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# Economic Evaluation of the Loss of Enjoyment of Life—Hedonic Damages\*

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## § 124.01 Introduction

In severe injury cases, victims sustain a significant impairment in their capacity to engage in the challenging and satisfying process of living one's life, and thus there is a significant partial loss of enjoyment of life, separate and apart from lost wages and other elements of damages. In wrongful death cases, there is a total loss of enjoyment of life. Hedonic damages,<sup>1</sup> a provocative phrase, is a new label I coined for this established concept. The term is meant to emphasize the economic evidentiary approach to measuring such damages. It has stirred considerable controversy in the legal press since I first used the term when I provided expert economic witness testimony in the § 1983 wrongful death case of *Sherrod v. Berry* <sup>2</sup> as to the damages for the decedent's "lost value of life."

<sup>1</sup> The word "hedonic" is defined as "[o]f or relating to pleasure." VII *Oxford English Dictionary* 98 (2d ed. 1989).

<sup>2</sup> See Appendix for the trial court opinion. 629 F. Supp. 159, 162-163 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195, 205-206 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). The original 7th Circuit appellate panel opinion reacted favorably to the trial judge's ruling to admit economic testimony on the value of life, 835 F.2d 1222 at 205:

[Because recovery is permitted] it is therefore axiomatic that plaintiffs seeking to recover the value of decedent's life must be entitled to submit expert testimony to help guide the jury in reaching an appropriate damages award. Mr. Smith testified as to how a life is valued in the field of economics. Smith was well qualified to discuss this matter.

And at 206:

The fact that the . . . value of a human life is difficult to measure did not make either Smith's testimony or the damages speculative. . . . The testimony of expert economist Stanley Smith was invaluable to the jury in enabling it to perform its function of determining the most accurate and probably estimate of the damages recoverable for the . . . value of [decedent's] life.

While the subsequent *en banc* appellate opinion, reversed on other grounds, they affirmed the original appellate panel opinion regarding the decision to admit economic testimony, 856 F.2d 802 at 807:

[T]o infer from the fact that Sherrod was unarmed that [the officer's] use of his weapon was unreasonable . . . is manifestly inappropriate, and [vacating the earlier appellate opinion and ordering] a new trial is the only way to remedy the evidentiary error. [But] because we reverse and remand for a new trial, we need not discuss the district court's other evidentiary rulings or jury instructions. We leave these questions for the district court on remand to decide in light of this court's prior discussions of those matters, specifically those found in our earlier vacated opinion. (Emphasis added)

More generally, however, it refers to damages for the “loss of enjoyment of life” which of course are recoverable in personal injury and survival actions, either as a separate element of damage, “loss of enjoyment of life” or “disability, nature, duration and extent,” or as factor in “pain and suffering.”

In wrongful death cases, loss of enjoyment of life damages are recoverable as a separate element of damages in some states such as Connecticut, Georgia, Mississippi, among others, and in 42 U.S.C. § 1983 actions.<sup>3</sup> In wrongful death actions in most states, recovery is not allowed for the decedents own loss of enjoyment of life after death, restricting recovery to pain and suffering before death, and to pecuniary losses to survivors. Some states such as Michigan include the loss of society and companionship as part of the survivor’s pecuniary losses. In some states such as Massachusetts and North Carolina, the law allows for the recovery of shortened life expectancy for living plaintiffs. Courts have generally been expanding recovery in this area according to the former publisher and editor of the American Bar Association Journal<sup>4</sup> and testimony is increasingly allowed by trial judges. The exact nature and recoverability of hedonic or loss of enjoyment of life damages, therefore, turns on the cause of action involved.<sup>5</sup> Whether state or federal law governs the action can also affect their recoverability.

Perhaps the most current and hotly debated issue involving 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 noneconomic<sup>6</sup> has the legal community in a flurry. But such

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<sup>3</sup> See ch. 23, *Wrongful Death Actions—Loss to Estate*, § 23.18 *supra*.

<sup>4</sup> See Bodine, *Hedonic Damages Catch On*, *The National Law Journal*, March 9, 1992, pp. 27–28; book forthcoming Lawpress, Westport Conn. Also, L. Bodine, S. Preiser and M. Preiser, *Trial Manual for Proving the Loss of Enjoyment of Life* (Lawpress Corp., Westport, Conn. 1992) and Larry Bodine Interview, *Recovering for Loss of Enjoyment of Life*, 11 *Lawyer’s Alert* 11 (Nov. 11, 1991).

<sup>5</sup> See generally ch. 8, *Loss of Enjoyment of Life* and ch. 23, *Wrongful Death Actions—Loss to Estate*, § 23.18 *supra*.

<sup>6</sup> Because numerous states place statutory limitations on the recovery of non-economic damages, it is important to determine whether or not hedonic/loss of enjoyment of life damages should be considered economic. To be sure, most states label them as nonpecuniary or noneconomic. See, e.g., *Nemmers v. United States*, 681 F. Supp. 567, 573 (C.D. Ill. 1988), *vacated*, 795 F.2d 628 (7th Cir.

testimony is long overdue.<sup>7</sup> Given recent U.S. Supreme Court guidelines on the admissibility of expert witness testimony, such testimony is likely to be increasingly relied upon by juries.<sup>8</sup>

Since these damages could conceivably constitute a significant, if not chief, portion of jury awards, personal injury attorneys should certainly educate themselves with the issues and methods involved. This chapter seeks to assist in that task by examining their recoverability, proof and valuation in personal injury and survival actions.

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1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989). To the extent they can be “rendered reasonably certain monetarily 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).

<sup>7</sup> See Smith, Stan V., *Life Values: Measuring the Loss of Enjoyment of Life—Economic Analysis Whose Time Has Come*, 22 *The Brief* 24-27, 62-63 (A.B.A. Summer 1993).

<sup>8</sup> *Daubert v. Merrell Dow Pharmaceuticals*, No. 92-102, 1993 U.S. Lexis 4408 (9th Cir. 1993). The U.S. Supreme Court unanimously ruled that the *Frye* test, requiring general acceptance by the relevant scientific community of the conclusions underlying the expert's opinion, was not required by Federal Rules of Evidence. In rejecting the 70-year-old test and overturning the lower courts, Justice Blackmun, wrote that the requirement of “general acceptance” was deemed to be “at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to opinion testimony.’” Judges still have a gatekeeping role and are expected to be given significant discretion over their decisions to admit or exclude testimony.

## § 124.02 Separateness of Damage Award

In the majority of jurisdictions, plaintiffs who, after an injury, are unable to engage in activities they had previously engaged in, may be awarded damages for their “loss of capacity to enjoy life” or loss of enjoyment of life. An important issue dividing the courts, however, is whether an award for these damages can be made separate and apart from damages for “pain and suffering”. The issue, in other words, is whether a separate verdict question can be submitted to the jury.<sup>1</sup>

Numerous courts believe that loss of enjoyment of life is conceptually distinct from pain and suffering and that separate verdict questions do not lead to jury confusion or a duplication of damage awards.<sup>2</sup> Loss of enjoyment of life 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 (e.g., recreational, household, daily living).<sup>3</sup> Pain and suffering, on the other hand, 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.<sup>4</sup> These courts contend that the difference between loss of enjoyment of life and pain and suffering is a problem of definition only and carefully worded jury instructions can minimize any possibility of jury

<sup>1</sup> There is a debate as to whether a separate verdict question would lead to an increase in overall damage awards. See *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 941 (1989).

See also Moore, *Loss of Enjoyment of Life*, 25 Trial 58 (Sept. 1989); Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac. L.J. 965, 978 (1981).

<sup>2</sup> See, e.g., *Kirk v. Washington State Univ.*, 109 Wash. 2d 448, 746 P.2d 285, 293 (1987); *Rufino v. United States*, 829 F.2d 354, 359-62 (2d Cir. 1987); *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980), cert. denied, 449 U.S. 1035 (1980).

See generally Annot., *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293, § 4 (1984); 22 Am. Jur. 2d Damages § 272 (1988); and L. Bodine, S. Preiser and M. Preiser, *Trial Manual for Proving Hedonic Damages* (Lawpress Corp., Westport, Conn. 1992).

<sup>3</sup> See ch. 8, *Loss of Enjoyment of Life supra*.

<sup>4</sup> See ch. 4, *Pain and Suffering supra*.

confusion or duplication.<sup>5</sup> Separate awards should contribute to greater accuracy, and facilitate judicial review for excessiveness.<sup>6</sup>

Many courts are against submitting a separate verdict question on loss of enjoyment of life, however, on grounds that a duplication of damages might result.<sup>7</sup> These courts rationalize that loss of enjoyment of life is merely a sub-element of pain and suffering because the two types of noneconomic damages generally consider the same evidentiary circumstances. It is even contended that loss of enjoyment of life 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.<sup>8</sup>

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<sup>5</sup> See *Andrews v. Mosley Well Serv.*, 514 So. 2d 491, 497-499 (La. Ct. App. 1987); *Mariner v. Marsden*, 610 P.2d 6, 17 (Wyo. 1980) (J. Rooney, concurring); *Willinger v. Mercy Catholic Medical Ctr.*, 393 A.2d 1188, 1193 (Pa. 1978) (J. Larsen, dissenting).

<sup>6</sup> See *McDougald v. Garber*, 135 A.D.2d 80, 524 N.Y.S.2d 192, 198 (1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 942-43 (1989) (J. Titone, dissenting).

See also Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac. L.J. 965, 973 (1981); Note, *Loss of Enjoyment of Life as an Element of Damages*, 73 Dick. L. Rev. 639, 645-46 (1969).

<sup>7</sup> See, e.g., *Canfield v. Sandock*, 546 N.E.2d 1237, 1239 (Ind. Ct. App. 1989); *Leiker by & through Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823, 834-35 (1989) (but not reversible error); *Stroud v. Stroud*, 385 S.E.2d 205, 206 (S.C. Ct. App. 1989).

See generally Annot., *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293 at § 3 (1984).

<sup>8</sup> See, e.g., *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 940-941 (1989).

*Cf.* *Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216, 1221 (Utah 1980).

See *Hermes, Loss of Enjoyment of Life—Duplication of Damages versus Full Compensation*, 63 N.D. L. Rev. 561, 589 (1987).

## § 124.03 Cognitive Awareness Requirement

Another key issue which divides the courts is whether or not injured plaintiffs must be mentally aware of their loss of enjoyment of life in order to recover damages. Plaintiffs who become comatose or whose intelligence is greatly reduced as a result of a brain-damaging injury are usually 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.<sup>1</sup> The issue is whether loss of enjoyment of life damages stand in a different position.

Following the lead of the English House of Lords,<sup>2</sup> several American courts have held that awareness is an irrelevant consideration with loss of enjoyment of life.<sup>3</sup> 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 which is not dependent on plaintiffs' mental perception.<sup>4</sup> 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 loss of enjoyment of life damages to a comatose plaintiff is accordingly not punitive.<sup>5</sup> The utility of the damages to the plaintiff is furthermore wholly irrelevant.<sup>6</sup>

<sup>1</sup> See 22 Am. Jur. 2d Damages § 241 (1988).

<sup>2</sup> See *H. West & Son, Ltd. v. Shephard*, [1963] 2 All E.R. 625, 633-634, 642-646 (H.L.).

<sup>3</sup> See *Flannery v. United States*, 297 S.E.2d 433, 438-439 (W. Va. 1982); *Rufino v. United States*, 829 F.2d 354, 360-361 (2d Cir. 1987).

See generally Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 Geo. L.J. 1547 (1973).

<sup>4</sup> See, e.g., *Flannery v. United States*, 297 S.E.2d at 438-439; *H. West & Son, Ltd. v. Shephard*, [1963] 2 All E.R. 625, 633-634 (L. Morris); *McDougald v. Garber*, 135 A.D.2d 80, 524 N.Y.S.2d 192, 199-200 (1988), *modified*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

<sup>5</sup> See, e.g., *Rufino v. United States*, 829 F.2d 354, 361 (2d Cir. 1987); *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 942-944 (1989) (J. Titone, dissenting).

<sup>6</sup> See, e.g., *Rufino v. United States*, 829 F.2d at 361; *Lim v. Camden Health Auth.*, [1980] A.C. 174, 188 (H.L.) (L. Scarman); *Wise v. King*, [1962] 1 Q.B. 638, 658 (C.A.) (J. Upjohn); *Croke v. Wiseman*, [1981] 3 All E.R. 852, 862-863 (J. Shaw).

A decedent's estate is commonly entitled to pre-death pain and suffering damages in survival actions, for example.<sup>7</sup>

Other courts, conversely, scale the amount of loss of enjoyment of life 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.<sup>8</sup> These courts have reasoned that loss of enjoyment of life damages do not provide consolation, ease any burden, or directly benefit a comatose plaintiff and hence are deterrent or punitive in nature.<sup>9</sup> Alternatively, because loss of enjoyment of life 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.<sup>10</sup>

In survival actions, a decedent's estate is generally allowed to recover damages for pre-death injuries in a statutory survival action.<sup>11</sup> Like wrongful death actions, survival actions are "creatures of the legislature;" at common law, all actions ceased with the death of the plaintiff.<sup>12</sup> The class of beneficiaries, types of actions, and nature and amount of damages allowed are all statutorily defined.

<sup>7</sup> See ch. 21, *Survival Actions*, § 21.02 *supra*.

<sup>8</sup> See *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937, 940-941 (1989).

<sup>9</sup> See *Flannery v. United States*, 718 F.2d 108, 110-111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *Andrulonis v. United States*, 724 F. Supp. 1421, 1524-1525 (N.D. N.Y. 1989); *Nemmers v. United States*, 681 F. Supp. 567, 575-76 (C.D. Ill. 1988), *vacated*, 795 F.2d 628 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989).

<sup>10</sup> See, e.g., *McDougald v. Garber*, 538 N.Y.S.2d at 940-941; *H. West & Son, Ltd. v. Shephard*, [1963] 2 All E.R. 625, 628-629, 636-637 (H.L.) (L. Reid and L. Devlin, dissenting); *cf. Leiker by & through Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823, 835-838 (1989).

<sup>11</sup> See, e.g., *Nussbaum v. Gibstein*, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289, 290 (1989).

<sup>12</sup> See *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).



## § 124.04 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 § 1983 might require a different analysis. As to the issue of separate loss of enjoyment of life damage awards, the applicable state law might control.<sup>1</sup> As to the awareness issue, however, a substantive federal standard might govern the matter. Under the FTCA, for example, punitive damages are statutorily prohibited.<sup>2</sup> Several federal courts faced with the awareness issue in an FTCA action have denied or reduced loss of enjoyment of life damages reasoning that such an award as a matter of federal law would be punitive and not compensatory.<sup>3</sup> Other federal courts have expressly rejected the punitive-argument and have found a plaintiff's awareness to be irrelevant under the applicable state law.<sup>4</sup>

But in a recent landmark decision by the United States Supreme court in *Molzof v. United States*,<sup>5</sup> Justice Clarence Thomas wrote the majority opinion allowing for the loss of enjoyment of life in injury under the Federal Tort Claims Act. *Molzof* struck down the definition of punitive damages under the FTCA as any damages that go beyond compensating for actual pecuniary loss, reversing decisions in the 1st, 4th, 5th, 7th and 9th U.S. Circuit Court of

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<sup>1</sup> State law generally controls in FTCA actions on the issue of damages. 28 U.S.C. § 2674. See *Fraysier v. United States*, 566 F. Supp. 1085, 1090 (S.D. Fla. 1983), *aff'd*, 766 F.2d 478 (11th Cir. 1985); *Dyer v. United States*, 551 F. Supp. 1266, 1281 (W.D. Mich. 1982).

Federal law may control the issue in FELA actions, however. See *Dugas v. Kansas City S. Ry. Lines*, 473 F.2d 821, 827 (5th Cir. 1973), *reh'g denied*, 475 F.2d 1404 (5th Cir. 1973), *cert. denied*, 414 U.S. 823 (1973) (holding loss of enjoyment of life is not a separate element from pain and suffering).

<sup>2</sup> See 28 U.S.C. § 2674.

<sup>3</sup> See *Flannery v. United States*, 718 F.2d 108, 110-111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *Nemmers v. United States*, 681 F. Supp. 567, 575-576 (C.D. Ill. 1988), *vacated*, 795 F.2d 628 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *cf. Burke v. United States*, 605 F. Supp. 981, 991 (D. Md. 1985) (distinguishing *Flannery*).

<sup>4</sup> See *Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987); *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); see also *Flannery v. United States*, 718 F.2d 108, 113-115 (4th Cir. 1983) (J. Hall, dissenting), *cert. denied*, 467 U.S. 1226 (1984).

<sup>5</sup> 502 U.S. —, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992).

Appeals that limited damages in FTCA to actual pecuniary loss. Notably, *Molzof* overturned *Flannery v. United States*<sup>6</sup> which held that there must be awareness in order for damages to be meaningful to victim in FTCA cases or else they would be punitive.

In survival actions, causes of action for pre-death injuries based on federal law such as § 1983 or the FTCA again may call for a different analysis. In § 1983 survival actions based on the wrongful death of a party, for example, the courts have generally allowed the decedent's estate to recover both pre-death loss of enjoyment of life and post-death hedonic or loss of life damages even though the latter were not recoverable under the applicable state statute.<sup>7</sup> In *Bell v. City of Milwaukee*,<sup>8</sup> for example, the Seventh Circuit Court of Appeals held that the denial of hedonic damages under Wisconsin's survival statute was in conflict with the deterrence and compensation policies of § 1983. It should be noted that post-death hedonic damages were obviously awarded separately from any pre-death pain and suffering and not dependent on any awareness, consciousness or utility requirements.

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<sup>6</sup> 718 F.2d (4th Cir. 1983), *cert. denied*, 467 U.S. 1226, 104 S. Ct. 2679, 81 L. Ed. 2d 874 (1984).

<sup>7</sup> See, e.g., *Bass* by *Lewis v. Wallenstein*, 769 F.2d 1173, 1189-1190 (7th Cir. 1985); *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1253-1257 (E.D. Wash. 1987), *aff'd*, 869 F.2d 1230 (9th Cir. 1989); *Guyton v. Phillips*, 532 F. Supp. 1154, 1164-1168 (N.D. Cal. 1981), *aff'd*, 606 F.2d 248 (9th Cir. 1979).

See generally Note, *Hedonic Damages in § 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 Wash. & Lee L. Rev. 321 (1987).

<sup>8</sup> 746 F.2d 1205, 1235-1240 (7th Cir. 1984).

## § 124.05 Proof and Valuation—Lay Testimony

Trial practitioners are accustomed to proving hedonic/loss of enjoyment of life damages in personal injury or survival actions by simply presenting evidence on the inability of the plaintiff to engage in various activities after the injury. Testimony from the plaintiffs themselves or others close to them is generally utilized to demonstrate the effect of the injury on a plaintiff's lifestyle.

While lay testimony is submitted to establish the extent of the plaintiff's loss of enjoyment of life, these witnesses are not allowed to quantify or monetarily value the damages. The courts have traditionally only allowed attorneys to suggest a lump sum award for hedonic/loss of enjoyment of life damages to the jury in closing argument.<sup>1</sup> As regards to the general category of pain and suffering or disability damages, "per diem" arguments are allowed in federal courts<sup>2</sup> but not all state courts. It is fair to say that the dollar amounts suggested by attorneys for loss of enjoyment of life or pain and suffering damages are rather arbitrarily determined and generally measured against other damage awards upheld within the jurisdiction.

<sup>1</sup> Some commentators have criticized attorneys' use of "naive formula[s]" such as arguing that "pain and suffering losses are two- or three-times earnings loss." See Berla, Brookshire and Smith, *Hedonic Damages and Personal Injury: A Conceptual Approach*, 3 J. Forensic Econ. (1) 1 (Jan. 1990).

<sup>2</sup> See, e.g., *Waldron v. Hardwick*, 406 F.2d 86, 89 (7th Cir. 1969).

## § 124.06 Proof and Valuation—Expert Testimony

Courtroom evidence about the loss of the value of life can take several forms. Evidence might be produced as to what 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 are routinely willing to pay to save lives. These sensational circumstances are extraordinary and rare; they do not reflect the ordinary process and price of living no more than does the price of a movie (\$3.00 per hour) reflect 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 life saving reflected in, for example, consumer purchases of life saving 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.<sup>1</sup> In the main these surveys conclude that life is routinely valued in the several million dollar range.<sup>2</sup> These life values must be reduced by lost earnings and other factors to produce a net hedonic value. The net value can then be tailored to the specific individual in various ways, some of which have been suggested by Brookshire and Smith.<sup>3</sup> In personal injury actions, the diminishment of the capacity to enjoy life can be quantified through an interdisciplinary approach using a psycho-social loss scale and an economic valuation.<sup>4</sup>

There exists some variation in figures that economists may arrive at. For example, it is generally recognized that different economists

<sup>1</sup> See Fisher, Chestnut and Violette, *The Value of Reducing Risks of Death: A note on New Evidence*, 8 J. of Policy Analysis and Management (1) 88 (1989).

<sup>2</sup> See Stan V. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 ABA J. 70 (Sept. 1988).

<sup>3</sup> See Michael L. Brookshire and Stan V. Smith, *Economic/Hedonic Damages: A Practice Manual for Plaintiff and Defense Attorneys* (Anderson Publishing Co., Cincinnati, Ohio (1990) and the 1991/2 and 1992/3 supplements thereto).

<sup>4</sup> See Ed P. Berla, Michael L. Brookshire and Stan V. Smith, *Hedonic Damages and Personal Injury: A Conceptual Approach*, 3 J. of Forensic Econ. (1) 1 (1990).

may arrive at somewhat different projections for lost earnings. The calculations could easily vary for a person killed during the first year of high school, with no previous earnings history. Economists exercise judgment regarding worklife, average earnings, growth and discount rates. Likewise, economists may differ as to precisely what is the net hedonic value of an average life, but such differences are generally within the general range of differences in other areas of valuation.

In 1987, I began testifying that the value of life was approximately \$2.3 million. In 1990, Miller<sup>5</sup> estimated whole life mean of \$2.2 million, and an hedonic value annualized at \$55,000 per year in 1988 after-tax dollars. This mean is arrived at by giving equal weight to the results of each of forty-seven studies. An equally weighted process to determine a mean is not the sole (nor necessarily the preferred) method for calculating a statistic to estimate the central tendency of life values. There are other estimates of the central tendency. In late 1987 using my own methodology, I estimated the average annualized hedonic value to be \$60,000 in 1988 pre-tax dollars.

Most economists who testify on hedonic damages start with a whole life value and subtract from that value an assessment of the value of the human capital costs and of household services for a statistical person. The methodology for subtracting human capital costs from whole life costs should reflect a conservative approach. It should maintain consistent assumptions about taxation and the characteristics of the statistical person. There are several possible approaches to taking all this into account. Let us examine one simple approach that should provide a generous estimate of the present value of lost production and household services for a statistical person and thus a conservative estimate of the hedonic value of life.

To calculate this, consider, for example, that GNP per capita in 1988 was approximately twenty thousand dollars. To this we add the value of household services which are estimated to be on

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<sup>5</sup> Ted R. Miller, *The Plausible Range for the Value of Life: Red Herrings Among the Mackerel*, 3 J. of Forensic Econ. (3) 17 (1990). This paper and companion papers by W. Kip Viscusi, Stan V. Smith and William Dickens were presented at the Annual Meeting of the National Association of Forensic Economists in Atlanta, December 1989, and Thomas Harvilesky wrote a short comment after the meeting; all are published in the same volume.

the order of perhaps twenty-five percent of GNP. A simple average of worklife expectancies for thirty-one-year old males and females is approximately twenty-five years. To take into account all human capital values, one might simply double the present value of GNP per capita, assuming a twenty-five year worklife for the statistically average thirty-one-year old, using a generously conservative two percent discount rate. This produces a human capital value of approximately \$800,000. This value can then be subtracted from the whole life costs to arrive at the hedonic value, which can then be annualized using a life expectancy figure and a discount rate.

Other economists have estimated the human capital costs using somewhat different or more detailed assumptions, but the results are similar. An appropriate adjustment must then be made to value the life of a particular person, taking into account that person's age, race and gender to determine life expectancy. In presenting this estimate and accompanying testimony, an economist, in effect, interprets the studies and provides information that can help a jury form its own judgment regarding the net hedonic value based on the estimates published in the literature.

The process of valuing the lost enjoyment of life in nonfatal injury is based on the hedonic value of life and an interdisciplinary approach using 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.<sup>6</sup> Miller describes an essentially similar process.<sup>7</sup> The application of the value-of-life literature in the measurement of the loss of enjoyment of life in injury is important. This process measures the value of the decrease in the ability to experience the enjoyment of life to which one would ordinarily look forward. It is separate and apart from palpable pain and the consequent suffering, such as fear, worry, mental disturbances, humiliation that can accompany the injury.

The reduction in the ability to experience the value of life is based on the total value of life, along with an evaluation by a psychologist, psychiatrist or other mental health professional, that

<sup>6</sup> Diagnostic and Statistical Manual of Mental Disorders pp. 11-12, 18-20 (Am. Psychiatric Ass'n, Washington, D.C., 1987).

<sup>7</sup> Ted R. Miller, *The Plausible Range for the Value of Life*, at 33, and *Willingness to Pay Comes of Age*, at 897.

measures the percentage reduction in the capacity to function and experience life as a whole individual. This evaluation examines the claimant's reduced capacity to function in all areas of life by examining the impact on occupational functioning, social and leisure activities, daily practical living, and his or her internal emotional state. This impact can vary from the time of the incident to the end of life expectancy. It may be more severe at the time of injury; it may decline as the injured person recovers and compensates; or it may get worse as the medical consequences are aggravated by physical deterioration as one ages.

Identical injuries will affect people differently. Consider, for example, the difference in the loss of enjoyment of life resulting from the amputation of the tip of a little finger for a twenty-one-year old concert pianist, as opposed to a twenty-one-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 his sight through the negligent slip of a scalpel may suffer no palpable pain and suffering, whereas another person who loses sight as a result of a gunshot wound may suffer substantial initial and subsequent pain and suffering. The loss of the capacity to engage in life's ordinary yet challenging experiences is not dependent upon the degree of physical incapacity or the degree of pain, suffering and mental anguish.

Recently, some standards for rating the percentage of functional disability have been suggested.<sup>8</sup> There are numerous possible assessment protocols. Ultimately, the percentage loss figure, however derived, is the psychologist's estimate as to the percent loss of the quality or enjoyment of life, 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.<sup>9</sup>

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<sup>8</sup> See Michael L. Brookshire, Stan V. Smith and Charles de Seve, *Economic/Hedonic Damages* (1991/2 Supplement, Anderson Publishing Co., 1991). Chapter 9, page 45 contains a table created by Dr. George Parsons, Associates for Psychological Resources, Cincinnati, OH. See also Ed Berla, Michael L. Brookshire and Stan V. Smith, *Hedonic Damages in Personal Injury*, 3 J. of Forensic Econ. (1) 3 (1990) for a similar table.

<sup>9</sup> See *Economic/Hedonic Damages*, n.8 *supra*. Chapter 9 contains a sample calculation; Chapter 11 contains sample testimony.

Let's assume that a fifty-five-year old female, Jane Tapper, a typist, has been significantly injured. Further assume that a psychologist describes her impairment and her loss of capacity to enjoy life on the psychological assessment below. As is readily apparent, Ms. Tapper's loss of capacity is not constant over time; it can vary. Immediately after a trauma, the loss is great. The ability to enjoy life may increase somewhat during the recovery period. Later life losses may remain constant or may increase toward the end of life expectancy, depending on the impact of the injury.

### Summary of Psychological Assessment of Jane Tapper

Age	Degree of Impact	Examples
33 (1.2 Yrs)	Severe (55%–65%)	Emotional trauma of accident and recovery from injuries. Disoriented in conversations with friends; loses train of thought. Unable to plan sequence of events such as dinner preparation.
35 (3 Yrs)	Moderate (40%–50%)	With therapy, may improve over next several years and be able to compensate for deficiencies. She still will have considerable difficulties in concentration and planning.
38 (LE)	Mild (20%–30%)	Continued improvement in ability to compensate and function, however she will still retain significant impairment for the balance of life.

Once this psychological evaluation is provided, it can be assessed and incorporated into a loss of enjoyment table such as the one below, in this case showing losses totalling between \$617,784 and \$884,856.



Table 1

**Present Value of Future Loss of Enjoyment of Life (LOEL) of  
Jane Tapper (Lower) 1994-2041**

Year	Age	LOEL	Discount Factor	Present Value	Cumulate
1994	33	\$40,441	0.98241	\$39,730	\$39,730
1995	34	31,820	0.96514	30,711	70,441
1996	35	29,789	0.94817	28,245	98,686
1997	36	29,980	0.93149	27,926	126,612
1998	37	30,172	0.91511	27,611	154,223
1999	38	15,182	0.89902	13,649	167,872
2000	39	15,279	0.88321	13,495	181,367
2001	40	15,377	0.86768	13,342	194,709
2002	41	15,475	0.85242	13,191	207,900
2003	42	15,574	0.83743	13,042	220,942
2004	43	15,674	0.82270	12,895	233,837
2005	44	15,774	0.80824	12,749	246,586
2006	45	15,875	0.79402	12,605	259,191
2007	46	15,977	0.78006	12,463	271,654
2008	47	16,079	0.76634	12,322	283,976
2009	48	16,182	0.75287	12,183	296,159
2010	49	16,286	0.73963	12,046	308,205
2011	50	16,390	0.72662	11,909	320,114
2012	51	16,495	0.71384	11,775	331,889
2013	52	16,601	0.70129	11,642	343,531
2014	53	16,707	0.68896	11,510	355,041
2015	54	16,814	0.67684	11,380	366,421
2016	55	16,922	0.66494	11,252	377,673
2017	56	17,030	0.65325	11,125	388,798
2018	57	17,139	0.64176	10,999	399,797
2019	58	17,249	0.63047	10,875	410,672
2020	59	17,359	0.61939	10,752	421,424
2021	60	17,470	0.60849	10,630	432,054
2022	61	17,582	0.59779	10,510	442,564
2023	62	17,695	0.58728	10,392	452,956
2024	63	17,808	0.57695	10,274	463,230
2025	64	17,922	0.56681	10,158	473,388
2026	65	18,037	0.55684	10,044	483,432
2027	66	18,152	0.54705	9,930	493,362
2028	67	18,268	0.53743	9,818	503,180
2029	68	18,385	0.52798	9,707	512,887
2030	69	18,503	0.51869	9,597	522,484
2031	70	18,621	0.50957	9,489	531,973
2032	71	18,740	0.50061	9,381	541,354
2033	72	18,860	0.49181	9,276	550,630
2034	73	18,981	0.48316	9,171	559,801
2035	74	19,102	0.47466	9,067	568,868
2036	75	19,224	0.46632	8,965	577,833

Table 1

(Cont'd)

Year	Age	LOEL	Discount Factor	Present Value	Cumulate
2037	76	19,347	0.45812	8,863	586,696
2038	77	19,471	0.45006	8,763	595,459
2039	78	19,596	0.44215	8,664	604,123
2040	79	19,721	0.43437	8,566	612,689
2041	80	11,854	0.42978	5,095	\$617,784
JAN.E. TAPPER					\$617,784

Table 2

**Present Value of Future Loss of Enjoyment of Life (LOEL) of  
Jane Tapper (Upper) 1994-2041**

Year	Age	LOEL	Discount Factor	Present Value	Cumulate
1994	33	\$47,794	0.98241	\$46,953	\$46,953
1995	34	39,220	0.96514	37,853	84,806
1996	35	37,237	0.94817	35,307	120,113
1997	36	37,475	0.93149	34,908	155,021
1998	37	37,715	0.91511	34,513	189,534
1999	38	22,774	0.89902	20,474	210,008
2000	39	22,920	0.88321	20,243	230,251
2001	40	23,067	0.86768	20,015	250,266
2002	41	23,215	0.85242	19,789	270,055
2003	42	23,364	0.83743	19,566	289,621
2004	43	23,514	0.82270	19,345	308,966
2005	44	23,664	0.80824	19,126	328,092
2006	45	23,815	0.79402	18,910	347,002
2007	46	23,967	0.78006	18,696	365,698
2008	47	24,120	0.76634	18,484	384,182
2009	48	24,274	0.75287	18,275	402,457
2010	49	24,429	0.73963	18,068	420,525
2011	50	24,585	0.72662	17,864	438,389
2012	51	24,742	0.71384	17,662	456,051
2013	52	24,900	0.70129	17,462	473,513
2014	53	25,059	0.68896	17,265	490,778
2015	54	25,219	0.67684	17,069	507,847
2016	55	25,380	0.66494	16,876	524,723
2017	56	25,542	0.65325	16,685	541,408
2018	57	25,705	0.64176	16,496	557,904
2019	58	25,870	0.63047	16,310	574,214
2020	59	26,036	0.61939	16,126	590,340
2021	60	26,203	0.60849	15,944	606,284
2022	61	26,371	0.59779	15,764	622,048
2023	62	26,540	0.58728	15,586	637,634
2024	63	26,710	0.57695	15,410	653,044
2025	64	26,881	0.56681	15,236	668,280
2026	65	27,053	0.55684	15,064	683,344
2027	66	27,226	0.54705	14,894	698,238
2028	67	27,400	0.53743	14,726	712,964
2029	68	27,575	0.52798	14,559	727,523
2030	69	27,751	0.51869	14,394	741,917
2031	70	27,929	0.50957	14,232	756,149
2032	71	28,108	0.50061	14,071	770,220
2033	72	28,288	0.49181	13,912	784,132
2034	73	28,469	0.48316	13,755	797,887
2035	74	28,651	0.47466	13,599	811,486
2036	75	28,834	0.46632	13,446	824,932

Table 2

(Cont'd)

Year	Age	LOEL	Discount Factor	Present Value	Cumulate
2037	76	29,019	0.45812	13,294	838,226
2038	77	29,205	0.45006	13,144	851,370
2039	78	29,392	0.44215	12,996	864,366
2040	79	29,580	0.43437	12,849	877,215
2041	80	17,780	0.42978	7,641	\$884,856
JAN.E. TAPPER					\$884,856

This interdisciplinary process is analogous to the process whereby a vocational rehabilitation expert estimates the percentage of the impairment of the capacity to earn a wage due to injury. 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. An economist would then apply this estimate to the pre-injury earning capacity and thus provide testimony routinely admitted into court. Bovbjerg, Sloan and Blumstein<sup>10</sup> argue that today we have sophisticated knowledge regarding the value that people place on the nonpecuniary aspects of life, and that this information should be used to guide juries and trial judges in their valuations of injuries in order to improve the accuracy and fairness of the awards and to make litigation less expensive and more predictable.

The important contribution of an expert economic witness with a knowledge of the studies in this area of economics lies in assisting a jury to determine the range of values and then to determine how that range is applicable to the case at hand. The evidence that an expert economist presents thus serves as a valuable guideline which jurors can then integrate with their own moral, social, philosophical and spiritual values to arrive at an appropriate conclusion.

Even when that is done, the juror must then 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 of that victim's life, and her or his ability to enjoy life. An economist can present a probable range of the value of life,

<sup>10</sup> Randall R. Bovbjerg, Frank A Sloan and James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908 (1989).

but only the jury can take all the additional information into account to decide where in that range a given individual falls. No single study can give the perfect answer as to the value of life; but the preponderance of studies, showing results falling in the \$1.5 to \$3.0 million range, should be viewed as evidence of a consensus as to where to begin.

The hedonic valuation process can be viewed as analogous to the process of valuing lost earnings. Once an earnings base has been selected, all that remains are adjustments for age, race, and gender, which determine worklife expectancy, and the selection of an appropriate growth and discount rate over a worklife. In estimating the loss of the value of life, the same method is used, based not on an annual earnings estimate, but an annualized value of life. 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 of valuing a life.<sup>11</sup>

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<sup>11</sup> See Michael L. Brookshire and Stan V. Smith, *Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys*, ch. 9, for sample calculations and questions for direct and cross examination, and ch. 11, Appendix I, for sample testimony (Anderson Publishing Co., Cincinnati, Ohio, 1990).

## § 124.07 Admissibility of Expert Testimony

My testimony has been admitted in over 70 cases in 17 states, including Alaska, Arizona, California, Florida, Georgia, Hawaii, Illinois, Louisiana, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Tennessee, Texas, Vermont, Wisconsin. My testimony is currently pending in over a dozen other states. Further, in Section 1983 actions, such testimony was admitted in Federal Courts in Illinois, Ohio and Wisconsin. Counting testimony provided by other economists, the list of courts is much, much longer. While the *Daubert* decision has undoubtedly eased the test under which expert witness testimony may be admitted, the admissibility of economic testimony by a trial judge is not assured;<sup>1</sup> trial courts are granted wide leeway by appellate courts in admitting expert testimony, overruling only when there has been an abuse of discretion.

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<sup>1</sup> *Daubert v. Merrell Dow Pharmaceuticals*, No. 92-102, 1993 U.S. Lexis 4408 (9th Cir. 1993).

## § 124.08 Conclusion

It is apparent from the degree of legal and economic interest in this topic that presentation of testimony on hedonic damages in courts of law will continue to expand. Economic testimony on the loss of enjoyment of life in injury 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 very rarely questioned as to conceptual validity. 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 some tortfeasors and depriving fair compensation to some of the victims. This is not a hallmark of a justice.

Testimony on hedonic damages can produce more consistent and rational jury verdicts. It can reduce the wide variability of awards which contributes to the current win/lose lottery effect of personal injury lawsuits. This encourages settlements rather than trials, and thereby reduces litigation and insurance costs. These are results we could all live with.

§ 124.99 Appendix: *Sherrod v. Berry*

Lucien SHERROD, Individually and as Administrator of the Estate of Ronald Sherrod, deceased, Plaintiff,

v.

Willie BERRY, Frederick Breen and the City of Joliet, a municipal corporation, Defendants.

No. 80 C 4117  
United States District Court,  
N.D. Illinois, E.D.  
Nov. 15, 1985.

Wrongful death action was brought against city, police chief and police officer. Following verdict for plaintiff, defendants filed post-trial motions concerning admissibility of evidence of hedonic value of human life. The District Court, Leighton, J., held that economist's testimony concerning hedonic value of human life was admissible.

Order accordingly.  
See also, 589 F.Supp. 433.

EVIDENCE: Economist's testimony concerning hedonic value of human life was admissible in wrongful death action. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

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Andrew J. Horwitz & Assoc., Chicago, Ill., Douglas Rallo, Lake Forest, Ill., for plaintiff.

A—William W. Kurnik, William C. Barasha, Kurnik & Cipolla, Arlington Heights, Ill., for defendants.

Memorandum

LEIGHTON, District Judge

This civil rights suit was brought by a father to recover for the death of his son who was shot and killed by a City of Joliet police officer. A jury returned verdicts and defendants have filed post-trial motions. One of the issues raised is whether this court erred in admitting evidence which allowed the jury to consider "the hedonic



value of a human life" when it decided the damages to be awarded plaintiff for the wrongful death of his son.

An expert in economics was permitted to testify that in determining the value of a human life in such a case, a factor to be considered is the hedonic value which, according to qualified economists, is worth more than the economic value of that person. The jury awarded the father \$450,000 for the loss of parental companionship with his son, \$300,000 for economic loss to the estate, \$1,700 for funeral expenses, and \$850,000 for the value of the son's life. Defendants contend they were prejudiced by the testimony of the expert and that consequently, they are entitled either to a judgment notwithstanding the verdict, a remittitur, or a new trial. This court does not agree. When a jury is shown that a person was wrongfully killed, and it is asked to award damages, evidence, including the testimony of an expert, is admissible to enable the jury to consider the hedonic value of the life thus taken.

## I

On December 8, 1979, Ronald Sherrod was 19 years old. He lived in Joliet, Illinois, with his father, Lucien, and worked as a mechanic in a family-owned auto repair shop that did business as Sherrod's Auto Repair. He had an older brother, Tyrone, who also worked in the auto shop. Ronald had gone as far as the senior year at Joliet Central High School. He was not known to the police; he had never been arrested for, or charged with, a crime.

The Sherrods are Negroes. When Ronald was 12 years old, his mother died; and his father married his present wife, Sandra, a Caucasian woman. She, as a stepmother, took over the task of rearing Ronald and guiding him through school. Whenever she spoke of him, as she did in her testimony in this case, she called him "my son." Ronald was close to his father and to other members of his family; they all considered him a kind, loving, and companionable youth who enjoyed life.

Lucien Sherrod had plans for his future which involved Ronald and his brother, Tyrone. In August, 1979, he spoke about their taking over the family garage business and running it. They informally agreed that Tyrone and Ronald would remain in Joliet, work in the garage, take care of expenses from gross income, and pay their father 50 percent of the net profits for his interest in the

auto shop property and business. It was agreed that the turnover would take place early the next year, January 1980, and that Lucien, Sandra, and the younger members of the family would move to Savanna, Illinois, a rural community northwest of Joliet where the Sherrods owned a home. As a boy growing up, Ronald had been there with his father on hunting and fishing trips.

December 8, 1979 was a Saturday; the weather was clear and cold, it was typical of a day in the oncoming Christmas shopping season in Joliet. That afternoon, shortly after 3:00 P.M., Ronald was working on a car, doing "a tune-up" with a part-time mechanic, Chuck Doran. Also at work were Tyrone and another employee, O.J. Smith. At about 3:17 P.M., a distance away from the Sherrod body shop and unknown to anyone there, Jim Youngquist and his wife, Janet, were in the basement area of their plants and gift shop called "Ziggy's." They heard a noise that sounded like some coins dropping on the floor from the cash register and heard footsteps along with the doorbell ringing.

Janet Youngquist ran upstairs. As she did, she saw a man dash out of the shop, and noticed that the cash register had been rifled: between \$50 and \$80 had been taken. She followed the man; he became excited, dropping to the ground the money he had taken from the cash register. A woman next door called the police, and at about a minute after 3:17 P.M., they sent out a radio alarm reporting that "some kind of robbery" had occurred at Ziggy's. The man Janet Youngquist saw was Gary Duckworth who was well known to Joliet police, but who had never been known to commit a violent crime. Janet Youngquist saw him run toward a car parked not far away; but he continued on, out of her sight.

At about 3:40 P.M., Duckworth entered the Sherrod Auto Repair Shop while Ronald Sherrod was still working on the tune-up. He asked Ronald and Chuck Doran if one of them would help him start his car which he said was parked some distance away. Ronald asked Doran to take over the tune-up job; he agreed to drive Duckworth to get his car started. Ronald and Duckworth entered a black Cadillac sedan which Lucien Sherrod had purchased for his son sometime before, secondhand. The two left the auto shop.

When the first radio alarm went out reporting that there had been "some kind of robbery at Ziggy's," Joliet police officer Willie Berry

was having a late lunch at a friend's home. He heard the transmission through a radio unit he carried. Berry was on a patrol assignment, driving a police Scout; with him was a rookie policeman, Richard Klepfer. Shortly after 3:30 P.M., Berry and Klepfer resumed their patrol duties; as they did, there was another police transmission which described the man who had entered Ziggy's earlier and rifled the cash register; it stated that the police believed his name was James Lee. However, Berry told Klepfer that, in his opinion, the description was of Gary Duckworth whom he knew. He went on to suggest that they join the investigation of the crime at Ziggy's.

Berry then drove the Scout past Ziggy's; but when he saw nothing of significance, he proceeded onto Waverly Avenue in the 900 block. The street was in "a part business, part residential white area." As Berry proceeded, he saw a black Cadillac sedan, the car driven by Ronald Sherrod with Gary Duckworth, as a passenger. Because of the area, it being "a white neighborhood," Berry became suspicious of the vehicle. He saw it slowly leave a parking lot next to a bank that was closed, as it was late Saturday afternoon. The car was not speeding; it was not engaged in any evasive maneuver; nor was anyone in it committing any act that was either unlawful, illegal, or threatening to anyone.

When the Cadillac was about 100 feet from the Scout, Berry recognized Duckworth; he told Klepfer to "watch that car." Then, as the Cadillac neared, he signaled the driver to stop. Berry drew out his Smith and Wesson city-issued revolver; Klepfer drew his; and the two police officers approached the vehicle. Berry, using street vulgarities and profanities, shouted to the occupants of the car, "Get your hands up! Get your M\_\_\_\_\_ F\_\_\_\_\_ hands up!" The two men complied; Berry then approached the driver from the left side of the vehicle, holding his pistol pointed at Ronald Sherrod's left temple. Berry said later, and has testified, that as he looked, he saw Ronald Sherrod raise his right hand and move it toward the left pocket of his jacket. At that, Berry pulled the trigger of his pistol shooting Ronald Sherrod in the left temple, killing him instantly. When his body was examined by Berry, Klepfer, and other Joliet police officers, Ronald Sherrod had a cigarette lighter in the left pocket of his jacket; in the right hand pocket was his driver's license. No weapon of any kind was found either in or near the

car, or on Duckworth. The news report of the killing stated that the police suspected Ronald of being a robber. A coroner's death certificate that was issued later recorded that Ronald Sherrod was suspected by the police of having been a robber. There was no factual basis for these suspicions.

Because of this fact, Sandra Sherrod, accompanied by a friend of long standing, went to the office of Frederick Breen, the Joliet Chief of Police, asking that "the name of my son be cleared" by removing the insinuation that Ronald Sherrod was suspected by the police of having been a robber, and that disciplinary action be taken against Berry. Her request was refused; she went to Breen's office a number of times later, always with the same friend, and always insisting that "the name of my son" be cleared by Breen in his capacity as Chief of Police of Joliet.

Berry, at the time of this incident, had been a Joliet policeman a little more than six years. Breen knew him; he had evaluated Berry as an average or above average police officer.

Breen had been Joliet's police chief for thirteen years. Sandra Sherrod's complaint was not the first time a citizen had complained to Breen about Berry using excessive force in the discharge of his official duties. In fact, on at least three earlier occasions, a citizen had been abused by Berry. In none of the incidents did Breen impose serious sanctions on Berry. This suit was filed by Lucien Sherrod, individually, and in his capacity as administrator of the estate of his son, after he and his wife, Sandra, could not obtain the redress they sought from Breen and the City of Joliet.

## II

At the trial, in order to prove the damages he suffered from the death of his son, Lucien Sherrod called as an expert witness, Stanley Smith, an economist, holder of a master's degree in economics from the University of Chicago. Defendants did not question Smith's qualifications; instead, they filed a motion *in limine* asking that his testimony concerning the hedonic value of life be excluded from the jury on the ground that it was speculative. The motion was denied, this court ruling that such testimony was not speculative; that it was relevant and material and would aid the jury in determining the proper amount of damages in the event it found in favor of the plaintiff.

Accordingly, Smith, after explaining what he did and the information he used, testified to the amount of loss Lucien Sherrod suffered when he was deprived of his son's association and companionship. Smith described and explained how he had calculated the economic loss which Ronald Sherrod's estate incurred from his death. Smith told the jury the basis of his opinions, and the economic theories which supported his conclusions.

Apart from his testimony concerning the economic value of life, he gave the jury some "insight into the guidelines that economists use in looking at how society values what we call the hedonic aspect, the hedonic value of life, separate from economic productive value of an individual." He said there had been studies by economists which "indicate that a human life has value separate from the economic productive value that a human being would have." Of course, Smith said, the economic aspect of life valuation presents what may appear to be imponderable difficulties in those cases when the individual, because of infancy, old age, or physical incapacity, has no measurable economic productivity. These difficulties, however, did not apply to the case before the jury because Ronald Sherrod was gainfully employed up to the day he was killed by Berry.

Smith told the jury that in the last 10 years economic literature showed some 15 studies "with respect to the value of life." There "was a study by Blomquist here in Illinois" which in turn considered all the other studies and found that there was a relationship somewhere in the dimension of three times up to 30 times their economic productive income. Smith expressed agreement with Blomquist's conclusions, considering him an authoritative source of knowledge on the subject of the hedonic value of life. At the end of Smith's testimony, which included extensive direct and intensive cross-examination, this court asked Smith to define for the jury the word "hedonic" as it is used in the expression "the hedonic value of life." Smith said:

"It derives from the word pleasing or pleasure. I believe it is a Greek word. It is distinct from the word economic. So it refers to the larger value of life, the life at the pleasure of society, if you will, the life—the value including economic, including moral, including philosophical, including all the value with which you might hold life, is the meaning of the expression "hedonic value'."

## III

This testimony was given to the jury that was considering the claims which Lucien Sherrod was asserting under 42 U.S.C. § 1983 as administrator of his son's estate. A § 1983 action is a suit for tort damages, even though the duty a defendant is alleged to have breached is created by the Constitution or federal law, *Benson v. Cady*, 761 F.2d 335, 339 (7th Cir.1985). This section was enacted by Congress to protect individuals against invasions of federally guaranteed rights through the misuse or abuse of powers derived from the state, *Luker v. Nelson*, 341 F. Supp. 111, 120 (N.D. Ill.1972); and to furnish a damages remedy, where proof is made, to those whose civil rights are violated but who cannot get relief in the courts or agencies of their state. *Monroe v. Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 480, 5 L. Ed. 2d 492 (1961). The basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252 (1978); *Kincaid v. Rusk*, 670 F.2d 737, 745-46 (7th Cir. 1982).

In this case, Ronald Sherrod's death was caused by the constitutional deprivation for which compensation was sought. Section 1983, and the applicable provisions of the Fourteenth Amendment, protect life. It is well established in this and other circuits that on the facts alleged, and on the evidence the jury heard, the estate of Ronald Sherrod could sue and recover damages for the loss of his life. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1236 (7th Cir. 1984); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1348 (E.D. Va.1981); cf. *Guyton v. Phillips*, 532 F. Supp. 1154, 1166 (N.D. Calif. 1981).

"Life," Blackstone has reminded us, "is the immediate gift of God, a right inherent by nature in every individual . . ." 1 W. Blackstone, *COMMENTARIES* \*129; *Evans v. The People*, 1 Cow. 494, 501 (N.Y. 1872) (Grover, J., dissenting). The deprivation of life that is prohibited by the Fourteenth Amendment includes "not only of life [itself], but of whatever God has given to everyone with life for its growth and enjoyment . . ." *Munn v. Illinois*, 4 Otto 113, 142, 94 U.S. 113, 142, 24 L. Ed. 77 (1876) (Field, J., dissenting). In other words, the loss of life means more than being deprived of the right to exist, or of the ability to earn a living; it includes deprivation of the pleasures of life.

This is the point that Smith discussed with the jury when he told them about “the hedonic value of life.” As he explained to them, “hedonic” refers “to the larger value of life . . .” This includes the pleasure of living which is destroyed by the blow that is lethal; in this case, the fatal pistol shot that Berry fired into the temple of Ronald Sherrod, a mere youth; and thus taking from him what all the wealth in the world could never purchase. Smith’s expert testimony enabled the jury to consider this important aspect of injury which the estate of Ronald Sherrod suffered, an aspect they should have considered in the event they determined that Lucien Sherrod, as administrator, was entitled to a judgment against the defendants.

All competent evidence tending to establish a legitimate item of damage is, under proper pleadings, relevant and admissible. *In re Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189, 1195 (7th Cir. 1983); see *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705, 711 (5th Cir. 1967); *De Koven Drug Co. v. First National Bank of Evergreen Park*, 27 Ill. App. 3d 798, 802, 327 N.E.2d 378, 380-81 (1st Dist.1975). Evidence of all the facts and circumstances of the case having any legitimate tendency to show the damages, or their probable amount may be admitted for the purpose of enabling the jury to make the most accurate and probable estimate that the nature of the case permits. The fact that the hedonic value of a human life is difficult to measure did not make either Smith’s testimony or the damages speculative. Damages are speculative when the probability that a circumstance as an element of compensation is conjectural. The rule against recovery of “speculative damages” is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent. That is, if it is uncertain whether the defendant caused the damages, or whether the damages proved flowed from his act, there may be no recovery of such uncertain damages; whereas, uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery. *Crichfield v. Julia*, 147 F. 65, 70-71 (2d Cir. 1906); see *Calkins v. F.W. Woolworth Co.*, 27 F.2d 314, 319 (8th Cir. 1928); *Shannon v. Shaffer Oil & Refining Co.*, 51 F.2d 878, 881 (10th Cir. 1931).

Contrary to what may be the popular view, the idea that an estate can recover for the hedonic value of the life of the person killed is not new in Anglo-American law. In England, for example,

hedonic damage awards have been allowed since 1976. Section 1 of the Law Reform (Miscellaneous Provisions) Act of 1934 has been construed by English judges so that the estate of a person killed can recover for "loss of expectation of life." Prichard, *Personal Injury Litigation*, 137-142 (London 1976); see also *McCann v. Sheppard*, 1 W.L.R. 540 (Ct. of App. Eng. 1973). In this country, legal scholars, economists, and social scientists have grappled with the task of formulating a method by which the value of a human life can be measured in terms understood by a jury. See Speiser, *Recovery for Wrongful Death*, *Second Economic Handbook*, Section 12.5; Broome, *Trying to Value a Life*, 9 *Journal of Public Economics* 91 (1978); Dardis, *The Value of Life: New Evidence from the Marketplace*, 70 *American Economic Review* 1077 (1980); Linnerooth, *The Value of Human Life: A Review of Models*, 17 *Economic Inquiry* 52 (1979). Therefore, the concept, although novel, is not unknown. The testimony of Stanley Smith as an expert in economics enabled the jury to perform its function in determining the proper measure of damages in this case. This court's ruling allowing him to testify concerning the "hedonic value of life" was not error.

So ordered.