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Life Values: *Measuring the Loss of Enjoyment of Life*

by Stan V. Smith

Economic analysis whose time has come

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For many decades, damages for the loss of enjoyment of life have been argued before juries in most jurisdictions, in both personal injury and wrongful death cases. However, it was not until the last ten years that claims for such damages have been supported by the testimony of economists who provide objective information on the loss of enjoyment of life, or hedonic damages. In the absence of such testimony, juries rely on ad hoc methods to award widely varying amounts for similar injuries. Indeed, much of the sentiment for tort reform has been stimulated by the rare but newsworthy "runaway" verdict for intangible damages. The hedonic-valuation approach can reduce the unpredictable and highly variable nature of jury awards without necessarily raising the amount of the average award.

Over the past three decades, the value-of-life literature in economics has developed to the point where it can provide useful guidance to jurors in the valuation process. This evidentiary approach to measuring the loss of enjoyment of life, which I first developed and called "hedonic damages" in 1983, uses an average of the many estimates of the value of life published in the economic literature. The *hedonic value* is that value which we place on our future life experience, separate and apart from the value we place on our labor in the marketplace and in providing household services, which is the *human-capital value*.

Whole-life values are established using a willingness-to-pay approach that measures the costs of investing in safety equipment, of safer consumer behavior, and of inducements provided to workers who undertake risk in the workplace. The hedonic value is thus the whole-life value less the human-capital value. Although not all measurement issues have been fully resolved, those that remain are no more

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acute than in most other areas of forensic economics.

Use in courts

The theory of hedonic damages, which compensate for the loss of enjoyment of life, "has moved quietly, case by case, into the mainstream of modern tort law," according to a former editor and publisher of the *ABA Journal*.[1] A majority of state and federal courts have ruled that the loss of enjoyment of life is a separate element of damages, while a minority of courts have ruled that it is a factor in pain and suffering.[2]

In a landmark ruling in *Molzof v. United States*,[3] Justice Clarence Thomas wrote the majority opinion allowing for the loss of enjoyment of life in damages under the Federal Tort Claims Act (FTCA), which does not allow punitive damages against the federal government. *Molzof* struck down the FTCA's definition of punitive damages as any damages that go beyond compensating for actual pecuniary loss. The case reversed decisions in the First, Fourth, Fifth, Seventh, and Ninth U.S. Circuit Courts of Appeals that had limited damages in the FTCA to actual pecuniary loss. Remarkably, *Molzof* overturned *Flannery v. United States*,[4] which held that in an FTCA case, the victim must be aware of the loss in order for the damages to apply; otherwise the damages would be punitive instead of compensatory.

Decedents' recovery. Only a minority of states now allow decedents to recover for the loss of enjoyment of their lives, although courts are continuing to expand these rights. Jurisdictions where recovery is allowed include Connecticut, Georgia, Hawaii, Idaho, and Mississippi, and U.S. District Courts in the Second, Seventh, and Ninth Circuits.

The original wrongful death case, in which I first presented testimony, was *Sherrod v. Berry*,[5] a U.S. Code 42, § 1983, civil rights case in 1985. In a Georgia case, *Wood v. APAC-Georgia Inc.*,[6] a jury awarded $250,000 for the loss of life's pleasures in the death of a three-year-old. The court allowed the jury to hear my expert testimony as an economist quantifying this loss. In a Hawaii case, *Conrad et al. v. Lamb et al.*,[7] a judge awarded damages to the decedent for his loss of enjoyment of life also on the basis of my analysis as an economic expert. In *Fliger v. Horton*,[8] which later settled, the court ruled in a pretrial motion that "one of the damages which is just under all circumstances is hedonic damages."

In *Jones v. Shaffer*,[9] a wrongful death case, Mississippi Supreme Court Justice Robertson stated in a concurring opinion that an earlier interpretation of Mississippi Code Annotated § 11-7-13 allowed for the recovery of the loss of the value of living in a wrongful death suit.[10] In *Stang v. Hertz*,[11] the Supreme Court of New Mexico ruled that losses are not limited to pecuniary losses, that damages are recoverable by proof of the worth of the life of the decedent, and that one purpose of the wrongful death act is to make negligence that causes death costly to the wrongdoer.

Expert economic testimony. Although courts are routinely allowing for damages for loss of enjoyment of life, the admissibility of expert economic testimony remains generally a matter of the judge's discretion. In many courts, expert economic testimony has been admitted under Federal Rules of Evidence 702 and 703. Such testimony is increasingly common in personal injury cases. I first presented testimony in a personal injury case in *Ferguson v. Vest et al.*[12] in 1989.[13] Note, however, that some courts require the victim to be cognitively aware of the loss in order to recover.

To date, expert economic testimony has been allowed or presented in state courts in many states, including Alaska, Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Mississippi, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, South Dakota, West Virginia, and Wisconsin, and in federal courts in the Second, Seventh, and Ninth Circuits. Be aware that the admission of economic testimony in a case offers no indication of the outcome—even judges in the same jurisdiction have reached opposite conclusions when presented with similar facts.

The expert and the jury. An economist familiar with studies in this area can make an important contribution by assisting a jury to determine both the range of values and how that range is applicable to the case at hand. Jurors can integrate the expert's evidence with their own moral, social, philosophical, and spiritual values to arrive at an appropriate conclusion.

Jurors must weigh the importance of the evidence that the defendants and plaintiffs present with respect to the quality of life of the individual concerned, the specific circumstances in the life ~~of~~ the victim, and her or his ability to enjoy life. An economist can present a probable range of the value of life, but only the jury can take all the information into account to decide where in that range a given individual falls. No single study can give the exact value of life; however, the preponderance of studies, showing results falling in the $1.5 million to $3 million range, should be viewed as evidence of a consensus as to where to begin.

Methodology

Wrongful death. My estimate of the value of life is based on many economic assessments published in the peer-reviewed literature over the past several decades.[14] Ted R. Miller estimated a whole-life mean of $2.2 million and a hedonic value annualized at $55,000 per year in 1988 after-tax dollars, based on a review of some sixty-seven published estimates.[15] In late 1987, I had estimated an average annualized hedonic value to be $60,000 in 1988 pre-tax dollars.

Economists must adjust for factors that influence life expectancy—such as age, race, and gender—in applying hedonic value to a particular case. Say, for example, that a 55-year-old white female has been killed, so that all of her enjoyment or value of life has been lost. Her remaining life expectancy would have been approximately twenty-seven years. The present value of $60,000 per year for twenty-seven years (using a real growth rate of 0.65 percent above the annual rate of inflation and a real discount rate of 1.8 percent, or a net discount rate of 1.15 percent) is approximately $1,400,000 in 1988 pre-tax dollars.

To estimate hedonic value, an estimate of the human-capital value of a life must first be made. Economists should be generous in the methodology used to subtract human-capital costs from whole-life costs in order to arrive at a conservative estimate for the enjoyment of life. They should maintain consistent assumptions about taxation and the age, race, and gender characteristics of a statistical person, which will then be adjusted to take into account the particularities of an individual case.

There are several possible approaches that can be used to arrive at an estimate of hedonic value. In one example, GNP per capita in 1988 was approximately $20,000. To this amount we add the value of household services, which is estimated to be on the order of perhaps as much as twenty-five percent of GNP. A simple average of worklife expectancies of 31-year-old males and females is approximately twenty-five years. To be very generous, one might take 1.5 times the present value of GNP per capita, assuming a twenty-five-year worklife for the statistically average 31-year-old and using a 1.15 percent discount rate. This produces a human-capital value of approximately $800,000. This value can then be subtracted from an appropriate measure of the whole-life costs to arrive at the hedonic value for a statistically average person.

The process of valuing lost earnings is similar to the hedonic-valuation process. Once an earnings base has been selected, all that remains are adjustments for age, race, and gender—factors that influence worklife expectancy—and the selection of an appropriate growth and discount rate over a worklife. To estimate lost earnings when a child is killed, it is common to select an earnings base from government tables for a broadly defined group—high school graduates, for example. This general process, readily accepted in courts of law, is no more nor less individualized than the process for valuing a life.[16]

Personal Injury. The value-of-life literature is also useful in measuring the loss of enjoyment of life due to injury. It helps to calculate the decrease in the value or enjoyment of life that one would ordinarily have been able to look forward to experiencing. This decrease is separate and apart from palpable pain and the consequent suffering that may accompany the injury, such as fear, worry, mental disturbances, or humiliation.

The loss of enjoyment of life in nonfatal injury cases is based on the total hedonic value of life and the percentage of global functional impairment. The process of valuing the loss involves an interdisciplinary approach that includes the assessment of a psychologist or psychiatrist and is based on a scale of global functioning such as that found in the *Diagnostic and Statistical Manual* published by the American Psychiatric Association.[17] Miller describes an essentially similar process.[18]

A psychologist (or psychiatrist or other mental health professional) measures the percentage of reduction in the capacity to function and experience life as a whole individual. The claimant's reduced capacity to function in all areas of life is evaluated by examining the impact of the injury on occupational functioning, social and leisure activities, daily practical living, and the claimant's emotional state. This impact may vary from the time of the incident to the end of life expectancy, being more severe at the time of injury and perhaps declining as the injured person recovers and compensates; or it may get worse as the medical consequences are aggravated by the natural physical deterioration of aging.

A vocational rehabilitation expert

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estimates the percentage of impairment, due to injury, of the capacity to earn a wage. A rehabilitation assessment might conclude that a person's hourly earning capacity has fallen by twenty-five percent, for example, due to certain physical disabilities. The testimony of an economist who applied this estimate to the pre-injury earning capacity would routinely be admitted into court.

Different people may react differently to identical injuries. Consider the difference in the loss of enjoyment of life resulting from the amputation of the tip of a little finger for a 21-year-old concert pianist as opposed to a 21-year-old economist. Further, an impairment such as the loss of eyesight may lead to similar estimates for the loss of enjoyment of life but may be accompanied by different degrees of pain and suffering. A person who loses sight through the negligent slip of a scalpel may suffer no palpable pain and suffering, whereas a person who loses sight as a result of a gunshot wound may suffer substantial initial and subsequent pain and suffering. Notably, the loss of the capacity to engage in life's ordinary yet challenging experiences is not a direct consequence of the degree of physical incapacity nor of the degree of pain, suffering, and mental anguish.

Some ratings and standards measuring the percentage of functional disability have been suggested.[19] There are numerous assessment protocols. Ultimately, the percentage estimate of the loss of the quality or enjoyment of life is the psychologist's own, based on his or her training, background, experience, and judgment. Once the percentage of loss has been determined, that reduction can be applied against the full hedonic value of life to arrive at a partial loss estimate.[20]

Let's assume, using the earlier example, that the 55-year-old female had not died, but had been seriously injured. Further assume that a psychologist rates her as having a forty percent loss of enjoyment of life. The losses would be approximately forty percent of her total hedonic value, or $640,000.

Conclusion

Routine admission of economic testimony on the value of life in personal injury and wrongful death cases is long overdue. Many years ago, the services of a housewife were deemed too intangible and speculative to value in court. Now, economic testimony as to this value is routinely provided, and its conceptual validity is very rarely questioned.

Testimony on the value of life is becoming increasingly common. The rapidity with which such testimony has been accepted is an indication that it is an idea whose time has come. This testimony does not invade the province of a jury. It is meant to serve as an aid, a tool, and a guide; it does not dictate a result. In the final analysis, jurors will take into account much more than the words of an economist or of any expert. By withholding from juries the enlightening evidence of the value of life, we may risk unduly rewarding some plaintiffs and impoverishing some defendants. We also risk subsidizing tortfeasors and depriving victims of fair compensation. This is not a hallmark of justice.

Testimony on hedonic damages can produce more consistent and rational jury verdicts.[21] It can reduce the wide variability of awards that contributes to the current win/lose lottery effect of personal injury lawsuits. More consistent verdicts will encourage settlements rather than trials and thereby will reduce litigation and insurance costs. These are results we could all live with. □

Endnotes

1. Larry Bodine, *Hedonic Damages Catch On*, Natl L J 27–28 (Mar 9, 1992); see also Larry Bodine, Stanley Preiser, and Monte Preiser, *Trial Manual for Proving Hedonic Damages* (Lawpress, 1992) ["*Trial Manual*"].
2. Gary A. Magnarini and Stan V. Smith, *Hedonic Damages*, 64(2) Wis Lawyer 17 (Feb 1991).
3. *Molzof v. United States*, 112 S Ct 71 (1992).
4. *Flannery v. United States*, 718 F2d (4th Cir 1983).
5. *Sherrod v. Berry*, 629 F Supp 159 (ND Ill 1985); aff'd, 827 F2d 195 (7th Cir 1987); rev'd on other grounds, 856 F2d 802 (7th Cir 1988). For a discussion of this case, see

Stanley V. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 ABA J 70–74 (Sept 1988).

6. *Wood v. APAC-Georgia Inc.*, No 179220 (Fulton County, Ga, Apr 4, 1990).

7. *Conrad et al. v. Lamb et al.*, Civil No 89-369 (9th Cir, Hawaii) (testimony provided Oct 21, 1992).

8. *Fliger v. Horton*, No 66622 (2d Dist, Idaho, Aug 2, 1989).

9. *Jones v. Shaffer*, 524 So2d 309 (Miss 1988).

10. *McGowan v. Estate of Wright*, 524 So2d 308, 311–13 (Miss 1988).

11. *Stang v. Hertz*, 463 P2d 45 (NM 1969), 467 P2d 14 (NM 1970).

12. *Ferguson v. Vest et al.*, 87-L-207 (Madison Cty, Ill Cir Ct 1989); Janan Hanna, *$1 Million in "Hedonic" Damages*, 3 Chi Daily L Bull (March 21, 1989); Andrew Blum, *More Suing over Lost Joy of Life*, 11(32) Natl L J 1, c3 (April 17, 1989).

13. For a discussion of the methodology of valuing life in wrongful death cases, see Michael L. Brookshire and Stan V. Smith, *Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys* (Anderson Publishing, 1990) ["*Economic/Hedonic Damages*"]. See ch 9 for sample calculations and questions for direct and cross examination; ch 11, app 1, for sample testimony; and ch 12, app 2, for case citations. For the methodology in personal injury cases, see Ed Berla, Michael L. Brookshire, and Stan V. Smith, *Hedonic Damages in Personal Injury: A Conceptual Approach*, 3(1) J Forensic Econ 1–8 (1990).

The impact of economic expert testimony and its contribution to the judicial process is discussed by Ted R. Miller in *Willingness to Pay Comes of Age: Will the System Survive?* 83(4) Nw U L Rev 880 (1989) ["*Willingness to Pay*"].

Larry Bodine, with Stanley Preiser and Monte Preiser, provides an analysis of precedents, trends, and practical courtroom techniques from a legal perspective in *Trial Manual*, cited in note 1.

A number of other law review and law journal articles discuss hedonic damages and the admissibility of the testimony. See Charles D. Blount, *Hedonic Damages: Compensation for the Lost Pleasure of Living*, 5 Cooley L Rev 861–86 (1988); Thomas E. Courtney, Jr., *Wrongful Death Damages in California: On the Brink of Full Compensation*, 24 San Diego L Rev 1003 (1987); Patrick Gaughan and Richard Ruth, *Hedonic Damages: Quantifying the Loss*, 124 NJ L J (Supp) 49–59 (Nov 22, 1989); Pam J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages versus Full Compensation*, 63 ND L Rev 561–600; Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L Rev 57 (1989); Erin A. O'Hara, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?* 78 Georgetown L J 1687 (1990); John Anthony Williamson, *Hedonic Damages in Section 1983 Cases: A Remedy for the Unconstitutional Deprivation of Life*, 44 Wash & Lee L Rev 321 (1987); Robert E. Murdock, *Hedonic Damages in Survival Actions*, 27(4) Court Rev 11–23 (Winter 1990) [American Judges Association 1990 Law Student Essay Contest winning entry]; John C. Wunsch, *Hedonic Damages: Proving the Loss of Enjoyment of Life*, 2(1) Ins Settlements J 36–42 (Winter 1990); Thomas A. Moore, *Loss of Enjoyment of Life*, 25(9) Trial 58–61 (Sept 1989).

14. Portions of this methodology section rely on Stan V. Smith, *Hedonic Damages in Personal Injury and Wrongful Death Litigation*, in *Issues and Methods in Litigation Economics*, Patrick Gaughan and Robert Thornton, eds. (JAI Press, forthcoming 1993).

15. Ted R. Miller, *The Plausible Range for the Value of Life: Red Herrings Among the Mackerel*, 3(3) J Forensic Econ 17–39 (1990) ["*Value of Life*"]. This paper and companion papers by W. Kip Viscusi, Stan V. Smith, and William Dickens, presented at the Annual Meeting of the National Association of Forensic Economists in Atlanta, December 1989, all appear in the same volume of the journal.

16. See Brookshire and Smith, *Economic/Hedonic Damages*, cited in note 13.

17. *Diagnostic and Statistical Manual of Mental Disorders* 11–12, 18–20 (Am Psychiatric Ass'n, 1987).

18. Ted R. Miller, *Value of Life* at 33, *Willingness to Pay* at 897–98.

19. See Michael L. Brookshire, Stan V. Smith, and Charles de Seve, *Economic/Hedonic Damages—1991 Supplement* (Anderson Publishing, 1991) ["*Economic/Hedonic Damages 1991*"]. Ch 9, at 45, contains a table created by Dr. George Parsons, Associates for Psychological Resources, Cincinnati, OH. For a similar table showing how to express the degree of loss of enjoyment of life over time, see Berla et al., *Hedonic Damages in Personal Injury* at 3.

20. See Brookshire et al., *Economic/Hedonic Damages 1991*, cited in note 19. Ch 9 contains a sample calculation, and ch 11 provides sample testimony.

21. Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein argue that today we have sophisticated knowledge regarding the value that people place on the nonpecuniary aspects of life. They feel that this information should be used to guide juries and trial judges in their valuations of injury in order to improve the accuracy and fairness of the awards and to make litigation less expensive and more predictable. See *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw U L Rev 908–76 (1989).