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*Reporter*

## FORENSIC FORUM

### The Hedonic Value of Life: Economic Expert Witness Testimony in Injury and Wrongful Death

Stanley V. Smith

Over the past several years, since I first testified as an economic expert in the wrongful death case of *Sherrod v Berry*, 629 F Supp 159 (ND Ill 1985) on what I termed the "hedonic value of life," the concept has gained national attention. In a recent trial in which I first applied the concept in an injury case, the verdict also received national coverage. See "More Suing Over Lost Joy of Life," *The National Law Journal*, April 17, 1989, p 1.

Why all the fuss? The notion that people have a value separate from their earning capacity is not new. Since 1937 in *Rose v Ford*, English courts have allowed separate recovery for the "loss of expectation of life." In the past, courts in many states have allowed for the full (i.e., including hedonic) value of life, even

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Plaintiffs' attorneys are seeing that in cases where the lost monetary streams are small, testimony on hedonic damages that quantifies for a jury the losses of the pleasure of life can have a very powerful effect.

Defense attorneys are beginning to see that in cases where the juries are likely to be very sympathetic to the victim, testimony on the victim's intangible losses can support an argument against unreasonably high claims.

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**From an economist's point of view, the goal of expert testimony on hedonic damages should be to support appropriate and reasoned jury awards. Through such testimony, awards may become more predictable, leading to more settlements, less litigation, and hence, lower insurance premiums.**

though it has no explicit market price and is therefore literally "priceless."

Since *Sherrod*, more and more state and federal courts have begun to allow economic expert witness testimony as to the hedonic value of life, in both injury and death cases. And the considerable fuss is because some juries are concluding that the hedonic value is not trivial. In *Sherrod*, for example, the hedonic award was for \$850,000 in addition to lost earnings of \$300,000 and loss of society and companionship of \$450,000. In the recent trial of an injury case mentioned above, the jury awarded \$1,082,000 for disability and an additional \$1,000,000 for pain and suffering.

Plaintiffs' attorneys are seeing that in cases where the lost monetary streams are small, for young or retired people for example, testimony on hedonic damages that quantifies for a jury the losses of the pleasure of life can have a very powerful effect.

Defense attorneys are beginning to see that in cases where the juries are likely to be very sympathetic to the victim, testimony on the victim's intangible losses can support an argument against unreasonably high claims for losses and thus help preclude runaway verdicts.

From an economist's point of view, the goal of expert testimony on hedonic damages should be to support appropriate and reasoned jury awards. Through such testimony, awards may become more predictable, leading to more settlements, less litigation, and hence, lower insurance premiums.

## Legal Bases for Admitting Testimony as to Hedonic Damages

There are various sources of authority for allowing testimony regarding hedonic damages. Statutes are an important source. In some states, such as Connecticut, statutes explicitly allow for the recovery of the lost pleasure of living, in addition to lost earning capacity. In *Katsetos v Nolan*, 170 Conn 637, 368 A2d 172 (1976), the Connecticut Supreme Court upheld a \$400,000 award for damages that included the loss of the ability to enjoy life's activities. In other states, such as Illinois and Michigan, among others, the statutory language is less precise, allowing for recovery of damages that the court or jury may consider "fair and equitable." See also *McGowan v Estate of Wright*, 524 So2d 308 (Miss 1988) [dissent would have allowed recovery for non-pecuniary "utility of life" of decedent for duration of life expectancy].

Recovery for the loss of the pleasure of living has been allowed under 42 USC §1983, which provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution, and provides courts with the freedom to fashion remedies which will fulfill the compensatory and deterrent policies of the statute. See, e.g., *Sherrod v. Berry*, 629 F Supp 159 (ND Ill 1985), 827 F2d 195 (7th Cir 1987), revd on other grds 856 F2d 802 (7th Cir 1988) [with directions that, on remand, district court decide evidentiary issues in light of opinion at 827 F2d 195, which concluded at 206 that "testimony of expert economist Stanley V. Smith was invaluable to the jury

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in enabling it to perform its function of determining the most accurate and probable estimate of the damages recoverable for the hedonic value of Ron Sherrod's life". See also *Guyton v Phillips* 532 F Supp 1154 (ND Cal 1981) [awarding \$100,000 damages in action under 42 USC §1983 for deprivation of constitutional "right to life"]. The Circuit Court in *Sherrod* reasoned that the Seventh Circuit had earlier affirmed awards for the loss of life in *Bass v. Wallenstein*, 769 F2d 1173 (7th Cir 1985) and *Bell v. City of Milwaukee*, 746 F2d 1205, 1236 (7th Cir 1984), and that it was "axiomatic" that a plaintiff who seeks to recover for the value of life is entitled to submit expert testimony to assist the jury in establishing that value. *Sherrod*, 827 F2d 195, 205.

## Theoretical Bases for Hedonic Damages

There are two principal economic models for valuing life: the human capital (HC) approach and the willingness-to-pay (WTP) approach. In the former (HC) approach, the value of life is based on the present value of projected lifetime earnings and consumption. In the latter (WTP) approach, the hedonic value of life is estimated from the price associated with a small change in the risk of death, as determined in several different ways through questionnaire studies, consumption studies, and labor market studies. I use the term "hedonic value" to refer to that part of life's worth which is separate from the financial value, such as lost earnings.

The HC approach to valuing life by valuing lost earnings is appealing in that it is actuarial and unemotional. But it poses numerous philosophical problems by ignoring non-wage related factors such as the individual's desire for life, the surplus value of living, and non-market (leisure) activity. It also yields inconsistencies. Since retirement years are typified by net consumption (negative net earnings), extending life from age 75 to age 85 would seem to have a negative value. Persons who are too young or disabled to be employed would also have a negative value. All things being equal, the wages and thus the traditionally measured value of a workaholic would be higher than of a person who led a more balanced life and who may have therefore contributed more to the community; a working mother

would receive greater compensation than a mother who chose to spend full time in the home and involved in community groups.

Generally, the law has been conservative in allowing for full compensation in wrongful death and injury cases. Claims for damages are usually analyzed under the HC approach, which assesses only the present value of lost earnings, fringes, and, more recently, household services, often off set by personal consumption. By valuing only the working life of an individual, courts are saying that one's non-work life has no value. The approach may seem rather austere and harsh; it may well be cheaper to kill than to maim, even after setting medical costs aside, because of the offset of personal consumption in death cases.

The HC approach may be viewed as yielding, at best, only a very lower bound on the value of life. Although that approach may have been convenient in the past, it is clearly insufficient for today.

Over the past two decades, the economic literature generally has recognized that the WTP approach provides more reasonable estimates of the value of life than the HC approach; indeed, while earlier work in the field concentrated on the HC approach, almost all work now is modeled on the WTP approach. While the notion of the hedonic value of life has hitherto been regarded as an intractable element defying reduction to monetary terms, this is no longer so. In earlier decades the intangible value of household services was viewed similarly, but now is routinely calculated and testified to as an element of economic damages. Hedonic value is an economic value just as the value of household services is an economic value; hedonic losses are pecuniary losses, as are household service losses. Even though we do not have an explicit marketplace for the value of life (or mothering for that matter), there is much evidence as to these values.

Hedonic damages are distinct from damages for pain and suffering, which may be large or quite insubstantial, depending upon the nature of the incident. In a recent trial in which I testified the jury found that the plaintiff suffered approximately \$1 million in loss of the pleasure of living, and, separately, \$1 million for pain and suffering, along with \$250,000 for medical costs. When interviewed, the jurors said they found testi-

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mony on the hedonic damages extremely useful to their discussions. Their \$200,000 award for past hedonic loss exceeded my \$136,000 estimate; their award of \$882,000 for future hedonic loss matched my estimate exactly.

## The Scope of Expert Testimony Regarding Hedonic Damages

The testimony I presented to the jury in *Sberrod v Berry*, 629 F Supp 159 (ND Ill 1985), and in a number of other federal and state courts since then, in both wrongful death and injury cases, includes a summary of approximately 20 years of economic literature regarding the value of life. The purpose of this testimony is to provide the jury with some understanding, from an economist's point of view, of how life is valued in our society. Juries, of course, must reach their own conclusions, but this information can be extremely powerful in assisting them to determine the proper amount of damages in wrongful death and injury cases. See, e.g., Gillette, C. P. & Hopkins, T.D., "Federal Agency Valuations of Human Life: A Report to the Administrative Conference of the United States," (April, 1988) [wherein the authors report that the majority of federal regulations impose a cost of compliance on regulated entities and on rulemaking agencies ranging from \$1.5 million to \$8.5 million dollars per life]; "The Value of Reducing Risks of Death: A Note on New Evidence," *Journal of Policy Analysis and Management*, Vol. 8, No. 1, 88-100 (1989) [wherein the authors review estimates based on individuals' willingness to pay ranging from \$1.6 million to \$8.5 million dollars].

Data from economic research regarding lifesaving may also be used to examine the loss of the value of society and companionship resulting from wrongful death and from profound injury. What we as a society are willing to pay to prevent the wrongful death of some statistically unknown average person is an estimate of what we would be willing to pay to preserve the life of a close loved one, and hence is an estimate of how we value our relationships with close loved ones.

Adjustments to the general valuations of life must then be made to take into account the fact that most measures of the total value of life include the value of earnings, net of personal consumption, and, probably, household services.

Additionally, in injury cases the values must be adjusted for the diminution of the pleasure or value of living, and for the value of the loss of companionship and society, or consortium.

Another significant variable associated with the value of life is life expectancy. The pleasure of life for an 80-year-old in good health would be less than for a 20-year-old, given equal wealth (i.e., assets plus present value of income). This is a reasonable assumption that a jury may wish to make and is consistent with the frequently used methodology employed in many courts to value pain and suffering on a *per diem* or *per annum* basis. Jurors are certainly free to conclude that adjustments for life expectancy at the extremes, such as for people 85 years old, are not appropriate, but their conclusions should incorporate as much economic insight as possible.

In some cases, it is possible for a qualified psychiatrist or psychologist or other mental health practitioner to determine the diminution of the quality of life of the victim of a particular trauma. A forecast may be made as to the prospective loss in future years. This diminution may then be used along with the hedonic model described above to estimate the reduction of hedonic value. For instance, if a woman who loses both legs in an accident is viewed to have lost approximately 50% of her hedonic value of life, and if that percentage loss is estimated to remain constant throughout her remaining life expectancy, then the loss may be estimated to be approximately one half the total value of life of the individual.

Although jurors may of course choose a higher or lower benchmark figure, I suggest to them that, while the results vary widely, there is a preponderance of evidence of what we as a society are willing to pay on average for the value of life, taking into account average earnings and the factors described above.

## Qualifications of Experts

Both defense and plaintiff attorneys should approach with great care the selection of an economist with experience in this area to testify on hedonic damages. I estimate that in the long run, it is inevitable that hedonic testimony will be routinely used in courts of law. But if improperly introduced, there may be undesirable short-term effects on the court

*I estimate that in the long run, it is inevitable that hedonic testimony will be routinely used in courts of law. But if improperly introduced, there may be undesirable short-term effects on the court system and unwanted ramifications within the insurance industry.*