HEDONIC DAMAGES
Measuring the Loss of Enjoyment of Life in Personal Injury Cases

Stan V. Smith

According to the laws of many states, your life isn't worth a "plug nickel" if you no longer work for a living. So, except in Georgia, Connecticut, Mississippi and New Mexico, and in Section 1983 cases, in most states, if you are killed and have lost all your future enjoyment of life, but have no lost income, your survivors stand little chance of collecting anything for the value of your life. Fortunately, most states allow for the partial loss of enjoyment of life in injury cases. The field of economics has much to say about how to value this loss.

Most people believe that the real reason we are alive is not only to work, at home or in the marketplace, but also to experience the full value of the gift of life. In death cases, this carries little weight in most states because their laws are set up mainly to compensate survivors for lost wages only.

Most states, however, do allow injury victims to recover for the lost pleasure of life, and most states do not require cognitive awareness on the part of the victim. Recently, in *Molzof v. United States*, 112 S.Ct. 711 (1992), a Federal Tort Claims Act case, the U.S. Supreme Court unanimously ruled that cognitive awareness is no longer required in order for damages to be claimed against the U.S. Government. In a few states, however, you can recover only if you are aware of the loss you have experienced from an injury. If you are in a permanent coma, you or your survivors are entitled to nothing. In these states, such as New York, it is thus "cheaper to kill than to maim."

The loss of enjoyment of life is a separate element of damages in the majority of states. In a number of states, it is a part of pain and suffering. From an economic point of view, where these damages fit on a jury form does not affect their calculation. The governing case in Nebraska is probably *Swiler v Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.E. 2d 697 (1979), which held that the "diminished capacity to enjoy life with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience," are compensible. In this case, the trial judge instructed the jury to consider the plaintiff's hedonic losses. On appeal, the defense argued that there was no state pattern jury instructions on the loss of enjoyment of life. The Supreme Court upheld the award stating that there was no error in the judge having given the instructions on hedonic losses.

Legal views on this issue of loss of enjoyment of life are beginning to change, in part because of an economic model which I introduced in 1984 that places a dollar figure on the *hedonic value of life*—the pleasure or satisfaction we get from living. New Mexico, for example, now allows for the loss of the value of life in death cases as well as in injury cases. My model of the value of life, and its implications, have stirred considerable controversy. Since I first presented the concept, dozens of articles have appeared in law reviews, legal and economic journals, and a handful of books have been published on the topic. In some twenty states so far, both in injury and death cases, judges have permitted me to testify and thus educate juries as to economic evidence on the hedonic value of life. In most of these cases, juries are concluding that the value of life itself is quite significant; in many cases, as you might expect, awards have been in excess of a million dollars.

Over the past decade, plaintiff attorneys have begun to see that in cases where there is little or no lost income, such as for very young or retired people, testimony on hedonic damages can have a very powerful effect. More recently, defense attorneys have recognized that in cases where the juries are likely to be overly sympathetic to the victim, defense testimony on hedonic damages can help argue against sky-high claims for losses, thus preventing runaway verdicts. Through such testimony, awards may become more predictable, leading to more settlements, less litigation, and hence lower insurance premiums. Appropriate and reasoned jury awards often result from such expert witness testimony.

Before economic testimony on the loss of enjoyment of life was available, the value of a workaholic, based primarily on wages, would be greater than the value of a person who led a more balanced life, and who may have thus contributed more significantly to the community. Similarly, a working mother would receive greater compensation than a mother who chose to work full time in the home and/or in volunteer settings. The testimony on the loss of enjoyment of life now gives juries a way to properly evaluate the non-monetary value of life.

I use the term *hedonic value* to refer to that part of life's worth which is separate from the financial value such as lost earnings. In death cases, the loss is total. The concept of hedonic

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value is used in injury cases to measure the diminution of the value of life as a consequence of trauma, separate from the palpable pain and suffering of the trauma itself. Courts are increasingly recognizing the distinction between experiencing the pain and suffering of the incident itself, and the subsequent suffering from a disability caused by an injury. If you lose a leg you may not only lose your job, but your self-esteem, your ability to perform many personal care functions, and much of your social and leisure potential.

Since 1985 when I first presented expert economic testimony on hedonic damages in the wrongful death case of *Sherrod v. Berry,* 629 F.Supp. 159, (N.D. Ill. 1985), *aff'd,* 827 F.2d 195, (7th Cir. 1987), *vacated,* 835 F.2d 1222 (7th Cir. 1987), *rev'd on other grounds,* 856 F.2d 802 (7th Cir. 1988), the concept has gained national attention. In *Sherrod,* a 19-year-old unarmed youth was killed by a policeman. The 7th Circuit Court ruled that my testimony was "invaluable" to the jury and that it did not invade their province, as the defense argued. More recently, in *Ferguson v. Vest,* Circuit Court, 3rd Judicial Circuit, Madison County, IL, Case No. 87-L-207, I successfully applied the concept to an injury of a woman who received unnecessary radiation for a false positive pap smear indicating a cancer she did not have.

In *Sherrod,* the hedonic award was for $850,000, in addition to lost earnings of $300,000 and loss of society and companionship of $450,000. In *Ferguson,* the jury awarded $1,082,000 for the hedonic loss of the pleasure of living, and an additional $1,000,000 for pain and suffering. Because of this novel use of economic testimony, both of these verdicts of over $1,000,000 received front-page coverage in *The Wall Street Journal, The National Law Journal* and elsewhere.

How then do we place a dollar value on life? Even though there is no explicit marketplace for life, there is much objective evidence as to its value. The expert testimony I present to juries includes a summary of the economic studies as to the value of life. This information thus assists juries, as a tool, an aid and a guide, in determining the proper amount of damages, a conclusion they must ultimately reach on their own.

There are several ways that economists measure the price society is willing to pay to save a life. One way, well-accepted in the peer-reviewed academic literature in economics, is to measure what we are currently paying to reduce a given risk of death. From these measurements we can derive the hedonic value. For example, suppose we can buy a certain safety device, such as an automotive airbag, for $500. If through the purchase of 5,000 of these devices one life has been saved, then economists reason that since $2,500,000 has been spent to save a life, that life is worth $2,500,000, at least to the 5,000 buyers of the device. Consumer safety devices, extra pay for risky work, and government safety regulations all provide a great deal of evidence that shows that we routinely value life in the several-million-dollar range.

My hedonic model relates the value of life to remaining life expectancy. The pleasure of life for an 80-year-old person in good health would be less than that for a 20-year-old. I take into account age, sex, and other factors that determine life expectancy. The more years to look forward to, the greater the loss of future satisfaction. This is a reasonable assumption that I suggest a jury may wish to adopt. My model also can take into account preexisting disabilities.

Jurors may, of course, choose higher or lower figures than the ones I testify to, depending on the results of their own individual search for the truth. The jury's search should incorporate as much economic insight as possible along with their moral and philosophical views, and all the specific information about the plaintiff. Just as a jeweler would evaluate the worth of a diamond by examining all of its facets, I believe a jury should evaluate a case from all of its aspects. While the economic aspects are not the only ones, they should not be ignored.

In evaluating an injury case such as in *Ferguson,* the testimony a psychiatrist or psychologist may also help the jury determine the amount of reduction in the quality of life of the victim. This reduction can be used in my hedonic model to estimate the reduction of hedonic value. For instance, if a woman who loses both legs in an accident is judged to have lost approximately 50% of her hedonic value of life, and if that percentage of loss is estimated to remain constant throughout her remaining life expectancy, then the loss may be estimated to be approximately one half the total value of her life.

The hedonic loss as a result of a disability is distinct from palpable pain and suffering, which may be large or small, depending on the nature of the incident. In *Ferguson,* the jurors interviewed after the verdict said they found my testimony on hedonic damages extremely useful to their deliberations. Their $200,000 award for past hedonic loss exceeded my $136,000 estimate, while their award of $882,000 for future hedonic loss matched my estimate exactly. Jurors interviewed after other trials typically found the testimony both credible and useful.

Data on the amounts of money we routinely pay for lifesaving may also be used to examine the loss of the value of society and companionship resulting from wrongful death or profound injury. What we as a society are

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prepare and which are already in its possession. As noted, because the court will inevitably require both parties to exchange a complete list of all documents expected to be used at trial, an order denying the request will result in severe and irreparable prejudice to all present and potential plaintiffs with similar claims against that manufacturers. On the other hand, granting the manufacturer's request would defeat the objective of the discovery rules and result in irreparable harm to the plaintiff.

Other Responses to Tactic

Should the court grant the defendant's request, the plaintiff is advised to take steps to require the manufacturer to produce every document it has produced in all other similar cases, as well as a list of particular documents selected by defense counsel for use in other cases. To paraphrase the old adage, "what's full disclosure for the goose should be full disclosure for the gander." Unless the court also requires the defendant to disclose at the same time the product of its own collaborative mechanism, defense counsel will be granted a tremendous and unjust advantage over the plaintiff in every individual case.

In no event should the court require the plaintiff to answer the defendant's request until *after* the defendant has fully responded to the plaintiff's initial discovery request. Such a provision is necessary to avoid the plaintiff's justified concern that the defendant will not produce any documents, the identity of which is not already known to the plaintiff.

Francis (Brother) Hare is a lifelong member of ATLA and served a two-year term as chair of ATLA's Department of Education. He is currently chief legal officer for The Attorneys Information Exchange Group, a collection of plaintiffs' litigation support groups serving under ATLA's aegis. Endnotes available by request. Call or write the NATA office.

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willing to pay to prevent the wrongful death of some statistically-average, unknown person, is an estimate of what we would be willing to pay to preserve the life of a close loved one.

Although some defense attorneys have called the testimony speculative, this is not true. As Judge Leighton wrote in the *Sherrod* case, speculative damages refers to the uncertainty as to the cause of the damages, not to the difficulty of measuring their extent. In the absence of such testimony, the alternative is for jurors to pluck a figure from thin air, swayed by the emotionality of the trial setting.

Courts have wide discretion to admit testimony by experts. Recently, in *Daubert v. Merrell Dow Pharmaceuticals,* 113 S.Ct. 2786 (1993), the U.S. Supreme Court ruled that decisions to admit expert testimony must be based on whether the expert's conclusions result from following proper scientific methods, not on the conclusions themselves. In *Daubert,* the Court reversed a 9th Circuit's affirmation of a Federal Court Judge's ruling to exclude an expert's testimony, stating that exclusions based on the so-called Frye test, which required general acceptance of the conclusions in the scientific community, was at odds with the liberal thrust of the Federal Rules of Evidence.

Obviously, many cases involving the loss of enjoyment of life have been decided by juries who haven't heard economic testimony on this topic. But emotional arguments in court are a poor substitute for rational and guided thinking to help frame appropriate awards. These decisions must be made with both mind and heart.

We can't live in a risk-free world. Nor should every accident have the economic consequence pinned on some third party. But if a court finds that someone is responsible for an injury or the loss of a life, then the full value of that injury or life should be compensated. We all place a value on our lives, even if we no longer earn a living. Until recently, jurors were left to their own unpredictable estimations of such values. More and more, courts and juries are agreeing that the value of life is not trivial. One does not have to be a social activist to argue for a better educated jury to determine elements of damages that are already allowable under the law. The use of testimony on hedonic damages increases the likelihood of a fairer jury result. We could all live with that outcome.

Professor Stan V. Smith admits to being an economist trained at the University of Chicago, and an adjunct professor at DePaul University College of Law where he teaches a course on economic damages. He is president of Corporate Financial Group, a Chicago-based firm offering consulting services in economics and finance. In 1985, as the economist and expert witness in Sherrod v. Berry, *he coined the term* hedonic damages. *He is co-author of* Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys, *published by Anderson, Cincinnati, Ohio.*

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