ITLA IN BRIEF

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REDUCING THE AGONY OF TORTFEASOR BANKRUPTCY

by
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Mr. Tu Badd severely injured your client, Elizabeth Cousin. Fortunately, your client's blood and tears were supplemented by your sweat, resulting in a favorable verdict for Cousin in her injury case. Badd's liability insurance is insufficient to fully satisfy the resulting judgment, but Badd has significant assets and also a considerable income stream as a fireworks displayer. Believing the difficult part of the matter to have ended when the verdict and judgment were announced last week, you grab a cup of coffee, settle into your chair, and begin opening the morning's mail.

A letter from Trumpcard, Badd's attorney. Post-judgment settlement offer? Instead, you discover a notice that Badd has filed bankruptcy.

The ramifications for Cousin are numerous. This article discusses two sets of ramifications.

I. Bankruptcy's Automatic Stay

The filing of Badd's bankruptcy petition, like any voluntary bankruptcy petition, au-

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FIRST, LETS PRAISE LAWYERS AND LAWSUITS

by
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"The first thing we do, let's kill all the lawyers." Lawyer-bashers who use these words in a derogatory way have never read Shakespeare's play, *Henry the Sixth*. These words were spoken by a scoundrel and an anarchist, *Dick the Butcher*, who, in conspiracy with others, wanted to tear down the government. Shakespeare's words were a compliment to and in praise of lawyers. The anarchist was correct; eliminate us, the trial lawyers, and you will be able to accomplish anarchy, destroy government and destroy the rights of individuals. The careless health care providers, the fraudulent drug companies, the toxic pollut-

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In This Issue:

Hedonic Damages

Measuring the Loss of Enjoyment of Life in P.I. Cases

by Stan V. Smith, professor and economist

In most courts, the value of a human being is not recognized. According to the laws of many states, your life isn't worth a "plug nickel" if you no longer work. So, except in Georgia, Connecticut, Mississippi and New Mexico, and in Section 1983 cases, if you are injured or killed, but have no lost income, you or your survivors stand little chance of collecting anything for the value of your life.

Fortunately, in non-fatal injury cases, most states do allow for the partial loss of enjoyment of life.[1] The field of economics has much to say about how to value these losses, and thus over a hundred courts in over half the states have allowed testimony on the loss of enjoyment of life damages to assist juries in evaluating these losses.

In fatal injury cases, while a decedent cannot recover for his or her own loss of enjoyment of life, a hedonic damages economic model can, and has, been used in courts throughout the country to value the loss of society and companionship to survivors.

Most states do allow non-fatal injury victims to recover for their lost enjoyment of life, without requiring 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 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 several 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.

Legal views on this issue of loss of enjoyment of life are beginning to change, in part because of an economic model that places a dollar figure on the hedonic model with its implications, has stirred some controversy. Since the concept was first presented, dozens of articles have appeared in law reviews and legal and economic journals, and a handful of books have been published on the topic. In some twenty-five states so far, both in injury and death cases, judges have permitted testimony 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, awards have been in excess of a million dollars.

Over the past decade, plaintiff's 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 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 have been considered to 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 choses to work full time in the home and/or in volunteer settings. Testimony on the loss of enjoyment of life now gives juries a way to properly evaluate the overall value of life.

Hedonic Damages

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"Hedonic" value refers 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. In injury cases the concept of hedonic value is used 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, and the subsequent suffering from a disability caused by an injury. If you lose a leg you may not only lose your job, but also your self-esteem, your ability to perform many personal care functions, and much of your social and leisure activity.

Since 1984, when expert economic testimony on hedonic damages was first presented 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.2nd 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 hedonic damage testimony was "invaluable" to the jury and that it did not invade their province, as the defense had argued. More recently, in *Ferguson v. Vest*, Circuit Court, 3rd Judicial Circuit, Madison County, IL, Case No. 87-L-207, the concept was applied to the 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 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 extensive front-page coverage in many major publications, including *The Wall Street Journal* and *The National Law Journal*.

How then do we place a dollar value on life?[2] There are several ways economists measure the price society is willing to pay to save a life. One way, well accepted in the peer-review academic literature in economics, is to measure what we currently pay to reduce a given risk of death. From these measurements we can then derive the hedonic value. For example, suppose we can buy a safety device, such as an automotive airbag, for $500. If through the purchase of 5,000 such devices one life is saved, then economists reason that since $2,500,000 has been spent to save a life, one 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.

The hedonic model relates the value of life to remaining life expectancy. The pleasure of life for an 80-year old person would be less than that for a 20-year old. The model takes 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. The model also takes into account pre-existing disabilities as well as the disabilities resulting from the current cause of action.

Jurors may, of course, choose higher or lower figures than the ones presented, 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 its facets, I believe a jury should evaluate a case from all its aspects.

In evaluating an injury case such as *Ferguson*, the testimony of a psychiatrist or psychologist can also help the jury determine the amount of reduction in the victim's quality of life. This reduction can be used in the 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 expectance, then the loss may be estimated to be approximately 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 the testimony on hedonic damages extremely useful to their deliberations. Their $200,000 award for past hedonic loss exceeded the $136,000 estimate, while their award of $882,000 for future hedonic loss matched the estimate exactly. Jurors interviewed after other trials typically found such 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 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. Thus many courts in many states have allowed the hedonic economic analysis to be used to value the loss of society and companionship to survivors.

Some defense attorneys have incorrectly called hedonic damage testimony speculative. Judge George Leighton wrote in the *Sherrod* case that speculative damages refer to 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.

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 testimony must be based on whether the expert's conclusions result from following proper scientific methods. 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 exclusion 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 most states already allow under the law. The use of testimony on hedonic damages increases the likelihood of a fairer jury result–an outcome we can all live with. ▲

1. For a detailed look at statutes and case law by state, see Trial Manual for Proving Hedonic Damages, by Monty L. Preiser, Laurence Bodine, and Stanley E. Preiser, Lawpress Corp., Westport, Conn.. 800-622-1181.
2. For specific details and examples, see the author's textbook Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys, Anderson Publishing Company, Cincinnati, Ohio, 1990. Or, call the author at 312-943-1551.

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