Trial Briefs

June 2001 Vol. 46, No. 6

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Jury instructions: when is a "normal life" lost?

Several years ago, I was involved in a trial where the plaintiff was suing my client, a local municipality, because she fractured her leg rather severely while snow sledding with her children. Thankfully, the injury healed well and no impairment resulted in her gait, other than residuary aching and soreness at intermittent intervals.

At the jury instruction conference, plaintiff's counsel, based on *Smith v. Evanston Hospital,* 260 Ill.App.3d 925, 197 Ill.Dec. 810, 631 N.E.2d 1269 (1st Dist. 1994), offered the following damage instruction, in addition to others:

* * *

When I use the expression "loss of normal life," I mean the temporary (or permanent) diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life. (I.P.I Civil 30.04.02); and ;

Loss of a normal life experienced and reasonably certain to be experienced in the future. (I.P.I. Civil 30.04. 01).

* * *

I objected to these instructions because, to me, there was no evidence that plaintiff had suffered any permanent, disabling injury and requested the court to give no instruction or the following admonition:

The disability experienced and reasonably certain to be experienced in the future. (I..P.I. Civil No. 30.04.01).

The Court concluded that plaintiff's instruction was proper based on *Smith*, and gave it.

At times, the concept of what constitutes "normal life" has confounded me. What is normal, or, who is normal? What is the standard for normalcy? And, more importantly, what proof must be adduced to show that a departure from normalcy has or has not occurred? Do we create any value for our clients by tendering a "normal life" instruction where the client's impairments are not substantial? Recent case law seems to indicate that after an initial love affair with the "loss of normal life" instruction, courts and practitioners are rethinking when such instruction should be given. *Torres v. Irving Press,* 303 Ill.App.3d 151, 236 Ill.Dec. 403, 707 N.E.2d 248 (1st Dist. 1999); *Tornabene v. Paramedic Services of Illinois, Inc.,* 314 Ill.App.3d 494, 247 Ill.Dec. 192, 731 N.E.2d 965 (1st Dist. 2000); *Jones v. Chicago Osteopathic Hospital* 316 Ill.App.3d 1121, 250 Ill.Dec. 326, 738 N.E.2d 542 (1st Dist. 2000).

The "loss of normal life" instruction has as its genesis the theory that loss of human life, in itself, is a separate component of damages. In other words, the concept of the loss of enjoyment of life is a relevant factor in determining what constitutes "pain and suffering" in an itemized verdict. *Fetzer v. Wood,* 211 Ill.App.3d 70, 83, 155 Ill.Dec. 626, 569 N.E.2d 1237 (2nd Dist. 1991); or, as one court has put it, that a human life has some "hedonic value." *Sherrod v. Barry,* 827 F.2d 195, 205 (7th Cir. 1987). And, no doubt, Professor Graham's article, "The Prospect of Under or Over Compensation in Damages Awards for Personal Injuries," (28 DePaul L.Rev. 33 (1978), which cogently advocated that a plaintiff should be compensated for "loss of normal life" added to the belief that such an instruction was preferable to its "disability" counter-part. It has been said that the term "disability" is unclear and overlaps with other components of itemized damages, such as lost wages. *Smith v. Evanston Hospital,* at 936, citing *Graham,* 28 DePaul L Rev. at 50-51. The loss of a normal life instruction, although endorsed by our appellate court, has never been adopted by our supreme court. Only recently has the appellate court questioned its continuing efficacy.

Nurymar Torres and her father, Miguel, were involved in an automobile collision when they were struck by Kurl Blumenthal, an Irving Press automobile driver. Nurymar severely injured her leg and knee. The leg was casted for several months. Her physician testified that the ankle would never regain full motion, she had a 25% chance of getting arthritis and her life activities, such as running and exercising, would be seriously restricted throughout her life. The jury returned a zero verdict for "loss of normal life."

At trial, the court gave the "loss or normal life" instruction and the appellate court found that this was error. The court determined that giving such an instruction was error, since it was not the recommended Illinois Pattern Jury Instruction. The court stated that the jury should be instructed on the element of "disability" rather than substituting the element of "loss of normal life" outlined in the *Smith* decision. It reversed the trial court and sent the matter back to the trial court for a new trial.

One has to wonder whether the reasoning of the court is sound. Clearly, Nurymar Torres's life as she knew it had been permanently altered by this automobile collision. Extensive testimony supported that fact. No basis

appeared in the reported opinion for a $0 verdict on "loss of normal life," other than perhaps the jury's misunderstanding as to what that phrase denotes.

In *Tornabene,* the court again found that pattern jury instructions are to be utilized unless the court determines such instructions do not accurately reflect the law. Invoking Supreme Court Rule 239, the defendant argued the plaintiff should not be permitted to submit a "loss of normal life" instruction to the jury since there was no proof that Rose Tornabene experienced regular aspects of life between 4:15 a.m. when defendant's paramedics arrived, and 4:45 a.m., when she died. Such negligence attributable to the defendant was the claim of the administrator, namely that the decedent died wrongfully because of alleged negligence committed by the paramedic company responding to and treating Rose. The court found the submission of the "loss of normal life" instruction to be error. Citing *Torres,* the court found the question of what amounts to a "normal life" to be too speculative and subjective a standard, making damages difficult to quantify. The appellate court fully adopted the *Torres* endorsement of requiring the trial courts to give I.P.I. Civil 30.04 in its "disability" version. Or did it?

The final *recent* opinion in this trilogy discussing the concept of using the "loss or normal life" instruction is *Jones.* Andrew Jones was born with severe brain damage and was physically and mentally impaired until he was one and a half years old, when he died. His mother, as next friend, brought an action against the Chicago Osteopathic Hospital on Andrew's behalf, alleging professional negligence was the proximate cause of the child's unfortunate life and death. The jury agreed, returning a $6,300,000 verdict against the hospital.

In *Jones,* the following instruction was given:

* * *

If you decide for plaintiff on the survival claim, you must fix the amount of money which will reasonably and fairly compensate the estate for any of the following elements of damages proved by the evidence ***

The pain and suffering experienced.

The disability experienced.

The loss of normal life.

The medical expenses incurred.

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

* * *

Also, on the survival count, "loss of normal life" was used. Notwithstanding this error, the appellate court upheld the verdict (*Jones,* at 1135-1136).

Defendant appealed challenging, *inter alia,* the use of the "loss of normal life" instruction in lieu of "disability." In a very thorough opinion written by Justice Wolfson, the court determined that the "loss of normal life" instruction was properly given under the circumstances of Andrew's life. In reviewing the *Smith*, *Torres* and *Tornabene* decisions, the court observed the use of the "loss of normal life" instruction was proper because it was more closely tailored to the evidence presented in the case than the "disability" instruction. The court noted that the child's injury occurred at birth and he never experienced a normal life before that injury occurred. *Jones* at 1136. Although the trial judge gave an instruction on both "disability" and "loss or normal life," the court rejected that double recovery occurred even though the verdict form included both "disability" and "loss of normal life" as separate damage components. The court concluded there was no double recovery in view of how the forms were completed and the jury was not asked to compensate for disability in addition to loss of normal life. In examining the nature of the child's injuries, the court determined that to be proper.

As can be seen from these three cases, our appellate court has concern about the use of the "loss of normal life" instruction. As trial lawyers, we should share this concern. What is normal to you, or a court, may not seem that way to a mother of two, a postal worker, or a linesman. If the "loss of normal life" instruction is utilized in factual scenarios where it is not warranted, it will be rejected by a jury as inconsistent with its view of the facts. Also, it will lessen your credibility with the jury who will think you are overreaching. By the same token, this instruction is entirely appropriate where the evidence shows, like in *Jones,* that the life of the plaintiff has been truly altered not just substantially, but in a manner that is distinct in the way we understand and live our lives.

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