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LOSS OF CONSORTIUM A FAMILY PSYCHOLOGICAL PERSPECTIVE

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In 1994 the New Mexico State Supreme Court in **Romero v. Byers**, 117 N.M. 422 (1994) recognized loss of spousal consortium, holding it as a separate cause of action. The court defined consortium as "conjugal fellowship of husband and wife, and the right of each to the company, society, cooperation, affection, and aid of the other in every conjugal relation." Our Supreme Court has brought New Mexico into harmony with extensive research in the health sciences.

Families¹ serve critical biological, psychological and social functions for the members². During their time together, members may come to depend on one another to solve practical problems, to develop and implement plans for the future, and to provide emotional support, intimacy, nurturance and guidance. When one family member becomes disabled or chronically ill, the impact on other members may be devastating.

In the process of evaluating a case, trial lawyers are advised to consider the impact of illness or injury not only on the client, but also on family members and on the organization of the family. We will summarize the extensive research, discuss the elements of a family psychological evaluation and consider treatment issues. To exemplify the issues, brain injury and chronic pain are examined separately. Gender issues are briefly reviewed since women have traditionally borne primary caretaking responsibilities.

Intimate Partners¹

Intimate partners may enhance one another's lives in ways which are difficult if not impossible to replace. Each partner trusts the other to perform and coordinate tasks to their mutual advantage. Private dreams and fears are often safe only with one's partner; a precious emotional sanctuary is created and may be enhanced by physical and sexual intimacies. Each partner knows what pleases the other.

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MEASURING THE LOSS OF ENJOYMENT OF LIFE IN PERSONAL INJURY CASES AND WRONGFUL DEATH CASES IN NEW MEXICO — HEDONIC DAMAGES

By Stan V. Smith*

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Stan V. Smith

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In most courts, the value of a human being who has been wrongfully killed is not recognized. According to the laws of most states, your life isn't worth a "plug nickel" if you no longer work. So, if you are injured or killed and have lost all your future enjoyment of life, but have no lost income, you or your survivors stand little chance of collecting anything for the value of your life.

New Mexico is an exception to this rule. In *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994), Case No. 20,441, consolidated with *Sears v. Nissan*, Case No. 20,794, the New Mexico Supreme Court decided, in an opinion filed on March 16, 1994 written by Judge Gene E. Franchini with unanimous concurrence by other 4 justices, to allow for the loss of enjoyment of life in death cases. "we hold that the value of life itself is compensable under the [New Mexico Wrongful Death] Act." The court said that New Mexico wrongful death act allows juries to award

such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting

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Appeals for the State of New Mexico, in a unanimous Appellate opinion by Judges Donnelly, Apodaca, and Flores, confirmed that testimony is allowed on hedonic damages by economists.

In fatal injury cases, in addition to the decedent's recovery for his or her own loss of enjoyment of life, my 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 *Moloz 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 in injury cases 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 which I introduced in 1984 that places a dollar figure on the *hedonic value of life* - the pleasure or satisfaction we get from living. My hedonic model of the value of life, along with its implications, has stirred some controversy. Since I first presented the concept, 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 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, 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 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 commu-

from such death to the surviving party or parties entitled to the judgment. . . . [T]he person . . . who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. (872 P.2d at 845)

Only Connecticut, Georgia, and Mississippi among the other forty-nine states allow for the recovery for the loss of enjoyment of life in death cases. Section 1983 actions also allow recovery for the value of life in wrongful death. In non-fatal injury cases, however, most states including New Mexico allow for the partial loss of enjoyment of life.¹

The field of economics has much to say about how to value these losses, both in death and injury cases.

The field of economics has much to say about how to value these losses, both in death and injury cases. Over a hundred courts in over half the states, including New Mexico, have allowed my testimony on the loss of enjoyment of life damages to assist juries in evaluating these losses. In *Sena v. New Mexico State Police*, 892 P.2d 604, the Court of

nity. 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. Testimony on the loss of enjoyment of life now gives juries a way to properly evaluate the non-monetary value of life.

"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. 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 also your self-esteem, your ability to perform many personal care functions, and much of your social and leisure potential.

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Since 1984 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 had 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 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? 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 assists juries, as a

tool and a guide, in determining the proper amount of damages, a conclusion which they must ultimately reach on their own.

There are several ways 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 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.

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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. In a death case, all the enjoyment of life has been lost. In an injury case, my model takes into account the disabilities resulting from the current cause of action, and preexisting disabilities, if any.

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 its facets, I believe a jury should evaluate a case from all its aspects. While the economic aspects are not the only ones, they should not be ignored.

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 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 half the total value of her life.

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1. For a detailed look at the statutes and case law state 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 my textbook *Economic Hedonic Damages: A Practice Book for Plaintiff and Defense Attor-*

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.

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.

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

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. 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 could all live with.

neys, Anderson Publishing Company, Cincinnati, Ohio, 1990. This book and other materials are available from my office: Corporate Financial Group, Ltd., 1165 N. Clark St., Chicago, IL 60610; Phone 312-943-1551 or Fax 312-943-1016.ntent