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 damages concept 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 whose time has come," says ATL- President-elect Russ M. Herman of New Orleans' Herman, Herman, Katz & Conn, 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 1984 civil rights case stemming from a fatal shooting.

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 jurors 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

"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) were 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

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

"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."
Hedonic Damages in Ferguson

Here is a breakdown of damages awarded in Ferguson v. Vase, 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

Mr. Crisham says the defense attorney in Sherrod, William W. Karrick of Arlington Heights, Ill.; Mr. Kimlik, a Chicago attorney; and Barasha Ltd., says plaintiffs' attorneys' reaction to the award is not surprising. "The way they state they are going to spend this money is going to be small," he says. "They play on the emotions of the jury. They get a lot of money from the jury." Mr. Karrick 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 beyond compensation and has no bearing on compensation." Defense attorney James Morris III of Richmond, Va., Browder, Russell, Morris and Butler calls the hedonic theory "damages from Wonderland" because it finds the plaintiff's lawsuit. "It is not a lawsuit involving a man on a hunting trip in a park, winds up with awards for failing to comply with the law," he says. It is primarily 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 golfer fanatic to the loss of happiness by an antiques enthusiast. Suppose a guy loved wine, women and song and was a financial strain to his family and a jury awards 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 correct in their predictions, that the concept of hedonic damages will gain more acceptance, economics, Mr. Morris says, "then perhaps the notion of awarding damages for loss of intangible life insurance" and that's the limit on damages.

DRI's stalwart opposition, meanwhile, maintains that although it is accepting of hedonic damages, "the idea has merit in both death and injury cases.

PLATE 1A

Tata President-elect Mr. Herman describes the concept as the next wave in progress on emotional damages that have been recently opened a threshold allowing juries to fairly and reasonably value such losses. "It is at this stage, however, even more than practicality, the difference," he says. Mr. Smith says there is 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 labeling is developed, it's likely the label will not catch on.

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

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

"The value of loss of life is different from the intangible 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

As part of the concept, Mr. Herman has problems with the word "hedonic" because it brings to mind the sense of pagan rites. A further benefit, he adds, might be simply "the component of pleasure of life." In one of the cases, Mr. Smith indicates that upcoming presentations by him before the ABA and insurers on insurance proof of life is gaining support.

For the ABA, the newness of the concept "is a challenge," said Section Chairman Judah Brustof the Washington, D.C., office of New York's Debevoise & Plimpton, his group. "We have been discussing the issue of hedonic values as a very modern consideration in the whole issue of damages," he says.

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PROBLEMS: Defense lawyer Thomas M. Grimes, speaking on behalf of the ABA's insurance coverage section, said the insurance industry should not be complaining about hedonic damages as long as we have that catch," he says. Noting that main defense argument is that the theory is speculative, Mr. Grimes adds, "We say you don't have to prove it to the exact penny." Among other defense arguments, Mr. Rallo scoffs at the one that says wrongful death recovery is provided for by statutes in most states. The main basis is that wrongful death statutes are mostly broadly worded, he says.

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"I think for the time being," 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 ABA's insurance coverage section chairman, Mr. Grimes will challenge any attempt to use hedonic damages in the Sherrod case, Douglas Rallo of Lake Forest, Ill.; and the insurance industry should not be complaining about hedonic damages as long as we have that catch," he says. Noting that main defense argument is that the theory is speculative, Mr. Grimes adds, "We say you don't have to prove it to the exact penny." Among other defense arguments, Mr. Rallo scoffs at the one that says wrongful death recovery is provided for by statutes in most states. The main basis is that wrongful death statutes are mostly broadly worded, he says.

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