

*ANALYSIS,
UNDERSTANDING
AND PRESENTATION
OF CASES INVOLVING*

**TRAUMATIC
BRAIN INJURY**

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Hedonic Damages: Evaluating the Loss of Enjoyment of Life

Stan V. Smith

In cases involving brain injury, individuals sustain a significant impairment of their capacity to engage in the challenging and satisfying process of living one's life. Thus, there is a significant loss of enjoyment of life, completely separate from lost wages and other elements of damages.

Hedonic damages,¹ a provocative phrase, is a new label for this established concept. It has stirred considerable controversy in the legal press since this author first coined the term in 1983 in the wrongful death case of Sherrod v. Berry.² It generally refers to damages for the "loss of enjoyment of life" which of course are recoverable in personal injury and survival actions, either as a separate element of damage, "loss of enjoyment of life" (LOEL) or "disability, nature, duration and extent," or as factor in "pain and suffering" (P&S).³

The exact nature and recoverability of hedonic or LOEL damages, therefore, turns on the cause of action involved. Whether state or federal law governs the action can also affect their recoverability. Perhaps the most current and hotly debated issue with hedonic damages is the appropriateness of using expert economic testimony to assign them monetary value. The mathematical quantification of damages which heretofore were considered non-pecuniary or non-economic⁴ has the legal community in a flurry. But such testimony is long overdue.⁵ Given recent U.S. Supreme court guidelines on the admissibility of expert witness testimony, such testimony is likely to be increasingly relied upon by juries.⁶

Since these damages could conceivably constitute a significant, if not chief, portion of jury awards, personal injury attorneys should certainly educate themselves with the issues and methods involved. This chapter seeks to assist in that task by examining their recoverability, proof and valuation in personal injury and survival actions.

Separateness of Damage Award

In the majority of jurisdictions, plaintiffs who are unable to engage in the same life activities after an injury may be awarded damages for their "loss of capacity to enjoy life" or LOEL. An important issue which divides the courts, however, is whether an award for these damages can be made separate and apart from damages for "pain and suffering". The issue, in other words, is whether a separate verdict question can be submitted to the jury.⁷

Numerous courts believe that LOEL is conceptually distinct from P&S and that separate verdict questions do not lead to jury confusion or a duplication of damage awards.⁸ LOEL refers to what was taken away from the injured plaintiff and may be proven by objective evidence establishing the curtailment of any of the plaintiff's activities (e.g., recreational, household, daily living). P&S, on the other hand, refers to what was inflicted on the plaintiff and is proven by more subjective evidence establishing the physical discomfort and mental anguish sensed by the plaintiff.⁹ These courts contend

that the difference between LOEL and P&S is a problem of definition only and carefully worded jury instructions can minimize any possibility of jury confusion or duplication.¹⁰ Separate awards should contribute to greater accuracy, moreover, and facilitate judicial review for excessiveness.¹¹

A large number of courts are against submitting a separate verdict question on LOEL, however, on grounds that a duplication of damages might result.¹² These courts rationalize that LOEL is merely a sub-element of P&S because the two types of non-economic damages generally consider the same evidentiary circumstances.¹³ It is even contended that LOEL is nothing more than the mental anguish component of P&S; an injured party who is unable to engage in various activities is frustrated and grieves over that fact.¹⁴

Cognitive Awareness Requirement

Another key issue which divides the courts is whether or not injured plaintiffs must be mentally aware of their LOEL in order to recover damages. Plaintiffs who become comatose or whose intelligence is greatly reduced as a result of a brain injury are usually unable to engage in their normal activities. To be sure, all courts hold that plaintiffs must be conscious of their P&S before recovering those damages.¹⁵ The issue is whether LOEL damages stand in a different position.

Following the lead of the English House of Lords,¹⁶ several American courts have held that awareness is an irrelevant consideration with LOEL.¹⁷ While plaintiffs who do not sense any physical or mental P&S obviously sustain no loss, the inability to engage in pleasurable activities is considered an objective loss which is not dependent on plaintiffs' mental perception.¹⁸ The goal of tort damages is to provide compensation and plaintiffs who lose part or all of their senses have suffered a definite objective loss. Awarding LOEL damages to a comatose plaintiff is accordingly not punitive.¹⁹ The utility of the damages to the plaintiff is furthermore wholly irrelevant.²⁰ A decedent's estate is commonly entitled to pre-death P&S damages in survival actions, for example.²¹

Other courts, conversely, scale the amount of LOEL damages according to the plaintiff's awareness of the loss. "Some level of cognitive awareness" is required because damages must have a utility or meaning to the injured party.²² These courts have reasoned that LOEL damages do not provide consolation, ease any burden, or directly benefit a comatose plaintiff and hence are deterrent or punitive in nature.²³ Alternatively, because LOEL is no more than a species of mental anguish, a person who lacks awareness of any diminished capacity to enjoy life has suffered no loss.²⁴

In survival actions, a decedent's estate is generally allowed to recover damages for pre-death injuries in a statutory survival action.²⁵ Like wrongful death actions, survival actions are "creatures of the legislature;" at common law, all actions ceased with the death of the plaintiff.²⁶ The class of beneficiaries, types of actions, and nature and amount of damages allowed are all statutorily defined.

Federal Law Distinctions

It should be noted that personal injury actions based on federal statutes such as the

Federal Tort Claims Act (FTCA), Federal Employers' Liability Act (FELA) or §1983 might require a different analysis. As to the issue of separate LOEL damage awards, the applicable state law might control.²⁷ As to the awareness issue, however, a substantive federal standard might govern the matter. Under the FTCA, for example, punitive damages are statutorily prohibited.²⁸ Several federal courts faced with the awareness issue in an FTCA action have denied or reduced LOEL damages reasoning that such an award as a matter of federal law would be punitive and not compensatory.²⁹ Other federal courts have expressly rejected the punitive-argument and have found a plaintiff's awareness to be irrelevant under the applicable state law.³⁰

But in a recent landmark decision by the U. S. Supreme court in Molzof v. United States,³¹ Justice Clarence Thomas wrote the majority opinion allowing for the loss of enjoyment of life in injury under the Federal Tort Claims Act. Molzof struck down the definition of punitive damages under the FTCA as any damages that go beyond compensating for actual pecuniary loss, reversing decisions in the 1st, 4th, 5th, 7th and 9th U.S. Circuit Court of Appeals that limited damages in FTCA to actual pecuniary loss. Notably, Molzof overturned Flannery v. United States³² which held that there must be awareness in order for damages to be meaningful to plaintiffs in FTCA cases or else they would be punitive.

In survival actions, causes of action for pre-death injuries based on federal law such as §1983 or the FTCA again may call for a different analysis. In §1983 survival actions based on the wrongful death of a party, for example, the courts have generally allowed the decedent's estate to recover both pre-death LOEL and post-death hedonic or loss of life damages even though the latter were not recoverable under the applicable state statute.³³ In Bell v. City of Milwaukee,³⁴ for example, the Seventh Circuit Court of Appeals held that the denial of hedonic damages under Wisconsin's survival statute was in conflict with the deterrence and compensation policies of §1983. It should be noted that post-death hedonic damages were obviously awarded separately from any pre-death P&S and not dependent on any awareness, consciousness or utility requirements.

Proof and Valuation – Lay Testimony

Trial practitioners are accustomed to proving hedonic/LOEL damages in personal injury or survival actions by simply presenting evidence on the plaintiff's inability to engage in various activities after the injury. Testimony from the plaintiffs themselves or others close to them is generally utilized to demonstrate the injury's effect on a plaintiff's lifestyle.

While lay testimony is submitted to establish the extent of the plaintiff's LOEL, these witnesses are not allowed to quantify or monetarily value the damages. The courts have traditionally only allowed attorneys to suggest a lump sum award for hedonic/LOEL damages to the jury in closing argument.³⁵ As regards to the general category of pain and suffering or disability damages, "per diem" arguments are allowed in federal courts³⁶ but not all state courts. It is fair to say that the dollar amounts suggested by attorneys for LOEL or P&S damages are rather arbitrarily determined and generally measured against other damage awards upheld within the jurisdiction.

Proof and Valuation – Expert Testimony

Courtroom evidence about the loss of the value of life can take several forms. Evidence might be produced as to what it costs to save the lives of specifically known individuals trapped in life threatening situations; the costs of maintaining prisoners serving life sentences without parole; the costs of maintaining people in the hospital who are irreversibly brain dead; and even the costs of saving whales. These latter estimates may have jury appeal but are a subjective measure of what we are routinely willing to pay to save lives. These sensational circumstances are extraordinary and rare. They do not reflect the ordinary process and price of living no more than does the price of a movie (\$3.00 per hour) reflect our enjoyment of life. Economists could argue for the additional capacity to earn if a decedent were faced with certain death as an alternative.

The most appropriate approach is to base the value of life on a wide body of literature measuring the cost/benefit of life saving. This could be reflected in consumer purchases of life saving devices, the value of life implied by the risk premium paid for hazardous jobs, or more controversially, the value of life implied by government regulations.³⁷ In the main these surveys conclude that life is routinely valued in the several million dollar range.³⁸ These life values must be reduced by lost earnings and other factors to produce a net hedonic value. The net value can then be tailored to the specific individual in various ways, some of which have been suggested by Brookshire and Smith.³⁹ In personal injury actions, the diminishment of the capacity to enjoy life can be quantified through an interdisciplinary approach using a psycho-social loss scale and an economic valuation.⁴⁰

Some variation exists in figures that economists may generate. For example, it is generally recognized that different economists may arrive at somewhat different projections for lost earnings. The calculations could easily vary for a person killed during the first year of high school, with no previous earnings history. Economists exercise judgment regarding worklife, average earnings, growth and discount rates. Likewise, economists may differ as to precisely what is the net hedonic value of an average life, but such differences are generally within the general range of differences in other areas of valuation.

In 1987, this author estimated the value of life to be approximately \$2.3 million. In 1990, Miller⁴¹ estimated a whole life mean of \$2.2 million, and an hedonic value annualized at \$55,000 per year in 1988 after-tax dollars. This mean is arrived at by giving equal weight to the results of each of forty-seven studies. An equally weighted process to determine a mean is not the sole (nor necessarily the preferred) method for calculating a statistic to estimate the central tendency of life values. There are other estimates of the central tendency. In late 1987, using my own methodology, this author estimated the average annualized hedonic value to be \$60,000 in 1988 pre-tax dollars.

Most economists who testify on hedonic damages start with a whole life value and then subtract an assessment of the value of the human capital costs and of household services for a statistical person. The methodology for subtracting human capital costs from whole life costs should reflect a conservative approach. It should maintain consistent assumptions about taxation and the characteristics of the statistical person. There are several possible approaches for taking all this into account. Let us examine one

simple approach that should provide a generous estimate of the present value of lost production and household services for a statistical person and thus a conservative estimate of the hedonic value of life.

To calculate this, consider, for example, that GNP per capita in 1988 was approximately twenty thousand dollars. To this we add value of household services which are estimated to be twenty-five percent of GNP. The average worklife expectancy for thirty-one-year old males and females is approximately twenty-five years. To take into account all human capital values simply double the present value of GNP per capita, assuming a twenty-five year worklife for the statistically average thirty-one-year old, using a conservative two percent discount rate. This produces a human capital value of approximately \$800,000. This value can then be subtracted from the whole life costs to arrive at the hedonic value, which can then be annualized using a life expectancy figure and a discount rate.

Other economists have estimated the human capital costs using somewhat different or more detailed assumptions, but the results are similar. An appropriate adjustment must then be made to value the life of a particular person, taking into account that person's age, race and gender to determine life expectancy. In presenting this estimate and accompanying testimony, an economist, interprets the studies and provides information that can help a jury form its own judgment regarding the net hedonic value based on the estimates published in the literature.

The process of valuing the lost enjoyment of life in non-fatal injury is based on the hedonic value of life and an interdisciplinary approach using the assessment of a psychologist or psychiatrist and is based on a scale of global functioning such as that found in the Diagnostic and Statistical Manual published by the American Psychiatric Association.⁴² Miller describes an essentially similar process.⁴³ The application of the value-of-life literature in the measurement of the loss of enjoyment of life in injury is important. This process measures the value of the decrease in the ability to experience the potential enjoyment of life. It is separate and apart from palpable pain and the consequent suffering, such as fear, worry, mental disturbances and humiliation that can accompany the injury.

The reduction in the ability to experience the value of life is based on the total value of life, along with an evaluation by a psychologist, psychiatrist or other mental health professional, that measures the percentage reduction in the capacity to function and experience life as a whole individual. This evaluation examines the claimant's reduced capacity to function in all areas of life by examining the impact on occupational functioning, social and leisure activities, daily practical living, and his or her internal emotional state. This impact can vary from the time of the incident to the end of life expectancy. It may be more severe at the time of injury; it may decline as the person with an injury recovers and compensates; or it may get worse as the medical consequences are aggravated by physical deterioration as one ages.

Identical injuries will affect people differently. Consider, for example, the difference in the loss of enjoyment of life resulting from the amputation of the tip of a little finger for a twenty-one-year old concert pianist, as opposed to a twenty-one-year old economist. Further, an impairment such as the loss of eyesight may lead to similar

estimates for the loss of enjoyment of life but may be accompanied by different degrees of pain and suffering. A person who loses his sight through the negligent slip of a scalpel may suffer no palpable pain and suffering, whereas another person who loses sight as a result of a gunshot wound may suffer substantial initial and subsequent pain and suffering. The inability to engage in life's ordinary yet challenging experiences is not dependent upon the degree of physical incapacity or the degree of pain, suffering and mental anguish.

Recently, some standards for rating the percentage of functional disability have been suggested.⁴⁴ There are numerous possible assessment protocols. Ultimately, the percentage loss figure, however derived, is the psychologist's estimate as to the percent loss of the quality or enjoyment of life, based on his or her training, background, experience and judgment. Once the percentage of loss has been determined, that reduction can be applied against the full hedonic value of life to arrive at a partial loss estimate.⁴⁵

Sample Case

Let's assume that a fifty-five-year old female, Jane Tapper, a typist, has been significantly injured. Further assume that a psychologist describes her impairment and her loss of capacity to enjoy life on the psychological assessment below. As is readily apparent, Ms. Tapper's loss of capacity is not constant over time; it can vary. Immediately after a trauma, the loss is great. The ability to enjoy life may increase somewhat during the recovery period. Later life losses may remain constant or may increase toward the end of life expectancy, depending on the impact of the injury.

SUMMARY OF PSYCHOLOGICAL ASSESSMENT OF JANE TAPPER

<u>AGE</u>	<u>DEGREE OF IMPACT</u>	<u>EXAMPLES</u>
33 (1.2 Yrs)	Severe (55%-65%)	Emotional trauma of accident and recovery from injuries. Disoriented in conversations with friends; loses train of thought. Unable to plan sequence of events such as dinner preparation.
35 (3 Yrs)	Moderate (40%-50%)	With therapy, may improve over next several years and be able to compensate for deficiencies. She still will have considerable difficulties in concentration and planning.
38 (LE)	Mild (20%-30%)	Continued improvement in ability to compensate and function, however she will still retain significant impairment for the balance of life.

Once this psychological evaluation is provided, it can be assessed and incorporated in into a loss of enjoyment table such as the one below, in this case showing losses totalling between \$617,784 and \$884,856.

Table 1
PRESENT VALUE OF FUTURE LOEL OF JANE TAPPER (LOWER)
1994 - 2041

YEAR ****	AGE ***	RVL *****	DISCOUNT FACTOR *****	PRESENT VALUE *****	CUMULATE *****
1994	33	\$40,441	0.98241	\$39,730	\$39,730
1995	34	31,820	0.96514	30,711	70,441
1996	35	29,789	0.94817	28,245	98,686
1997	36	29,980	0.93149	27,926	126,612
1998	37	30,172	0.91511	27,611	154,223
1999	38	15,182	0.89902	13,649	167,872
2000	39	15,279	0.88321	13,495	181,367
2001	40	15,377	0.86768	13,342	194,709
2002	41	15,475	0.85242	13,191	207,900
2003	42	15,574	0.83743	13,042	220,942
2004	43	15,674	0.82270	12,895	233,837
2005	44	15,774	0.80824	12,749	246,586
2006	45	15,875	0.79402	12,605	259,191
2007	46	15,977	0.78006	12,463	271,654
2008	47	16,079	0.76634	12,322	283,976
2009	48	16,182	0.75287	12,183	296,159
2010	49	16,286	0.73963	12,046	308,205
2011	50	16,390	0.72662	11,909	320,114
2012	51	16,495	0.71384	11,775	331,889
2013	52	16,601	0.70129	11,642	343,531
2014	53	16,707	0.68896	11,510	355,041
2015	54	16,814	0.67684	11,380	366,421
2016	55	16,922	0.66494	11,252	377,673
2017	56	17,030	0.65325	11,125	388,798
2018	57	17,139	0.64176	10,999	399,797
2019	58	17,249	0.63047	10,875	410,672
2020	59	17,359	0.61939	10,752	421,424
2021	60	17,470	0.60849	10,630	432,054
2022	61	17,582	0.59779	10,510	442,564
2023	62	17,695	0.58728	10,392	452,956
2024	63	17,808	0.57695	10,274	463,230
2025	64	17,922	0.56681	10,158	473,388
2026	65	18,037	0.55684	10,044	483,432
2027	66	18,152	0.54705	9,930	493,362
2028	67	18,268	0.53743	9,818	503,180
2029	68	18,385	0.52798	9,707	512,887
2030	69	18,503	0.51869	9,597	522,484
2031	70	18,621	0.50957	9,489	531,973
2032	71	18,740	0.50061	9,381	541,354
2033	72	18,860	0.49181	9,276	550,630
2034	73	18,981	0.48316	9,171	559,801
2035	74	19,102	0.47466	9,067	568,868
2036	75	19,224	0.46632	8,965	577,833
2037	76	19,347	0.45812	8,863	586,696
2038	77	19,471	0.45006	8,763	595,459
2039	78	19,596	0.44215	8,664	604,123
2040	79	19,721	0.43437	8,566	612,689
2041	80	11,854	0.42978	5,095	\$617,784

JANE TAPPER

\$617,784

Table 2
PRESENT VALUE OF FUTURE LOEL OF JANE TAPPER (UPPER)
1994 - 2041

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
1994	33	\$47,794	0.98241	\$46,953	\$46,953
1995	34	39,220	0.96514	37,853	84,806
1996	35	37,237	0.94817	35,307	120,113
1997	36	37,475	0.93149	34,908	155,021
1998	37	37,715	0.91511	34,513	189,534
1999	38	22,774	0.89902	20,474	210,008
2000	39	22,920	0.88321	20,243	230,251
2001	40	23,067	0.86768	20,015	250,266
2002	41	23,215	0.85242	19,789	270,055
2003	42	23,364	0.83743	19,566	289,621
2004	43	23,514	0.82270	19,345	308,966
2005	44	23,664	0.80824	19,126	328,092
2006	45	23,815	0.79402	18,910	347,002
2007	46	23,967	0.78006	18,696	365,698
2008	47	24,120	0.76634	18,484	384,182
2009	48	24,274	0.75287	18,275	402,457
2010	49	24,429	0.73963	18,068	420,525
2011	50	24,585	0.72662	17,864	438,389
2012	51	24,742	0.71384	17,662	456,051
2013	52	24,900	0.70129	17,462	473,513
2014	53	25,059	0.68896	17,265	490,778
2015	54	25,219	0.67684	17,069	507,847
2016	55	25,380	0.66494	16,876	524,723
2017	56	25,542	0.65325	16,685	541,408
2018	57	25,705	0.64176	16,496	557,904
2019	58	25,870	0.63047	16,310	574,214
2020	59	26,036	0.61939	16,126	590,340
2021	60	26,203	0.60849	15,944	606,284
2022	61	26,371	0.59779	15,764	622,048
2023	62	26,540	0.58728	15,586	637,634
2024	63	26,710	0.57695	15,410	653,044
2025	64	26,881	0.56681	15,236	668,280
2026	65	27,053	0.55684	15,064	683,344
2027	66	27,226	0.54705	14,894	698,238
2028	67	27,400	0.53743	14,726	712,964
2029	68	27,575	0.52798	14,559	727,523
2030	69	27,751	0.51869	14,394	741,917
2031	70	27,929	0.50957	14,232	756,149
2032	71	28,108	0.50061	14,071	770,220
2033	72	28,288	0.49181	13,912	784,132
2034	73	28,469	0.48316	13,755	797,887
2035	74	28,651	0.47466	13,599	811,486
2036	75	28,834	0.46632	13,446	824,932
2037	76	29,019	0.45812	13,294	838,226
2038	77	29,205	0.45006	13,144	851,370
2039	78	29,392	0.44215	12,996	864,366
2040	79	29,580	0.43437	12,849	877,215
2041	80	17,780	0.42978	7,641	\$884,856
JANE TAPPER				\$884,856	

Guideline for the Jury

This interdisciplinary process is analogous to the process whereby a vocational rehabilitation expert estimates the percentage of the impairment of the capacity to earn a wage due to injury. A rehabilitation assessment might conclude that a person's hourly earning capacity has fallen by twenty-five percent, for example, due to certain physical disabilities. An economist would then apply this estimate to the pre-injury earning capacity and thus provide testimony routinely admitted into court. Bovbjerg, Sloan and Blumstein⁴⁶ argue that today we have sophisticated knowledge regarding the value that people place on the non-pecuniary aspects of life, and that this information should be used to guide juries and trial judges in their valuations of injuries in order to improve the accuracy and fairness of the awards and to make litigation less expensive and more predictable.

The important contribution of an expert economic witness with a knowledge in this area of economics lies in assisting a jury to determine the range of values and then to determine how that range is applicable to the case at hand. The evidence that an expert economist presents thus serves as a valuable guideline which jurors can then integrate with their own moral, social, philosophical and spiritual values.

Even when that is done, the juror must then weigh the importance of the evidence that the defendants and plaintiffs present with respect to the individual's quality of life, the specific circumstances of that person's life, and her or his ability to enjoy life. An economist can present a probable range of the value of life, but only the jury can take all the additional information into account to decide where in that range a given individual falls. No single study can give the perfect answer as to the value of life; but the preponderance of studies, showing results falling in the \$1.5 to \$3.0 million range, should be viewed as evidence of a consensus.

The hedonic valuation process can be viewed as analogous to the lost earnings valuation process. Once an earnings base has been selected, all that remains are adjustments for age, race, and gender, which determine worklife expectancy, and the selection of an appropriate growth and discount rate over a worklife. In estimating the loss of the value of life, the same method is used, based not on an annual earnings estimate, but an annualized value of life. To estimate lost earnings when a child is killed, it is common to select an earnings base from government tables for a broadly defined group — high school graduates, for example. This general process, readily accepted in courts of law, is no more nor less individualized than the process of valuing a life.⁴⁷

Admissibility of Expert Testimony

While the admissibility of economic testimony by a trial judge is not assured,⁴⁸ many states have admitted this author's testimony, including Alaska, Arizona, California, Florida, Georgia, Hawaii, Illinois, Louisiana, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Tennessee, Texas, Vermont, Wisconsin, and is currently pending in over a dozen other states. Further, in Section 1983 actions, such testimony was admitted in Federal Courts in Illinois, Ohio and Wisconsin. Counting testimony by other economists, the list of courts is much, much longer.

Conclusion

It is apparent from the degree of legal and economic interest in this topic that presentation of hedonic damage testimony in courts of law will continue to expand. Economic testimony on the loss of enjoyment of life in injury cases is long overdue. Many years ago, the services of a housewife were deemed too intangible and speculative to value in court. Now, economic testimony as to this value is routinely provided and very rarely questioned as to conceptual validity. Testimony on the value of life is becoming increasingly common. The rapidity with which such testimony has been accepted is an indication that it is an idea whose time has come. This testimony does not invade the province of a jury. It is meant to serve as an aid, a tool and a guide; it does not dictate a result. In the final analysis, jurors will take into account much more than the words of an economist, or of any expert. By withholding from juries the enlightening evidence of the value of life, we may risk unduly rewarding some plaintiffs and impoverishing some defendants. We also risk subsidizing some tortfeasors and depriving fair compensation to some people. This is not a hallmark of a justice.

Testimony on hedonic damages can produce more consistent and rational jury verdicts. It can reduce the wide variability of awards which contributes to the current win/lose lottery effect of personal injury lawsuits. This encourages settlements rather than trials, and thereby reduces litigation and insurance costs. These are results we could all live with.

