Gary N. Stern
STERNLAW: THE LAW OFFICE OF GARY N. STERN

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"Loss of enjoyment of life" and the declaration of independence

RETHINKING CACI 3905A AS A STAND-ALONE GENERAL DAMAGE

Pain and Suffering. Plaintiff tort lawyers know the phrase like they know their parents or children. The phrase is also known to the people who make up our juries. Sadly, what they know or assume often strikes fear in our hearts. Few of us have escaped the cynicism of a prospective juror who equates "pain and suffering" with greedy plaintiffs and their greedy lawyers. It is the singular set of words, more than any other, that has been adopted by our adversaries as their slogan in favor of "tort reform." Why have we allowed these words to be so abused by those who care so little about the people we represent? Why have we allowed the most important jury instruction in our arsenal to be so mischaracterized?

The published California Civil Jury Instructions (CACI) contain the well-known non-economic damages instruction at the heart of just about every case handled by the personal injury lawyer. Usually identified with the incomplete shorthand "pain and suffering," CACI 3905 and 3905A state:

> The following are specific items of non-economic damages:
>
> (Past)(and)(future) physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress. No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Before 2003, the analogous "pain and suffering" instruction contained in the Book of Approved Jury Instructions (BAJI), 7th Edition, 1986 said this under the phrase "each of the following elements of claimed loss or harm:"

"Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress."

There is no clear statement of history in the California Judicial Council deliberations that explain why the CACI instruction added such words and phrases

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as disfigurement, physical impairment, inconvenience, grief, humiliation and "loss of enjoyment of life." Yet there is a century or more of history behind "loss of enjoyment of life," although none of that history is contained in a statute or as a central part of a judicial holding. And thus, "loss of enjoyment of life" is and has always been a subtext in catastrophic personal-injury cases.

It is time to unpack "loss of enjoyment of life," dust it off and give it its due as the centerpiece in every personal-injury case where general damage is at the heart of the plaintiff's case. It is time that the plaintiff lawyer fight back against the overused and overwrought "pain and suffering" in favor of a more nuanced and yet compelling way of proving and arguing general damages as the centerpiece of many personal injury cases.

One need not travel far to see how the phrase "loss of enjoyment of life" can and should be honored, emphasized, and argued because it is right there in our nation's Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness."

These words remain the bedrock of all that the United States of America was meant to be. Thomas Jefferson was first among equals in drafting these legendary words. I will say more in this article about the source for Jefferson's words, but I submit there is a symbiotic relationship between "loss of enjoyment of life" and "pursuit of happiness."

CACI 3905A can and should be applied and argued in a new and different way in every case of significant injuries with permanent residual harm. Every specific form of harm listed in CACI 3905A, where applicable, can be thought of as central to the deprivation of the Plaintiff's natural and inherent right to enjoy life. The phrase "loss of enjoyment of life" should be considered as a loss of one's natural right to "pursue happiness."

It is no accident that Jefferson and the Framers did not consider a state of "happiness" to be an inherent and inalienable right. Rather, they asserted that a free society can only exist if each human being, consistent with his natural abilities and talents, has an absolute right to "pursue" his own state of happiness, whatever that may mean to the individual.

It therefore follows that no other person, through his or her own carelessness, recklessness, or intentional act, has a right to deprive another of that natural right to pursue happiness. When a tortious act or omission to act results in the creation or exacerbation in another of a state of pain, suffering, anxiety, disfigurement, etc., no one can doubt that one's enjoyment of life has been injured, damaged, taken away, or impaired. Such deprivation interferes with the right to pursue happiness.

The plaintiff lawyer has permitted the other side to take over the framing of our cases by reducing the concept of "pain and suffering" to a cynical slogan that too many jurors equate with excessive complaining and exaggerated harm. "I have back pain every day and you do not see me staying home from work or wallowing in self-pity." What is required is a consistent theme backed up by the entirety of our learned experience in the nation that is (for the most part) our common home. That learned experience is grounded in our natural right to "pursue" the life we choose. If another takes that right away from us, few would argue that accountability should not follow.

What follows in this article is a historical perspective regarding "loss of enjoyment of life" and "pursuit of happiness." I believe the reader will become convinced that these phrases, taken for granted by most, ought to be adopted by the trial attorney as the thematic center of a case for long-term general damages, both in the way in which the plaintiff's story is told throughout trial and then as the rhetorical heart of closing argument.

Loss of enjoyment of life

Before 2003, as referred to above regarding the prior BAJI instructions, juries were instructed with these words when it came to what the public commonly refers to as "pain and suffering:" pain, discomfort, fears, anxiety, and other mental and emotional distress. After 2003, with the adoption of CACI, juries were instructed to consider evidence of physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.

CACI eliminated "discomfort," and "fear" from what BAJI listed in its instruction and added what was not previously articulated in BAJI: loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, and humiliation. Left unexplained by the drafters of CACI is how "mental suffering" and "emotional distress" are different. I believe the most significant change by the drafters of CACI is the addition of "loss of enjoyment of life."

This expansion of the general damage instruction could not have been an accident, as the phrase "loss of enjoyment of life" had been known and used in the law for over a century. What are we to make of the inclusion of this phrase in CACI? More important, have trial lawyers made sufficient use of this phrase in ways that can enhance the story they seek to tell a jury?

Historically, loss of enjoyment of life is a phrase associated with something called "hedonic damages." The word hedonic derives from a philosophy called "hedonism" which postulates that the seeking of pleasure and the avoidance of suffering are the only components of human well-being. This philosophy of life is as old as civilization and a discussion of its proponents and opponents is beyond the scope of this article. (See Preece, Alexandra, 50 San Diego Law Review, "Joyless Life and Lifeless Joy," p. 721 (2013).) In 1985, economists

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Brookshire and Smith published "Economic/Hedonic Damages," a book designed to demonstrate how an economist could be helpful to a plaintiff lawyer seeking to value life.

However, in California at least since 1986, economic damages must be analyzed separate and apart from non-economic damages. By the time of the adoption of CACI, California law held that one could not get a jury instruction on loss of enjoyment of life separate and apart from general, non-economic damages for "pain and suffering."

In *Huff v. Tracy* (1976) 57 Cal.App.3d 939, plaintiff suffered injuries in an automobile accident. The trial judge permitted the jury to be instructed on the standard BAJI "pain and suffering" instruction. The judge also gave a special instruction proposed by plaintiff's counsel: "You may also award plaintiff reasonable compensation for the physical and mental effects of the injury on his ability to engage in those activities which normally constitutes (sic) the enjoyment of life."

The issue before the Court in *Huff* was whether a separate "enjoyment of life" instruction was duplicative of BAJI 14.13. The court held the separate instruction was duplicative and should not have been given, although the appellate court then found the duplication to be harmless error as the damages awarded were fair regardless of the duplicative instruction. The Court recognized that a lawyer could argue loss of enjoyment of life as an element of general damages. In the Court's view, "loss of enjoyment of life" repeats what is "effectively communicated" by the other words of the general damage instruction. The Court explicitly stated that it was not willing to authorize even the potential for double recovery.

The *Huff* case was undoubtedly on the minds of the CACI drafters. They appear to have concluded that "loss of enjoyment of life" is an accepted "form" of general damage along with physical pain, mental suffering and the other descriptive conditions historically disclosed to the civil jury in California. It has always been this way. When California courts refer to "loss of enjoyment of life," the phrase is used within the confines of the general damage words familiar to juries, judges, and lawyers. (See *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300.)

Is this truly the right way to think about "loss of enjoyment of life?" Trial preparation in a case emphasizing general damages must include a careful breakdown of CACI 3905A. A mere reference to "pain and suffering" will generally sell the plaintiff short when it comes to telling the story of how defendant's negligence fundamentally and permanently altered plaintiff's life journey. The instruction uses 10 specific words and phrases. When one considers that the possible claims include the past and future, the actual distinct number of sources of damage is 20. But this breakdown of the words fails to confront the true significance of loss of enjoyment of life separate and apart from the other descriptive words and phrases.

Loss of enjoyment of life stands alone within the list for its capacity to encompass the other nine descriptions of harm. Yet our courts have rarely addressed the way in which this one phrase differs from the other words in CACI 3905A. Instead, our appellate courts have been asked in numerous cases over the years to address the matter of excessive awards of general damages, with loss of enjoyment of life mentioned as part of general damages, but not truly defined or explored by the court. (See, e.g., *Buell-Wilson v. Ford Motor Company* (2006) 141 Cal.App.4th 525.)

Loss of enjoyment as a stand-alone general damage

"Loss of enjoyment of life" is not a component of "pain and suffering," but a stand-alone type of general damage, at least as CACI 3905A has been traditionally interpreted. This article advocates for an alternative interpretation. "Loss of enjoyment of life" ought to be thought of as the "engine," with each other descriptive term in CACI 3905A considered as parts of that engine that, when defective, prevent the vehicle from working as intended.

The only other application of "loss of enjoyment of life" seen in the history of American law has been the discredited view that loss of enjoyment of life is to be applied to the plaintiff as a living human being who has no enjoyment at all because he or she is comatose, in a persistent vegetative state.

This unfortunate form of analysis of what courts in the past have called "hedonic" damage arises from the long since discredited notion that a person in a persistent vegetative state cannot be experiencing pain, suffering or emotional distress. Yet such a person surely must be entitled to recover (through his or her representative) some form of non-economic damage. The result was the interchangeable "loss of joy" or "hedonic" damage.

The tendency of courts throughout the United States to discuss "loss of enjoyment of life (hedonic)" damage as distinct from "pain and suffering" damage is discussed at great length in the law review article cited above, Preece, Alexandra, 50 San Diego Law Review, "Joyless Life and Lifeless Joy," p. 721 (2013). The author argues for a legal system in which loss of enjoyment of life damages receive their full due, thus rejecting any suggestion that general damages at the discretion of the jury is not possible as to those in a persistent vegetative state.

I submit that "loss of enjoyment of life" is the practical and deeply human result of all other impairments and forms of existence named in the CACI instruction as the result of the acts and omissions of the tortfeasor. It ought not to matter how the plaintiff presents to the jury for it is not beyond the capacity of a jury, left with no one set of rules to guide them as to dollars and pain, to apply words and phrases such as physical pain, mental suffering, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional

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distress, especially if all are understood as having damaged in whole or in part, the plaintiff's ability to pursue the enjoyment of life that was his/her birthright.

California courts hold that "loss of enjoyment of life" is not to be considered as a distinct form of damage but is to be considered within the overall context of the single CACI jury instruction, 3905A. The attempt to apply the phrase to the narrow situation of a comatose patient has been shown as folly, but in truth, demonstrates that the judiciary has not done a particularly good job of defining loss of enjoyment of life in any context. Now is the time to do so.

Loss of enjoyment of life is the *sine qua non* of all the other descriptive terms. Can one experience loss of enjoyment of life without any physical pain, mental suffering, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress? Perhaps, although even in the case of the tragic figure who is left permanently comatose due to medical negligence, there is physical impairment at the least. Does one experience loss of enjoyment of life when the plaintiff is left with daily pain, mental suffering, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress? The answer is a resounding yes. Common sense tells us this and yet, for over 100 years, courts have failed to step back and evaluate the simplicity of the phrase and its umbrella-like quality over the other words that today make up CACI 3905A. Further, as stated above, the characterization by some of "loss of enjoyment of life" as a zero-sum idea, where "loss" means "preclusion" (as in the rare case of the comatose plaintiff) is plain wrong. Fault is often apportioned among the parties and by the same token, loss or harm is usually not total, but substantial, nonetheless.

There is likely another reason why "loss of enjoyment of life" has been so misapplied by courts throughout our history. The phrase does not tell the true story of what has been lost. When we lose the ability to "enjoy life," we lose the ability to maximize the enjoyment we receive from simple pleasures, simple tasks and from the people we love and with whom we want to spend time. There is no fixed level of enjoyment. Rather, to understand the import of the phrase, it must be modified to read "loss of our capacity to enjoy life," or "loss of our ability to enjoy life."

In our everyday lives, how do we reach maximum capacity to enjoy? We pursue the feeling! Loss of enjoyment of life is the loss of our inherent right to pursue enjoyment. And that is a phrase every American ought to appreciate and honor. Our lives are journeys. We are not promised anything, except for the right to fashion our own destiny. Tort law provides us with the vehicle for holding others accountable who interfere with our journey. It therefore stands to reason that a compelling way to present a tort case involving permanent residual damages is to demonstrate how each element of loss has, in a substantial, tangible, and real way, interfered with our pursuit of life's pleasures. We need only look back to our nation's founding. None of us is guaranteed happiness. But we are guaranteed its pursuit, against those who would stand in our way.

The pursuit of happiness

No one knows with certainty the sources for inspiration relied on by the Founders when they used the phrase "the pursuit of happiness." But we do know that they were influenced by the great English philosophers, the writings of the French Enlightenment and the contents of the great legal documents of the Middle Ages.

One such great thinker was John Locke. In 1689, Locke was especially prolific in his writings. In his *Two Treatises of Government*, Locke wrote that political society existed for the sake of protecting a person's "life, liberty and estate," which he collectively referred to as a person's "property." In *A Letter Concerning Toleration*, Locke wrote about the power of the magistrate. He said that this power was limited to a person's "civil interest." Locke described this interest as one's life, liberty, health, indolency of body and possession of outward things. During Locke's time, "indolency" meant an absence of pain. But Locke was clearly troubled by his own efforts to describe each human being's purpose within an ordered society. The result was a third essay in 1689, *Essay Concerning Human Understanding*, in which he said that "the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness."

The question for us today is whether Locke continued to limit his thoughts to a person's property. More relevant to our times and our American society is whether Jefferson meant to limit his "pursuit of happiness" to the protection of property.

Can we say that Jefferson intended to broaden his vision of "pursuit of happiness" to a state of being not tied to property rights? A source for inspiration to Jefferson was undoubtedly Benjamin Franklin, who spoke about "happiness" and wrote about it throughout the 1760s, into the 1780s. His words have a certain attraction even to the modern ear:

"One's true Happiness depends more upon one's own Judgement of one's self, on a Consciousness of Rectitude in Action and Intention, and in the Approbation of those few who judge impartially, than upon the Applause of the unthinking undiscerning Multitude, who are apt to cry Hosanna today, and tomorrow, Crucify him."

Franklin later wrote these words in his 1785 essay *"On True Happiness:"*

"The desire of happiness in general is so natural to us that all the world are in pursuit of it; all have this one end in view, though they take such different methods to attain it, and are so much divided in their notions of it."

Franklin also wrote about happiness tied to one's economic station in life, but with a twist:

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"There are two ways of being happy: We may either diminish our wants or augment our means – either will do – the result is the same; and it is for each man to decide for himself and do that which happens to be the easiest. If you are idle or sick or poor, however hard it may be to diminish your wants, it will be harder to augment your means. If you are active and prosperous or young and in good health, it may be easier for you to augment your means than to diminish your wants. But if you are wise, you will do both at the same time, young or old, rich or poor, sick or well; and if you are very wise you will do both in such a way as to augment the general happiness of society."

What did the Founders want to accomplish in creating a society intended to be just and equal by writing about "the pursuit of happiness" and not merely a right to "life, liberty and happiness?" An individualistic, emotion-driven notion of happiness is not what our Founders had in mind and to that extent, it is not a great leap to acknowledge that what they had been reading was about human life in "pursuit" of a state of being. Jefferson himself weighed in on "happiness" when he wrote, "Our greatest happiness does not depend on the condition of life in which chance has placed us, but is always the result of a good conscience, good health, occupation, and freedom in all just pursuits."

The great philosophers Locke, Hobbes, and Aristotle shaped America's founders in the sense that they did not try to resolve the differences in what it meant to be happy or to pursue happiness. They recognized the dilemma in trying to craft a just and equal model founded on notions of liberty. By the time of our founding, Jefferson and his colleagues understood the complications of human existence. They understood the human condition. In the words of an unknown modern "philosopher," it is man's burden to "shop till we drop." He or she may not have used the word, but they understood the notion of a journey. Man moves from the desire of one object to another. Man is inclined to a perpetual, restless desire for power, control and influence, a desire that ends only with death. The Founders understood that human nature tends to look beyond present enjoyment to an absent good. In other words, happiness is not only elusive, but also not achievable during life. But what is achievable is the opportunity to pursue those things, people, and feelings that for the individual just might result in happiness.

CACI 3905A and the pursuit

A discussion about "happiness" as opposed to its "pursuit" can and has resulted in books, not merely articles. But a review of the works of the Founders and those who inspired them reveals that freedom and liberty are inextricably tied to the individual's right to craft his or her own destiny, a destiny and a life spent in pursuit of the "holy grail" – happiness.

Accordingly, I believe the Founders would have agreed that any careless, inexcusable, "negligent" interference with that pursuit cuts to the very heart of a person's reason for being.

And so, we come back to the central thesis of this article; that in California, the modern instruction on the law published in the "CACI" instructions, denominated 3905A, can and should be reevaluated with a new emphasis on the phrase "loss of enjoyment of life." This phrase should not be considered literally as one of many "specific items of non-economic damages," but rather as the spiritual and thematic home for the other "specific items": physical pain, mental suffering, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress. Every item can have a life of its own in any given case, but all of them just as powerfully create a loss of enjoyment of life. It is critical however, to identify the nature of this loss in the life of each of our clients. The client, attempting to navigate his or her journey in the United States of America, was given a birthright that came not with a guarantee of happiness, but with the right to pursue it and that verb, that pursuit, is not another's right to impair. When a person acts negligently, creating in another a new life filled with pain, mental suffering, disfigurement, physical impairment, and the like, that person is no longer able to pursue his or her own vision of happiness, truly causing a loss of enjoyment of life. The enjoyment we speak of is in the pursuit of happiness, a bedrock principle that any juror will appreciate if the linkage between CACI 3905A, Thomas Jefferson and the Founding Generation is brought to life at trial.

Gary N. Stern is the owner of SternLaw: The Law Office of Gary N. Stern, *Woodland Hills. After 40 years litigating medical negligence, elder abuse and general personal injury cases, Mr. Stern now serves as a freelance litigation consultant and mediator in addition to managing a limited number of plaintiff tort cases. Mr. Stern can be reached at gstern@sternlaw.org.*