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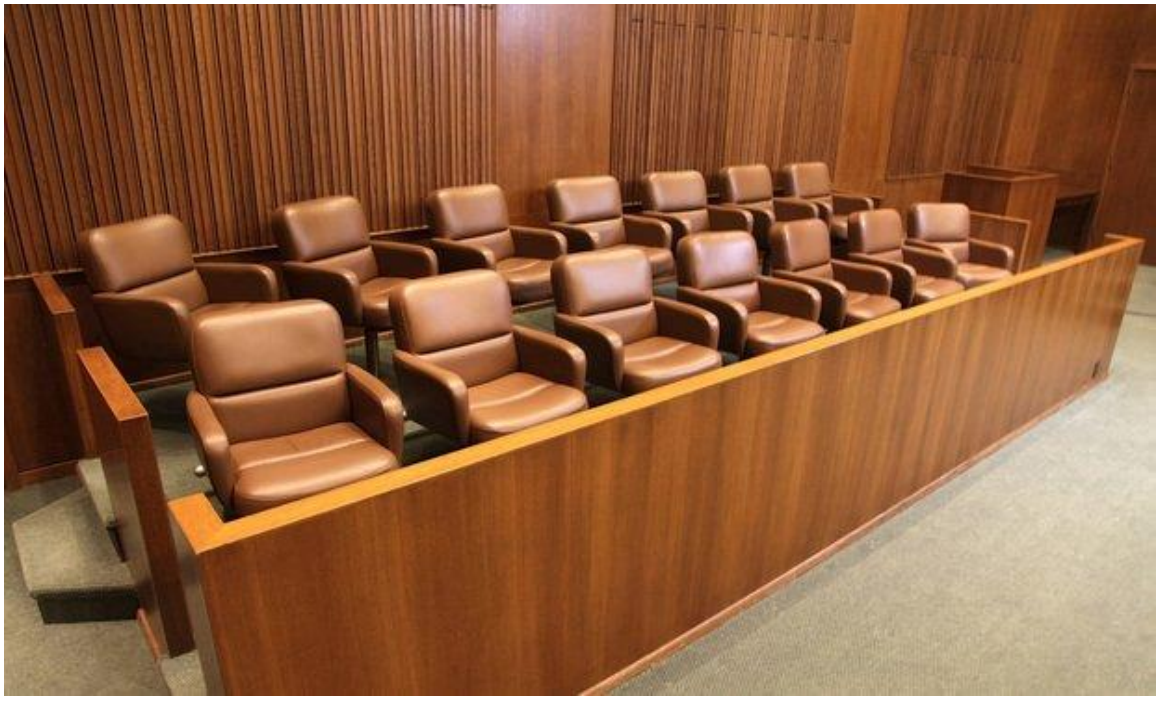
When a Pattern Jury Instruction Contrary to New York Law Arrogates the Law

PJI 2:320 Versus the Court of Appeals' Seminal Decision in 'McDougald v. Garber'

By **Timothy R. Capowski and Jonathan P. Shaub** | September 28, 2020



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All too often, perception becomes reality. Awards for pre-impact terror in New York are no exception. While pre-impact terror was historically an element of conscious pain and suffering in wrongful death actions, in 2012, the New York Pattern Jury Instructions (PJI) were amended to allow a plaintiff to recover damages for a decedent's pre-impact terror *and* independent damages for his or her conscious pain and suffering. Although the origins of this groundbreaking change are of uncertain provenance and its continued propagation the product of inertia, rather than rigorous legal analysis, one thing is clear: it is fundamentally improper under New York law to allow a jury to issue separate awards for pre-impact terror and conscious pain and suffering. Nevertheless, perception is reality and attorneys throughout New York take it as an article of faith that a plaintiff is entitled to recover separate awards for pre-impact terror and conscious pain and suffering. The urgent need to address this misconception assumes added importance as plaintiffs, with increasing frequency, turn to the PJI's construct to inflate the value of their claims.

Awards for Non-Economic Damages in New York Serve a Narrow Purpose

Awards for non-economic damages in New York are carefully circumscribed. The Court of Appeals has long recognized that "recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on 'the legal fiction that money damages can compensate for a victim's injury.'"[i] While money can never truly return a plaintiff to their pre-accident condition or ease his or her pain, it is "as close as the law can come in its effort to right the wrong."[ii] Nevertheless, the court's "willingness to indulge this fiction comes to an end [] when it ceases to serve the compensatory goals of tort recovery. When that limit is met, further indulgence can only result in assessing damages that are punitive."[iii]

Pre-Impact Terror Enters the Lexicon

The modern incarnation of pre-impact terror entered New York jurisprudence with little fanfare through a short 1980 decision from the Fourth Department. Specifically, in *Anderson v. Rowe* the court affirmed a motion for summary judgment dismissing plaintiff's claim for conscious pain and suffering on the ground that the evidence demonstrated that the decedents were killed instantaneously.[iv] Then, in a throwaway sentence, devoid of any further analysis, the court noted: "nor was the plaintiff able to show evidence from which one might imply that the decedents were aware of the danger and suffered from pre-impact terror."[v] This single sentence planted the innocuous seed that eventually blossomed into a separate line item for pre-impact terror in the PJI.

The Evolution of the Pattern Jury Instructions

The PJI, per the decisional law, historically recognized some variant of pre-impact terror as a compensable element of a decedent's conscious pain and suffering. The comments to the 1996 PJI specifically provided that "the elements to be considered in determining the conscious pain award when the interval between injury and death is short are the degree of consciousness, severity of pain, apprehension of impending death, and the duration."[vi] The PJI gradually expanded pre-impact terror to embrace that concept as it is more commonly understood today: the comments to the 2000 PJI noted that "recovery for 'pre-impact terror' may be allowed where the driver of a motorcycle applied his brakes, indicating that he had seen defendant's truck and was aware of the likelihood of a serious collision."[vii] The comments to the 2010 PJI expanded on these prior iterations, expressly observing that "the courts have recognized the injured person's 'pre-impact terror' as an element of conscious pain and suffering."[viii]

While these incremental changes altered the contours of pre-impact terror, the 2012 PJI worked a seismic shift in the New York litigation landscape. As late as the 2011 PJI, pre-impact terror was treated as an element of conscious pain and suffering and consequently juries were instructed to issue a single damages award for "pain and suffering."[ix] Starkly departing from this structure, the 2012 PJI added language directing the jury to award damages for "emotional pain and suffering [the decedent] endured between the moment [the decedent] realized that (he, she) was going to... die and the moment [the decedent] sustained a physical injury."[x]

Problematically, the PJI also directed the jury to award separate damages for "pain and suffering of [the decedent] from the moment of physical injury to the moment of death"[xi] The decision to discard the single award framework in favor of separate awards was unaccompanied by a meaningful analysis of the change, or a shred of supporting decisional authority to justify this tectonic shift. In fact, there was no change in case authorities from the 2011 PJI—where pre-impact terror was an element of conscious pain and suffering—to the 2012 PJI—where pre-impact terror became, for the very first time, a new and altogether independent category of damages recovery.[xii]

The Dual Line Item Structure is at Odds With Controlling Court of Appeals Authority

Perhaps it is unsurprising, then, that the PJI's dichotomy is sharply at odds with the Court of Appeals' decision in *McDougald.* There, the plaintiff explicitly attempted to recover separate awards for the loss of enjoyment of life and conscious pain and suffering.[xiii] While the court recognized that if the term "suffering" is "limited to the emotional response to the sensation of pain then the emotional response caused by the limitation of life's activities may be considered qualitatively different."[xiv] Critically, however, the court refused to adopt such a cabined interpretation of

the word "suffering." Instead, "suffering," for purposes of non-economic awards, encompasses a panoply of psychological injuries, including those occasioned by the "inability to participate in activities that once brought pleasure."[xv] The court thus rejected the plaintiff's efforts to segregate mental anguish into separately compensable damages.[xvi]

The court's reluctance to parse out elements of non-economic damages stemmed from its well-grounded fear that, unlike economic damages, such awards are not susceptible to analytical precision.[xvii] As the court reasoned "translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction."[xviii] Consequently, "the figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary injuries...cannot make it more accurate. If anything, the distortion will be amplified by repetition."[xix]

As a corollary, decoupling the loss of enjoyment of life from conscious pain and suffering would merely result in higher awards for non-economic damages.[xx] And, as the court explained, a higher award "does not by itself indicate that the goal of compensation has been better served."[xxi]

Against this backdrop, the PJI's provision of separate line items is improper on at least three fronts. First, similar to the loss of enjoyment of life, pre-impact terror involves a form of mental anguish/psychological injury that is untethered from physical pain. Indeed, pre-impact terror shares a far closer nexus to conscious pain and suffering than the loss of enjoyment of life. As the court of Appeals rejected the individual line item approach for the loss of enjoyment of life, it stands to reason that it is equally improper to allow a separate award for pre-impact terror.

Second, as noted above, the court of Appeals in *McDougald* astutely observed that awards for non-economic damages rest on the necessary, albeit tenuous, fiction that money can adequately compensate an injured plaintiff. The court's willingness to indulge in that fiction, however, ends where an award no longer serves a compensatory purpose. A separate award for pre-impact terror collapses under the weight of this admonition. Pre-impact terror is simply another species or element of human suffering that is incapable of precise quantification. Accordingly, the addition of a separate line item does not yield a more accurate award, but rather furnishes a vehicle for plaintiffs to drive the upward spiral of verdicts in New York.[xxii]

Finally, the PJI's provision of separate awards ignores a long line of *McDougald*-based authority that categorically rejected similar efforts to balkanize non-economic damages into discrete categories.[xxiii]

Circular Logic: The 2012 PJI Relied on Non-Existent Authority, Leading to a 2020 PJI That Relies on Authority Created by the 2012 PJI

Stepping into the present, the 2020 PJI ostensibly relies on a host of cases to support separate awards for pre-impact terror and conscious pain and suffering. A closer examination of these decisions reveals that they are either inapposite, antithetical to the charge, or the product of circular logic. First, a number of the decisions cited by the PJI involve motions for summary judgment.[xxiv] These decisions stand for the unremarkable proposition that a plaintiff can recover for a decedent's pre-impact terror, not that pre-impact terror is a separately compensable measure of damages.

Second, several of the decisions actually provide a single line item for pre-impact terror and conscious pain and suffering directly contradicting the PJI's current approach.[xxv]

Third, the decisions that expressly involve separate line items post-date the 2012 PJI's dual award framework, often citing the PJI as a basis for this structure.[xxvi] The logic is Kafkaesque: the 2020 PJI justifies dual line items through citations to cases that rely on the 2012 PJI's ill-conceived, unsourced, and facially improper embrace of separate awards. The PJI, through these decisions, are simply perpetuating their own deeply flawed logic, rather than offering critical support for their position that pre-impact terror and conscious pain and suffering are separately compensable. Nor do these decisions offer any analysis of the legal and logical tension inherent in separating the element of pre-impact terror from conscious pain and suffering.

Finally, the PJI are not gospel. The fact that separate line items appear in the PJI do not have the talismanic effect of transforming this structure into law. Axiomatically, the PJI "no matter how eminent their authors, do not take precedence over decisional law."[xxvii]

Re-Writing The Narrative

Ultimately the PJI are not entitled to any deference as their provision for separate awards for pre-impact terror and conscious pain and suffering contravenes controlling Court of Appeals precedent and draws on questionable authority. While the flaw in the PJI's approach is obvious, it cannot be entirely remediated until it is actually litigated. Whenever a plaintiff or court (or mediator) proposes separate line items or separate recoveries, defense counsel must argue forcefully for a single recovery based on the controlling Court of Appeals edict in McDougald. When confronted with a court that opts for the PJI approach over that of the Court of Appeals, defense counsel must object and create a proper record for appeal. Unless and until this division is consistently challenged, perception will remain reality and plaintiffs will continue to rely on the erroneous PJI provision to increase the value of their claims.

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ENDNOTES:

[i] *McDougald v. Garber*, 73 N.Y.2d 246, 254 (1989) (quoting *Howard v. Lecher*, 42 N.Y.2d 109, 111 (1977)).

[ii] *McDougald*, 73 N.Y.2d at 254.

[iii] Id.

[iv] *Anderson v. Rowe*, 73 A.D.2d 1030, 1031 (4th Dept. 1980).

[v] Id.

[vi] 1 NY PJI2d 2:320.5 at 627 (1996).

[vii] 1A NY PJI3d 2:320.5 at 1350-51 (2000).

[viii] 1B NY PJI3d 2:320.5 at 1715 (2010).

[ix] 1B NY PJI3d 2:320.5 at 1733 (2011); 1B NY PJI3d 2:320 at 1702 (2011).

[x] 1B NY PJI3d 2:320 at 955-56 (2012).

[xi] 1B NY PJI3d 2:320 at 955-56 (2012).

[xii] Compare, 1B NY PJI3d 2:320-2:320.5 (2011), with 1B NY PJI3d 2:320-2:320.5 (2012).

[xiii] *McDougald*, 73 N.Y.2d at 251.

[xiv] Id. at 256-57.

[xv] Id. at 257.

[xvi] Id. at 256.

[xvii] Id. at 257.

[xviii] Id.

[xix] Id.

[xx] Id.

[xxi] Id.

[xxii] *See* Timothy R. Capowski & Jonathan P. Shaub, "*Improper Summation Anchoring Is Turning The New York Court System on Its Head and Contributing to the Demise of New York State*", NYLJ (Apr. 28, 2020), https://www.law.com/newyorklawjournal/2020/04/28/improper-summation-anchoring-is-turning-the-new-york-court-system-on-its-head-and-contributing-to-the-demise-of-new-york-state/; Timothy R. Capowski & John F. Watkins, "*CPLR 5501(c) Review in the Age of Summation 'Anchoring' Abuse*", NYLJ (June 26, 2019), https://www.law.com/newyorklawjournal/2019/06/26/cplr-5501c-review-in-the-age-of-summation-anchoring-abuse/.

[xxiii] See *Bartoli v. Asto Constr. Corp.*, 22 A.D.3d 437, 438-39 (2d Dept. 2005) (Supreme Court erred in allowing jury to award plaintiff damages for disfigurement that were distinct from damages for pain and suffering); *Eaton v. Comprehensive Care Am.,* 233 A.D.2d 875, 876 (4th Dept. 1996) (shock and fright is not a separate category of damages); *Toscarelli v. Purdy*, 217 A.D.2d 815, 818 (3d Dept. 1995) (mental suffering is a component of pain and suffering); *Pallotta v. W. Bend Co.*, 166 A.D.2d 637, 639-40 (2d Dept. 1990) (mental anguish should not be awarded separately from pain and suffering); *Lamot v. Gondek*, 163 A.D.2d 678, 679 (3d Dept. 1990) (mental suffering is an element of pain and suffering).

[xxiv] *Anderson*, 73 A.D.2d at 1031; *Martin v. Reedy*, 194 A.D.2d 255 (3d Dept. 1994); *Boston v. Dunham*, 274 A.D.2d 708 (3d Dept. 2000); *Phiri v. Joseph,* 32 A.D.3d 922 (2d Dept. 2006); *McKenna v. Reale*, 137 A.D.3d 1533 (3d Dept. 2016).

[xxv] *Lang v. Bouju*, 245 A.D.2d 1000, 1001 (3d Dept. 1997); *Lubecki v. City of N.Y.,* 304 A.D.2d 224, 238 (1st Dept. 2003); see also *Smiley-Walsh v. N.Y.C. Hous. Auth.*, 243 A.D.2d 261, 261 (1st Dept. 1997) (citing *Donofrio v. Montalbano*, 240 A.D.2d 617, 618 (2d Dept. 1997) (reducing award for conscious pain and suffering that included pre-impact terror as a component of the award)).

[xxvi] *Keenan v. Molloy*, 137 A.D.3d 868 (2d Dept. 2016); *Matter of 91st St. Crane Collapse Litig.,* 154 A.D.3d 139 (1st Dept. 2017); *Vatalaro v. Cty. of Suffolk*, 163 A.D.3d 893 (2d Dept. 2018).

[xxvii] *Acerra v. Trippardella*, 34 A.D.2d 927, 927 (1st Dept. 1970); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.,* 93 Civ. 6876 (LMM), 2000 U.S. Dist. LEXIS 16403, at *2 (S.D.N.Y. Nov. 9, 2000) ("The PJI, of course, are not binding authority").
