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**DAMAGES—Compensation for Curtailment of Life
Expectancy as a Separate Element of Damages
—Downie v. United States Lines Co.***

While plaintiff was aboard ship as an employee of the defendant, he suffered a heart attack which was aggravated by the negligence of one of defendant's employees. In suing under the Jones Act¹ for damages caused by this aggravation of his condition, plaintiff sought recovery for the eight year curtailment of his life expectancy as a separate and distinct item of damages, independent of the economic loss sustained as a result of such curtailment. The jury made a general award of \$86,900 of which \$25,000 was a special award for the curtailment of plaintiff's life. On defendant's motion, the trial judge eliminated this special award and entered judgment on the verdict as modified. On appeal to the Court of Appeals for the Third Circuit, *held*, reversed and remanded for a new trial on the issue of damages because of inadequate instructions.² Diminution of life expectancy is not of itself a separately compensable item of damages, but may be considered by the jurors in measuring other areas of damages.

Where negligence results in the curtailment of a person's life expectancy, English courts have granted compensation to the injured person for the nonpecuniary loss of enjoyment and happiness denied him by the shortening of his life, but have not allowed him to recover the lost earnings for the period cut from his normal life.³

* 359 F.2d 344 (3d Cir.), *cert. denied*, 87 Sup. Ct. 201 (1966), *reversing* 231 F. Supp. 192 (E.D. Pa. 1964) [hereinafter referred to as principal case].

1. Jones Act § 20, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

2. Principal case at 348. The instructions were deemed inadequate because they permitted the jury to give a recovery for curtailment of life expectancy as a separate item rather than limiting consideration of curtailment to being only one factor among many which could be drawn upon in reaching a fair award.

3. Separate damages for the psychic loss of life expectancy were first allowed in *Flint v. Lovell*, [1935] 1 K.B. 354. The House of Lords approved such awards and distinguished them from pain and suffering in *Rose v. Ford*, [1937] A.C. 826, where the administrator of the victim, who was unconscious until death, was allowed to recover these damages under a survival act. In 1941, the House of Lords called for moderation and restraint in the awarding of such damages in *Benham v. Gambling*, [1941] A.C. 157, where a £1,200 award for a deceased two year old was reduced to £200.

Although there was a period of uncertainty over whether damages for lost earnings were to be measured only in terms of the shortened life or in terms of the normal pre-accident life span, the Court of Appeals in *Oliver v. Ashman*, [1961] 3 Weekly L.R. 669 (C.A.), made it clear that the shortened life span was to be used. See *Annots.*, 131 A.L.R. 1351 (1941); 97 A.L.R. 823 (1935); *Hannigan, Recent English Decisions in Damages for Injuries Ending in Premature Death*, 18 B.U.L. REV. 275 (1938). The English argue that the injury has affected the plaintiff's capacity to suffer loss. Just as he can suffer no pain and mental anguish during these "lost years," so too he cannot suffer the loss of earnings (only his surviving dependents can suffer this loss), for it is exactly this power to suffer loss, to experience pain, or to enjoy happiness of which the victim has been deprived. Hence, the only compensation that should be given the injured party is compensation for his psychic loss. The English system may leave the surviving dependents unprotected, for under the Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93, the dependents are allowed to recover their loss of support if the de-

American courts, on the other hand, refuse to compensate for the psychic loss of the enjoyable experiences of life, but do permit compensation for the more easily measured lost earnings that the injured party would have acquired had he lived an unaltered span of life.⁴ The first American case that dealt with the question of damages for loss of life expectancy was *Richmond Gas Co. v. Baker*, in which the Indiana Supreme Court rejected diminution of life expectancy as a separate heading of damages and reversed a judgment of \$4,600 for an eighty-five year old woman injured in a gas explosion.⁵ The court indicated that although curtailment of life could be considered as a factor in measuring the severity of the injury and the present and future pain and suffering, it was not by itself an independently compensable item. The only cases cited by the court were those which had applied the common law doctrine of *Baker v. Bolton* that "in a civil court the death of a human being

cedent had a cause of action at the time of his death, but if the decedent settled or obtained a recovery before death, his dependents are barred from suit and neither the deceased nor the surviving dependents receive any part of the earnings these "lost years" would have provided. See *British Elec. Ry. v. Gentile*, [1914] A.C. 1034 (P.C.); *Williams v. Mersey Docks & Harbour Bd.*, [1905] 1 K.B. 804. If the deceased did not recover before death, his dependents may recover for the lost support under the Fatal Accidents Act and the decedent's administrator may also sue on the surviving cause of action under the Law Reform (Misc. Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41. Any recovery the dependents receive under the survival act for the decedent's loss of the expectation of life or pain and suffering will be deducted from their recovery under the death act. If, however, the decedent bequeathed the residue of his estate to non-dependents, or numerous creditors were owed, or no dependents survived, the recovery for loss of life expectancy and pain and suffering will pass to a stranger or distant heir. See *Boberg, Damages Occasioned by Shortened (or Lengthened) Expectation of Life: A New Case and Some Further Thoughts*, 79 S.A.L.J. 43 (1962); *Howroyd, Damages for Pecuniary Loss Occasioned by Shortened Expectation of Life*, 77 S.A.L.J. 448 (1960); *Assessment of Damages in Fatal Accidents*, 100 L.J. 312 (1950); 1962 C.A.M.B. L.J. 153; 25 MODERN L. REV. 479 (1962); 25 MODERN L. REV. 108 (1962). It should be noted that courts of Canada and South Africa have also accepted the English rule. *Mackenzie v. Harbour & B.C. Elec. Ry.*, [1938] 53 B.C. 88, [1938] 3 D.L.R. 786; *Barr v. Miller*, [1938] 46 Man. 260, [1938] 4 D.L.R. 278; *Lockhat's Estate v. North British & Mercantile Ins. Co.*, [1959] 3 So. Afr. L.R. 295; *Goldie v. City Council of Johannesburg*, [1948] 2 So. Afr. L.R. 913 (1947).

4. *Rhone v. Fisher*, 224 Md. 223, 167 A.2d 773 (1961); *Borcherding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952). Since the American courts compensate for lost earnings based on the normal pre-accident life span, the total economic loss caused by the injury is compensated and the dependents can be provided for. In fact there is overcompensation since the personal expenses or maintenance of the victim during the "lost years" have been avoided by his death. If American courts grant separate damages for the psychic loss due to curtailment of life, an adjustment of the economic loss would be in order so that the future living expenses avoided by the earlier death are deducted from the victim's award for lost earnings. For an excellent article which advocates an extension of legal protection to cover the psychic loss caused by the curtailment of life, see *Smith, Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. PA. L. REV. 781 (1950). See generally *Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages*, 50 CALIF. L. REV. 598 (1962); *Comment, The Measure of Damages for a Shortened Life*, 22 U. CHI. L. REV. 505 (1954).

5. 146 Ind. 600, 45 N.E. 1049 (1897). It was undetermined what proportion of the judgment was for the curtailment of life.

cannot be complained of as an injury."⁶ This doctrine, which was traditionally used to deny survivors any tort damages for the death of another person, has been greatly criticized⁷ and in fact overturned by modern death acts. The Indiana court, however, accepted the appellant's argument that the common law did not allow recovery for the death of another as well as his contention that the common law did not allow recovery for the shortening of one's own life.⁸ This latter assertion cannot be substantiated, for although there are no cases cited allowing such a recovery, no cases have been found at English common law that deny recovery for curtailment of life;⁹ indeed, Lord Wright, in his opinion in *Rose v. Ford*, stated that he thought such damages had been previously allowed to a living plaintiff without objection.¹⁰ The Indiana court, deluded by the common law hostility to recovery for death, failed to recognize that its plaintiff was still very much alive and that authority concerning deceased victims was simply inapplicable to its case. This initial error was perpetuated by several subsequent cases which relied upon the beclouded reasoning of *Richmond Gas* without truly analyzing its validity.¹¹

More modern cases that have been decided by courts less influenced by the old distaste for causes of action dealing with death have summoned additional and more adequate reasons for denying this separate heading of damages. One court said that the intangible nature of enjoyment of continued life and related problems of assessment provide boundless opportunities for arbitrary and excessive awards.¹² Another court reasoned that if such a heading of damages existed, it would have passed under that jurisdiction's survival statute, thereby bringing substantial awards to the estate and rendering unnecessary a death act that was enacted to insure the dependents' security.¹³ Other courts point to the difficulty the British courts have had in measuring such damages.¹⁴ Finally, in the

6. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

7. See, e.g., *Hooper v. Gorham*, 45 Me. 209, 212 (1858); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 581, 162 S.W. 584, 586 (1914); PROSSER, TORTS § 121 (3d ed. 1964); *Duffey, Life Expectancy and Loss of Earning Capacity*, 19 OHIO ST. L. REV. 314, 321 (1958).

8. *Richmond Gas Co. v. Baker*, 146 Ind. 600, 608, 45 N.E. 1049, 1052 (1897); see principal case at 349.

9. *Smith*, *supra* note 4, at 783.

10. *Rose v. Ford*, [1937] A.C. 826, 848-49.

11. *Krakowski v. Aurora, E. & C. Ry.*, 167 Ill. App. 469 (1912); *Lake Erie & W.R.R. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922); *Cleveland, C., C. & St. L. Ry. v. Miller*, 165 Ind. 381, 74 N.E. 509 (1905); *Muncie Pulp Co. v. Hacker*, 37 Ind. App. 194, 76 N.E. 770 (1906).

12. *Ham v. Maine-New Hampshire Interstate Bridge Auth.*, 92 N.H. 268, 30 A.2d 1 (1943).

13. *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940). The court, applying Maine law, cited as support *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 763 (1903), which held that it was clearly settled that recovery for loss of life expectancy could not be claimed, but did not give any authority or convincing reasons.

principal case, the majority rejected this separate heading of damages because of its "incalculable variables" and the danger of "base speculation."¹⁵

The soundness and force of these arguments against independent recovery were challenged in the principal case in a vigorous dissent by Chief Judge Kalodner¹⁶ who found our current scheme of awarding damages inadequate insofar as it attempts to compensate for curtailment of life only by indirect damage awards. American decisions have allowed the jury to take shortening of life into account in order to determine the general extent or severity of the injury, the damages for pain and suffering and mental anguish, and its effect on the victim's future earnings.¹⁷ However, such limited consideration of the curtailment of life deals only with the economic damages and lowered quality of the remaining years and fails to reach the positive future loss of several years of life itself.¹⁸ Furthermore, since evidence on the curtailment of life may be presented in court in connection with proof of other elements of damage, juries have an opportunity to adjust other damage awards either consciously or unconsciously so as to give a recovery for the lost years notwithstanding instructions that damages for the lost years are not recoverable.¹⁹ If the jury is able to consider loss of life expectancy as a factor in determining damages, such consideration should be

14. *O'Leary v. United States Lines Co.*, 111 F. Supp. 745 (D. Mass. 1953); *Rhone v. Fisher*, 224 Md. 223, 167 A.2d 773 (1961). These two cases point to the limitations on recovery for loss of life expectancy since the call for moderation by the House of Lords in the *Benham* case. Awards that used to be £1,000 or more are presently limited to £200 to £500. Diplock, L.J., in *Wise v. Kaye*, [1962] 1 All E.R. 257 (C.A.), failed in his attempt to raise a £400 award for loss of life expectancy of a twenty year old girl to a more realistic level of £1,000. O. Kahn-Freund criticizes the English rule in his article *Expectation of Happiness*, 5 MODERN L. REV. 81 (1941), and claims that since English custom will not allow the reversal of a prior decision, the House of Lords eliminated damages for loss of life expectancy by emasculating them into token sums.

15. Principal case at 347.

16. *Id.* at 348-51. The dissent was joined by Judge Staley.

17. *Rhone v. Fisher*, 224 Md. 223, 167 A.2d 773 (1961); see Smith, *supra* note 4, at 794-803. Indeed, the court in the principal case in remanding the case for trial on the issue of damages indicated that curtailment of life expectancy might be a factor to be considered though it did not indicate how it was to be considered. Principal case at 348.

18. Conceptually, damages for the general extent or severity of the injury do not cover the "lost years" but rather deal with injury to the quality of the remaining years. An award for the loss of earning capacity fails to compensate for the separate, nonpecuniary damage to the psychic or personal dimension of life, and merely compensates the economic dimension of the years lost. Damages for physiological pain and suffering cannot compensate for the non-physical psychic loss of prospective happiness. Even an award for increased mental anguish proves inadequate for it does not compensate for the positive future loss of life's very substance but rather merely compensates the victim for his present, subjective mental attitude toward this loss; mental anguish is the suffering encountered before death, not the loss of the experiences and expressions of the personality that would have occurred but for the premature death. See Smith, *supra* note 4, at 794.

19. See the instruction used in *Rhone v. Fisher*, 224 Md. 223, 226, 167 A.2d 773, 775 (1961); Smith, *supra* note 4, at 795.

done openly under proper instructions which define, limit, and distinguish the curtailment of life expectancy as a separate area of damages.

Courts are beginning to allow recovery for the purely psychic loss to an injured or crippled plaintiff of such creative or pleasurable pursuits as dancing, taking long walks, or playing tennis.²⁰ The majority in the principal case recognizes the rule of compensation for the loss of such specific amenities of life and adds that "justice demands the application of a similar rule where, as in the instant case, an element of the permanent disability is the consequent curtailment of life expectancy."²¹ Thus a few enumerated amenities lost by the curtailment of life are compensable, but the other innumerable experiences and pleasures of life that are denied the victim go uncompensated. The illogic of this result is pointed out by Judge Kalodner's dissent:

I cannot subscribe to a doctrine which sanctions compensation for "inability to dance, bowl, swim or engage in similar recreational activities" but denies compensation for the loss of the right to life itself

The distilled essence of the majority's doctrine is that the part is greater than the whole; that the fragments of life which it specifies have ascertainable value, but that the total fabric and structure of life itself has no separate ascertainable value.²²

The loss or crippling of a bodily member, pain and suffering, loss of consortium, fear, humiliation, and loss of specific amenities of life all entail psychic losses in that they lower the quality of life by narrowing the breadth of normal experience, and courts have held such losses compensable.²³ Fullness of life is also denied when the wrongful act lessens the quantity of life by shortening its normal length, but, ironically, when the personality suffers the absolute and inescapable loss of several years of life itself, the law denies compensation.

Yet, what is the meaning or place of compensation when the

20. See, e.g., *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961) (Disfigurement from amputation of a leg and loss of normal recreational activities may be considered in awarding damages); *Kasiski v. Central Jersey Power and Light Co.*, 4 N.J. Misc. 130, 132 Atl. 201 (Sup. Ct. 1926) (Impairment of the ability to enter into and enjoy boyhood games and pastimes may be considered); *Galveston Elec. Co. v. Briggs*, 14 S.W.2d 307 (Tex. Civ. App. 1929) (Inability to dance, play tennis, walk for any considerable time may be considered); Annot., 120 A.L.R. 535 (1939). However, many courts do not recognize separate damages for the loss of the enjoyment or amenities of life, and several of the courts granting such damages would probably restrict them to specific pleasures lost during the remainder of the shortened life rather than for the loss of pleasures based on the normal life span.

21. Principal case at 348.

22. *Id.* at 350.

23. *McCORMICK, DAMAGES* §§ 88-92 (1935).

very substance of life itself is being considered?²⁴ The broad goal of compensation is to put the plaintiff, as nearly as is possible, in the same position he would have been in had the defendant not injured him.²⁵ However, one suffering loss of life expectancy can no more be put in his former position than one who has suffered pain, the loss of an arm, or various other non-pecuniary losses. Consequently, as a solatium or consolation to express society's sincerity in seeking to protect the victim's bodily and personal integrity, our legal system offers money damages for immeasurable losses.²⁶ If money can serve as a solatium, or bring added opportunity for happiness to one whose life has been cut short, it seems reasonable to award it as compensation. Yet such solace will not be possible in all cases. Therefore, in attempting to solve the problem of compensation for shortened life, one must take into account the capacity of the victim to be compensated.

The first situation is one in which the victim is alive and conscious and his prospects of life continue though in a reduced state. By adding a new heading of damages for curtailment of prospective life to those damages presently awarded by the courts, this plaintiff would be more adequately compensated for his absolute loss of the psychic pleasures of life, for in his remaining years he would have the opportunity to convert the money damages received into some of the lost elements of life. He can use the award to obtain leisure so that he may do those things that he has planned to do and add enjoyment to the years remaining, thereby replacing some pleasures of life denied him by the wrongful act. Such an award is not meaningless or overcompensatory in this situation, for it merely makes the victim whole—as nearly as money can—with respect to the possible joys of life.

The second situation involves a victim who is either killed immediately or dies before the trial. The loss to his psyche is as absolute as the shortening of life is to the psyche of a living victim, but a great difference lies in the fact that the deceased victim is beyond compensation. Money damages could not be of any solace to him and the court should not convert psychic loss into an economic substitute where the victim is dead and thus incapable of converting the award into psychic pleasures. The victim's dependents have no legitimate claim to this award, for their loss is that

24. For arguments against expanding the compensatory theory of damages to areas of no monetary dimension and in support of an emerging functional view of damages, see Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *LAW & CONTEMP. PROB.* 219 (1953); James, *Damages in Accident Cases*, 41 *CORNELL L.Q.* 582 (1956). For support of the compensatory system protecting rights of personality, see DeParcq & Wright, *Damages Under the Federal Employers' Liability Act*, 17 *OHIO ST. L.J.* 430 (1956).

25. *MCCORMICK, DAMAGES* § 137 (1935).

26. See Jaffe, *supra* note 24, at 224.

of economic support, services, and their own psychic disturbances; no dependent can share the deceased's uniquely individual psychic loss.²⁷ Nor should such an award accrue to the estate, for since its losses can only be economic, not psychic, such recovery would be an unwarranted windfall to the heirs.²⁸ To grant the award where it can no longer compensate the personal loss of the deceased is to abandon the standard of compensating the injured party for the standard of making the wrongdoer pay, and such a justification is punitive in nature.²⁹ Possibly an unspoken reason which has prompted the courts to refuse recovery for loss of life expectancy in any case is the fear that this cause of action will necessarily survive in those instances when the award has lost its meaning and purpose due to the death of the injured party. Yet a distinction between the living and deceased victim can be made under our survival statutes if the courts will recognize the purpose of this special award and the uniquely personal loss it seeks to compensate. Under survival acts that require both pecuniary and nonpecuniary losses for personal injuries to survive,³⁰ a judge could refuse to grant the award in cases of common negligence on the ground that such an award would be punitive and hence improper.³¹ Indeed, some jurisdictions do not allow punitive damages to survive even in cases of reckless, willful or wanton conduct, where such exemplary awards are normally warranted.³² If the judge were unwilling to distinguish between the compensatory and punitive nature of the award in the different situations or were to allow the survival of punitive damages, legislative amendments such as those which have been enacted by some states to prevent the survival of pain and suffering awards could prevent the claim for curtailment of life from surviving.³³

The third and final situation is the case of a living but unconscious victim.³⁴ Again, consideration must be given to the prospec-

27. See DeParcq & Wright, *supra* note 24, at 452; Kahn-Freund, *supra* note 14, at 98-100; James, *supra* note 24, at 617.

28. *Ibid.*

29. See Kahn-Freund, *supra* note 14, at 85-86, 98-100; Livingston, *Survival of Tort Actions—A Proposal For California Legislation*, 37 CALIF. L. REV. 63, 74 (1949).

30. See, e.g., ALA. CODE tit. 7, § 150 (1958); DEL. CODE ANN. tit. 10, § 3704 (1953); PA. STAT. ANN. tit. 22, § 320.549 (1950); WASH. REV. CODE § 4.20.060 (1957). For statutes that presently do not allow the survival of such a claim see, e.g., COLO. REV. STAT. ANN. § 153-1-9 (1963); CAL. CIV. CODE § 956.

31. McCORMICK, DAMAGES §§ 77, 79, 118 (1935); see note 29 *supra* and accompanying text.

32. See, e.g., Florida E.C. Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); Grimes v. United Elec. Rys., 58 R.I. 458, 193 Atl. 740 (1937); CAL. CIV. CODE § 956; COLO. REV. STAT. ANN. § 153-1-9 (1963); R.I. GEN. LAWS ANN. § 9-1-8 (1956).

33. See Livingston, *supra* note 29, for arguments that brought about the change in CAL. CIV. CODE § 956; Seymour v. Richardson, 194 Va. 709, 75 S.E.2d 77 (1953) uses VA. CODE ANN. § 8-628.1 (1950) to prevent survival of pain and suffering even though the suit was filed before death.

34. Two such cases that recently troubled the English courts are noted in 25 MODERN L. REV. 108, 479 (1962).

tive capacity of the injured party to be compensated. Some states might except the unconscious victim from the running of the statute of limitations under a disability provision such as mental incapacity, for the victim is unconscious, unaware of his rights, and unable to pursue his remedies.³⁵ The suit could thus be delayed until it was determined whether he was likely to regain consciousness. If the suit had to be brought before consciousness was regained, evidence as to the possibility of future consciousness must be presented. If it is established that the victim may regain consciousness and may be able to enjoy psychic pleasures, compensation should be given whereas if recovery of consciousness is impossible, compensation here, as in the case of the deceased victim, would be inappropriate and should be denied.

Before a separate category of damages for the curtailment of life expectancy can be applied, the basic reasons for courts' denying such damages—the speculative nature of this loss, the difficulty of its measurement, and the danger of excessive and arbitrary assessments by sympathetic juries—must be overcome. The courts' present desire for certainty is normally a strict requirement only in establishing the fact of damages, and is relaxed with respect to their extent.³⁶ The plaintiff should have the burden of proving, by use of advanced medical prognosis and testimony as to his prior physical condition, that his span of life has been shortened and the approximate extent of the abridgment. In assessing the amount of recovery, the number of years, as predicted by the expert, without more will not be enough, for this would reduce the award to a mere actuarial damage scale. Rather, evidence as to the quality of the life lost must be brought forth.³⁷ Facts concerning the person, his circumstances, prospects, habits, temperament, and attitudes should be required so as to enable the jury to determine the chances of future happiness had the life not been shortened. The jury should be instructed to make an objective estimate from the evidence rather than being

35. See, e.g., *Hoffman v. Keller*, 193 F. Supp. 733, 735 (D. Ore. 1961); *Kyle v. Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965); *Rust Eng'r Co. v. Ramsey*, 194 Va. 975, 982, 76 S.E.2d 195, 196 (1953); CAL. CIV. PROC. CODE § 352; ILL. REV. STAT. ch. 83, § 22 (1963); MICH. COMP. LAWS § 609.15 (1948); N.Y. CIV. PRAC. LAW § 208; VA. CODE ANN. §§ 8-30 (1950). If consciousness were regained, the procedural advantage of having an aware and participating plaintiff should outweigh any fears the court might have of such a claim and its evidence growing stale. Also, the defendant's loss of the protection of the statute of limitations is not totally inequitable in a case where his wrongdoing created the plaintiff's disability and where he is likely to realize the seriousness of the damage and can begin to prepare his defense immediately whether or not a complaint has been filed.

36. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, *rehearing denied*, 329 U.S. 822 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *NLRB v. Kartarik, Inc.*, 227 F.2d 190 (8th Cir. 1955); *General Fin. Corp. v. Dillon*, 172 F.2d 924 (10th Cir. 1949).

37. See *Benham v. Gambling*, [1941] A.C. 157, 166; *Smith*, *supra* note 4, at 809-12.

bound by the victim's subjective evaluation.³⁸ All evidence must be presented in open court and be subjected to the test of cross-examination. Where evidence as to the prospects of a predominately happy future is uncertain or questionable, smaller awards should be made.³⁹ Finally, the award should not be reduced to a mere formal grant as has been done in England,⁴⁰ but must remain flexible, within realistic limits, to fit both the quantity and quality of the life lost.

Exorbitant awards are not a necessary result. The judge should carefully instruct the jury so as to evoke its prudence and reason. He should define and illustrate what factors are to be considered or discounted and explain how damages for curtailment of life expectancy is but one category of damages distinct from other categories. Unlike instructions which ask the jurors to consider curtailment of life in determining other categories of damages,⁴¹ such instructions would clarify the jury's task by breaking down the total injury into areas common to their experience. Also, direct recovery for loss of the expectation of life would prevent the injustice of one jury covertly including such an award under some other label of damages while another jury ignores it. The jury has been deemed competent to deal with such immeasurable and speculative damages as pain and suffering, fear, and loss of consortium and therefore it should be deemed competent to measure damages for curtailment of life as well. If the legislature could be induced to act, specific limits could be set as an arbitrary ceiling to prevent abuses of the award.⁴² Finally, the award should be separate under the special heading of "damages for the curtailment of life" so as to reveal clearly the actual workings of the jury, thereby facilitating judicial review, remittur, or reversal when such an award is unsupported by the evidence.⁴³

38. *Benham v. Gambling*, [1941] A.C. 157, 167.

39. *Ibid.*

40. See note 14 *supra*.

41. See text accompanying notes 17-20 *supra*.

42. Smith, *supra* note 4, at 823, suggests a ceiling for curtailment of prospective life of \$5,000 for persons over 45 years of age and \$10,000 for children. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958), suggests such a limit for pain and suffering awards.

43. See Smith, *supra* note 4, at 795.