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More Suing Over Lost Joy of Life

Defense, plaintiffs' bars
split on hedonic damages.

By ANDREW BLUM
National Law Journal Staff Reporter

WHAT'S 5 YEARS old, sounds like "hedonism," appeals to the legal entrepreneur and could help both plaintiffs' and defense attorneys?

The answer is hedonic damages.

First used in economic testimony in a 1984 wrongful death case, the sexy-sounding damage theory has been gaining steam ever since. Last month for the first time, it accounted for part of an injury case verdict, and it's grabbed the attention of the defense bar, the Association of Trial Lawyers of America and the American Bar Association.

The theory for computing wrongful death and injury value seeks recovery for loss of enjoyment of life beyond that of more traditional awards for bodily injury, pain and suffering, and loss of consortium.

"I think it is a new word for an old theme



Richard Derk

Economist Stanley V. Smith first used the term 'hedonic damages' in a 1984 civil rights case stemming from a fatal shooting.

whose time has come," says ATLA President-elect Russ M. Herman of New Orleans' Herman, Herman, Katz & Cotlar, who examined the theory last year and finds it worthwhile to pursue.

To date, the damages have been used largely by plaintiffs' attorneys, says economist Stanley V. Smith, who devised the term in a 1984 civil rights case stemming from a fatal shooting. *Sherrod v. Berry*, 628 F.Supp. 159 (N.D. Ill.).

Evolving Concept

Defense bar leaders have their doubts about hedonic damages, saying they can lead to new big damage awards and another "insurance crisis." The lawyers dub the theory "damages from Wonderland."

The defense bar also questions if juries should hear specific dollar ranges for such losses and raises the issue of where pain and suffering or loss of consortium end and where — if at all — hedonic damages start.

Mr. Smith, a Chicago-based economist with Corporate Financial Group Ltd., says

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The Enjoyment of Life: How Much Is It Worth?

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it's still evolving.

"The concept of value of life has occupied a good deal of economic literature over the last 25 years as economists tried to grapple with the problem of traditional measure," Mr. Smith says.

The *Sherrod* case marked the first time that economic testimony was given on hedonic damages, he adds. "That's the novel part." The case, in which more than half of the \$1.6 million damages were hedonic, ended with a \$450,000 settlement after reversal on unrelated grounds.

Dozens of Cases

There are now several dozen hedonic cases pending, two-thirds of them wrongful death cases, but the defense has not yet embraced the theory. "I think by and large [defense attorneys] are not the same kind of entrepreneurial beings that plaintiffs' attorneys are," says Mr. Smith.

He predicts they will use it, though. While a potentially powerful new weapon for plaintiffs, Mr. Smith and others acknowledge that the law can

Mr. Smith believes, for example, the \$8.75 million won last September by a woman claiming infertility from an intrauterine device might have been much less had the theory of hedonic damages been used. *Kociemba v. G.D. Searle & Co.*, 3-85-1599 (D. Minn.).

Using \$3 million as the value of an adult life the plaintiff's age, he says the jury could have determined from expert testimony that the ability to derive pleasure from life was devalued 33 percent, so hedonic damages would amount to \$1 million. "I do not think that the jury would award an amount for infertility almost triple the value that we place on life itself," he says.

The plaintiffs' attorney in that case, Michael V. Ciresi of Minneapolis' Rob-



UNKNOWN: ATLA President-Elect Russ M. Herman says he can't predict whether a jury will accept the concept.

cut both ways in that it may be used to reduce damages.

"Using this concept may preclude their getting a low award," says Mr. Smith, "but it sure ensures against an unreasonably high award, and while they give up the downside, they also ensure against the upside."

The theory also has uses in cases attorneys might not normally bring — such as small losses by low wage earners or retirees. "In some cases, defendants will be paying more, in some cases, less," adds Mr. Smith, "but importantly, the awards will be far more appropriate — a result we could all live with."

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Hedonic Damages in Ferguson

Here is a breakdown of damages awarded in *Ferguson v. Vest*, the first injury case in which hedonic damages played a role:

Past disability and disfigurement.....	\$200,000
Future disability and disfigurement.....	\$882,000
Past pain and suffering.....	\$250,000
Future pain and suffering.....	\$750,000
Past medical expenses.....	\$50,000
Future medical expenses.....	\$200,000
Total.....	\$2,332,000

Hedonic Damages On Rise

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time," he says, noting in such expansions the plaintiffs' attorneys have the chance to discuss more and possibly win more. "We either roll over and play dead or put up counter-arguments."

Despite some ups and downs in the courtroom for the theory — such as the recent New York Court of Appeals ruling that refused to allow separate loss of enjoyment of life damages — Mr. Smith is committed to the theory. *McDougal v. Garber*, 2.

"I'm for the concept," he says. "[But] I have great concern as to how this method will be applied in court. If it's misapplied or misunderstood, it won't be a smooth transition."

According to the plaintiffs' attorney in the *Sherrod* case, Douglas Rallo of



PROBLEMS: Defense lawyer Thomas M. Crisham has trouble with having experts testify on hedonic damages.

Lake Forest, Ill.'s Semmelman & Bertucci Ltd., hedonic damages are here to stay.

"It's been embraced in wrongful death cases and in non-death cases," he says. "Juries and judges have shown to be receptive to it and to follow it in bringing back huge awards."

But Mr. Rallo points out, it really is used in only a minority of all personal injury claims. And he reminds the defense bar that there are built-in protections against any excess. "One of the bases for post-trial motions is excessive damages. If the judge agrees... he has the authority and duty to reduce it."

"The insurance industry should not be complaining about hedonic damages so long as we have that catch," he says.

Noting that a main defense argument is that the theory is speculative, Mr. Rallo adds, "We say you don't have to prove it to the exact penny."

Among other defense arguments Mr. Rallo scoffs at is the one that says wrongful death recovery is provided for by statutes in most states. "My answer is that wrongful death statutes are mostly pretty broadly worded," he notes, adding that in Illinois the law pertains to "fair and just" compensation.

Mr. Smith, on the other hand, even partially welcomes the critics. "I believe we got to the moon by [having] protagonists and antagonists," he says, adding, "I would like to see the antagonists of the issue step up and learn as much as they can so it gets developed."

Ins, Kaplan, Miller & Ciresal, disagrees with Mr. Smith's analysis. "The difference is you don't start with [a] life worth \$3 million depreciated down for the value of rights lost," he says, "no I think that's the difference, the starting point... It might be of more use when you are talking in a mass tort area."

Likely to Expand

Mr. Herman of ATLA says it's hard to predict how a jury or court is going to accept the damages in the future. He agrees with Mr. Smith that "the law cuts both ways."

Although Defense Research Institute President Thomas M. Crisham concurs in part, he thinks using experts to testify about hedonic damages can cause problems. "Even if it's true — and I question if it is — I don't think a jury trial comes down to hearing an expert saying this loss is worth \$1 million and mine say it's worth \$5," he says. "How does that help the jury assess the damage? Then it becomes a pointless exercise."

Until March 18, such debate was largely limited to wrongful death cases, but with the personal injury verdict it is likely to expand.

"The type of research and fact-finding that Smith uses amounts to something of a breakthrough," says Merle C. Bassett, who won \$2.3 million in that injury case — almost \$1 million in hedonic damages. "But the concept of loss of enjoyment of life... that's an advance," adds Mr. Bassett of Wood River, Ill.'s Bassett Law Offices.

The case involved a 63-year-old woman whose pap smear tested false positive, prompting doctors to give her full-dose radiation treatment. She later tested negative, but that result was ignored, says Mr. Smith, who notes he testified on loss of household services and disability. *Ferguson v. Vest*, 87-1-207 (3d Judicial Cir., Madison City.).

The economist determined past loss of services and disability was worth \$136,000; the jury awarded \$200,000. Future disability of \$882,000 was accepted by the jury. Also awarded were \$250,000 for past pain and suffering and \$750,000 for future pain, plus \$50,000 for past medical expenses and \$200,000 for future medical costs. Hedonic damages totaled \$956,000. (See accompanying chart, Page 24.)

Says Mr. Bassett: "If I had not used Smith, we would not have gotten the same figures."

But Mr. Crisham of Chicago's Hinshaw, Culbertson, Moelmann, Hoban & Fuller, whose firm defended a doctor in the case, says the verdict is to be challenged in post-trial motions.

Larger Attorney Fees?

DRI, as part of its traditional educational role, tries to teach defense lawyers how to prevent awards for hedonic damages. "If one gets to a reviewing court, we would file an amicus," says Mr. Crisham.

"The vice in doing what some plaintiffs' lawyers and this expert are doing is putting a specific dollar value on various segments of pleasures of life," he says. The problem, he adds, is that many states already allow for losses — like loss of smell — to be compensated under already accepted theories.

That is OK, Mr. Crisham notes, but he challenges a witness like Mr. Smith, saying such a loss is worth \$5,000 a year for a person with a 42-year life expectancy. "I don't think hedonic damages can be the subject of expert testimony," he says.

Perhaps the real reason for their new-found popularity, he offers, is to make more money for plaintiffs' attorneys. "Anything that is used to increase [damages] thereby increases the amount of money for the plaintiff

and plaintiffs' attorney," Mr. Crisham says.

The defense attorney in *Sherrod*, William W. Kurnik of Arlington Heights, Ill.'s Kurnik, Cipolla, Stephenson & Barasha Ltd., says plaintiffs' attorneys advance the theory when they think awards are going to be small. "They play on the emotions of the jury. They get a lot more money."

Mr. Kurnik says case law goes against the concept of awarding damages for loss of intangible constitutional rights. "The purpose of damages is to compensate," he says. "Hedonic damages, in my estimation, goes well beyond compensation and has no bearing on compensation."

Defense attorney James Morris III of Richmond, Va.'s Browder, Russell, Morris and Butcher calls the hedonic theory "damages from Wonderland" because he finds it unreal, for example, that a case involving a man who loved hunting can wind up with awards for losing that specific pleasure.

He finds it particularly offensive in death cases because, "You can never put a price on a person for what they gave up. It can't be evaluated."

Next Wave

As with all theories, examples of potential extreme cases are almost endless, ranging from the loss of pleasure that was derived by a golf fanatic to that enjoyed by an antique enthusiast.

"Suppose a guy loved wine, women and song and was a financial drain on his family but [a jury] awarded his family money because he could not do it any more," says Mr. Morris, who is DRI's chairman.

If economists such as Mr. Smith are allowed to give numbers that are accepted into evidence, Mr. Morris says, then "why not allow the defense to present statistics saying a white male business executive has [only] \$80,000 in life insurance" and that's the limit on his worth?

DRI's stalwart opposition, meanwhile, maintains that although it's early on in the life of hedonic value, the idea has merit in both death and injury cases.

ATLA President-elect Mr. Herman describes the concept as the next wave



NEW: ABA Litigation Section Chairman Judah Best calls hedonic values a "very modern consideration."

in progress on emotional damages that would reasonably open a threshold allowing juries to fairly and reasonably value such losses. "It is at this stage more theoretical than practical in application," he says.

"What I believe is there are a lot more cases litigated which claim these types of damages," says Mr. Herman, "but the term 'hedonic' is not being used to any great extent and until some tagline [is developed], it's likely the label will not catch on."

He notes that for years, personal injury attorneys have challenged low-limit recovery in death cases involving loss of life of minor children and pursued claims of adult children who are not dependent upon a deceased parent. In cases of college students killed, Mr. Herman says parents never recover emotionally. "Their life is shriveled like raisins. There is inadequate compensation in these cases."

While a potentially new weapon for plaintiffs, lawyers concede that it at times also can be used to reduce some awards.

"The value of loss of life is different than the loss of relationship and enjoyment of living," he adds. "It's as if there must be economic loss for there to be any substantial loss of pleasure of life."

ABA to Study

While a fan of the concept, Mr. Herman has problems with the word "hedonic" because it brings to mind epicureanism or pagan rites. A better phrase, he adds, might be simply "loss of pleasure of life."

Terminology aside, Mr. Smith indicates that upcoming presentations by him before the ABA and insurers on hedonic damages are proof it is gaining support.

For the ABA, the newness of the concept led its Litigation Section to put Mr. Smith on the program for its annual convention in August. "That area of testimony is an interesting subject to arguments on both sides as to whether it ought to be admissible," says Brad D. Brian of Los Angeles' Munger, Toiles & Olson. "It's a little different way of looking at a problem... the kind of thing on which reasonable lawyers can disagree."

Litigation Section Chairman Judah Best of the Washington, D.C., office of New York's Debevoise & Plimpton suggested the program because the theory is new and made sense for the section. "We regard the issue of hedonic value as a very modern consideration in the whole issue of damages," he says.

Not quite so friendly is American Reinsurance Co., which is hosting a seminar for insurance clients featuring Mr. Smith and defense attorney Barry Montgomery of Chicago's Williams & Montgomery. Company spokesman Bill Edwards says the topic was chosen because of interest when new causes of actions are invented.

"The plaintiffs' bar does that all the

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