

CASENOTE

***McGEE v. A C & S, INC.*: LOSS OF ENJOYMENT OF LIFE AS A COMPENSABLE CATEGORY OF GENERAL DAMAGES**

I. INTRODUCTION

Under Louisiana law, the term “general damages” includes those damages that may not be fixed with any pecuniary exactitude, but which involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money.¹ The award for general damages is left to the discretion of the jury and the judge, and calls for the trier of fact to make a determination of a monetary award for losses that are not associated with any actual mathematical or financial calculation. As a result, the determination of general damages is unique to each fact pattern and virtually every human victim’s experience.

The term “hedonic damages” refers to damages for loss of enjoyment of life or lifestyle, which are typically a part of damages for pain and suffering or a general damage award.² In *McGee*, the Louisiana Supreme Court resolved a split in the state circuit courts concerning awards for hedonic damages and recognized a plaintiff’s ability to seek a separate damage award for loss of enjoyment of life.³ By allowing for the categorization of the damage for loss of enjoyment of life, Louisiana has provided recourse to plaintiffs who can prove that they have suffered such losses.

This Note will discuss *McGee* and examine the policy implications

1. *Foster v. Trafalgar House Oil & Gas*, 603 So. 2d 284, 285 (La. Ct. App. 1992) (citing *Boswell v. Roy O. Martin Lumber Co.*, 363 So. 2d 506 (La. 1978); *Anderson v. Bennett Wood Fabricators*, 571 So. 2d 780 (La. Ct. App. 1990)). This definition of general damages is typically cited by Louisiana courts.

2. See Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037 (2004) (providing a discussion of the meaning of the term “hedonic damages” and further analysis of the practice of awarding damages using this principle).

3. *McGee v. A C & S, Inc.*, 05-1036 (La. 7/10/06); 933 So. 2d 770. *McGee* also clarifies that the loss of enjoyment of life “is not recoverable by [a] primary tort victim’s family members who are eligible to recover for loss of consortium.” *Id.* at 779.

that such a ruling holds for future tort and survival action damage verdicts.⁴ Part II will discuss the facts and holding of the case. Next, Part III will review the background of the case with regards to the relevant civil code articles and case law concerning a separate award for hedonic damages. Part IV will analyze the court's decision that damages for loss of enjoyment of life can be awarded as a separate element of general damages. Lastly, Part V will debate whether the Louisiana Supreme Court has gone far enough—or if it has gone too far—in deciding that loss of enjoyment of life is a compensable element of damages. In particular, it will focus on the fact that the *McGee* decision (1) creates the risk of double compensation associated with awards for hedonic losses and pain and suffering; and (2) complicates the procedural standards for jury instructions and appellate review of general damage awards due to the highly subjective nature required for the determination of hedonic losses. Though the ability for a plaintiff to recover all damages occasioned by the injury he or she sustains in any circumstance is essential to Louisiana tort law, critics will likely attack the *McGee* ruling claiming that there is no distinction between awards for loss of enjoyment of life and an award for pain and suffering. The Louisiana Supreme Court's choice to recognize a conceptual distinction between these particular components of general damages has potentially expanded the realm of possible damage recovery options to include currently unrecognized elements of general damages. Although tort law in the state has developed through application of case law, Louisiana courts should be mindful, even in the wake of *McGee*, that the legislature has provided for a clear distinction between awards when necessary to guide a jury seeking to compensate a victim for the injuries he or she sustains.

II. FACTS AND PROCEDURAL HISTORY

The litigation in *McGee* began in 2000 when the plaintiffs, the widow and children of James Edward McGee, filed a wrongful death and survival action against McGee's former employers to recover damages for injuries sustained as a result of McGee's occupational exposures to asbestos-containing products.⁵ According to the plaintiffs, McGee was exposed to dangerously high levels of asbestos on a daily basis as a routine part of his

4. Because the plaintiffs in *McGee* filed a wrongful death and survival action against the defendants, the Louisiana Supreme Court clarifies that the plaintiffs are limited to asserting a claim for the loss of enjoyment of life during the victim's lifetime under the survival action, and are precluded from asserting their own loss of enjoyment of life caused by the victim's illness under the wrongful death action. *McGee*, 933 So. 2d at 780.

5. *Id.* at 770.

work responsibilities.⁶ Plaintiffs alleged that while performing his routine work duties, Mr. McGee inhaled asbestos fibers proximately causing his asbestos-related disease which, in turn, resulted in his death on January 28, 2000.⁷ As part of their petition, the plaintiffs sought damages for McGee's loss of enjoyment of life.⁸

In response to the plaintiffs' efforts to obtain an award for loss of enjoyment of life as a separate and additional award to general damages and to present expert testimony to quantify such damages, the defendants filed a "Motion *in limine* to Exclude Hedonic Damages."⁹ Defendants argued that loss of enjoyment of life is a part of the general damage award and is not a separate compensable category; however, the plaintiffs stated that loss of enjoyment of life is a separate item of damages.¹⁰ On October 5, 2004, the district court orally denied the defendants' motion and the trial judge signed an Order on November 3, 2004 reflecting the oral ruling.¹¹ Thereafter, the defendants filed a Notice of Intent to Apply for Supervisory Writs, which were granted by the Fourth Circuit Court of Appeal.¹²

In granting the defendants' motion, the court of appeal ruled that hedonic damages are not to be awarded as a separate item of damages distinct from any general damages award and that allowing such an award was "erroneous as a matter of law."¹³ The court of appeal reversed the district court ruling and granted defendants' motion *in limine* to prohibit plaintiffs from asserting a claim for loss of enjoyment of life and excluding any expert testimony that would be offered in relation to the jury's quantification

6. Brief of Petitioner-Appellant at 4, McGee v. A C & S, Inc., 05-1036 (La. 7/10/06); 933 So. 2d 770. Mr. McGee's asbestos exposure was associated with the construction, erection, building, use, or cutting of defendants' asbestos-containing products. *Id.* at 5. Mr. McGee worked as a doffer for Thomaston Mills, Inc. from 1947 until 1952, and for Kaiser Aluminum & Chemical Corporation from 1952 until 1982. Brief of Petitioner-Appellant, *supra* note 6, at 5.

7. *Id.*

8. McGee, 933 So. 2d at 773.

9. Brief of Respondent-Appellee at 5, McGee v. A C & S, Inc., 05-1036 (La. 7/10/06); 933 So. 2d 770. The motion *in limine* is a "pretrial request that certain inadmissible evidence not be referred to or offered at trial." BLACK'S LAW DICTIONARY 1038 (8th ed. 1999).

10. McGee, 933 So. 2d at 773.

11. Brief of Petitioner-Appellant, *supra* note 6, at 5. The trial judge noted that loss of enjoyment of life had been allowed as a separate category of damages in previous cases. *See McGee*, 933 So. 2d at 773.

12. McGee, 933 So. 2d at 773.

13. Brief of Respondent-Appellee, *supra* note 9, at 6. The court of appeal relied on its decision in *Mistich v. Volkswagen of Germany, Inc.*, 94-0226 (La. App. 4 Cir. 6/25/97); 698 So. 2d 47. *See McGee*, 933 So. 2d at 773. It is noteworthy that at the time of the case, the Fourth Circuit Court of Appeal was the only circuit court that regarded a separate award for loss of enjoyment of life as erroneous as a matter of law. *See discussion infra* Part III.C.

of hedonic damages.¹⁴ Subsequently, plaintiffs applied for supervisory writs to the Louisiana Supreme Court on the hedonic damages issue, and on June 17, 2005, the Louisiana Supreme Court granted the writ application.¹⁵

The issue before the court was whether loss of enjoyment of life is a separate element of general damages, like pain and suffering, and whether the jury can consider a separate award for loss of enjoyment of life.¹⁶ The court held that there was a conceptual difference between pain and suffering and loss of enjoyment of life.¹⁷ As a result, the court rejected the Fourth Circuit's conclusion that a separate award for loss of enjoyment of life is erroneous as a matter of law, and concluded that "loss of enjoyment of life constitutes damage that is compensable under [Louisiana Civil Code article] 2315 and accordingly that the jury may be allowed to give a separate award for loss of enjoyment of life."¹⁸

III. BACKGROUND

In *McGee*, the Louisiana Supreme Court resolved a split in the circuits regarding the recognition of a separate, compensable award for loss of enjoyment of life.¹⁹ In making its decision, the court analyzed the current Louisiana Civil Code articles and case law relevant to compensatory damages to determine if loss of enjoyment of life was in fact a compensable component of general damages.²⁰ Then, the court analyzed the split decisions in the courts of appeal to determine if loss of enjoyment of life is dis-

14. *McGee*, 933 So. 2d at 773.

15. See *McGee v. A C & S, Inc.*, 05-1036 (La. 6/17/05); 904 So. 2d 709.

16. *McGee*, 933 So. 2d at 774. Up to this point, the Louisiana Supreme Court had "never squarely addressed the issue of awarding hedonic damages for loss of enjoyment of life as a separate element of damages." *Id.* (citing *Joseph v. Broussard Rice Mill, Inc.*, 00-0628, p. 1 (La. 10/30/00); 772 So. 2d 94, 106-07 (Victory, J., assigning additional reasons)). See also *McGee*, 933 So. 2d at 775 (citing *Matos v. Clarendon Nat'l Ins. Co.*, 00-2814, p. 9 (La. App. 1 Cir. 2/15/02); 808 So. 2d 841, 848) (noting that there appears to be a conflict between the Louisiana Courts of Appeal over loss of enjoyment of life as a separate element of damages).

17. *McGee*, 933 So. 2d at 776. The court noted that when jurors are given proper jury instructions, they are able to comprehend the differences in pain and suffering and loss of enjoyment of life. *Id.* Additionally, the recoverability for the loss of enjoyment of life depends on the particular facts of the case, and "should be left to the district court's discretion on a case-by-case analysis." *Id.* at 779.

18. *Id.* For a review of Louisiana Civil Code article 2315 and its current application to damage recovery in Louisiana tort actions, see discussion *infra* Part III.A.

19. *McGee*, 933 So. 2d at 776 ("The First, Second, Third, and Fifth Circuit Court of Appeal have held that a separate award for loss of enjoyment of life is compensable when proven, while only the Fourth Circuit Court of Appeal has held that such an award is erroneous as a matter of law.").

20. *Id.* at 773-74.

tinct from other elements of general damages, such as pain and suffering.²¹ The same framework used by the court will be used in this section to explore the legislation and case law underlying the court's decision.

A. LOUISIANA CIVIL CODE ARTICLE 2315 AND COMPENSATORY DAMAGES

Under Louisiana law, an action seeking damages for injuries caused by the act of another is called an offense or quasi-offense and is generally termed a delictual or tort action.²² Delictual actions are governed by Louisiana Civil Code article 2315(A), which states that "[e]very act of man that causes damages to another obliges him by whose fault it happened to repair it."²³ Therefore, a tortfeasor is liable to a tort victim for all damages resulting from his actions, and a monetary award to compensate the victim is the typical remedy provided by courts in delictual actions.²⁴

Compensatory damages are divided into two broad categories: special damages and general damages.²⁵ General damages include damages for injuries that result in "the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms."²⁶ Loss of enjoyment of life fits within the

21. *McGee*, 933 So. 2d at 775-79.

22. *Langlois v. Allied Chem. Corp.*, 249 So. 2d 133 (La. 1971) (providing a general overview of article 2315).

23. LA. CIV. CODE. ANN. art. 2315(A) (2007). As noted by Louisiana commentators :

This article has been called the "fountainhead" from which flows all tort liability under Louisiana law. "However, Article 2315 and the articles that follow it are so broad and unspecific that it fell to the Louisiana courts to be the primary developers of the state's tort law." *Id.* That development has been heavily influenced by the common law tradition of Louisiana's sister states. While based in the Civil Code, Louisiana's tort law has been developed judicially with heavy reliance on prior decisions, respect for the hierarchy of appellate courts, and reliance on the jury in deciding tort cases.

FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 1.01 (Matthew Bender & Co. 2d ed. 2006).

24. MARAIST & GALLIGAN, *supra* note 23, § 7.01. Damages awarded in delictual actions are referred to as compensatory damages and are "designed to place the plaintiff in the position in which he would have been if the tort had not been committed." MARAIST & GALLIGAN, *supra* note 23, § 7.01. See also *Fogle v. Feazel*, 10 So. 2d 695, 698 (La. 1942) (providing that the term "damages" refers to "pecuniary compensation, recompense, or satisfaction for an injury sustained").

25. "Special damages are those which have a ready market value, such that the amount of the damages theoretically may be determined with relative certainty, including medical expenses and lost wages, while general damages are inherently speculative and cannot be calculated with mathematical certainty." *McGee*, 933 So. 2d at 774 (quoting MARAIST & GALLIGAN, *supra* note 23, § 7.02).

26. *Id.* (citing *Duncan v. Kansas City S. R.R.*, 00-0066, p. 13 (La. 10/30/00); 773 So. 2d 670, 682).

definition of general damages because it involves the quality of a person's life, and cannot be definitively measured in monetary terms.²⁷ Thus, loss of enjoyment of life is a component of general damages that has been recognized by Louisiana courts.²⁸ Traditionally, the primary categories of general damages recognized in Louisiana are pain and suffering and mental distress.²⁹

Article 2315 authorizes the recovery of any damages caused by the tortfeasor, whether specific or general damages. In a suit for damages, the plaintiff bears the burden to prove that the damages he or she suffered are a result of the defendant's fault and, to support the award, there must be evidence in the record.³⁰ Under Louisiana Civil Code article 2324.1, the trier of fact is given "much discretion" in the assessment of damages.³¹ Because the award for general damages is highly speculative and much discretion is given the trier of fact in assessing the amount to award, the determination of the compensable components of such an award varies with respect to the facts in the record and the proof presented at trial.³²

B. SURVIVAL, WRONGFUL DEATH AND LOSS OF CONSORTIUM ACTIONS

Historically, the general tort claim rule was that the claim died with the victim; however, Louisiana adopted a survival action in 1855, and a

27. *McGee*, 933 So. 2d at 774. Schwartz and Silverman provide an excellent background on hedonic damages in their article, *Hedonic Damages: The Rapidly Bubbling Cauldron*:

Hedonic damages are not a new idea. As a Louisiana appellate court recognized, "while this term is new to our jurisprudence, the concept is not." Prior to the mid-to late 1980s, courts did not refer to hedonic damages, but instead awarded damages for "loss of enjoyment of life." These damages were usually part of damages for pain and suffering or a general damage award. Today, however, with increasing frequency in personal injury and wrongful death actions, plaintiffs' lawyers are attempting to introduce expert testimony on hedonic damages and requesting that courts provide juries with a separate instruction and verdict form for lost enjoyment of life . . . Due to variations in application between individual courts and because many state supreme courts have not ruled on the issue, it is difficult to precisely gauge the extent to which states allow juries to separately award hedonic damages.

Silverman & Schwartz, *Hedonic Damages*, *supra* note 2, at 1040-42 (internal footnotes omitted).

28. *See, e.g.*, *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00); 772 So. 2d 94; *Boswell v. Roy O. Martin Lumber Co., Inc.*, 363 So. 2d 506 (La. 1978); *Matos v. Clarendon Nat'l Ins. Co.*, 00-2814 (La. App. 1 Cir. 2/15/02); 808 So. 2d 841; *Andrews v. Mosley Well Serv.*, 514 So. 2d 491 (La. Ct. App. 1987).

29. MARAIST & GALLIGAN, *supra* note 23, § 7.02.

30. *Borden, Inc. v. Howard Trucking Co.*, 454 So. 2d 1081, 1092 (La. 1984). General damages "may be established by the victim's testimony, medical testimony, and the circumstances of the case." MARAIST & GALLIGAN, *supra* note 23, § 7.02(3).

31. Article 2324.1 states: "In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." LA. CIV. CODE ANN. art. 2324.1 (2007).

32. *See* MARAIST & GALLIGAN, *supra* note 23, § 7.01.

wrongful death action in 1884.³³ The legislature statutorily defined the survival action in Louisiana Civil Code article 2315.1.³⁴ The survival action arises simultaneously with the occurrence of the tort and allows the beneficiaries of the victim recovery “only for the damages suffered by the victim from the time of injury to the moment of death.”³⁵ As provided by Louisiana Civil Code article 2315.2³⁶, the wrongful death action does not arise un-

33. See H. Alston Johnson III, *Death on the “Calais” Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1 (1976). A “survival” action “permits recovery by the victim’s legal successor of some of the damages that the victim sustained” and a “wrongful death” action “allows some of the victim’s survivors to recover some of the damages they sustain because of the victim’s death.” MARAIST & GALLIGAN, *supra* note 23, § 18.01.

34. The Louisiana Civil Code defines the survival action as follows:

A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:

- (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;
- (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and
- (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
- (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi offense, may be urged by the decedent’s succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words “child”, “brother”, “sister”, “father”, “mother”, “grandfather”, and “grandmother” include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

LA. CIV. CODE. ANN. art. 2315.1 (2007).

35. McGee v. A C & S, Inc., 05-1036 (La. 7/10/06); 933 So. 2d 770, 780 (citing Taylor v. Giddens, 618 So. 2d 834 (La. 1993)). Claimants bringing an action for damages under a survival action can seek recovery for “(1) loss of earnings from the time of injury to death, (2) general damages (the victim’s conscious pain and suffering), (3) medical expenses, and (4) funeral expenses.” MARAIST & GALLIGAN, *supra* note 23, § 18.04.

36. The Louisiana Civil Code defines the wrongful death action as follows:

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

- (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;
- (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving;
- (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving; and
- (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the de-

til the victim's death and allows the beneficiaries recovery "for their own injuries which they suffer from the moment of the victim's death and thereafter."³⁷ The beneficiary in the survival action recovers the damages the victim could have recovered at the time of death, whereas the beneficiary in a wrongful death action recovers damages for his or her own injuries, "separate and distinct from the primary victim's injuries."³⁸

Similar to a wrongful death action, a loss of consortium action³⁹ "compensates the beneficiaries for their own injuries, separate and distinct from the primary victim's injuries."⁴⁰ Loss of consortium is an injury sustained by an individual who has a close relationship with the injured party, and who suffers a loss or alteration in lifestyle as a result of the physical harm to the other party in the relationship.⁴¹ Therefore, beneficiaries of the tort victim have a loss of consortium action to compensate them for "their diminished relationship with the primary tort victim."⁴²

C. LOUISIANA APPELLATE COURTS' DIVERGENT DEVELOPMENT OF LOSS OF ENJOYMENT OF LIFE CASELAW

In *McGee*, the Louisiana Supreme Court addressed the existing split in the circuit courts regarding the recognition of loss of enjoyment of life as a separate element of general damages. The court explored the decisions upholding a separate award for loss of enjoyment of life in the First, Second, Third, and Fifth Circuit Courts of Appeal, as well as the lone decisions of

ceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

LA. CIV. CODE. ANN. art. 2315.2 (2007).

37. *Taylor*, 618 So. 2d at 840.

38. *McGee*, 933 So. 2d at 780 (citing *Landry v. Avondale Indus., Inc.*, 03-019, p. 10 (La. 12/3/03); 864 So. 2d 117, 126).

39. The Louisiana Civil Code provides for the loss of consortium as follows: "Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person." LA. CIV. CODE. ANN. art. 2315(B) (2007).

40. *Landry*, 864 So. 2d at 126.

41. *McGee*, 933 So. 2d at 779 (citing *Ferrell v. Fireman's Fund Ins. Co.*, 96-3028, p. 8 (La. 7/1/97); 696 So. 2d 569, 574).

42. *Id.* The claimant seeking damages for loss of consortium are allowed recovery for loss of society, service or support; "a spouse may also recover for impairment of sexual relations." MARAIST & GALLIGAN, *supra* note 23, § 7.02(4).

the Fourth Circuit Court of Appeal that such an award is erroneous as a matter of law.⁴³ The Third Circuit Court of Appeal was the first court to recognize loss of enjoyment of life as separate award, in *Andrews v. Mosley Well Service*.⁴⁴ The Third Circuit based its decision upon the finding that the district court had “fully explained what loss of enjoyment of life meant and how it differed from pain and suffering in its [jury] instructions.”⁴⁵

The First Circuit Court of Appeal followed the Third Circuit’s recognition of loss of enjoyment of life as a separate element of damages in the case *In re Medical Review Panel on Behalf of Laurent*.⁴⁶ As decided in the Third Circuit, the First Circuit required the district court to explain the difference between loss of enjoyment of life and pain and suffering in its jury instructions; also, evidence in the record must have existed to support such a finding.⁴⁷ Only then could loss of enjoyment of life be recognized as a separate and independent element of the damages award.⁴⁸ Similarly, the Second⁴⁹ and the Fifth⁵⁰ Circuit Courts of Appeal recognized loss of enjoy-

43. *McGee*, 933 So. 2d at 776.

44. *Id.* (citing *Andrews v. Mosley Well Serv.*, 514 So. 2d 491 (La. Ct. App. 1987)).

45. *Id.* The Third Circuit continues to hold that loss of enjoyment of life is a separate element of general damages. See, e.g., *McGee*, 933 So. 2d at 776 (citing *Basco v. Liberty Mut. Ins. Co.*, 05-0143 (La. App. 3 Cir. 8/17/05); 909 So. 2d 660 (recognizing loss of enjoyment of life as a separate element of damages); *Knepper v. Robin*, 99-95 (La. App. 3 Cir. 11/17/99); 745 So. 2d 1248 (holding that loss of enjoyment of life as a separate award is supported by the evidence and not duplicative of the award for pain and suffering); *Richard v. Teague*, 92-17 (La. App. 3 Cir. 5/4/94); 636 So. 2d 1160 (finding sufficient “evidence in the record to warrant the listing of loss of enjoyment of life as a separate element of damages”)).

46. *Id.* (citing *In re Med. Review Panel on Behalf of Laurent*, 94-1661 (La. App. 1 Cir. 6/23/95); 657 So. 2d 713) (providing that “[l]oss of enjoyment of life is separate and independent from physical pain and suffering”). The First Circuit continues to recognize loss of enjoyment of life as a separate item of damages. See, e.g., *id.* (citing *Levy v. Bayou Ind. Maint. Servs., Inc.*, 03-0037 (La. App. 1 Cir. 9/26/03); 855 So. 2d 968 (noting that the First Circuit has “consistently recognized an award for loss of enjoyment of life as a separate and independent item of damages”); *Matos v. Clarendon Nat’l Ins. Co.*, 00-2814 (La. App. 1 Cir. 2/15/02); 808 So. 2d 841 (recognizing loss of enjoyment of life as a separate item of damages that was supported by evidence in the record along with a proper distinction made by the district court between loss of enjoyment of life and pain and suffering in the jury instructions); *Lemaire v. CIBA-GEIGY Corp.*, 99-1809 (La. App. 1 Cir. 6/22/01); 793 So. 2d 336) (reiterating that the First Circuit has previously determined that loss of enjoyment of life is a separate element of damages)).

47. *Id.*

48. *Id.*

49. See *id.* (citing *Bruce v. State Farm Ins. Co.*, 03-37704 (La. App. 2 Cir. 10/29/03); 859 So. 2d 296 (determining that an individual award for loss of enjoyment of life is not duplicative); *Day v. Ouachita Parish Sch. Bd.*, 35,831 (La. App. 2 Cir. 8/8/02); 823 So. 2d 1039 (holding that loss of enjoyment of life is a compensable element of damages if the plaintiff “proves that his lifestyle was detrimentally altered or if he was forced to give up activities because of his injury.”); *Varnell v. Louisiana Tech. Univ.*, 30,620 (La. App. 2 Cir. 2/25/98); 709 So. 2d 890 (finding that loss of enjoyment of life is not always duplicative of the award for general damages and depends upon

ment of life as a separate element of compensable general damages.⁵¹

In contrast, “[t]he Fourth Circuit declined to follow the other circuits and remain[ed] the only circuit in Louisiana to have declared a separate recovery for loss of enjoyment of life erroneous as a matter of law.”⁵² But, the Fourth Circuit *did* initially recognize a separate award for loss of enjoyment of life in *Bernard v. Royal Insurance Co.*⁵³ However, in the later case of *Koepp v. Sea-Land Service, Inc.*, a federal maritime law case, the court decided that loss of enjoyment of life is “inherently duplicative” of damages for pain and suffering.⁵⁴ The Fourth Circuit found it necessary to distinguish its holding in *Koepp* because it was a maritime law case, and later adopted a “case-by-case approach for determining whether an award for loss of enjoyment of life is duplicative.”⁵⁵

Finally, in *Mistitch v. Volkswagen of Germany, Inc.*, the Fourth Circuit Court of Appeal determined that a separate award for loss of enjoyment was erroneous as a matter of law.⁵⁶ Subsequently, as shown by the *McGee* case,

the totality of the circumstances)).

50. See *McGee*, 933 So. 2d at 776 (citing *Poche v. Allstate Ins. Co.*, 04-1058 (La. App. 5 Cir. 3/1/05); 900 So. 2d 55 (recognizing “that loss of enjoyment of life is a separate element of compensable general damages which is not necessarily included in an award for general damages”); *Hebert v. Old Republic Ins. Co.*, 01-355 (La. App. 5 Cir. 1/29/02); 807 So. 2d 1114 (“The jurisprudence recognizes that loss of enjoyment of life is a separate element of compensable general damages which is not necessarily included in an award for general damages.”); *Stevenson v. Louisiana Patient’s Comp. Fund*, 97-709 (La. App. 5 Cir. 4/9/98); 710 So. 2d 1178 (“Loss of enjoyment of life is a separate element of compensable general damages which must be determined by the trial judge.”)).

51. *Id.* at 777.

52. *McGee*, 933 So. 2d at 776.

53. See *id.* (citing *Bernard v. Royal Ins. Co.*, 586 So. 2d 607 (La. Ct. App. 1991)) (affirming an award for loss of enjoyment of life based upon the evidence of the plaintiff’s suffering and false hopes for improvement).

54. *Id.* at 778 (citing *Koepp v. Sea-Land Serv., Inc.*, 93-2562 (La. App. 4 Cir. 11/17/94); 645 So. 2d 1269) (providing that under maritime law, a “[p]laintiff is not entitled to receive compensation for physical and mental effects of the injury plus compensation for loss of enjoyment of life, for loss of enjoyment of life constitutes the basis for the physical and mental components”).

55. See *id.* (citing *Smith v. Juneau*, 95-0724 (La. App. 4 Cir. 4/9/97); 692 So. 2d 1365) (discussing that defendant’s reliance on *Koepp*, in arguing that loss of enjoyment of life is a duplicative award, is misguided because *Koepp* was a maritime case and non-maritime cases must be decided under applicable state law). In *Smith v. Juneau*, the court went on to state:

[T]he record contains no evidence to substantiate a finding that loss of enjoyment of life comprised a separate distinct element of damages from the general categories of past and future physical and mental suffering, the separate award for loss of enjoyment of life must be deleted from the general damages award.

Smith, 692 So. 2d at 1394.

56. See *McGee*, 933 So. 2d at 778 (citing *Mistitch v. Volkswagen of Germany, Inc.*, 94-0226 (La. App. 4 Cir. 6/25/97); 698 So. 2d 47) (holding that a separate award for loss of enjoyment of

the Fourth Circuit continued to “reiterat[e] its holding that a separate award for loss of enjoyment of life [was] erroneous as a matter of law.”⁵⁷

IV. THE COURT’S DECISION

In *McGee v. A C & S, Inc.*, the Louisiana Supreme Court determined whether loss of enjoyment of life may be separated from other elements of general damages, and whether loss of enjoyment of life is recoverable in wrongful death or survival actions.⁵⁸ The court’s decision is separated into a discussion of the conceptual difference between pain and suffering and loss of enjoyment of life, a discussion of the circuit courts’ split decisions, and an analysis of the distinction between survival and wrongful death actions.⁵⁹ This section will follow the same framework for analysis of the court’s decision.

A. CONCEPTUALIZING THE LOSS OF ENJOYMENT OF LIFE

General damages are routinely separated into compensable categories. Based on this history, the Louisiana Supreme Court reasoned that “allowing a separate award for loss of enjoyment of life would not offend the existing concept of general damages and would reflect the accepted method of listing elements of general damages separately.”⁶⁰ Buttressed by this methodology, the court introduced a conceptual distinction between loss of enjoyment of life and other components of general damages that have historically been listed separately, such as pain and suffering.⁶¹ The court explained:

Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. Loss of enjoyment of life, in comparison, refers to detrimental alterations of the person’s life or lifestyle or the person’s inability to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury. In contrast to pain and suffering, whether or not a plaintiff experiences a detrimental lifestyle change

life is unsupported by the evidence and such an award is included in the concept of general damages).

57. *McGee*, 933 So. 2d at 778 (citing *Washington v. Aetna Life Ins. Co.*, 04-0135 (La. App. 4 Cir. 10/13/04); 886 So. 2d 572 (providing that a separate award for loss of enjoyment of life is erroneous as a matter of law based upon prior jurisprudence); *Brown v. S. Baptist Hosp.*, 96-1990 (La. App. 4 Cir. 3/11/98); 715 So. 2d 423 (holding that an award for loss of enjoyment of life is duplicative of an award for pain and suffering and is therefore unwarranted)).

58. *McGee*, 933 So. 2d at 774-80.

59. *Id.*

60. *Id.* at 775.

61. *Id.*

depends on both the nature and severity of the injury and the lifestyle of the plaintiff prior to the injury.⁶²

Through this analysis, the court addressed the defendants' argument that an award for loss of enjoyment of life is duplicative of an award for pain and suffering.

The court rejected the notion that loss of enjoyment of life is included in an award for pain and suffering by posing a hypothetical that discerned the conceptual difference between the two components of general damages. The hypothetical indicated that the difference is entirely dependent upon the factual circumstances of the injury sustained and the lifestyle of the victim.⁶³ For the hypothetical, the court considered "two boys, one athletic and the other artistic, who are both involved in an accident and suffer similar injuries."⁶⁴ The court argued that even though the victims have sustained the same injuries, their lifestyles are affected differently.⁶⁵ Because the athlete is no longer able to "participate in athletics, in competition or at practice, and has to find another avocation to fill his leisure time," the court determined that the athlete is entitled to an additional award for the loss of enjoyment of life.⁶⁶ The artist, on the other hand, is able to continue in his accustomed lifestyle and should not receive an additional award for loss of enjoyment of life.⁶⁷

Based upon the circumstantial distinction posed in the hypothetical, the court concluded that there is a conceptual difference between pain and

62. *McGee*, 933 So. 2d at 775.

63. *Id.* at 774-80. The court expanded upon a distinction made by the First Circuit Court of Appeal in *Matos*, where the circuit court described the difference as follows:

The same injuries may affect people differently. A quiet, reclusive person with a desk job may have pain and suffering from losing a leg. He would have a permanent disability but he would be able to continue work. He may have some loss of enjoyment of life but not to the extent that person who liked to hike, hunt or play tennis would. A person with a bad back and grown children, who does not do heavy lifting, may not lose as much enjoyment of life as someone with young children who cannot play "horse" or enjoy the squeals of a young child being tossed into the air. Life is much more than simple toil and sometimes the greatest pleasures come from the simplest things.

Id. (citing *Matos v. Clarendon Nat'l Ins. Co.*, 00-2814, p. 9 (La. App. 1 Cir. 2/15/02); 808 So. 2d 841, 848).

64. *Id.* The court also presumes that the two boys will receive the same award for pain and suffering. *Id.*

65. *Id.*

66. *Id.* ("These detrimental changes in lifestyle go uncompensated in an award for pain and suffering.").

67. *Id.* ("The artist's lifestyle was not drastically altered by the accident, as he was able to resume his artistic activities after the accident, whereas the athlete's lifestyle is altered significantly, as he has to resign from his team and can no longer participate in athletics.").

suffering and loss of enjoyment of life.⁶⁸ As a result, the court held that “a separate award for loss of enjoyment of life is warranted and is not duplicative of the award for pain and suffering, if the damages resulting from loss of enjoyment of life are sufficiently proven.”⁶⁹ Additionally, the court provided that jurors, given proper jury instructions with respect to the conceptual distinction between pain and suffering and loss of enjoyment of life, can comprehend such a difference between the two categories of general damages.⁷⁰

B. RESOLVING THE CIRCUIT SPLIT BY REJECTING THE FOURTH CIRCUIT’S REASONING

Upon recognition of loss of enjoyment of life as a separate element of general damages, the Louisiana Supreme Court addressed the existing split in the circuits.⁷¹ Only the Fourth Circuit Court of Appeal regarded a separate award for loss of enjoyment of life as erroneous as a matter of law.⁷² Additionally, the *McGee* case was on appeal from the Fourth Circuit after that court had rejected the plaintiff’s attempts to include loss of enjoyment of life in their request for damages.⁷³

After a review of the circuit court decisions, the Louisiana Supreme Court rejected the Fourth Circuit’s decision that a separate award for loss of enjoyment of life is erroneous as a matter of law.⁷⁴ The court noted that “there is conflict among the state and federal courts nationwide on this issue;” however, the states that have made a decision on the issue have based that decision on their “specific statutory scheme for tort.”⁷⁵ Using Louisiana’s statutory tort scheme, the court concluded that loss of enjoyment of life is a compensable damage under Louisiana Civil Code article 2315 because article 2315 “authorizes a tort victim to be compensated for the damage sustained as a result of the delict, including those for loss of enjoyment

68. *McGee*, 933 So. 2d at 774-80.

69. *Id.* at 776.

70. *Id.*

71. See discussion *infra* Part III.C. (providing a review of the decisions in the circuit courts concerning the loss of enjoyment of life as a separate award).

72. *McGee*, 933 So. 2d at 776.

73. *Id.* at 773.

74. *Id.* at 778. The court agreed with the First, Second, Third, and Fifth Circuit Courts of Appeal that loss of enjoyment of life is a separate compensable element of general damages. *Id.* at 779.

75. *Id.* at 779. The court discussed that “the trend nationwide remains unclear,” and is dependent upon the states’ ability “to disallow or to allow a separate recovery for loss of enjoyment of life [with respect to] their specific statutory scheme for tort, wrongful death, and survival actions.” *Id.* at 779 n.3.

of life, if proven.”⁷⁶

Upon determination that loss of enjoyment of life is a compensable element of general damages, the court next concluded that this damage could be separated from other elements of general damages.⁷⁷ The court reasoned that “general damages in Louisiana are routinely dissected,” therefore allowing a separate award for loss of enjoyment of life “would not offend the existing concept of general damages and would reflect the accepted method of listing elements of general damages separately.”⁷⁸ Finally, the court concluded that a separate award for loss of enjoyment of life is acceptable based upon the recognition that loss of enjoyment of life is conceptually distinct from other components of general damages.⁷⁹ Accordingly, the court held that a jury is allowed to give a separate award for loss of enjoyment of life and such a finding “should be left to the district court’s discretion on a case-by-case analysis.”⁸⁰

C. ALLOWABLE BENEFICIARY ACTIONS FOR LOSS OF ENJOYMENT OF LIFE

After concluding that a separate award for loss of enjoyment of life is “recoverable by the primary tort victim for the loss of enjoyment of life sustained during the victim’s lifetime,” the court had to make a determination of which action or actions a victim’s beneficiary could employ to assert a claim for such an award.⁸¹ First, the court provided that loss of enjoyment of life “is not recoverable by the primary tort victim’s family members who are eligible to recover for loss of consortium, service and society under Louisiana Civil Code article 2315(B).”⁸² The court reasoned that a loss of consortium action compensates the victim’s beneficiaries for “their diminished relationship with the primary tort victim.”⁸³ As a result, the court concluded that the beneficiaries’ loss of enjoyment of life is a direct result of their diminished relationship with the primary tort victim “and therefore

76. *McGee*, 933 So. 2d at 774. See also discussion *supra* Part III.A (examining Louisiana Civil Code article 2315 and compensable damages under Louisiana tort law).

77. *Id.* at 774.

78. *Id.* at 774-75.

79. *McGee*, 933 So. 2d at 779. See also discussion *infra* Part IV.A (reviewing the *McGee* court’s determination that loss of enjoyment of life is a conceptually distinct element of general damages).

80. *Id.* As previously discussed, the Louisiana Supreme Court conditioned a separate award for loss of enjoyment of life on the particular facts of the case. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

is already compensated with an award for loss of consortium.”⁸⁴ The court held that allowing a recovery for both loss of consortium and loss of enjoyment of life was duplicative and not authorized by article 2315(B).⁸⁵

Next, the court noted that a decision on recoverability for loss of enjoyment of life in a wrongful death and/or survival action had to be determined because it was unclear which action the plaintiffs were asserting in order to seek such an award.⁸⁶ As previously discussed, the court recognized that survival and wrongful death actions are “separate and distinct.”⁸⁷ With respect to the beneficiaries’ recovery for loss of enjoyment of life, the court reasoned that the most important distinctions between the two actions are both the point at which the action comes into existence and the damages awarded to the beneficiaries.⁸⁸ Because a survival action comes into existence at the time of the tort and compensates the beneficiaries for damages suffered by the *victim* during his lifetime, the court held that the plaintiffs were allowed to assert a claim for McGee’s loss of enjoyment of life during his lifetime.⁸⁹

In contrast, the court argued that a wrongful death action arises when the victim dies and only “compensates the beneficiaries for their *own* injuries, separate and distinct from the primary tort victim’s injuries,” similar to a loss of consortium claim.⁹⁰ The Louisiana Supreme Court stated:

Since we have determined that recovery is precluded for the loss of enjoyment of life suffered by the primary victim’s family members as it is duplicative of their loss of consortium claim, we likewise conclude that recovery is precluded for the loss of enjoyment of life suffered by the primary victim’s family members as it is duplicative of their wrongful death claim.⁹¹

84. *McGee*, 933 So. 2d at 779.

85. *Id.*

86. *Id.* at 780. The wrongful death/survival action determination was unclear because the loss of enjoyment of life issue presented to the Louisiana Supreme Court was resolved on a motion *in limine* and in advance of trial; therefore, the determination of which action the plaintiffs were asserting for recovery of such an award was unresolved. *Id.*

87. *McGee*, 933 So. 2d at 780. Both the wrongful death and survival action are only available to a primary tort victim’s beneficiaries upon the victim’s death. *Id.* See also discussion *supra* Part III.B (providing a discussion of the differences between a survival and wrongful death action).

88. *Id.*

89. *Id.* (citing *Taylor v. Giddens*, 618 So. 2d 834 (La. 1993)) (emphasis added).

90. *Id.* (citing *Landry v. Avondale Indus., Inc.*, 03-0719, p. 10 (La. 12/3/03); 864 So. 2d 117, 126) (emphasis added).

91. *Id.*

As a result, the court made clear the distinction that loss of enjoyment of life is only applicable to damages suffered by the primary tort victim, while other actions exist under Louisiana law to compensate family members for their detrimental alterations in lifestyle. Therefore, beneficiaries of the victim are limited to asserting a claim for loss of enjoyment of life sustained by a victim during his lifetime.⁹²

D. THE DISSENT: REJECTING THE CONCEPTUAL DISTINCTION OFFERED BY THE MAJORITY

Disagreeing that loss of enjoyment of life is conceptually distinct from pain and suffering, Justice Weimer and Justice Victory dissented, arguing that loss of enjoyment of life is not a separate element of general damages.⁹³

Justice Weimer agreed that an injured party could collect damages for loss of enjoyment of life; however, he disagreed that such an award was available as a separate line item of damages when coupled with an award for mental pain and suffering.⁹⁴ Instead, he argued that pain and suffering compensates an injured party for the mental or physical condition that results from the injury, while loss of enjoyment of life compensates for the "absence of a physical or mental activity that formerly was a part of his or her life."⁹⁵ Additionally, he argued that these awards are "merely two sides of the same coin," resulting in an injured party potentially being compensated for the same condition twice.⁹⁶ He disagreed with the majority's conceptual distinction that supported the court's decision, and argued that such a distinction is impractical.⁹⁷ Further, he suggested that depending upon the facts of the case, a jury should be given the opportunity to either award for both loss of enjoyment of life *and* pain and suffering as a single line item, or award for loss of enjoyment of life *or* pain and suffering, but not both.⁹⁸

Justice Victory dissented based upon his conclusion that a separate award for loss of enjoyment of life is both an excessive and duplicative award.⁹⁹ Similar to Justice Weimer, Justice Victory argued that the loss of

92. *McGee*, 933 So. 2d at 780.

93. *Id.* at 780-86 (Victory & Weimer, JJ., dissenting).

94. *Id.* at 785 (Weimer, J., dissenting). Justice Weimer wrote: "I respectfully dissent because I find that a damage award for mental pain and suffering can adequately compensate for hedonic damages." *Id.* (Weimer, J., dissenting).

95. *Id.* (Weimer, J., dissenting).

96. *Id.* (Weimer, J., dissenting).

97. *Id.* (Weimer, J., dissenting).

98. *Id.* at 786 (Weimer, J., dissenting). Such a suggestion was the only feasible option according to Justice Weimer to avoid a duplication of awards. *Id.* (Weimer, J., dissenting).

99. *Id.* at 781 (Victory, J., dissenting). Justice Victory argued:

enjoyment of life is a part of mental pain and suffering, and "there is no need to distinguish a loss of enjoyment of life that is already included within the definition of general damages."¹⁰⁰ As a result, Justice Victory's dissent disagreed with the majority's reasoning that loss of enjoyment of life is conceptually distinct from pain and suffering. He suggested that when the Louisiana legislature has found it necessary to recognize separate and distinct elements of general damages, such awards have been provided for by statute.¹⁰¹ Further, he argued that the legislature had no reason to create a loss of enjoyment of life damage statute, and he therefore agreed with the Fourth Circuit that loss of enjoyment of life is not a separate element of general damages.¹⁰²

V. ANALYSIS

The *McGee* majority held that a separate award for loss of enjoyment of life is appropriate and should be left to a court's discretion based on a case-by-case analysis.¹⁰³ The debate over whether such an award is valid continues in other states and hinges upon the ability of a court to distinguish an award for loss of enjoyment of life based upon the victim's circumstances.¹⁰⁴ The Louisiana Supreme Court reasoned that a jury could differentiate between loss of enjoyment of life and pain and suffering by providing the proper jury instruction concerning which general damages are recoverable. Therefore, the court concluded that a separate award for each category of damages was compensable.¹⁰⁵ The remainder of this Note will analyze the legal ramifications of the *McGee* decision, first discussing the current debate on the conceptual distinction between loss of enjoyment of life and other recognized categories of general damages. Next, a discussion of the possible pitfalls of the decision will be analyzed emphasizing the risks of double compensation, problems with application of the new stan-

Louisiana's unified concept of general damages serves to balance the potentially competing public policies of making the victim whole under Louisiana Civil Code art. 2315 et seq., along with avoiding the inequitable outcome of the injured party securing a "double recovery" for a single element of harm—a recovery that would be more in the nature of exemplary or punitive damages that are not allowed under Louisiana law unless expressly provided for by statute.

McGee, 933 So. 2d at 782 (Victory, J., dissenting).

100. *Id.* at 783 (Victory, J., dissenting).

101. *Id.* at 784 (Victory, J., dissenting). Justice Victory pointed out that the legislature has made such separate and distinct damages available for cases involving bystander and loss of consortium claims. *McGee*, 933 So. 2d at 784 (Victory, J., dissenting).

102. *Id.* (Victory, J., dissenting).

103. *Id.* at 780.

104. See discussion *infra* Part V.A.

105. *McGee*, 933 So. 2d at 768.

dard, and limitations on a beneficiaries' ability to recover in all allowable actions. Finally, the beneficial applications of the decision will be discussed as well as alternative, future avenues of recovery.

A. CONCEPTUALIZING LOSS OF ENJOYMENT OF LIFE IN COMPARISON TO PAIN AND SUFFERING: THE CURRENT DEBATE

The *McGee* court argued that loss of enjoyment of life is conceptually distinct from pain and suffering.¹⁰⁶ While such a concept can theoretically be identified and hypothesized, the real problem arises when the award must be argued and determined. The *McGee* court did limit application of its holding to factually specific scenarios; however, most individuals who suffer significant injuries experience some loss of enjoyment of life. Although the *McGee* decision does provide a valid argument that, without a separate award, loss of enjoyment of life likely goes uncompensated, the conceptual distinction theory is false and aggravates, rather than solves, the possibility of a damage compensation shortfall in some circumstances.

To distinguish between the elements of general damages, the court posed a hypothetical wherein the victims suffer similar damages but sustain significantly different effects to their lifestyles.¹⁰⁷ The *McGee* court suggests in its hypothetical that an athlete and an artist suffering the same injury have dramatically divergent alterations to their lifestyle.¹⁰⁸ This point is arguable given that the artist may be unable to perform or create because of the injuries he or she sustained. Although the artist could have *continued* to perform or create, the injury has led to a detrimental alteration in lifestyle because of the trauma associated with the injury. Therefore the distinction may not be completely honest. Nevertheless, the court suggests that such injured parties are compensated for this mental anguish by an award for pain and suffering.¹⁰⁹ In other words, the injured party is told that he or she must now seek recovery only for pain and suffering because he or she is still "able" to continue a previous lifestyle even though the injury has caused some detrimental alteration to an ability to perform a previously common or necessary action.

Such an outcome appears inconsistent with the *McGee* court's desire to compensate an individual for changes in lifestyle that go uncompensated

106. See discussion *supra* Part IV.A (providing a discussion of the court's conceptual distinction between loss of enjoyment of life and pain and suffering).

107. See discussion *supra* Part IV.A.

108. *McGee*, 933 So. 2d at 775.

109. *Id.* ("Arguably, the athlete may be entitled to a greater pain and suffering award if he can demonstrate his mental anguish occasioned by the accident and its consequences.").

in an award for pain and suffering. When one considers that every individual suffers some degree of loss of enjoyment of life with every injury, the hypothetical distinction that the court applies in its reasoning is misleading. An individual should not be limited to a single award for pain and suffering if a separate award for loss of enjoyment of life is available. As a result, McGee's conceptual distinction theory limits recovery in some circumstances rather than extends to the injured party an additional opportunity to recover for all losses sustained.

Courts in other jurisdictions permitting a separate and distinct award for loss of enjoyment of life also justify such an award by drawing the same conceptual distinctions between the concepts of pain and suffering and loss of enjoyment of life.¹¹⁰ For instance, South Carolina conceptualizes loss of enjoyment of life as a limitation on a person's ability "to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations."¹¹¹ The court reasoned that awards for pain and suffering and mental anguish do not compensate an individual for his or her physical and mental consequences of no longer being able to engage in or pursue previously enjoyed activities, whereas a separate award for loss of enjoyment of life does compensate for this type injury.¹¹² Additionally, the Washington Supreme Court distinguished an award for a cheerleader's inability to become a ballet dancer from awards for pain and suffering and disability.¹¹³ The court reasoned that awards for pain and suffering and disability do not compensate the victim for the non-economic awards of pursuing the goal of being a dancer.¹¹⁴ Within this context, the Louisiana Supreme Court's use of a hypothetical to conceptualize a distinction between loss of enjoyment of life and other elements of general damages is not groundbreaking. The distinction that Louisiana and other similar jurisdictions recognize is that pain and suffering and disability awards do not compensate a victim for losses of a person's ability to participate, to derive pleasure from, or to pursue their dreams in life. On the other hand, the recognition of such a distinction is not the majority rule in the United States.

A majority of states agree that an award for pain and suffering may in-

110. See Schwartz & Silverman, *supra* note 2, at 1046 (providing that the following jurisdictions recognize hedonic damages as a separate award as of 2004: United States Court of Appeals for the Sixth Circuit interpreting Tennessee law, South Carolina, Maryland, New Mexico, Washington, and Wyoming).

111. Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001).

112. *Id.*

113. Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987).

114. *Id.* at 293.

clude compensation for loss of enjoyment of life, but loss of enjoyment of life may not be calculated as a separate award. A recent law review article argues that:

As an analytical matter, "pleasure" and "pain" are related words of opposite meaning. Awarding damages both for "lost pleasure" and "pain and suffering" appears entirely redundant. Furthermore, to the extent that hedonic damages compensate a victim for the lost ability to undertake a physical activity, those damages are already provided for as disability.¹¹⁵

The jurisdictions rejecting a separate award for loss of enjoyment of life oppose the distinction of such an award from the already universally recognized award for pain and suffering. The consensus opinion of these courts is that pain and suffering already compensates a victim's detrimental alterations in lifestyle resulting from the physical injury. Additionally, if the compensation is not a component of pain and suffering, then a victim is compensated for such losses as an item in the general damage award. Therefore, a conceptual distinction may serve to limit some plaintiff's recoveries while also serving to over compensate for other plaintiff's losses.

In addition, the *McGee* decision seems to perch at the top of a slippery slope that leads to additional, separate damage claims. The majority state rule is consistent with the *McGee* decision regarding an individual who is able to continue his previous lifestyle. However, after an injury, some individuals may not have the desire or creativity required of their previous lifestyles though they still possess the physical abilities to pursue these goals. Such individuals will likely argue that their loss of enjoyment of life injuries are conceptually distinct or that *other* elements of their injuries should be identified as separate and distinct because they are likewise uncompensated by an award for pain and suffering.

This proposition exemplifies the problem Louisiana currently faces. By recognizing a conceptually distinct element of general damages, such as loss of enjoyment of life, the *McGee* decision has opened the door to arguments by injured parties seeking recognition of *additional* separate elements of damages. If the Louisiana Supreme Court recognizes a conceptual difference between the element of loss of enjoyment of life and that of pain and suffering, then it should also recognize other categories of damages that can be similarly distinguished by plaintiffs.

In his dissent, Justice Victory suggested that "perhaps the Court

115. See Schwartz & Silverman, *supra* note 2, at 1049.

should add separate lines for the following: depression, sadness, moodiness, inability to attend a football game, inability to attend a baseball game, inability to go fishing, and so on *ad infinitum*. The result is nonsensical and substantially duplicative.”¹¹⁶ Although there is a hint of sarcasm in such a statement, the reality is that Justice Victory foresees the potential issues Louisiana courts face by recognizing an award for loss of enjoyment of life merely based upon a judge’s or jury’s ability to distinguish it from other recognized elements of general damages. Justice Victory suggests that the best alternative for Louisiana is to allow the legislature to determine when the state should recognize separate and distinct elements of compensable general damages.¹¹⁷ Louisiana does recognize specific recoverable damages such as the recovery for bystander damages under Civil Code article 2315.6 and the recovery for loss of consortium under article 2315. Because Louisiana is a Civil Code state, the legislature should be relied upon to guide the legal profession and courts as to the proper elements of general damages that can be considered and argued as conceptually distinct from other recognized elements.

The best argument for allowing a separate award for loss of enjoyment of life relies on the ability of the fact finder to draw a distinction between losses that are not compensated by an award for pain and suffering and losses that are compensated by such an award. The analysis applied in *McGee* suggests that an award for loss of enjoyment of life can be distinguished based merely on the physical consequences of the injury. The physical consequences manifest themselves in the realization that the individual can no longer pursue lifelong goals or dreams. This manifestation is a consequence of the injury that the *McGee* court determined to be uncompensated by an award for pain and suffering. However, the court’s distinction is false when one considers that every individual suffers some degree of loss of enjoyment of life when he or she is injured. In addition, the recognition of conceptual distinctions between the elements of a general damages award places the issue at the edge of a slippery slope. Louisiana should be aware that such a distinction is acceptable only if the court is prepared to recognize other mental elements of an injured party’s claim that are arguably not compensated by the award for mental pain and suffering, which calls into mind Justice Victory’s *ad infinitum* argument. For better or worse, *McGee*’s conceptualization analysis will be recognized as binding and applicable until either the legislature decides to address the categorization of general damages or future case law limits its elements.

116. *McGee*, 933 So. 2d at 784 (Victory, J., dissenting).

117. *Id.*

B. POTENTIAL CRITICISM AND SHORTFALLS

By allowing for a distinction between pain and suffering and loss of enjoyment of life, the Louisiana Supreme Court has opened the door to an additional argument for the recovery of damages. However, concerns arise when juries are asked to identify and quantify an award for loss of enjoyment of life. The *McGee* decision will likely be attacked and criticized because of the potential for a jury or judge to award double compensation for the same injury. Additionally, the *McGee* decision limited a beneficiary's recovery for loss of enjoyment of life to survival action claims.¹¹⁸ The court's reasoning that wrongful death and loss of consortium claims already compensate the beneficiary for loss of enjoyment of life does not concur with a determination that loss of enjoyment of life is conceptually distinct from other elements of general damages. The following sections will discuss these criticisms and shortfalls.

1. LOSS OF ENJOYMENT OF LIFE AS A DUPLICATIVE AWARD

The greatest criticism that Louisiana faces by recognizing loss of enjoyment of life as a separate element of general damages is that such an award is duplicative of the award for pain and suffering. As Justice Weimer argued in his dissenting opinion, an injured party always has the opportunity to collect damages for loss of enjoyment of life and pain and suffering; however, a separate compensation for both elements potentially compensates the victim for the same injury twice.¹¹⁹ Critics of rulings similar to that in *McGee* contend that the subjective nature of calculating separate elements of general damages is imprecise and lends itself to the possibilities of duplicate recovery.¹²⁰ It is precisely this subjective characteristic of general damages—including loss of enjoyment of life—that lends itself to the possibility that a jury will become confused and unable to differentiate between the similar elements of a general damage award. As a result, Louisiana risks an increase in decisions in which the award is duplicative or excessive.

Prior to distinguishing between the elements of general damages, a jury should be able to identify what injury is compensated by each existing category of general damages. The *McGee* court suggests that the jury can comprehend the differences between pain and suffering and loss of enjoy-

118. See discussion *supra* Part IV.C (reviewing the *McGee* court's decision concerning allowable claims for recovery of loss of enjoyment of life).

119. *McGee*, 933 So. 2d at 785 (Weimer, J., dissenting).

120. The *McGee* court's holding was rationalized by drawing a conceptual distinction between damages for loss of enjoyment of life and pain and suffering. See discussion *supra* Part IV.A (discussing the Louisiana Supreme Court's conceptual distinction between pain and suffering and loss of enjoyment of life).

ment of life when properly instructed, thereby avoiding any risk of duplicative compensation.¹²¹ However, the court provides no guidance as to how to achieve this objective beyond suggesting that a party seeking compensation should introduce information to the jury that allows for a conceptual distinction to be drawn between the elements of pain and suffering and loss of enjoyment of life. Other jurisdictions attempt to differentiate between the elements and provide a framework for analysis by defining the separate elements of general damages. For instance, the United States Court of Appeal for the Sixth Circuit provides a working definition for the current recognized categories of general damages as follows:

Permanent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury.¹²²

Similarly, the *McGee* court defines pain and suffering as the "pain, discomfort, inconvenience, anguish and emotional trauma that accompanies an injury."¹²³ In comparison, the court defines loss of enjoyment of life as the "detrimental alterations of the person's life or lifestyle or the person's inability to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury."¹²⁴ The court argues that a determination of whether or not an injured party experiences a detrimental lifestyle change "depends upon the nature and severity of the injury and the lifestyle of the plaintiff prior to the injury."¹²⁵ Thus, an injured party is required to convince a jury that his or her injuries have resulted in loss that is not compensated by the award for pain and suffering.

Given this information, an attorney seeking a separate award for loss of enjoyment of life has the burden of proving that the detrimental alterations to a person's lifestyle are a separate and distinct from an already existing category of general damages, such as the physical and mental discomfort caused by the injury. "The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated

121. *McGee*, 933 So. 2d at 776.

122. *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814, 823 (6th Cir. 1980). Permanent impairment is synonymous with the Louisiana recognized general damage of disability.

123. *McGee*, 933 So. 2d at 775.

124. *Id.*

125. *Id.*

fully for each distinct injury suffered.”¹²⁶ If a distinction cannot be established or the existence of such a distinction is false, the award for loss of enjoyment is duplicative of the existing categories of general damages. A majority of jurisdictions contend that loss of enjoyment of life is *not* distinguishable from pain and suffering and hold that a separate award for both damages is duplicative.

For instance, California recognizes a unified concept of an award for pain and suffering in which a plaintiff recovers for not only physical pain and the accompanying mental anguish, but also the impairment of health, mind, or person which encompasses damages for loss of enjoyment of life.¹²⁷ California courts recognize that a jury may consider an award for loss of enjoyment of life, but only as a component of the award for pain and suffering.¹²⁸ Any additional award for loss of enjoyment of life that is separate and distinct from the pain and suffering award is regarded as duplicative.¹²⁹ Similarly, the Pennsylvania Supreme Court has held that an award for the “loss of life’s pleasures” is a component of pain and suffering.¹³⁰ The court reasoned that the two types of losses are interrelated and as a result cannot be considered separate and distinct from one another.¹³¹ Finally, the Utah Supreme Court ruled that pain and suffering includes an award for the mental anguish associated with the realization of the detrimental consequences of the physical injury.¹³² The court based its holding on the recognition of a unified concept of pain and suffering which has historically incorporated all aspects of an injured party’s physical and mental pain and anguish such as the “diminished enjoyment of life.”¹³³ Thus, the majority rule is that loss of enjoyment is included in general damages as a component of pain and suffering.

In his dissenting opinion, Justice Victory likewise attacked the majority’s holding that loss of enjoyment of life is a conceptually separate and distinct element of general damages.¹³⁴ Justice Victory argued that “[j]ust as there is no need to separate “pain” and “suffering” from each other, there is no need to distinguish a loss of enjoyment of life that is already included

126. See Schwartz & Silverman, *supra* note 2, at 1048.

127. *Capelouto v. Kaiser Found. Hosps.*, 500 P.2d 880, 883 (Cal. 1972).

128. *Huff v. Tracy*, 129 Cal. Rptr. 551, 553 (Cal. App. 1976).

129. *Id.*

130. *Willinger v. Mercy Catholic Med. Ctr. of Se. Pa., Fitzgerald Mercy Div.*, 393 A.2d 1188 (1978).

131. *Willinger*, 393 A.2d at 1191.

132. *Judd v. Rowley’s Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980).

133. *Id.* at 1221.

134. *McGee*, 933 So.2d at 780-84 (Victory, J., dissenting).

within the definition of general damages.”¹³⁵ Justice Victory’s logic is based on the understanding that the physical consequences of an injury that prevent an individual from enjoying certain things that were once enjoyed are manifested as a mental state of the victim.

Louisiana courts already routinely award such mental pain and suffering as a separate element of general damages, whether it is physical pain and suffering, mental pain and suffering, or disability.¹³⁶ Additionally, Louisiana has long recognized the unified concept of general damages under Louisiana Civil Code article 2315, which has served the purpose of compensating tort victims for damages suffered in the past. By opening the door to the further categorization of the award for general damages in the *McGee* decision, Louisiana must now be prepared for the risk of duplicate recovery for the same injury. The reason for this risk is based on the fact that the two elements have long been considered as a single element, and while drawing a distinction between the two elements is conceivable, the results are speculative and conjectural. The *McGee* court argues that an individual is awarded for loss of enjoyment of life to compensate for the absence of a physical or mental activity that was or may have been a part of the individual’s lifestyle.

Arguably, each of these awards can be a component of the other, and the potential exists that an injured party could be compensated for the same deprivation twice.¹³⁷ In other words, although an argument can be made that loss of enjoyment of life is a distinct element of general damages, such a distinction may be impractical upon application. The jury must now make multiple subjective determinations of compensation for which there is no sound basis for assessment.¹³⁸ Louisiana courts have recognized mental and physical pain and suffering and disability as elements of general damages for decades.¹³⁹ It is also well recognized that quantification of such damages cannot be performed with pecuniary exactitude.¹⁴⁰ By introducing a new element of general damages that may be covered by an award for mental and physical pain and suffering and disability, and that is just as difficult to calculate, the Louisiana Supreme Court will face criticism because of the

135. *McGee*, 933 So.2d at 783 (Victory, J., dissenting).

136. *Id.*

137. *Id.* at 785 (Weimer, J., dissenting). Justice Weimer also agreed that an “alteration” in lifestyle caused by the physical component of the injury is accompanied by mental pain and suffering. *Id.*

138. See Schwartz & Silverman, *supra* note 2, at 1049.

139. *McGee*, 933 So. 2d at 786 (Weimer, J., dissenting) (citing *Andrews v. Mosley Well Serv.*, 514 So. 2d 491 (La. Ct. App. 1987)).

140. *Id.* at 774 (citing MARAIST & GALLIGAN, *supra* note 23, § 7.02).

possibility for duplicative and excessive awards.

2. JURY INSTRUCTIONS & LOSS QUANTIFICATION

Loss of enjoyment of life as either a component of general damages or as a separate element of general damages is a highly subjective award item.¹⁴¹ The *McGee* court assumes that a jury will be able to distinguish between loss of enjoyment of life and pain and suffering while also determining an assessment of such damages. These expectations are high given that the *McGee* court failed to provide sufficient guidance for lower courts beyond defining loss of enjoyment of life as “detrimental alterations of a person’s life or lifestyle or a person’s inability to participate in the activities or pleasures of life that were formerly enjoyed.”¹⁴² Additionally, a proper method for quantification of an award for loss of enjoyment of life, which may provide a framework for appellate review, was not suggested by the court. These failures are likely due to the fact that loss of enjoyment of life is not awarded by a majority of jurisdictions, and proponents have yet to establish an acceptable methodology for quantification.¹⁴³ Thus, critics will argue that juries lack the proper tools to make an award that is acceptable or reviewable because of the subjective nature of an award for loss of enjoyment of life and the limited standards for application.

Historically, a jury instruction on general damages that included a loss of enjoyment of life instruction proceeded as follows:

Plaintiff has claimed as a part of his damages that he has suffered loss of enjoyment of life in addition to the other physical and mental damages that he asserts. As with all other aspects of damage claims, you have much discretion as to whether any such damages should be awarded, and in what amounts. In this connection, you may take into account plaintiff’s interests and way of life and the extent to which he may have suffered damage with respect to it which is separate from his other physical and mental damages.¹⁴⁴

Since the *McGee* decision, additional guidance has been suggested in order to provide juries with a better understanding of the potential distinction between loss of enjoyment of life and the mental aspects of pain and

141. *McGee*, 933 So. 2d at 774 (citing MARAIST & GALLIGAN, *supra* note 23, § 7.02).

142. *Id.*

143. See Schwartz & Silverman, *supra* note 2, at 1062-70.

144. 18 H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE: CIVIL JURY INSTRUCTIONS § 18.17 (2d ed. 2001).

suffering.¹⁴⁵ At a minimum, the jury should be instructed that loss of enjoyment of life has been defined as a detrimental alteration to a person's lifestyle or a person's inability to participate in activities previously enjoyed.¹⁴⁶ This additional clarification can be added to the general instruction along with a brief description of the other elements of general damages. Additionally, judges should be prepared to provide guidance to juries regarding their ability to award loss of enjoyment of life as a separate element of general damages along with physical and mental pain and suffering and disability.

With the introduction of a separate award for loss of enjoyment of life, juries are required to recognize a difference between the separate categories of general damages based solely on their ability to differentiate between how these categories are defined by the court. The currently suggested instructions may continue to serve their intended purpose of explaining theoretical or textual differences; however, there is no indication that a jury can discern a difference between the recognized categories of general damages and an award for loss of enjoyment of life without the possibility of error. In order to facilitate the jury's ability to understand and assess an award for loss of enjoyment of life, a party seeking such an award should introduce expert testimony concerning the meaning and quantification of loss of enjoyment of life. In addition, these plaintiffs should seek a jury interrogatory concerning the award for general damages and request that a separate line item for loss of enjoyment of life be included on the jury damage award form.¹⁴⁷ Based on this approach, the jury instructions may have little impact on the jury's ability to effectively assess an award for loss of enjoyment of life. Nonetheless, an injured party must have faith in the *McGee* court's determination that juries are capable of recognizing the differences in the elements of general damages. However, the task of submitting the issue of separate elements of general damage awards does not conclude the problem. The jury must also be able to make a determination of a reasonable value to award for each of the elements.

Quantification of the two separate elements will require additional testimony regarding the calculations that should be applied when assessing

145. 18 H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE: CIVIL JURY INSTRUCTIONS § 18.17 (Supp. 2007).

146. *Id.* ("It would probably be advisable to include some language close to [the *McGee* definition] so that the jury has some idea what is meant by loss of enjoyment of life.").

147. See LA. CODE CIV. PROC. ANN. art. 1812 (2007). Article 1812 provides the rule that allows a jury to return a special verdict with a finding upon each issue. *Id.* The jury can be submitted questions regarding categorical answers, such as damages, and the court shall enter judgment conforming to the jury's answers. *Id.*

hedonic damages. However, many of the methods used to determine the value of a loss of enjoyment of life award have been criticized because of the feeling that economists are no better equipped to value such an award than the average juror.¹⁴⁸ Additionally, most of these calculations depend on assumptions and hypothetical individuals which do not logically correlate to the actual harm sustained.¹⁴⁹ The real danger is that juries could be provided quantification guidance that results in value of life estimates ranging from "high six-figure amounts to high seven-figure amounts."¹⁵⁰ Although the hedonic damages award is likely calculated as a percentage of the total value of life, one can see the potential danger for excessiveness or error because of the calculations subjectivity.

On the other hand, some Louisiana courts have been awarding loss of enjoyment of life as a separate element of general damages since 1987.¹⁵¹ Due to this fact, Louisiana courts should be familiar with the acceptable level of compensation to award for loss of enjoyment of life. A review of a recent *Loyola Law Review* quantum study reveals that awards for loss of enjoyment of life range from \$10,000 to \$100,000 depending upon the severity of the injury.¹⁵² Such compensation represents less than 5% to as much as 33% of the total damages awarded to the injured party. Because past awards have been common, Louisiana should feel confident that its courts are prepared to handle the assessment and review of loss of enjoyment of life awards in the future.

Nevertheless, critics argue that loss of enjoyment of life awards are subject to extreme variability even when applied in similar cases.¹⁵³ This argument coupled with the relatively short history of awarding victims for loss of enjoyment of life leads to the concern that appellate judges are disadvantaged when asked to take an "objective, comparative approach to de-

148. See Schwartz & Silverman, *supra* note 2, at 1066.

149. See Schwartz & Silverman, *supra* note 2, at 1066. A discussion of the different economic models for calculating hedonic damages is beyond the scope of this Note. For a discussion of such methods, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL.L. REV. 773 (1995); W. Kip Viscusi, *Misuses and Proper Uses of Hedonic Values of Life in Legal Context*, 13 J. FORENSIC ECON. 111 (2000).

150. Schwartz & Silverman, *supra* note 2, at 1066 (citing MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS 168-69 (1990 & 1992-1993 cum. supp.)).

151. See discussion *supra* Part III.C (providing background on the early cases that recognized loss of enjoyment of life as a compensable element of general damages).

152. *Quantum Study, Louisiana Personal Injury Awards*, 52 LOY. L. REV. 525 (2006).

153. Schwartz & Silverman, *supra* note 2, at 1069.

termining whether a hedonic damages award is excessive.”¹⁵⁴ Such a concern is valid when one considers that the number of awards for loss of enjoyment of life since *McGee* will likely increase, leading to more juries having to assess and comprehend the differences in the elements of general damages. This fact could lead to more frequent incidences of excess or double compensation.

Regardless of past application, there is little doubt that a loss of enjoyment of life category is potentially confusing for jurors. While the goal is to compensate a tort victim for the injuries that he or she has sustained, the desire is that the compensation reflects some recognized standard or method of application that is assessable and reviewable.¹⁵⁵ In *McGee*, the Louisiana Supreme Court failed to address the issue of application. This failure may be due to the fact that Louisiana courts are already familiar with the application of loss of enjoyment of life as a separate element of general damages. However, the subjectivity and uncertainty associated with assessing loss of enjoyment of life awards will continue to face scrutiny due to argument that these awards are excessive and duplicative. Unfortunately, as the new standard is applied more often in the future, plaintiffs seeking such an award will discover new methods to convince juries that the award should be greater, which in turn will require significant guidance and control on the part of the Louisiana court system.

3. EXPANSION OF THE ACTIONS TO RECOVER DAMAGES FOR LOSS OF ENJOYMENT OF LIFE

The *McGee* court held that a beneficiary could only seek compensation for loss of enjoyment of life sustained by the victim prior to his or her death through a survival action.¹⁵⁶ The court reasoned that the victim suffers loss of enjoyment of life during the time he or she was still alive up until his or her death, which allows a beneficiary to recover those damages in a survival action. On the other hand, the court determined that a beneficiary is already compensated for loss of enjoyment of life that the beneficiary experiences after the victim's death in a wrongful death or loss of consortium claim.¹⁵⁷

Although such reasoning is sound, the court appears to neglect its previous holding that loss of enjoyment of life is a conceptually distinct and separate element of damages. Following this reasoning, the beneficiary

154. Schwartz & Silverman, *supra* note 2, at 1069-70.

155. See Schwartz & Silverman, *supra* note 2, at 1069.

156. *McGee*, 933 So. 2d at 780.

157. *Id.*

should also be able to argue that he or she has experienced a detrimental alteration in lifestyle as a result of the victim's death, which is separate and distinct from the damages awarded in a loss of consortium or wrongful death action. But for reasons it does not explain, the court decided to limit the scope of its new rule to recovery for the injured party's loss of enjoyment of life while excluding recovery for a victim's beneficiaries who arguably fall within the very parameters introduced by the court.

A majority of jurisdictions that both allow and disallow a separate recovery for loss of enjoyment of life have either expressly or impliedly rejected the idea of the beneficiary's ability to seek an award for loss of enjoyment of life in wrongful death actions.¹⁵⁸ Louisiana, Maryland and Washington are the only three states that recognize a separate award for loss of enjoyment of life but reject a beneficiary's claim for such damages in a wrongful death action.¹⁵⁹ Similar to Louisiana, Washington reasons that survival actions "preserve claims that a living person could have brought; . . . [t]hey do not create claims on behalf of dead persons for the loss of life itself."¹⁶⁰ Subsequently, the prevailing argument against awarding loss of enjoyment of life for wrongful death claims is that the loss of life's pleasures should be viewed as "something that is compensable only for a living plaintiff who has suffered from that loss."¹⁶¹

Currently, only four states find that their wrongful death statutes permit recovery for loss of enjoyment of life: Connecticut, Hawaii, New Hampshire and New Mexico.¹⁶² All of these states interpret their statutes to allow for recovery upon consideration of the victim's "probable duration of his life but for the injury"¹⁶³ or the victim's inability to experience the joy of living.¹⁶⁴ In contrast, the majority's argument seems reasonable in the circumstances where a court is asked to consider recovery for a victim's loss of enjoyment of life occurring after the victim's death. Such a consideration is too subjective to assess when the jury cannot feasibly determine a difference between the victim's life before and after the injury which

158. Schwartz & Silverman, *supra* note 2, at 1060 (listing the jurisdictions that reject an award for hedonic damages in wrongful death actions as Arkansas, California, Delaware, Florida, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Nebraska, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin).

159. Schwartz & Silverman, *supra* note 2, at 1041-42, 1060, nn. 26-27.

160. *Otani v. Broudy*, 59 P.3d 126, 130 (Wash. Ct. App. 2002).

161. Schwartz & Silverman, *supra* note 2, at 1061.

162. Schwartz & Silverman, *supra* note 2, at 1059-60.

163. *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 399 (N.H. 1999).

164. *Ozaki v. Ass'n of Apartment Owners by Discovery Bay*, 954 P.2d 652, 668 (Haw. Ct. App. 1998).

caused the death. However, a different issue arises when the jury is required to consider a claim for the beneficiary's loss of enjoyment of life that he or she experiences as a result of the absence of the victim from the beneficiary's life.

Louisiana's wrongful death statute allows beneficiaries to recover "damages which they have sustained as a result of the death."¹⁶⁵ The *McGee* court reasoned that the wrongful death and loss of consortium claims compensate the beneficiaries for their own injuries.¹⁶⁶ As a result, the court held that an award for loss of enjoyment suffered by the beneficiaries is duplicative of the damages awarded in a loss of consortium or wrongful death claim and is therefore precluded.¹⁶⁷ However, a beneficiary should be able to apply the *McGee* holding and argue that his or her loss of enjoyment of life resulting from the primary tort victim's death is a conceptually distinct injury. Just as in the case of the primary tort victim, the goal of article 2315.2 is to insure that the beneficiary is awarded damages for the losses that he or she has sustained. In keeping with the *McGee* court's reasoning, the beneficiary should also be able to demonstrate the detrimental alterations in his or her lifestyle or the loss of life's pleasures resulting from the victim's absence when seeking such an award.

Under the *McGee* rule, the beneficiary should be able to argue and prove that his or her life has been affected by the loss of the family member in such a way that he or she is unable to continue to enjoy life's pleasures as he or she once was able. For instance, the deceased victim may have been a working partner, hunting companion or inspirational figure in the beneficiary's life. Therefore, the absence of such a figure from the beneficiary's life goes uncompensated in a wrongful death claim.

Despite the court's limitation on wrongful death actions, there is no language in the Louisiana wrongful death statute that suggests a beneficiary is compensated for such a loss. The *McGee* holding allows a tort victim beneficiary to recover a separate award for loss of enjoyment of life based upon the reasoning that Louisiana's current damage legislation will not be offended and does not limit the recovery of separate elements of general damages. However, the court determined that Louisiana's legislation does limit recovery for beneficiaries seeking the same award without offering an explanation for this limitation. This outcome does not coincide with the court's reasoning in *McGee* because the court decided that loss of enjoy-

165. LA. CIV. CODE. ANN. art. 2315.2 (2007).

166. *McGee v. A C & S, Inc.*, 05-1036, p. 14 (La. 7/10/06); 933 So. 2d 770, 780.

167. *Id.*

ment of life is a conceptually distinct injury that goes uncompensated unless the jury or judge makes a separate award.

Instead of providing such a narrow application, the court could have avoided some speculation by allowing recovery for all victims who are able to prove that they have sustained hedonic damages. In expanding the available recovery options, the court's determination that loss of enjoyment of life is a conceptually distinct injury is justifiable. The fallacy of the *McGee* holding is that loss of enjoyment of life goes uncompensated unless recognized as a separate and distinct award. According to the Louisiana Supreme Court, this application only holds true for the detrimental alterations in lifestyle that the victim experiences but not for the same injuries suffered by the victim's beneficiaries. However, a beneficiary should be able to recover for all the damages that he or she has sustained as a result of the victim's death. Therefore, the recognition of loss of enjoyment of life as a separate and distinct element of damages should also apply to a beneficiary who is able to prove that he or she has sustained losses as defined by the court in *McGee*.

The *McGee* decision falls short of permitting recovery for loss of enjoyment of life by a beneficiary for the same loss that the court permits the primary tort victim a means of recovery. Without providing a beneficiary the opportunity to make the same argument as the injured party, the Louisiana Supreme Court has narrowed its holding in *McGee* to apply only to situations where the *victim* has suffered loss of enjoyment of life. There is no language in the Civil Code that limits a beneficiary's right to seek compensation for loss of enjoyment of life. The beneficiary should be able to seek recovery for an injury which Louisiana has recognized as a conceptually distinct element of damages. By not recognizing this distinction in every recovery possibility, the acceptability of the Louisiana Supreme Court's basis for the *McGee* holding appears to be on shaky ground if challenged by opponents in the future.

C. A LEGAL SOLUTION

The *McGee* case provides a mechanism by which an injured party can seek compensation for damages that occur when an individual sustains injuries that result in a detrimental alteration of lifestyle or the loss of life's pleasures. As a result, the decision will be regularly cited by injured parties. However, critics will argue that loss of enjoyment is only a component of general damages and should not be recognized as a separate and distinct element of damages. The debate will likely continue until Louisiana adopts an alternate approach to hedonic damages either through legislative action or a subsequent judicial decision.

The *McGee* decision does not guarantee an injured party the right to compensation for loss of enjoyment of life as a separate award. The Louisiana Supreme Court makes clear that a decision to compensate the victim for loss of enjoyment of life is left to the discretion of the judge or the jury.¹⁶⁸ Additionally, individuals must prove that their injuries are conceptually distinct from those damages that have been awarded in the past, and such proof will be considered by the court on a case-by-case analysis.¹⁶⁹ Thus, the *McGee* decision provides a basis for judges to review decisions recognizing separate awards for loss of enjoyment of life, along with a source of information for parties attempting to prove such an injury. However, because of the subjective nature of assessing the elements of general damages, the debate will continue over whether or not allowing recovery of these two elements as separate awards is duplicative or excessive.¹⁷⁰ Louisiana could offset this debate by either legitimizing the *McGee* holding in legislation or limiting the decision's application.

Louisiana is a state with a civil code tradition, and legislation is the primary source of law. Although Louisiana tort law has developed through judicial decisions,¹⁷¹ the state has adopted legislation that specifically addresses certain claims that may be brought to compensate individuals for these expressly recognized, separate forms of damages. These legislatively mandated damages were enacted by the state due to the understanding that these elements had no alternate means of compensation without statutory recognition. For instance, the legislature enacted Louisiana Civil Code article 2315.6 which allows a bystander who happens upon the scene of a traumatic event to recover damages for the shock and distress of witnessing the accident.¹⁷² Similarly, the second paragraph of Louisiana Civil Code article 2315 permits for the recovery of "loss of consortium, services or society" that a beneficiary suffers as a result of an injury to a loved one.¹⁷³ The fact that Louisiana has not enacted a "loss of enjoyment of life statute" indicates that the state legislature probably does not believe that this damage goes uncompensated and therefore such damages should not be considered as a separate and distinct category of compensation. The court should have waited for the legislature to act on this issue.

In his dissent, Justice Victory criticizes the *McGee* majority for recog-

168. *McGee*, 933 So. 2d at 780.

169. *Id.* at 779.

170. See discussion *supra* Part V.A.

171. See discussion *supra* Part III.A.

172. LA. CIV. CODE ANN. art. 2315.6 (2007).

173. *Id.* at art. 2315.

nizing loss of enjoyment of life as a separate element of damages when the Louisiana legislature has not offered a statute that recognizes this award as separate and distinct.¹⁷⁴ He suggests that the legislature has found no need to pass a statute recognizing this type of damage. The best approach for Louisiana may be to continue with the traditionally unified general damage award until the legislature decides to address the issue. If enough public pressure arises because loss of enjoyment of life is uncompensated in an award for general damages, the legislature will be forced to recognize these damages and enact a statute enabling an injured party to recover. Additionally, the legislature will be given the opportunity to provide guidance on the application and assessment of loss of enjoyment of life. However, the Louisiana Supreme Court may have made their decision in an effort to initiate a debate that will result in a legislative solution.

Should public pressure lead to a debate over the adoption of a new statute, the legislature will likely consider an alternate method of application than that suggested in *McGee*. The legislature must provide guidance on when a loss of enjoyment of life claim can be brought along with a basis for differentiating hedonic damages from other traditionally recognized elements of general damages. To avoid the danger of juries awarding duplicate or excessive awards, the legislature should consider the approach suggested by Justice Weimer in his dissent.¹⁷⁵

Justice Weimer offers a practical solution to the problem of juries being confused by a separate award for both pain and suffering and loss of enjoyment of life by suggesting that a jury should be given the option to award an injured party for loss of enjoyment of life or for mental pain and suffering, but not for both.¹⁷⁶ In the alternative, he suggests that the jury should be able to consider an award for loss of enjoyment of life and mental pain and suffering as a single element of general damages. This alternate appears to be the best solution to the problem and addresses the concerns that arise when a jury is required to distinguish between the two components of general damages. Additionally, the jury would be allowed to consider both components without having to choose which element should be compensated based upon the facts of the case. Justice Weimer is correct when he states that "[t]his resolution would serve the goal of making the plaintiff whole and would avoid duplication."¹⁷⁷

174. *McGee v. A C & S, Inc.*, 05-1036 (La. 7/10/06); 933 So. 2d 770, 784 (Victory, J., dissenting).

175. *Id.* at 785 (Weimer, J., dissenting).

176. *McGee*, 933 So. 2d at 785.

177. *Id.* at 786.

The *McGee* holding will be cited and relied upon in many future personal injury and medical malpractice cases where the victim and the victim's beneficiaries are seeking compensation for loss of enjoyment of life. Unfortunately, the decision in *McGee* provided little guidance on how the standard should be applied in future cases beyond recognizing loss of enjoyment of life as a separate element of damages and limiting recovery by the victim's beneficiary to a survival action. As a result, the *McGee* decision will be a fundamental standard until the legislature decides to adopt a statute that recognizes hedonic damages or outlines the acceptable elements of a general damage award. A statute that establishes loss of enjoyment of life as a separate element of damages would be more effective if its application were limited to situations where the jury is only allowed to award pain and suffering and hedonic damages as a combined separate element of general damages. This application avoids the concern that a jury is unable to distinguish between the subjective elements of general damages that can ultimately lead to an injured party being compensated twice for the same injury.

VI. CONCLUSION

Critics of hedonic damages suggest that a separate award for loss of enjoyment of life is duplicative and excessive because there is no conceptual distinction between loss of enjoyment of life and mental pain and suffering. An award for general damages is highly subjective, and it is impractical to believe that a jury can differentiate between two elements of general damages, which are so closely related. However, in *McGee*, the Louisiana Supreme Court recognized a conceptual distinction between hedonic damages and pain and suffering damages. The *McGee* decision provides little guidance or suggestion on how to educate jurors that loss of enjoyment of life is conceptually distinct beyond suggesting a definition that can be reviewed in the jury instruction. In addition, the court contradicts itself by allowing a beneficiary to recover for the victim's loss of enjoyment of life, but not allowing the beneficiary to seek recovery for his or her own loss of enjoyment of life damages. As a result, the *McGee* court finds a conceptual distinction to be appropriate in situations that are analogous to that court's reasoning, but makes no room for other applications where an injured party can identify a similar injury. Thus, the shortfall of the decision appears to be its restrictive application lending itself to criticism.

Moving forward, the best approach may be to continue the recognition of a unified general damage recovery until legislation supports a change in damage categorization. Louisiana has introduced legislation in the past where public policy concerns have necessitated the introduction of separate

and distinct elements of compensation. To this point, the legislature has had no need to enact a loss of enjoyment of life statute. While awarding damages to an individual based upon the desire to make him or her whole is central to Louisiana tort law, damages should be awarded for actual losses that can be reasonably assessed by a judge or jury. The fact remains that the Louisiana legislature has determined that hedonic damages are adequately compensated under the current general damages framework. However, until the *McGee* decision is overturned or an appropriate damage statute is adopted by the state, loss of enjoyment of life will be argued and recognized as a separate element of damages.

Rick M. Shelby