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The Louisville Accident Lawyer Journal

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We gladly accept  
and appreciate  
your referrals

- We are counselors, not just attorneys
- We meet with our clients personally - not caseworkers
- We want you to understand how the legal system works as it applies to your case
- We will keep you informed and guide you every step of the way

### Why a Newsletter?

You are receiving this newsletter because you are an existing or past client of our firm, or have contacted us about representation. For this reason, this newsletter is not an "advertisement" under Ky. Supreme Court Rule 3.130-7.02(1)(h). It is our way of staying in touch with people who have had a relationship with our firm. We care about the people we have helped and want you to know your relationship is valuable to us, even after your case is over. We hope you find it entertaining and informative, and would love to hear from you if you enjoy it! Our best,  
Brad Harville  
Dana Skaggs

## The Law of Pain and Suffering

The toughest challenge faced by any trial lawyer in a personal injury case is persuading a jury to award money for an injured plaintiff's pain and suffering. Many prospective jurors are very cynical about awarding money for pain and suffering, and some just don't believe in it, period.

Why is that? The principle that injured plaintiffs should be allowed to recover for pain and suffering has been around since its roots in the evolution of tort law beginning in the mid-19th century.

It is, without a doubt, a feature of Western culture - particularly American culture - that has no counterpart in many other cultures around the world. Remember, the United States was founded upon the fundamental principle stated in the 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."

Thus, perhaps more than any other nation, America places a high value upon the right to enjoy "Life, Liberty and the pursuit of Happiness." Accordingly, the established rule of law throughout the United States has become that one who is wrongfully injured due to someone else's negligence has a right to recover damages for pain and suffering, because their unalienable right to enjoy "Life, Liberty and the pursuit of Happiness" has been wrongfully disrupted.



I think part of the reason that many jurors have a problem with pain and suffering is because suffering is a natural part of human existence. Nearly all of us have endured difficulties in our lives, whether involving ourselves or loved ones, but we had to tough it out and no one paid us anything, so why should we award any money to a plaintiff in a personal injury case? Plus, the onslaught of lawyer advertising in the past 30 years, coupled with tort reform lobbying by insurance companies, has engendered a public perception that personal injury cases in general are just a money grab.

That's unfortunate, because a primary aim of tort law is to make society safer by holding people accountable who engage in harmful behavior. This is why Kentucky law requires everyone who drives a car to have liability insurance to compensate anyone injured due to their negligence. Which highlights another problem with cynical jurors in car accident cases: the defendants in these cases always have insurance which will pay for any judgment, even though lawyers aren't allowed to mention that fact in court. No plaintiff's attorney is going to pursue a case against a defendant who doesn't have insurance, because

there's no money in it. So why give the insurance company a pass and let them off the hook for their insured's negligent conduct?

On the other hand, jurors are much more willing to award compensation for "economic damages," such as medical expenses. That doesn't make a lot of sense, either, since medical expenses are usually paid by automobile or health insurance, which the plaintiff will have to pay back out of his or her recovery.

For this reason, plaintiffs' attorneys are increasingly employing a strategy of *not* asking for economic damages, in order to get juries to focus on noneconomic damages. Noneconomic damages - i.e., pain and suffering - require juries to assess the human costs of the defendant's conduct, as measured against the plaintiff's right to live without injury, without having to deal with the stress of the injury, or the effects of the injury upon relationships with loved ones. In other words, the value of one's normal life free of the injury inflicted upon them by the defendant.

I don't think the human cost of this sort of disruption has ever been more widely evident than what we are all experiencing during the COVID-19 pandemic. I wonder, when we get back to our normal lives, if this collective experience might make juries more empathetic to awarding damages for pain and suffering. Life is short, and every day we are able to go about our normal lives, free of the burden of being injured by someone else, has tremendous value. • BDH

## HOW NOT TO WISH YOUR LIFE AWAY

*"Where can I get meat for all these people? They keep waiting to me, 'Give us meat to eat!' I cannot carry all these people by myself; the burden is too heavy for me. If this is how you intend to treat me, just go ahead and kill me. Do me a favor and spare me this misery!"*

-Numbers 11:13-15

These were the words of Moses as he wandered in the desert with the Israelites for 40 years. How many of you are feeling that way these days?

I've heard this from more than one of my friends lately: "I'll be glad when 2020 is over. It sucks!!!"

I'll be the first to admit, I am the last person who should be writing a column about why you should not be wishing your life away, because I'm one of the worst persons I know who do exactly that.

It seems like something is always hanging in the air, doesn't it? That's especially true when you practice law. Not a week goes by when I don't get a call from a client wanting to know, how much longer before my case gets resolved?

I get it, I really do. We all feel that way. About everything. Believe me, I want to get your case over with just as much as you do. But I want to get it done right. And the truth of the matter, and about life in general, is that things get done in their own time. I've told many clients, if I had a magic wand and could get things done whenever I wanted them to get done, I'd be the most successful lawyer ever. But it just doesn't work that way.

And it's not just practicing law. This is true for every phase in our lives. When I was young I couldn't wait to get older. I couldn't wait to get my driver's license. I couldn't wait to get through school.

The best times were when my two sons were growing up. But then came college and tuition payments. We anxiously awaited the day when they would graduate with their degrees and we might see some disposable income again.

Meanwhile, the milestone birthdays whizzed by. 40 years old, 50 years old. And then - holy s\*\*t - I turned 60 this past May! How did that happen? When did I get old?

But here's the thing. I don't think I'm old. I feel great and I know I



have plenty of good years ahead. One thing about turning 60, you get smarter in some ways, in that you know what you know and you know what you don't know, and you've long ago quit trying to be someone you're not.

But I will also say, at my age, knowing that I hope to have 20, 25, even 30 years left if I'm really lucky, I am a lot more vigilant about not wishing my life away.

Sure, I'll be glad when this whole COVID-19 business is over. I am very hopeful that one day all of the political and racial unrest might calm down, and, perhaps foolishly, I think that maybe one day it will.

But here's the thing: My life, on this earth, is right now. I can't cure COVID-19. I can't do anything about all of the social turmoil, other than to try to keep from being part of the problem. All I can control is what I do with my time each and every day. And be grateful for whatever I can accomplish each day. And, for the time I get to spend with my family, friends, clients and people each day, whether in person, on the phone, remotely, or whatever form of contact I might have with them. Because I truly believe your life is measured by your relationships, and how you serve and treat people.

One of my favorite quotes is from the great Trappist Monk Thomas Merton, who spent much of his adult life at the Abbey of Gethsemani near Bardstown, Kentucky. He said: "We do not exist for ourselves alone, and it is only when we are fully convinced of this fact that we begin to love ourselves properly and thus also love others." In a similar vein, appropriate to these times, Dr. Martin Luther King, Jr. said: "I have decided to stick with love. Hate is too great a burden to bear."

How could these ideas possibly help me to be a better lawyer? Well, as the old saying goes, I have found I can catch a lot more flies with honey than vinegar. My wife likes to remind me of something I once told her: "Why would you be nasty to someone whom you are trying to get to pay you money?" That was a remark I made to her when I mainly defended cases. When it came time to settle, it was always easier to want to settle with the lawyers on the other side who were kind and gracious toward you, as opposed to those who were really nasty to you, and the nicer ones always seemed to come out ahead. That's just human nature.

Still, we all have times when we feel like Moses did in the desert. All I can say is, hang in there. Find something to appreciate in each day. Take some time for yourself. Take care of yourself. Take a moment to appreciate what is good in your life. Count your blessings. And try to find a way to have some fun.

Don't wish your life away. It goes by plenty fast without helping it along.

## Current Trends in Personal Injury Law

In October, 2017, I discussed the case of *Genesis Healthcare v. Stevens* in this column, in which the Ky. Court of Appeals held that a general power of attorney did not authorize the person holding the power of attorney to enter into an arbitration agreement with a nursing home. Since that case, Kentucky courts have completely flip-flopped in this area of the law. The recent case of *LP Louisville East v. Patton*, decided by the Ky. Supreme Court on August 20, 2020, pretty much guarantees that any nursing home arbitration agreement signed by the holder of a power of attorney for the patient is going to be held enforceable.

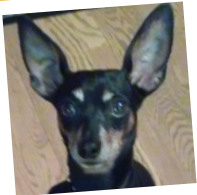
This is a scenario that plays out every day, usually by a son or daughter who has a power of attorney for an aging parent, who has to be admitted to a nursing home. The nursing home will always present an arbitration agreement as part of the paperwork, which is routinely signed without a second thought. But once a lawsuit is filed over an injury caused by the nursing home's negligence, the first thing that the nursing home does is to file a motion to enforce the arbitration agreement to avoid a jury trial. And it works. How, then, did our courts go from not enforcing these agreements to enforcing them, within the span of just 3 years?

What happened is that another 2017 case went all the way to the U.S. Supreme Court, which agreed to hear the case and basically said that Kentucky's interpretation of these powers of attorney, which applied a "clear statement rule" in regard to nursing homes, was at odds with federal law. Ever since then, Kentucky courts have been walking back from their former cases which disfavored these arbitration agreements. The upshot is that if you have to admit your Mom or Dad to a nursing home, you should beware of these arbitration agreements. If you have a choice, you should always refuse to sign them.

BRADLEY D. HARVILLE LAW OFFICES PLLC

### 20 Questions about Kentucky No-Fault

The key to understanding how the legal and medical system works in personal injury cases resulting from motor vehicle accidents in Kentucky.



Casey's Ky. Trivia Question:  
What is the deepest lake in Kentucky?

- A. Herrington Lake
- B. Lake Cumberland
- C. Greenbo Lake
- D. Buckhorn Lake

Be the first person to answer correctly by sending an e-mail to [bdh@harvillelaw.com](mailto:bdh@harvillelaw.com) and we'll mail you a \$5 Starbucks gift card!

## Stupid-Easy Recipe of the Month

Muy Delicioso!

### Easy Chicken Enchiladas

#### Ingredients:

- 1 can (10 ounces) enchilada sauce, divided
- 4 ounces cream cheese, cubed
- 1-1/2 cups salsa (your choice, mild, med or hot)
- 2 cups cubed cooked chicken
- 1 can (15 oz) pinto beans, rinsed and drained
- 1 can Rotel diced tomatoes with green chiles
- 10 flour tortillas (6 inches)
- 1 cup shredded Mexican cheese blend
- Optional: Shredded lettuce, chopped tomato, sour cream and sliced ripe olives

#### Directions:

Spoon 1/2 cup enchilada sauce into a greased 13x9 in. baking dish. In a large saucepan, cook and stir the cream cheese and salsa over medium heat until blended. Stir in chicken, beans and chiles. Place ~ 1/3 cup of chicken mixture in each tortilla. Roll up and place seam side down over sauce. Top with remaining enchilada sauce; sprinkle with cheese. Cover and bake at 350° until heated through, 25-30 minutes. Serve with lettuce, tomato, sour cream and olives.



## Favorite Pet of the Month

Meet Frank, the pug. Named after the famous pug in the movie Men in Black, Frank was found wandering alone so a friend of the rescue took him in so he didn't get hurt. Weeks have gone by and he has not been claimed so the rescue has gladly stepped in for some TLC. Frank is young, probably 2-ish, but a vet visit soon will confirm. He is an energetic dog ready to play and be loved.

Have you been looking for a pug to love? Visit [www.barktownrescue.org](http://www.barktownrescue.org) and fill out an application!

Dana serves on the Board of Directors at Barktown Rescue.

Brad and his family love pets, too!

If you want to tell us about your pet(s), send an e-mail to [bdh@harvillelaw.com](mailto:bdh@harvillelaw.com) with a photo and we'll try to put this in a future issue!



Frank



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**We want to help you secure the best possible outcome out of a difficult situation that you wish had never happened. If you have been injured, our goal is to obtain maximum recovery in the shortest amount of time it takes to get your case resolved.**



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