, consists of those patients in a persistent vegetative state (PVS) [citation omitted.] Patients in this condition have an eyes-opened unconsciousness. They are awake, but unaware. The eyes are open at times, during periods of normal wakefulness, and they have physiologic sleep/wake cycles which are readily apparent to observers. The damage in these patients is to the higher centers of the brain (the cerebral hemispheres), more specifically to the neocortex, while the lower centers of the brain, the brain stem, are relatively intact. . . . In contrast to the vegetative state, coma is an eyes-closed unconsciousness. In these patients, there is extensive damage to the brain stem. . . . Thus, it can be said that patients in a true coma are "terminally ill;" with a high degree of probability, these patients will usually die within a period of weeks or months — rarely years. . . . The third clinical category for permanently unconscious patients consists of anencephalic infants. Anencephalic infants. Anencephali is a severe congenital malformation in which the infant has essentially no cerebral hemispheres, but retains a variable amount of functioning brain stem.

\textsuperscript{109} Cranford, supra note 73, at 29.

\textsuperscript{110} Hirsh, supra note 38, at 2:103. "Objective evidence of pain has always been difficult to demonstrate." Id. It is very difficult to determine whether pain exists at all and if it does, its intensity is difficult to prove because that pain is subjective. Id.


\textsuperscript{112} Newman, supra note 111, at 1.
body emits symmetrical heat patterns in the absence of tissue damage or trauma.113 "Any pressure or irritation on a nerve root or peripheral nerve fiber can produce changes thought . . . [to result in a] vasoconstriction [narrowing of blood vessels] and, therefore, decreased heat emission along the course of the nerve or nerve root affected."114 These variations in skin temperature are then registered on thermograms.

"Thermography's most practical applications have been in diagnostic screening for neurologic, musculoskeletal, and soft-tissue damage, such as nerve root irritation, peripheral nerve injury, reflex sympathetic dystrophy, and musculoskeletal soft-tissue syndromes."115 From a legal perspective, thermography provides a partial picture of objective manifestations of subjective pain, thus helping to prove the existence or absence of pain.116 However, thermographies are not meant to take the place of other neurologic or orthopedic examinations.117 The key to the successful use of thermography is the corroboration of its findings with findings from other tests such as electromyography (EMG),118 computerized axial tomography (CAT) scans,119 and myelograms.120


114. Id. This Comment author merely intends to give a general overview of thermography. For a more in-depth discussion of thermography uses in law and medicine, see generally Archer & Zinn, Thermograms: Persuasive Tools in Soft-Tissue Injury Cases, 19 TRIAL, Feb. 1983, at 68; Ness & Ness, Thermography: Its Legal Implications, 33 MED. TRIAL TECH. Q. 162 (1987); Newman, supra note 111; Rein, Thermography: Medical and Legal Implications, 13 LEGAL ASPECTS OF MED. PRAC., Mar. 1985, at 4; Uricchio, Electronic Thermography in Medical Practice, 13 LEGAL ASPECTS OF MED. PRAC., Apr. 1985, at 1; Uricchio, supra note 113; and Hirsh, supra note 38.

115. Uricchio, supra note 114, at 1.

116. Ness & Ness, supra note 114, at 167. "Before the plaintiff or defense claim thermography as their tool, both must understand that it can be a double-edged sword. It may confirm a diagnosis, but it also may help to weed out the malingerers." Newman, supra note 111, at 3.

Three fundamental questions now can be answered objectively using thermography: (1) Is there physiologic nerve-fiber involvement? (2) Is there substantial soft-tissue injury? (3) Is there a reason for the pain? When the answer to any of these is affirmative, treating doctors can improve the quality of their evaluations and the medical management of their patients. In addition, lawyers can better judge how vigorously to proceed. If the answers to these questions are all negative, injuries may be considered less severe.

Rein, supra note 114, at 4.


118. An EMG is a "graphic record of the contraction of a muscle as a result of electrical stimulation." TABER'S, supra note 35, at 527-28.

119. CAT scans are a precise reconstruction of body structure by use of a radiographic beam and have been most successful in diagnostic studies of the brain. Id. at 1744. "CAT . . . scanning will show extensive structural damage to the cerebral hemispheres consistent with the clinical diagnosis, but these studies are not quantifiable." Cranford, supra note 73, at 30.

120. Myelography is the "[r]oentgenographic inspection of the spinal cord by use of a radiopaque medium injected into the intrathecal space." TABER'S, supra note 73 at 1085; see also
There are other objective tests available to determine the degree of normalcy for body structures in either acute or chronic medical conditions. Such tests include electroencephalography (EEG), magnetic resonance imaging (MRI), single photon emissions computerized tomography (SPECT), and positron emissions tomography (PET). These tests can be helpful in supporting or denying the existence of pain and determining whether the patient is capable of experiencing pain in the first instance. Nevertheless, the experience of pain is always subjective because pain is based, in part, upon one's conscious perception of a stimulus. The presence or absence of a pathophysiologic cause as demonstrated through medical testing is not a guarantee that subjective complaints of pain are real or fabricated.  

IV. Legal Treatment of "Conscious Pain and Suffering" Damages  

A. Overview  

As discussed in earlier portions of this Comment, there are no clear delineations between "pain" and "suffering." "The phrase 'pain and suffering' has been used generically to encompass a number of injury concepts, ranging from physical pain to anxiety and depression and the resulting con-

Hirsh, supra note 38, at 2:109. For example, when thermography and EMG test results are corroborated, the diagnosis of spinal nerve involvement is 92 percent accurate.  

121. EEG is an "[a]mplification, recording, and analysis of the electrical activity of the brain." TABER'S, supra note 35, at 524.  

122. MRI is an imaging technique that uses magnetism and radio waves to produce images that are more sensitive and contain more information than a CAT (CT) scan. Lyfkin, Magnetic Resonance Imaging of the Central Nervous System: Interpretation and Normal Anatomy, 6 SEMINARS IN NEUROLOGY, Mar. 1986, at 1.  

123. SPECT or SPET is frequently referred to as the "poor man's PET test." The process is cheaper and easier to complete, yet the degree of imagery is less precise. Frackowiak, A Short Introduction to Positron Emission Tomography, 9 SEMINARS IN NEUROLOGY, Dec. 1989, at 277-78.  

124. [The PET] test measures in a quantitative fashion the metabolic rates of glucose and oxygen in various parts of the brain, including the cerebral cortex, an important index since consciousness cannot be sustained below certain quantifiable levels of metabolism... However, PET scanning is new and extremely expensive; only a few centers in the country currently have the equipment necessary to carry out PET scanning. Furthermore, there is not yet sufficient data to document unequivocally the value of this test in the diagnosis of the persistent vegetative state.  

Cranford, supra note 73, at 30. Note that the PET test results were used as evidence in In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987). See supra note 108 and accompanying text.  

125. See supra note 108 and accompanying text.  

126. Hirsh, supra note 38, at 2:51; see also supra note 44 and accompanying text.  

sequences on the injured person's life style." In short, "[c]ourts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other." The actual meaning of each individual word becomes less important when one recognizes that the "unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal." Pain itself can be distinguished between mental or psychogenic pain and physical or organic pain. The realities of medicine indicate that a "physician is not always able to partition organic factors from psychological variables, since psychogenic pain almost always has an organic psychological

128. 1 M. Minzer, supra note 8, § 4.11(1), at 4-20. "Traumatic (psycho)neurosis is a favored designation in American law under which varieties of pain and suffering states are subsumed." Hirsh, supra note 38, at 2:99.

129. 22 AM. JUR. 2D, Damages § 239, at 240 (1988). Nevertheless, some legal and medical experts believe that it is prudent to present to the jury pain and suffering as separate items of damages. Reducing general pain and suffering damages into separate elements facilitates jury understanding of complex medical issues. Moreover, a failure to build a solid factual foundation under both pain and suffering damages can be disregarded by the defense (and correspondingly the jury) with the argument that such pain or suffering is a "functional overlay," which implies malingering. Hirsh, supra note 38, at 2:99.

130. 22 AM. JUR. 2D, Damages § 240 (1988). The concept of "pain and suffering" also "covers disfigurement and deformity, impairment of ability to work or labor, anxiety or worry proximately attributable to an injury, and mental distress caused by impairment of the enjoyment of life." Id. But see 23 AM. JUR. POF 2D § 4, at 14-15 (1980) (discussing compensation for suffering without the experience of pain (relying on Peck, Foudyce and Black, The Effect of the Pendency of Claims for Compensation Upon Behavior Indicative of Pain, 53 WASH. L. REV. 251 (1978))).

131. See infra notes 133-35 and accompanying text. What appears to be one of the earliest court recognitions of a plaintiff's entitlement to both physical and mental suffering in Wisconsin was outlined in Stutz v. Chicago & N.W. Ry. Co., 73 Wis. 147, 40 N.W. 653 (1888). In this case, a female passenger was instructed to exit the train several hundred feet from the depot platform. In order for the plaintiff to reach the highway, it was necessary for her to walk along the tracks until they intersected with the highway. The night was dark and she was carrying bundles in her hands. Id. at 148, 40 N.W. at 653-54. As she proceeded down the track, she fell down into a trench beneath the tracks used by cattle to cross underneath the tracks. After injuring her knee, she attempted to climb out of the culvert. At this time, trains were switched to the track that traveled directly over the open culvert and began to move towards the plaintiff. The woman became greatly excited and frightened by their approach. Id. at 149, 40 N.W. at 654-55.

The following jury instruction, on appeal, was found to be within the confines of Wisconsin tort law by the supreme court:

She is entitled to such amount of damages as in your judgment, will compensate her for all the physical injuries directly resulting from the negligence complained of, as well as the mental suffering resulting therefrom. . . . The plaintiff, if she is entitled to recover, is entitled to full compensatory damages for all the direct physical injury, as well as the mental suffering, you may find from, the evidence, resulted from the injury caused by the negligence complained of.

Id. at 151, 40 N.W. at 654.
component whereas organic pain is never without emotional reaction.” 132
It is therefore not surprising that the legal profession has not developed any
of its own models to differentiate between “mental” and “physical”
damages. 133

Given our current medical understanding of pain, a distinction between
physical pain and mental pain is misleading. 134 “Physical refers to the anato-
mical site and origin of the pain. The term takes no cognizance of the fact
that pain, like all other perceptions, regardless of its ‘physical’ origins, is
ultimately ‘mental.’” 135 One author purports that the search for the
“cause” of pain, where numerous medical disciplines are asked to dissect
medical complexities that are not fully realized, is fueled by the very nature
of our adversarial legal system. 136

B. Proving and Calculating Pain and Suffering

As early as 1947, The Wisconsin Supreme Court sought to quantify fu-
ture pain and suffering by requiring that a plaintiff’s claim for damages be
supported by competent proof. In Wenneman v. Royal Indemnity Co., 137
the court held that the plaintiff’s award for future pain and suffering as a
result of an automobile accident lacked sufficient evidence since the jury’s

132. Hirsh, supra note 38, at 2: 53; see also supra notes 47-53 and accompanying text for a
discussion concerning the interaction between stimuli and emotional reaction as a necessary com-
ponent of the experience of pain.

133. Koskoff, supra note 63, at 21, 22. Any cursory legal research of pain will show that
most sources will make distinctions between mental and physical damages. See, e.g., 1 M.
MINZER, supra note 8, § 4.11(2) Physical Pain, § 4.11(3) Mental Suffering; 22 AM. JUR. 2d supra
note 18, §§ 251-261.

The concept of “mental suffering” is nearly synonymous with that of “mental anguish” and
“emotional distress” as defined by case law. However, in a practical sense, “mental anguish” and
“emotional distress” appear to be associated with the cases in which mental harm is the principle
injury for which relief is sought. In contrast, “mental suffering” appears to be confined to cases
where the harm arises out of or naturally follows from a physical pain or injury. “Thus, the
concepts can be distinguished on the basis of their operational definitions. Mental anguish can be
characterized as ‘unpleasant mental sequelae’ — such as worry, concern, grief, humiliation, em-
barrassment, and depression — ‘which are not directly related to pain sensations.’” 1 M.
MINZER, supra note 8, § 4.11(4).

134. Koskoff, supra note 63, at 22.

135. Id.; see also supra note 129 and accompanying text concerning a medical perspective of
the organic and psychogenic dimensions of pain.

136. Brena & Turk, supra note 37, at 125. The ultimate victim in this search for a cause-
harm linkage is the plaintiff/patient himself. “Both groups of professionals [physicians and attor-
neyes] do not realize that prolonged, repetitive diagnostic investigation often carried along through
multiple physicians across various medical specialties, is in itself a major stressor, likely to further
decompenstate a pain patient into a maladaptive CPS [chronic pain sufferer] that is too often not
recognized.” Id. (citation omitted).

137. 251 Wis. 630, 30 N.W.2d 250 (1947).
award was based upon the unsupported subjective statements of the plaintiff. 138 "In the absence of sufficient competent proof in that respect, the award in question cannot be sustained, and any attempt by the court to assess the proper amount would be dependent largely upon mere conjecture." 139

The supreme court added to the Wenneman guidelines for jury calculations of future pain and suffering in the case of Diemel v. Weirich. 140 In this case the court held that:

[]only a medical expert is qualified to express an opinion to a medical certainty . . . as to whether the pain will continue in the future, and, if so, for how long a period it will so continue. In the absence of such expert testimony . . . the jury should be instructed that no damages may be allowed for future pain and suffering." 141

However, in Drexler v. All American Life & Casualty Co., 142 the court modified the requirement that an expert testify at trial as to the existence of the plaintiff's current or past pain and suffering. 143 "In general, expert testimony is not required to support a jury's finding of fact unless the subject matter involved is outside the realm of the ordinary experience of mankind and requires special learning, study and experience." 144 The jury is entitled to believe the claimant even in the absence of objective evidence which may account for his pain. 145

The court modified the principles outlined in Diemel by altering the plaintiff's burden in proving pain and suffering damages through expert tes-

138. Id. at 634, 30 N.W.2d at 252.
139. Id. at 634-35, 30 N.W.2d at 252; see also Wasicek v. M. Carpenter Baking Co., 179 Wis. 274, 278, 191 N.W. 503, 504 (1923) ("There is no accurate scale by which either court or jury can determine damages for pain and suffering."). GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN 72 (1964).
140. 264 Wis. 265, 58 N.W.2d 651 (1953).
141. Id. at 268-69, 58 N.W.2d at 652-53. The court also stated that the general rule in Wisconsin regarding proof of pain and suffering damages was best articulated as:

[Where the injury is subjective in character and of such nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts generally require the introduction of competent expert opinion testimony bearing upon the permanency of such injury or the likelihood that the injured person will endure future pain and suffering before allowing recovery therefor.]

Id., 58 N.W.2d at 652 (citation omitted).
142. 72 Wis. 2d 420, 241 N.W.2d 401 (1976).
143. Id. at 428, 241 N.W.2d at 406.
144. Id. (citing Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258 (1971); Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 172 N.W.2d 427 (1969); Pollock v. Pollock, 273 Wis. 233, 77 N.W.2d 485 (1956); see also Leiker v. Gafford, 245 Kan. 325, 778 P.2d 823 (1989) (medical expert testimony is not required to establish conscious pain and suffering).
145. Drexler, 72 Wis. 2d at 428, 241 N.W.2d at 406.
timony. Courts originally required the jury to reach its decision concerning pain and suffering with "reasonable certainty." Now the standard for the jury's award is an "ordinary experience of mankind" when the understanding of the alleged pain and suffering does not require "special learning, study and experience." This change in emphasis of the trier of fact's approach to damages follows an historical trend in Wisconsin that allows the jury greater deference in its deliberation on damages.

The Drexler court also appeared to limit the required use of a medical expert to only address the "existence" of "current or past" pain and stated that an expert "may express an opinion" as to the type of pain experienced, i.e., real, imaginary, or feigned. The court leaves open, perhaps intentionally, whether an expert opinion is required to prove future pain and suffering as well as degrees of suffering.

The Wisconsin Supreme Court has also stated that when a jury is given the responsibility for calculating conscious pain and suffering damages, such damages cannot be calculated by use of an hourly formula. Moreover, it is extremely doubtful that any justification could be made for the use of a formula in the calculation of future conscious pain and suffering damages.

The Wisconsin Supreme Court provided additional direction to trial courts in the calculation of conscious pain and suffering damages in the case

146. See supra notes 140-41 and accompanying text.
147. See supra note 140-41 and accompanying text.
148. See infra note 162.
149. Drexler, 72 Wis. 2d at 430, 241 N.W.2d at 407. "While expert testimony is not essential to support a finding that an individual suffers pain, the rule is that a medical expert may express an opinion as to whether the pain of one he has attended or examined is real, imaginary or feigned." Id.
150. Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940). In this case, the plaintiff was conscious for one hour and twenty minutes before his death due to an automobile accident. The jury's award of $500 for the conscious pain and suffering in this case was considered not excessive. Id. at 582, 290 N.W. at 198. The court, however, referred to an earlier Wisconsin Supreme Court opinion which considered $200 per hour for suffering as a sufficient rate of compensation for conscious pain and suffering. Id. (citing Nygaard v. Wadhams Oil Co., 231 Wis. 236, 284 N.W. 577 (1939)).
151. Hamilton, 233 Wis. at 582, 290 N.W. at 204; see also Blaisdell v. Allstate Ins. Co., 1 Wis. 2d 19, 82 N.W.2d 886 (1957); Redepenning v. Dore, 56 Wis. 2d 129, 201 N.W.2d 580 (1972).
of *Helleckson v. Loiselle*.\(^{153}\) The court held that the jury should consider the following factors in evaluating disputed pain and suffering: (1) the duration of the conscious suffering; (2) prior health; (3) whether sedatives and other drugs were used to relieve pain and whether they were effective; and (4) whether some pain was attributable to pre-existing physical disorders and, if so, whether this condition was aggravated by the incident in question.\(^{154}\)

The court continued to grapple with the policy concerns of nonpecuniary pain and suffering damages in *Blaisdell v. All State Insurance Co.*\(^{155}\) In one instance, the court reaffirmed the existing law, which identifies the limited value mathematical formulas provide in the calculation of conscious pain and suffering.\(^{156}\) In another instance, the court attempts to apply a “high/low” system of compensation on a case-by-case basis.\(^{157}\) In short, the supreme court’s attempts to create and define a mechanism for juries to calculate conscious pain and suffering damages proved fruitless. The “per hour rate” and “high/low” systems for calculating conscious pain and suffering damages lacked a consistent abuse of discretion threshold. Trial judges could decide within a wide latitude of discretion to accept or reject a jury’s award and still be within acceptable discretionary boundaries.

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153. 37 Wis. 2d 423, 155 N.W.2d 45 (1967). A pedestrian was struck by an automobile and died six and one-half days later. *Id.*

154. *Id.* at 430, 155 N.W.2d at 50. The court relied, in part, upon the factors to be considered in the calculation of past and future earning losses as outlined in *Ghiardi*, see *supra* note 139, at 71-72. *See also Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 428 N.Y.S.2d 535 (App. Div. 1980) (the award of damages for conscious pain and suffering depends upon the interval between injury and death, the degree of consciousness, severity of pain, apprehension of impending death, and the overall duration of all of these factors).

The court directs the jury to consider the use of medication to suppress pain and consciousness as a factor in determining the degree of pain and suffering damages. Does the plaintiff have a duty to avoid foreseeable consequences (Doctrine of Avoidable Consequences) by insisting the treating physician make them unconscious? If a plaintiff is drug induced to produce unconsciousness, is the plaintiff precluded from conscious pain and suffering damages or any nonpecuniary damages in jurisdictions that do not recognize recovery for the “loss of enjoyment of life”? *See infra* notes 192-94 and accompanying text for an overview of “loss of enjoyment of life” damages. *See also infra* notes 192-204 and accompanying text for the author’s proposed solution to avoid or minimize these legal predicaments.

155. 1 Wis. 2d 19, 82 N.W.2d 886 (1957).

156. *Id.* at 26, 82 N.W.2d at 890.

157. *Id.* That is, if the evidence of a particular case supports a high compensation amount of $3,500 and a low compensation amount of $1,500, and the jury award falls within such parameters, then such an award will not be deemed excessive. *Id.* The court also recognized the effect of inflation on the dollar’s purchasing power and inferred that inflation should be considered in calculating future conscious pain and suffering damages. *Id.*
The court in Affett v. Milwaukee and S. T. Corp. meticulously examined the arguments for and against the use of mathematical formulas. The court concluded:

There is no mathematical way of formulating a formula which will represent all the varying factors involved in pain and suffering in a given case without making assumptions of fact which are not in the evidence. The formula, rather than being an aid as claimed, would result in confusing the jury. The basic reasoning behind the use of any mathematical formula is not so much to aid, or even to persuade, ... the jury as it is to ultimately establish a fixed standard to compensate for the pain and suffering sustained as shown by the evidence in the light of the common knowledge and experience possessed by the jury of the nature of pain and suffering and the value of money.

Once again, the court rejected the use of a per diem amount as a means calculating conscious pain and suffering awards. The court's rationale is simple and forthright: A mathematical formula would standardize a jury's approach to compensation for pain and suffering, regardless of the specific facts of the case.

Arguments in opposition to a formalized method for calculation of damages in Affett were outlined as follows: (1) there is no evidentiary basis for converting pain and suffering into monetary damages; (2) it is improper for counsel to suggest a total amount of pain and suffering damages and, therefore, improper to suggest a per diem amount; (3) to allow an attorney to suggest total damage amounts is tantamount to the attorney giving testimony — opinions and conclusions not supported by evidence; (4) since juries are frequently mislead, suggested damages would result in excessive awards; and (5) it is impossible for a defendant to argue against a suggested amount (or a per diem amount) for such a suggestion has no basis in evidence. Therefore, if the defendant responds to plaintiff's argument, he/she suffers the same effect of arguing without basis in evidence. If defendant does not respond, such inaction implies approval of the suggested per diem amount. Id. at 610, 106 N.W.2d at 278.

Arguments supporting a structured approach to damage calculations include the following: (1) the court should guide the jury using practical and reasonable considerations; (2) a per diem argument does not lack an evidentiary foundation because the jury must, by some reasoning process, arrive at a damage amount that is appropriately tailored to the facts of the case; (3) a suggested total amount or per diem amount does no more than present one method of reasoning available to the trier of fact; (4) a per diem argument is not evidence and is only an illustration and suggestion; and (5) when one counsel has made a suggested damage award, opposing counsel is equally free to suggest his own amounts based upon the evidence at trial. Id. at 610-11, 106 N.W.2d at 278-79. Less substantive arguments were also summarized by the court. Id.

158. 11 Wis. 2d 604, 106 N.W.2d 274 (1960).
159. Arguments supporting a structured approach to damage calculations include the following: (1) the court should guide the jury using practical and reasonable considerations; (2) a per diem argument does not lack an evidentiary foundation because the jury must, by some reasoning process, arrive at a damage amount that is appropriately tailored to the facts of the case; (3) a suggested total amount or per diem amount does no more than present one method of reasoning available to the trier of fact; (4) a per diem argument is not evidence and is only an illustration and suggestion; and (5) when one counsel has made a suggested damage award, opposing counsel is equally free to suggest his own amounts based upon the evidence at trial. Id. at 610-11, 106 N.W.2d at 278-79. Less substantive arguments were also summarized by the court. Id.

160. Id. at 612-13, 106 N.W.2d at 279-80.
161. Id., 106 N.W.2d at 279. Such an approach could yield the same jury verdict for the same injuries in two separate suits. Assume that a pain and suffering award of $50,000 for a ruptured disc was awarded as the result of a slip and fall accident for plaintiff No. 1 and an award of $50,000 for plaintiff No. 2 for the same injury in a head-on automobile collision. These two experiences of pain and suffering are completely different, resulting from two completely different
Underlying these various approaches in the calculation of pain and suffering damages, the court adheres to the general rule on damages:

In actions sounding in damages merely, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere. As shown elsewhere, a verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly excessive as to indicate that it was the result of passion, prejudice or corruption, or it is clear that the jury disregarded the evidence or the rules of law. . . .

Since it is for the jury, and not for the court, to fix the amount of the damages, their verdict in an action for unliquidated damages will not be set aside merely because it is large or because the reviewing court would have awarded less. Full compensation is impossible in the abstract, and different individuals will vary in their estimate of the sum which will be a just pecuniary compensation. Hence, all that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see the results attained do not shock the judicial conscience.162

Even though the "shock[s] the judicial conscience" standard is nebulous and subjective, it is the only direction the Wisconsin Supreme Court has provided in determining the reasonableness of damage awards. This standard implies that the trial court must provide justification in order to overturn a jury's award.

An academic examination of pain and suffering damages would perhaps make a distinction between the proof and the calculation of damages with the intent to facilitate a greater understanding.163 However, in past or future conscious pain and suffering jury awards, proof of such pain and suffering and the actual calculation method work in unison:

A jury may mistakenly assume (without supporting evidence) that there have been, or will be certain effects from an injury or fix compensation for sufficiently proved effects of injury at a figure which is

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162. Bethke v. Duwe, 256 Wis. 378, 384-85, 41 N.W.2d 277, 280 (1950) (citation omitted); see also Makowski v. Ehlerback, 11 Wis. 2d 38, 42, 103 N.W.2d 907, 910 (1960).

163. Achieving fairness between a plaintiff and defendant is fraught with difficulty. The "[t]heoretical nicety [of a calculation method] is impossible." Makowski, 11 Wis. 2d at 41-42, 103 N.W.2d at 910. Our judicial system primarily relies on the good sense of jurors to determine what amount of money will reasonably compensate an individual for loss of their well-being. Id. at 42, 103 N.W.2d at 910.
beyond the range of reasonably debatable amounts. In a case where it is clear to the court that the amount awarded must necessarily reflect an allowance for the effects of injury not sufficiently proved or reflect a rate of compensation which is beyond reason, the court will declare the damages excessive. Where the question is a close one, it should be resolved in favor of the verdict.\textsuperscript{164}

In short, existing Wisconsin law gives great deference to the jury in its calculation of conscious pain and suffering damages.\textsuperscript{165} Wisconsin courts have continued to uphold the prohibition of a suggested per diem amount,\textsuperscript{166} yet have permitted counsel for either party to suggest a dollar amount for damages in their closing arguments.\textsuperscript{167} The reason for this allowance stems from attorneys' latitude to point out to the jury reasonable conclusions or inferences based upon the evidence.\textsuperscript{168} In addition, it is important that a jury be given some guidance in determining what dollar amount would reasonably compensate the claimant.\textsuperscript{169} This approach to jury award calculations is self-policing in the sense that jurors have the ability to discern reasonable suggestions from absurd ones.\textsuperscript{170}

\section*{C. Degrees of Consciousness/Levels of Awareness}

In order to recover damages for pain and suffering in Wisconsin, as in most jurisdictions, the plaintiff is required to be "conscious."\textsuperscript{171} In emphasizing the consciousness requirement, the Wisconsin Supreme Court has expressed its preference for "conscious pain and suffering" instead of "personal injury" as the phrase to describe the plaintiff's injuries in jury

\begin{itemize}
  \item \textsuperscript{164} Id. at 42-43, 103 N.W.2d at 910-11.
  \item \textsuperscript{165} Burns v. Geres, 140 Wis. 2d 197, 204 n.4, 409 N.W.2d 428, 431 n.4 (1987) (the judicial system relies on the good sense of jurors in calculating pain and suffering awards) (citing Makowski v. Ehlenback, 11 Wis. 2d 38, 42, 103 N.W.2d 907, 910 (1960)); Fahrenberg v. Tengel, 96 Wis. 2d 211, 236, 291 N.W.2d 516, 527 (1980) (because there is no mechanical legal rule for measurement of pain and suffering damages, the damage award rests with the discretion of the jury).
  \item \textsuperscript{166} E.g., Herman v. Milwaukee Children's Hosp., 121 Wis. 2d 531, 361 N.W.2d 297 (Ct. App. 1984).
  \item \textsuperscript{167} E.g., Peot v. Ferraro, 83 Wis. 2d 727, 743, 266 N.W.2d 586, 594 (1978) (citations omitted).
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.} at 744, 266 N.W.2d at 595. However, if the plaintiff is recovering damages for loss of society and companionship as the survivor of a wrongful death suit, such a lump sum argument does not contain self-policing qualities and is, therefore, prohibited. \textit{Id.} at 745-46, 266 N.W.2d at 595; \textit{see generally} Minter, \textit{Task Force on Tort Reform Research Paper on Limiting Recovery of Noneconomic Damages} 60 Wis. BAR BULL., July 1987, at 15.
  \item \textsuperscript{171} Schulz v. General Casualty Co., 233 Wis. 118, 288 N.W. 803 (1939). A jury verdict of $1,000 for pain and suffering was rendered perverse because the decedent was wholly unconscious after an automobile accident. The supreme court held that it was proper for the trial court to
instructions. The court further refined the concept of conscious pain and suffering by recognizing "degrees of consciousness" in *Blaisdell v. All State Insurance Co.* The *Blaisdell* court stated that the duration of pain and suffering, along with "[t]he degree of consciousness, severity of pain, and apprehension of impending death have all been mentioned as important elements for consideration" in calculating pain and suffering damages. Jurisdictions other than Wisconsin have also recognized "degrees of conscious pain and suffering" or "levels of awareness" as factors to be considered by juries.

The New York Appellate Court in *Kenavan v. City of New York* acknowledged degrees of conscious pain and suffering. The court held that, given the expert medical testimony at trial, it was unclear whether the firefighter experienced pain prior to death:

[T]he expert witness called by his estate testified that (1) there existed five levels of consciousness which, in ascending order, contained decreasing responses to pain, and (2) Kenavan, at the time of his arri-
val at the hospital, was in "either state 3, possibly early 4" which the
expert defined as follows: "Level 3 is somewhat below that. Now the
individual is unconscious, that is not responsive to the outside
world, but still has a response to pain so that in level 3 a painful
stimulus will invoke a response such as a pinch on the arm, the arm
will be withdrawn. A pinch on the leg or a stick with the needle.
The leg will be withdrawn. An attempt to put a tube down the
mouth, the unconscious patient will try to push it away with his
hand. This is called a response to noxious or painful stimuli. Level
four is one level below this. Now, there is little response to pain but
still some.\textsuperscript{177}

This expert's position, as adopted by the New York Appellate Court, is that
a patient can experience varying degrees of pain at different levels of con-
sciousness. In other words, the plaintiff's recovery of damages should cor-
respond to the degree of his conscious pain and suffering.\textsuperscript{178}

New York's highest court revisited the issue of consciousness as it re-
lates to damages for pain and suffering and the loss of enjoyment in \textit{McDou-
gald v. Garber}.\textsuperscript{179} The trial court instructed the jury to award pain and
suffering damages only if there is "some level of awareness" on the part of
the plaintiff.\textsuperscript{180} The \textit{McDougal}d court held that the "some level of aware-
ness" standard established by the trial court was an appropriate instruction
for the jury to follow in all aspects of calculating nonpecuniary losses.\textsuperscript{181}

No doubt the standard ignores analytically relevant levels of cogni-
tion, but we resist the desire for analytical purity in favor of simplic-
ity. A more complex instruction might give the appearance of

\textsuperscript{177} \textit{Id.} at 34, 507 N.Y.S.2d at 200. See \textit{supra} notes 90-95 and accompanying text for a
discussion of levels of consciousness.

108 N.J. 394, 529 A.2d 434 (1987). The Superior Court's decision supported this proposition. \textit{See}
\textit{infra} note 184.

\textsuperscript{179} 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S. 937 (1989). A thirty-one year old woman
underwent a Caesarean section and tubal ligation when she experienced oxygen deprivation result-
ing in a permanent comatose condition. \textit{Id.} at 251, 536 N.E.2d at 373, 538 N.Y.S.2d at 938.

\textsuperscript{180} \textit{Id.} at 253, 536 N.E.2d at 374, 538 N.Y.S.2d at 939. The jury instruction stated:
It is for you to determine the level of Emma McDougal's perception and awareness. Suf-
fering relates primarily to the emotional reaction of the injured person to the injury. Thus,
for an injured person to experience suffering, there, again, must be some level of awareness.
If Emma McDougal is totally unaware of her condition or totally incapable of any emo-
tional reaction, then you cannot award her damages for suffering. If, however, you con-
clude that there is some level of perception or that she is capable of an emotional response
at some level, then damages for pain and suffering should be awarded. . .

\textit{Id.}

\textsuperscript{181} \textit{Id.} at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940.
greater precision but, given the limits of our understanding of the human mind, it would in reality lead to only greater speculation.\textsuperscript{182}

The \textit{McDougald} court's distinction, if any, between "levels of cognition" or "levels of awareness" is not clear from this opinion. The most logical conclusion is that levels of awareness and cognition are synonymous with "levels of consciousness" because the denotation of consciousness is an "awareness of one's environment."\textsuperscript{183} In contrast to the \textit{McDougald} analysis, New Jersey courts would allow a plaintiff compensation according to the pain experienced at each level of awareness/consciousness.\textsuperscript{184}

The South Dakota Supreme Court is less specific in its required jury instructions on pain and suffering. In \textit{Plank v. Heirigs},\textsuperscript{185} the court upheld a lower court's jury instruction which omitted "conscious" from the pain and suffering instruction.\textsuperscript{186} The South Dakota Supreme Court concluded that the jury could only have understood the meaning of pain and suffering as conscious pain and suffering.\textsuperscript{187}

\textsuperscript{182} Id.
\textsuperscript{183} See supra notes 73-83 and accompanying text concerning the complete definition of consciousness.
\textsuperscript{184} The Superior Court of New Jersey alluded to two levels of consciousness in \textit{In re Jobes}, 210 N.J. Super. 543, 510 A.2d 133 (N.J. Super. Ct. Ch. Div. 1986). The issue before this New Jersey court was whether a "life advocate" could be appointed for a woman who was rendered comatose due to an anesthesiological misadventure. The woman's husband sought to remove his wife from a life-sustaining food nutrition system. \textit{Id.} at 544 n.1, 510 A.2d at 134 n.1. However, the court stated:

[The use of "comatose," "unconscious" and "non-cognitive" is not meant to be dispositive of certain issues which must be decided at the trial; e.g., whether Nancy Ellen Jobes is presently in a vegetative state; what level, if any, of consciousness exists, and whether she does, in fact, respond in a comprehending sense to external stimuli, such as pain and the commands of others.

\textit{Id.}

\textsuperscript{185} 83 S.D. 173, 156 N.W.2d 193 (1968).
\textsuperscript{186} \textit{Id.} at 186, 156 N.W.2d at 201. The plaintiff in \textit{Plank v. Heirigs} sustained severe brain injury as a result of a rear end automobile accident. The plaintiff received $18,740.90 for pain and suffering out of a total of $30,000 in general damages. One of the issues on appeal was whether the jury was properly instructed regarding conscious pain and suffering. \textit{Id.} at 186, 156 N.W.2d at 200. The appellant contended that such an omission resulted in a jury verdict that was based upon "prejudice, passion, speculation or conjecture." \textit{Id.} at 185, 156 N.W. 2d at 200-01.
\textsuperscript{187} \textit{Id.}

[W]e believe when he instructed that damages may only be awarded for pain experienced, the jury was in effect told and it could only have understood this to mean conscious pain for if one is unconscious, he does not experience pain. To experience something is to "meet with, feel, suffer, (or) undergo" it.

\textit{Id.} at 186, 156 N.W.2d at 201 (citations omitted) (emphasis in original).

The same court subsequently held that the addition of the word "conscious" to "pain and suffering" did not impose an improper burden on the plaintiff in their claim for damages. \textit{Krumm v. Feuerhelm}, 298 N.W.2d 184, 189 (S.D. 1980).
In summary, some jurisdictions, such as South Dakota, appear to hold the jury in high esteem and to believe that "conscious" need not modify "pain and suffering" in order for the jury to comprehend and fulfill its duties. In contrast, other jurisdictions implicitly believe that the plaintiff can experience different levels of pain at different levels of consciousness. The latter belief is contrary to the medical findings as outlined in this Comment. Conscious pain and suffering is an all or nothing proposition. In short, the danger in a loosely constructed jury instruction on pain and suffering will undoubtedly result in unjust compensation.

V. DEGREES OF AWARENESS/CONSCIOUSNESS FOR PAIN AND SUFFERING DAMAGES SHOULD NOT EXIST AS A MATTER OF LAW

The American jurisprudence system enables an individual who has sustained a bodily injury to receive monetary compensation from the tortfeasor. When the injured party is rendered unconscious as a result of another's negligent conduct, such an injured party is entitled to just compensation. This compensation should not be in the form of pain and suffering damages, but rather in a form of nonpecuniary damages, such as loss of enjoyment of life.

188. See supra notes 76-83 and accompanying text for a discussion in interrelationship of pain and consciousness.

189. See also Cook v. Erwin, 30 A.D.2d 579, 289 N.Y.S.2d (App. Div. 1968) (movement of plaintiff's eyes, acknowledgment and acceptance of his last rites, and groaning was sufficient evidence to prove the experience of pain). But see Tenczar v. Milligan, 47 A.D.2d 773, 365 N.Y.S.2d 272 (App. Div. 1975) (plaintiff's moaning and groaning was insufficient evidence to support a $30,000 conscious pain and suffering award, and was therefore reduced to $10,000).

190. See generally supra notes 10-16 and accompanying text concerning the purposes of the tort legal system.

The "Doctrine of Avoidable Consequences" or duty to "mitigate damages" is a topic related to that of damages for conscious pain and suffering. The Wisconsin Supreme Court in Helleckson v. Loiselle, 37 Wis. 2d 423, 155 N.W.2d 45 (1967), held that sedatives and their effects, as well as other drugs used to relieve pain, are factors that juries should consider when calculating pain and suffering damages. Id. at 430, 155 N.W.2d at 50. See generally Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 8.9, at 579 (1973); RESTATEMENT (SECOND) OF TORTS § 918 Avoidable Consequences (1977); 2 M. Minzer, J. Nates, C. Kimball, D. Axelrod, & R. Goldstein, DAMAGES IN TORT ACTIONS §§ 16.30-16.35 (1989).

191. The term "unconscious" is used in this context to denote the plaintiff's inability to experience pain. For a discussion of consciousness from a medical perspective, see supra notes 73-83 and accompanying text.

192. "Loss of enjoyment of life" may consist of the plaintiff's loss of ability to engage in sports or recreational activities, or in the loss of ability to play with one's children." 22 AM. JUR. 2D Damages § 272, at 222 (1988). Specifically, the plaintiff can seek to prove the following facts and circumstances to establish damages for loss of enjoyment of life:
a separate part of the overall nonpecuniary damages is a distinct issue which exceeds the scope of this Comment.\textsuperscript{193}

In evaluating nonpecuniary damages, juries are generally expected to be objective in examining and weighing all the evidence introduced at trial. The jury is to arrive at a verdict based upon the evidence as viewed from the objective position of a “reasonable person.”\textsuperscript{194} The requirement that juries examine the facts of a case objectively is the very reason damages for pain and suffering are not calculated on a “per hour” basis or “per diem” ba-

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\textit{Nature of plaintiff's injury and disability caused by it; Impairment of ability to engage in athletic activities [including] golf, swimming, tennis, roller skating, handball; Impairment of ability to engage in recreational activities [including] hunting, fishing, reading; Interference with family activities [including] picnics, excursions, shopping, caring for children; Interference with religious activities [including] church attendance; Interference with social activities [including] dances, parties, playing cards.}

\textit{Id. § 273, at 222-23. For additional discussion of loss of enjoyment of life, see \textit{supra} notes 21-29.}

\textit{193. A number of jurisdictions have accepted the proposition that “loss of enjoyment of life” is an element of damages distinct from pain and suffering, including Georgia; Maryland; Minnesota; Nebraska; New Jersey; Washington; Wisconsin, Bassett v. Milwaukee N. Ry. Co., 169 Wis. 152, 170 N.W. 944 (1919); and Wyoming. In addition, numerous federal courts have also recognized this distinction in application of state law to cases in the following federal district and/or circuit courts: Colorado, Maryland, Michigan, New York, and Tennessee. For an extensive list of citations pertaining to the above-mentioned states, see 22 AM. JUR. 2D Damages § 272, at 221 n.27; see also Annotation, \textit{Damage Element — Loss of Enjoyment of Life}, 34 A.L.R. 4th 293 (1984); Comment, \textit{Loss of Enjoyment of Life as a Separate Element of Damages}, 12 PAC. L.J. 965 (1981); and C. Hermes, \textit{Loss of Enjoyment of Life — Duplication of Damages Versus Full Compensation}, 63 N.D.L. Rev. 561 (1987). \textit{But see} Leiken v. Gafford, 245 Kan. 325, 778 P.2d 823 (1989) (as a general rule, loss of enjoyment of life is “inextricably included” in damages for pain and suffering).}

\textit{When a jurisdiction makes the distinction between damages for pain and suffering and loss of enjoyment of life, “awareness” of such a loss of enjoyment of life should not be a prerequisite for the plaintiff’s recovery. To hold otherwise is to deny the plaintiff the opportunity to seek just compensation under long-established tort law. If awareness is adopted as an element, a tortfeasor would not be liable to the plaintiff for conscious pain and suffering or for the loss of enjoyment of life when the plaintiff is rendered unconscious. The defendant’s liability is limited, which in turn restricts the plaintiff’s opportunity to recover compensatory damages.}

\textit{However, if recovery for loss of enjoyment of life includes awareness as an element, keeping jurors within the confines of the jury instructions would be difficult. For example, the defense counsel in the beating and rape of the Central Park jogger would be required to muster an infinite amount of creativity to convince a jury that the female investment banker is not entitled to pain and suffering damages or loss of enjoyment of life, as a matter of law, for the eleven days she was unconscious. It obviously would be imprudent for defense counsel to argue such a position because the jury would be incensed given the heinous nature of the crime. The logical solution to this quandary is to allow the jury to award loss of enjoyment of life damages for those eleven days without requiring an element of “awareness.” Such a solution would justly compensate the victim, limit the defendant’s liability within his duty to compensate, and maintain reasonable control of, and provide direction to, the jury in deliberations.}

\textit{194. See generally \textit{supra} notes 21-26 and accompanying text for a discussion of subjective and objective jury approaches to awarding damages.}
Juries should not speculate; rather they should base all the factual findings and damage awards on the evidence submitted at trial.\textsuperscript{196}

To that end, courts instruct jurors in an attempt to prevent jury speculation or to help prevent juries from thinking that a person who is semiconscious is experiencing pain and suffering and therefore is entitled to a monetary damage award. When objective medical evidence proves that the plaintiff’s cerebral cortex is not functioning,\textsuperscript{197} or when objective medical evidence proves that the plaintiff’s brain stem and cerebral cortex are severely damaged,\textsuperscript{198} the court should not submit the issue of conscious pain and suffering to the jury as a matter of law because the plaintiff is incapable of experiencing pain and suffering. When objective medical evidence indicates to a reasonable degree of medical certainty that the plaintiff’s cerebral cortex is incapable of perception or that the plaintiff’s brain stem is not properly functioning, in the absence of controverting evidence, the issue of conscious pain and suffering should not be submitted to the jury as a matter of law.\textsuperscript{199} Such a finding of law would protect the interests of the defendant; i.e., she need only pay her fair share of the damages she has caused. Moreover, such a finding of law would protect the integrity of the tort system. Nonpecuniary compensation for an unconscious plaintiff could originate from some category of damages other than conscious pain and suffering, such as loss of enjoyment of life.

When the issue of whether a plaintiff can experience pain at different degrees of consciousness is specifically addressed by the Wisconsin Supreme Court, the court will be expected to rule consistently with its holding in \textit{Schulz v. General Casualty Co.}\textsuperscript{200} The \textit{Schulz} court held that if the plaintiff is wholly unconscious, the question of pain and suffering should not be submitted to the jury.\textsuperscript{201} The Wisconsin Supreme Court could also look to the New York court’s holding in \textit{McDougald v. Garber},\textsuperscript{202} which sought to provide the jury with simple instructions.

The \textit{McDougald} court did not expect nor imply that “the fact finder should sort out varying degrees of cognition and determine at what level a

\textsuperscript{195} See supra note 151 and accompanying text.
\textsuperscript{196} Id.
\textsuperscript{197} The cerebral cortex, specifically the neocortex, is the center of human consciousness. See supra notes 73-74 and accompanying text for a more detailed discussion of consciousness.
\textsuperscript{198} See supra note 75 and accompanying text.
\textsuperscript{199} Id.
\textsuperscript{201} Schulz, 233 Wis. at 128-29, 288 N.W. at 808. See also supra note 180 and accompanying text.
particular deprivation can be fully appreciated."\textsuperscript{203} The experience of pain is stimulus, perception, and effect.\textsuperscript{204} The existence of these three elements in a tort action for pain and suffering damages (excluding psychogenic pain and suffering)\textsuperscript{205} entitles the plaintiff to economic damages for the negligent conduct of another. In the absence of any one of these three elements of pain and suffering, the plaintiff should not be able to seek nonpecuniary damages from the "conscious pain and suffering" category of damages because the harm, the experience of pain, is absent.

\section*{VII. Conclusion}

The narrow scope of this Comment touches upon a wide range of tort topics. Its intent is to provide a simplified understanding of the complex interworkings of the human brain and nervous system to the extent necessary to fulfill its purpose. The purpose of this Comment is to point out that existing tort law does not reflect medical realities. That is, when certain pathogenic conditions within the human body exist, it is impossible for a human to experience pain. Courts should not submit the issue of conscious pain and suffering to juries for deliberation as a matter of law when such conditions exist. Moreover, the medical profession is in agreement to a reasonable degree of medical certainty that, though there are levels or degrees of consciousness, there are only limited levels or degrees at which one can experience pain. One can experience pain only when the brain's center of cognition and perception (neocortex) is functioning. Any human being in a condition short of the ability to perceive her environment should not be entitled to conscious pain and suffering damages. Other existing tort damages are available to compensate the injured party for their loss or harm.

The bases for damages for conscious pain and suffering lie within the principles of tort law: to compensate plaintiffs for pain and suffering if, to a reasonable degree of medical certainty, such pain and suffering exists. Instructing the jury to calculate pain and suffering damages in light of "degrees of consciousness" is to ask the jury to speculate on the compensatory value of conscious pain and suffering that the plaintiff has not experienced.

\begin{footnotesize}
\begin{enumerate}
\item[203.] Id. at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940; see also supra notes 80-85 and accompanying text.
\item[204.] See supra notes 47-53 and accompanying text.
\item[205.] See supra note 20 and accompanying text.
\end{enumerate}
\end{footnotesize}
The author is grateful for the guidance and support of Professor John J. Kircher and Associate Professor Michael K. McChrystal in the research and writing of this Comment.

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