



## Hedonic Damages: Assessing the Loss of Enjoyment of Life

by Stan V. Smith

Recovery for the loss of enjoyment of life is not new. Since *Scally v. Garratt*, 11 Ca. App. 138 (1909), and later *Huff V. Tracy*, 57 Cal. App. 3d 929, 129 Cal Rptr. 551 (1976), California courts have allowed for recovery of the loss of enjoyment of life in non-fatal injury cases. More recent is the practice of providing economic expert witness testimony at trial to assist juries in placing a value on this intangible element of damage. Testimony on the loss of the enjoyment of life has been introduced into California trial courts a number of times in recent years. Many other state and federal courts have allowed expert testimony to assist the trier of fact in assessing

this area of loss.

Such testimony was first introduced in the civil rights case *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985). In affirming *Sherrod*, and adopting the term used by the economist (this author) at trial, the 7th Circuit ruled that such testimony was "invaluable to the jury...to estimate the hedonic value..." of the decedent's life. In a reversal on other grounds, the full court showed strong support for hedonic testimony in urging the trial court on remand to take heed of the evidentiary rulings on hedonic damages "found in our earlier vacated opinion."

*continued on page 3*

*continued from page 1*

Prior to *Sherrod*, the 9th Circuit, like the 7th Circuit, had allowed for compensation for the loss of the enjoyment of life of a deceased victim in *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981). Such testimony was later proposed for state wrongful death actions.

By 1987, such testimony was being offered in many states to estimate the loss of enjoyment of life in non-fatal injury cases as well as in assessing the loss of the value of society and companionship. Expansion of economic testimony to assess this common element of damage, which formerly had been argued subjectively, stirred considerable interest.



Stan Smith

State courts in California and over a dozen other states have begun to permit such testimony in injury cases, some of which gained national prominence. The admissibility issue has yet to be decided by an appellate court in California or in any other state except the 7th Circuit opinion in *Sherrod*.

So-called hedonic damages testimony is founded on a broad body of economic literature that has gained general acceptance in the field of economics over the past two-and-

a-half decades. These studies reveal to what extent we as a contemporary American society value life. Courts have ruled that since this methodology has "gained general acceptance" in economics, it is readily admissible. A federal judge in Illinois stated that he viewed the testimony as neither pro plaintiff nor pro defendant, since the value of life testimony does not necessarily lead to higher estimates than what might be awarded by juries on average. Another Illinois judge called the process valid, reliable and scientific.

Some economists argue that the *ad hoc* methodologies typically used by jurors, who are given broad discretion and no clear standards, generate widely varying awards. More uniform jury verdicts imply fewer runaway awards; more predictable verdicts can lead to more pre-trial settlements. Both effects can lower insurance premiums. These are desirable goals. But more important is the question as to whether this testimony can fairly assist juries in their difficult task. More and more, courts in California and elsewhere seem to be saying "yes." This may lead to more equal justice under the law.

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