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## Price of Pleasure

### New Legal Theorists

### Attach a Dollar Value To the Joys of Living

### 'Hedonic' Damage Argument By Economist Stan Smith Stirs Debate in Death Suits

### The Worth of Smelling a Rose

By PAUL M. BARRETT

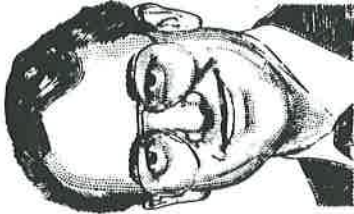
Staff Reporter of THE WALL STREET JOURNAL

The best things in life may be free. But the way Stanley V. Smith figures it, they can be worth a bundle, nonetheless.

The simple joys of living—baseball, hot dogs, apple pie and such—have real and substantial monetary value, the 42-year-old Chicago economist and former investment adviser believes. And because he is willing to swear to that in a courtroom, he is stirring up more than a little conflict inside the legal establishment these days.

As a self-employed witness for hire, Mr. Smith is the high priest of "hedonic damages," urging juries in death-related lawsuits to award huge sums to the estates of victims deprived of the pleasure of life. Usually, payment in death cases is based on what the victim might have earned in the future. But life is more than a paycheck, argues Mr. Smith: "We are worth more than what we earn."

A lot more, perhaps. Mr. Smith doesn't appraise specific lives but confronts juries with data that he says suggest the intrinsic value of life in general could be as high as \$12 million. He often proposes \$500,000 to \$3.5 million as a "reasonable" range for compensation—on top of the \$1 million or so a typical adult male might be worth in terms of lost income. Contrary to the popular view that jury awards are out of control, Mr. Smith maintains that they severely underestimate the value of life.



Stanley V. Smith

### Gaining Momentum

By no means do such assertions automatically bowl over judges and juries. Indeed, they usually provoke stiff resistance. Still, since 1985, Mr. Smith has helped win millions of dollars in behalf of a half-dozen victims from Florida to Ohio. He is consulting in 15 more cases now and, with another economist, is planning seminars for lawyers to spread his gospel.

The Association of Trial Lawyers of America has endorsed his ideas, and judges have praised his testimony. The latest editions of at least two legal reference books address the concept, academic law reviews have reacted favorably, and other consultants are beginning to sell similar testimony.

Needless to say, all this is unsettling in some quarters. Defense lawyers condemn hedonic damages as pure speculation, dismiss Mr. Smith's economic statistics as irrelevant, or try to punch holes in them.

Richard G. Halpern, a rival New Jersey litigation consultant, calls Mr. Smith's testimony "footloose and fancy-free." Albert Fitzpatrick, a California economist who has opposed Mr. Smith on the stand, says, "He's way out in left field—or beyond."

The argument for hedonic damages "could lead to a whole new insurance crisis if it's sprung by surprise by clever lawyers familiar with the lacademic literature," worries Ted R. Miller, an economist with the Urban Institute in Washington who also researches the value of life.

### Simple-Sounding Theory

But even Mr. Smith's critics concede the theory couldn't have a more able advocate. "A great salesman," says one attorney. And his argument seems simple: In injury cases, courts already accept the notion of payment for "pain and suffering" and diminished ability to enjoy certain activities. So why not extend that to deaths and broaden it to all aspects of life? "We ask juries to place a [dollar] value on all sorts of intangible things—pain, suffering and so on," he reasons. "The hedonic measure provides rough guidelines for valuing lost pleasure."

The big break for the hedonic-damage theory came in 1985 in a federal civil-rights suit in Illinois. Mr. Smith had done the usual income calculations on Ronald Sherrod, a 19-year-old killed by a Joliet policeman. But besides having a secure future in the family garage business, the youth was a "kind, loving and companionable youth" who enjoyed hunting and fishing with his father, witnesses testified.

Mr. Smith took the stand to argue that these pleasures could be worth more than \$1.5 million, based on available academic and government data. The judge enthusiastically backed the approach, and the jury awarded hedonic damages of \$850,000 to

Mr. Sherrod's estate. That was on top of \$300,000 for lost earnings and \$450,000 to his family for loss of "parental association."

An appeals-court panel later complimented Mr. Smith's unusual testimony as "invaluable to the jury." (The case, however, is still pending because the panel ordered a new trial on unrelated matters.)

### More Success

Suddenly, Mr. Smith and hedonics were hot. Lawyers in another police killing suit in Ohio credit him with helping them win \$3.5 million. A Florida case involving a two-year-old girl killed by a truck was settled for what the family's lawyer calls "a very acceptable high six-figure amount" after Mr. Smith testified.

Mr. Smith earns \$150 an hour for such work but won't disclose his income. He isn't bashful about self-promotion. He writes for legal publications and has a ready-to-go packet of information about himself. It includes news accounts of victories and effusive recommendations from lawyers who have hired him. More visibility is likely from planned nonprofit appearances before bar groups.

But he sees himself as more than a hired gun. In a sense, he is the latest emissary to the legal world from the University of Chicago, where he is a Ph.D. candidate. In recent years, professors and judges associated with that center of free-market thinking have reshaped other legal fields with empirical research and economics. "The pleasure of my life is greater because I think I'm making a contribution to the legal system," he says.

Mr. Smith goes about his craft in an appropriately scholarly fashion. In his small downtown office, academic journals compete for space with boldly colored artwork by his two young children. He works alone, well away from the lawyers who hire him

# Price of Pleasure: Legal Theorists Put a Dollar Value on Happiness

## How Much Is One Life Worth?

Range of implied values of a human life, extrapolated from what people pay for various products, services or regulations that can change the risk of death.

| BASIS FOR CALCULATION                     | VALUE OF LIFE |
|---|---------------|
| Desire for prompt coronary care           | \$ 66,000     |
| Automobile air bag purchases              | 360,000       |
| Smoke detector purchases                  | 373,000       |
| EPA requirement for sulfur scrubbers      | 500,000       |
| Seat belt usage                           | 541,000       |
| Wage premiums for dangerous police work   | 850,000       |
| EPA regulation of radium content in water | 2,500,000     |
| Wage premiums for dangerous factory jobs  | 3,200,000     |
| OSHA rules for workplace safety           | 3,500,000     |
| Premium tire usage                        | 3,600,000     |
| Desire for safer airline travel           | 11,800,000    |

NOTE: In 1987 dollars

Source: Stanley V. Smith

### Continued From First Page

and the victims' families. He doesn't even study the victims' particular joys and sorrows. "I'm not an expert on any one person's pleasures," he says.

#### Determining Life's Value

Instead, he works with hypothetical values—some derived from economists' analysis of human behavior, others taken from government research.

Some studies extrapolate from how much consumers are willing to pay for safety devices such as smoke detectors or automobile air bags. In principle, this method starts with the dollars consumers spend on a certain life-saving product or activity. That's divided by an estimate of the life-saving potential of that item. The result is the *implied* value consumers put on their own lives by their spending.

A hypothetical example: Consumers might be willing to pay \$100 for a brand of smoke detector that has one chance in 1,000 of saving a life. Thus, each detector "saves" one one-thousandth of a life. Buying of this detector implies a value of life equal to \$100 divided by .001, or \$100,000. Calculations in one actual smoke detector study were vastly more complicated, of course. Risks somehow had to be quantified and other variables held constant. Once all the factors were controlled, that study produced an implied value of at least \$373,000 per life.

Other figures are based on wage premiums that people demand for dangerous jobs, such as coal mining or high-beam welding. This method produces values as high as \$3.2 million. One study of policemen who shift to riskier cities suggests a value of \$850,000 a life.

Government agencies also set values on life when doing cost-benefit analyses of regulations. The Occupational Safety and Health Administration assigns a \$3.5 mil-

lion price tag to life in certain worker safety programs; the Environmental Protection Agency staff has used values between \$400,000 and \$7 million. One study of federal regulation of environmental carcinogens concludes that society tends to regulate vigorously if lives can be saved for less than \$2 million each.

#### Making the Pitch

These values vary tremendously, so Mr. Smith selects a range for a jury. He contends that the ambiguity is appropriate. "As a society, we clearly haven't come up with a single value that everyone recognizes," he says. Given a range, jurors "can apply their own philosophical, moral and religious beliefs about how much living is worth beyond earning power alone."

Anxious defense lawyers condemn the hedonic-damage theory as nothing more than a potential license to raid municipal and corporate coffers. When jurors consider awards for pain and suffering, they can rely on experience and common sense, says William W. Kurnik, defense co-counsel in the Joliet police case. "But life is particular to every person: what it's worth to smell a rose or eat a steak."

#### Is It Immoral?

Ohio attorney Neil F. Freund, who has cross-examined Mr. Smith in two cases, is more blunt: "I don't think it's right in a moral sense for someone to be telling a jury what the value of someone's life is." And, he asks, "Why should there be any separate award for lost pleasure to someone who is already dead?"

When confronted by such critics in court, Mr. Smith is usually unflappable. "How much am I enjoying life right now?" Mr. Freund demands during one exchange. "What's it worth today as I sit here? How

much fun am I having?" Mr. Smith shoots back, "Probably not much."

But at times, other experts do effectively beat him. In a recent Nevada case, the judge excluded his testimony after it was challenged by Mr. Fitzpatrick, the California economist.

The underpinnings of hedonics are just too shaky, these experts argue. Employment studies ignore the fact that many people aren't fully aware of job hazards, may not be able to get less risky work, or may actually enjoy dangerous duty, says John R. Glennie, a Washington, D.C., economist and litigation consultant.

#### More Flaws Alleged

Values extrapolated from safety-related products are equally flawed, he argues. Consumers, he says, "aren't calculating cost-effectiveness" when they buy safety devices or decide to buckle up. Such behavior is driven by whim, advertising, peer pressure, and other social and psychological factors, he maintains. In addition, most state wrongful-death statutes and relevant common law focus on real money losses to value lives. Without reinterpretation by judges or legislative amendment, they leave little leeway for hedonic damages.

Mr. Smith insists nonetheless that he welcomes all the criticism as a spur to further research and debate. "There are a lot of rough edges" to the theory, he declares, "but that doesn't undermine the basic attractiveness of the idea."

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