Hedonic Damages

Recoverability, proof and valuation in personal injury, survival and wrongful death actions in Wisconsin

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Hedonic damages,1 a provocative phrase, is a new label for an established concept, but it has stirred considerable controversy in the legal press.2 The term first was coined by an economist when testifying in the section 1983 wrongful death case of Sherrod v. Berry3 as to the damages for the decedent’s "lost value of life." More generally, however, it refers to damages for the "loss of enjoyment of life" (LOEL), which are recoverable in personal injury and survival actions often under the rubric of "pain and suffering."4

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 also can affect their recoverability. Perhaps the most current and hotly debated issue with hedonic damages is the appropriateness of using expert economic testimony to monetarily value them. The mathematical quantification of damages, which heretofore were considered nonpecuniary or noneconomic5 has the legal community buzzing.6

Wisconsin case law has not addressed many of the key issues surrounding hedonic or LOEL damages. Considering that these damages conceivably could constitute a substantial if not predominant portion of various jury awards, personal injury attorneys should familiarize themselves with the issues involved. This article broadly examines the issues of recoverability, proof and valuation in personal injury, survival and wrongful death actions in Wisconsin.

Personal injury actions
Separateness of damage award. In the majority of jurisdictions, including Wisconsin, plaintiffs who are unable to engage in the same activities after an injury as before may be awarded damages for their "loss of capacity to enjoy life," or LOEL.7 An important issue that divides the courts, however, is whether an award for these damages can be made separate
and apart from damages for "pain and suffering." In other words, the issue is whether a separate verdict question can be submitted to the jury.3

Numerous courts believe that LOEL is conceptually distinct from pain and suffering and that separate verdict questions do not lead to jury confusion or a duplication of damage awards.4 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 (for example, recreational, household, daily living). Pain and suffering 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.5 These courts contend that the difference between LOEL and pain and suffering is a problem of definition only, and carefully worded jury instructions can minimize any possibility of jury confusion or duplication.6 Separate awards should contribute to greater accuracy, moreover, and facilitate judicial review for excessiveness.7

A large number of courts are against submitting a separate verdict question on LOEL on grounds that a duplication of damages might result.8 These courts rationalize that LOEL is merely a subelement of pain and suffering (or "pain, suffering and disability") because the two types of noneconomic damages generally consider the same evidentiary circumstances.9 It is even contended that LOEL is nothing more than the mental anguish component of pain and suffering; an injured party who is unable to engage in various activities is frustrated and grieves over that fact.10 Wisconsin courts have not clearly addressed the separateness issue. To be sure, trial practitioners normally only submit verdict questions to the jury for the determination of the plaintiff's past and future "pain, suffering and disability."11 However, LOEL was not always an element to be considered under the rubric of pain, suffering and disability. In early cases, juries were clearly instructed to consider the plaintiff's LOEL apart from pain and suffering.12 Over time, it appears that the two damage awards were lumped together and the term "disability" inserted into the general category of "pain and suffering."13 Although some courts have tried to distinguish the "disability" or "permanent injury" from LOEL,14 it is fair to say that these terms generally can be equated in Wisconsin.15 On that point it is essential to note that Wisconsin courts have required varying degrees of proof for the more subjective pain and suffering and objective disability/permanent injury.16 Overall, there is clear legal authority to support a separate award of LOEL damages if the courts are pressed to decide the issue.

Awareness/consciousness requirement. Another key issue that divides the courts is whether injured plaintiffs must be mentally aware of their LOEL in order to recover damages. Plaintiffs who become comatose or whose intelligence is reduced greatly as a result of a brain-damaging injury usually are unable to engage in their normal activities. To be sure, all courts hold that plaintiffs must be conscious of their pain and suffering before recovering those damages.20 The issue is whether LOEL damages stand in a different position.

Following the lead of the English House of Lords,21 several American courts have held that awareness is an irrelevant consideration with LOEL.22 While plaintiffs who do not sense any physical or mental pain and suffering obviously sustain no loss, the inability to engage in pleasurable activities is considered an objective loss that is not dependent on plaintiffs' mental perception.23 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 accordingly is not punitive.24 The utility of the damages to the plaintiff furthermore is wholly irrelevant.25 For example, a decedent's estate commonly is entitled to predeth pain and suffering damages in survival actions.26 Conversely, other courts 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.27 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.28 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.29 Wisconsin courts have yet to tackle the awareness issue with LOEL damages. Although Wisconsin, like all other jurisdictions, requires conscious pain and suffering as a prerequisite to recovering those damages,30 that does not resolve the LOEL issue. The
awareness and separateness issues obviously are tied together. To the extent Wisconsin courts would consider LOEL to be nothing more than mental anguish, a plaintiff's consciousness would be a relevant factor. Furthermore, while the utility argument has found favor with the court in the analogous situation of denying hedonic or LOEL damages in wrongful death actions, Wisconsin does allow for the recovery of predeath pain and suffering damages in survival actions where the injured party is dead and obviously has no utility with the money whatsoever.

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 section 1983 might require a different analysis. As to the issue of separate LOEL damage awards, the applicable state law might control. However, as to the awareness issue a substantive federal standard might govern the matter. Under the FTCA, for example, punitive damages are prohibited statutorily. 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. Other courts expressly have rejected the punitive argument and have found a plaintiff's awareness to be irrelevant under the applicable state law.

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

Under Wisconsin's survival statute, Wis. Stat. section 895.01, a decedent's estate may recover in tort for "other damage to the person." While the statutory language is extremely broad and really does not place any limitation "as to the nature of damages," the courts only have allowed for the recovery of predeath damages. Postdeath pecuniary or nonpecuniary losses, such as future lost income and, most relevantly, hedonic or loss of life damages, are not recoverable by the decedent's estate. Like most states, Wisconsin does allow for the recovery of predeath conscious pain and suffering. Under this rubric, therefore, it would appear that predeath LOEL damages would be recoverable although "shortened life expectancy" damages have been excluded. It further would appear that the separateness and awareness issues would be controlled by the same factors as in personal injury actions.

Federal law distinctions. Causes of action for predeath injuries based on federal law such as section 1983 or the FTCA again may call for a different analysis. In section 1983 survival actions based on the wrongful death of a party, for example, the courts generally have allowed the decedent's estate to recover both predeath LOEL and postdeath hedonic or loss of life damages even though the latter were not recoverable under the applicable state statute. In Bell v. City of Milwaukee, the Seventh Circuit Court of Appeals specifically held that the denial of hedonic damages to the decedent's estate under Wisconsin's survival statute was in conflict with the deterrence and compensation policies of section 1983. In survival actions based on the FTCA, on the other hand, it appears that the courts inconsistently would hold that predeath LOEL damages are compensatory and recoverable but that postdeath hedonic or loss of life damages are punitive and nonrecoverable.

Wrongful death actions
State law. Wrongful death actions also are "creatures of the legislature" and did not exist at common law. The class of beneficiaries and type and amount of damages allowed are defined statutorily. The majority of states do not allow either survivors or the decedent's estate to recover postdeath hedonic or loss of life damages. Wisconsin has followed suit with our courts surmising that hedonic damages were excluded under sections 895.03-.04 of the Wisconsin Statutes because they would not have any utility to the decedent. However, a minority of states expressly do allow for the recovery of hedonic or loss of life damages. In support of their recovery the courts have cited the policy of full compensation in tort law and inferentially have rejected any utility requirement.

Federal law distinctions. Wrongful death actions premised on federal laws such as section 1983 or the FTCA also might require a different analysis. In section 1983 wrongful death actions, for example, the courts generally have allowed the decedent's estate to recover postdeath hedonic or loss of life damages even though the applicable state law would not have allowed it. In order to further the deterrence and compensation policies of section 1983, state law has had to give way. In wrongful death actions based on the FTCA, on the other hand, the statutory ban on punitive damages might affect any potential recovery of postdeath hedonic damages.

(continued on page 56)
Hedonic
(from page 19)

Proof and valuation

Lay testimony. Trial practitioners are accustomed to proving hedonic/LOEL damages in personal injury or survival actions simply by presenting evidence on the inability of the plaintiff to engage in various activities after the injury.40 Testimony from the plaintiffs themselves or others close to them generally is utilized to demonstrate the effect of the injury on a plaintiff’s lifestyle.41 In wrongful death actions where hedonic damages are allowed, on the other hand, the decedent obviously has sustained a total and permanent LOEL and hence a before/after analysis need only be made if the loss of life is valued according to its effects on the survivors.42 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 traditionally have only allowed attorneys to suggest a lump sum award for hedonic/LOEL damages to the jury in closing argument.43 Regarding the general category of pain, suffering and disability damages, "per diem" arguments are all from owed in federal courts but not in Wisconsin and many other state courts.44 Expert testimony. Courtroom evidence about the loss of the value of life can take several forms. Evidence might be produced as to how 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 hospital patients 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 routinely are willing to pay to save lives. They do not reflect the ordinary process and price of living any more than the price of a movie ($3 per hour) reflects 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 lifesaving reflected in, for example, consumer purchases of lifesaving 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.46 In the main these surveys conclude that life routinely is valued in the several million dollar range.47

In wrongful death actions, these life values must be reduced by lost earnings and other factors to produce a net hedonic value. The net value then can be tailored to the specific individual in various ways.48 In personal injury and survival actions, the diminishment of the capacity to enjoy life can be quantified through an interdisciplinary approach using a psychosocial loss scale and an economic valuation.49 More research on this methodology is forthcoming.

Admissibility of expert testimony. In Sherrod v. Berry, a section 1983 wrongful death case, expert testimony on hedonic damages was allowed into evidence for the first time because it was neither irrelevant nor speculative but rather "invaluable to the jury" in determining the hedonic value of the decedent’s lost life.45 A more recent publicized personal injury case that settled, expert testimony similarly was introduced to value a plaintiff’s LOEL damages.46 The "value of life" model also has been admitted to quantify the loss of society and companionship.

There is no catalog of states where testimony on hedonic damages has been provided at the trial court level, but the authors personally are aware that testimony has been admitted in numerous states including Alaska, California, Florida, Illinois, Indiana, Mississippi, Ohio and Texas.47 Testimony currently is pending in more than a dozen other states. Further, in section 1983 actions, such testimony was admitted in federal courts in Illinois and Ohio. Counting testimony by other economists, the list may be longer.

While no appellate court has ruled against the admissibility of such testimony, trial courts in some states, including Wisconsin, Missouri and Michigan, have not allowed it. The arguments against its introduction into evidence are that it is irrelevant, speculative,40 an improper mathematical computation,41 or an intrusion on the jury’s discretion to calculate pain, suffering and disability damages.48 The countervailing arguments in favor of its introduction, however, are that it is evidence that is indeed relevant,49 nonspeculative,50 and well accepted in the field and will assist the trier of fact.51 Moreover, it has been argued that hedonic valuation can reduce the variability of awards and thus fundamentally be fairer to both defendants and plaintiffs at trial.80

Conclusion

It is apparent from the degree of legal and economic interest in this topic that presentation of testimony on hedonic damages in courts will continue to expand. To the extent that significant social issues are raised by the new approach to quantification, state legislatures may take an interest in more precisely delineating intangible elements of damage and rights to recoverability in wrongful death, survival and personal injury actions.

Endnotes

4The word "hedonic" is defined as "[of] or relating to pleasure." VII Oxford English Dictionary 98 (2d ed. 1989).
629 F. Supp. 159, 162-63 (N.D. Ill. 1985), aff'd, 827 F.2d 195, 205-06 (7th Cir. 1987), vacated, 835 F.2d 1222 (7th Cir. 1987), rev'd on other grounds, 856 F.2d 802 (7th Cir. 1988).
8Because numerous states place statutory limitations on economic damages, it is important to determine whether hedonic/LOEL damages should be considered economic. See Wis. Stat. §§ 657.017, 893.55. To be sure, most states label them as nonpecuniary or noneconomic. See, e.g., Nennem v. United States, 681 F. Supp. 567, 573 (C.D. Ill. 1988), vacated, 795 F.2d 628 (7th Cir. 1986), aff’d, 850 F.2d 426 (7th Cir. 1989); cf. Wis. Stat. § 893.55(4)(a). To the extent they can be "rendered reasonably certain" by a mathematical figure or calculation" by a forensic economist, however, they could be deemed pecuniary or economic. See Flannery v. United States, 297 S.E.2d 433, 435 (W. Va. 1982); Black’s Law Dictionary 206 (5th ed. 1983).
9See, e.g., Kramer v. Chicago, M., St. P. & P. R. Co., 226 Wis. 118, 133, 276 N.W. 113 (1937). In personal injury actions, the courts employ a variety of terms and concepts to refer to hedonic/LOEL damages, e.g., disability, permanent injury, loss of amenity. See Williger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1190 (Pa. 1978).
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and the decedent is punitive under FTC act.

31. It appears that most states patterned their wrongful death statutes after Lord Campbell's Act passed by the English legislature in 1846. See generally Brown v. Chicago & N.W.R. Co., 102 Wis. 137, 77 N.W. 748 (1899); Minzer et al., Damages in Tort Actions § 8.03 (1984).


36. Various federal courts have characterized state wrongful death statutes as punitive to the extent that damages are determined according to the "lost value of life" or "economic loss" to the decedent. See D'Ambra v. United States, 481 F.2d 14, 20 (1st Cir. 1973); cert. denied, 414 U.S. 1075 (1973) (Rhode Island survivor-type wrongful death act which looks at economic loss to decedent is punitive under FTC act). See also McQuirt v. City of Atlanta, 572 F. Supp. 1401, 1421-22 (N.D. Ga. 1983); Minzer et al., Damages in Tort Actions § 8.03 (1984).

37. See Ghiardi, Personal Injury Damages in Wisconsin 79-81 (1964). Some commentators, however, have criticized attorneys' use of "naive formalism" such as arguing that "pain and suffering losses are two- or three-times earnings loss." See Beria, Brookshire and Smith, Hedonic Damages and Personal Injury: A Conceptual Approach, 31 (1) J. Forensic Econ. 1-8 (1990).

38. See, e.g., Waldron v. Hardwick, 406 F.2d 86, 89 (7th Cir. 1969).


44. See Shaw v. City of Milwaukee, 257 F.2d 195, 206 (7th Cir. 1957), vacated, 383 F.2d 1222 (7th Cir. 1967), rev'd on other grounds, 385 F.2d 802 (7th Cir. 1968) (en banc). It should be noted that while the Seventh Circuit's first decision was vacated, on rehearing the court sitting en banc specifically left standing its ruling on the admissibility of expert testimony. See Sherrod, 856 F.2d at 807.


47. See Gillen & Olson, Economic and Legal Defenses Against Claims for Hedonic Damages, 33 for the Defense 18 (Jan. 1991); Miller, The Price of Life, 8 Read. 9, The Chicago Reader Inc. (Sept. 22, 1989).


51. See Wis. Stat. § 904.01; Sherrod, 629 F. Supp. at 162 (N.D. Ill. 1985).

52. See Sherrod, 629 F. Supp. at 164; Essroe v. Mow- hanny, 3 Wis. 2d 258, 270, 88 N.W.2d 659 (1958) ("rule against recovery of punitive damages is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent").
