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ITLA'S 24th Annual Meeting



Hugh Mossman passes the gavel
to new ITLA President Michael J. Verbillis

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Measuring the Loss of Enjoyment of Life in Personal Injury Cases in Idaho— Hedonic Damages

by Stan V. Smith with Introduction by Darrel W. Aherin

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DePaul University College of Law where he teaches a course on economic damages. As President of Corporate Financial Group, a Chicago-based firm offering consulting services in economics and finance, he has provided economic testimony in hundreds of cases nationwide. 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*.

and the Nez Perce Tribal Court in 1992. Mr. Aherin is a member of the Idaho State Bar; Clearwater Bar Association (President 1977-1979); American Bar Association; Idaho Trial Lawyers Association (Treasurer 1986-87, Seminar Chairman 1988-89, State Delegate to ATLA 1987-88 and 1988-89, Secretary 1992-93, Vice President 1993-94, President 1994-95); and Association of Trial Lawyers of America. He has published a number of articles and papers, including a chapter in the Idaho Trial Lawyers Trial Practice Manual.

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away from his/her parents. The joy of knowing your parents are alive gives the adult child pleasure. We all "live" for those times of getting together with family at holidays, reunions, or family get-togethers. It is one of life's pleasures to know your family member is alive.

In an injury case, the trier of fact is asked to quantify *all* damages which proximately flow from the wrongful act. In a death case in Idaho, it is the loss to each heir under Idaho Code § 5-311 which must be determined. In an Idaho wrongful death case, the recovery for the loss of the joy of living requires an heir.

But, in Idaho an heir is not entitled to recover for the pain and suffering experienced by a relative before death because it is determined that damage for pain and suffering does not survive if the injured person dies. The potential heir thus cannot recover for the pain and suffering the injured person experienced before death. Pain and suffering is personal to the injured person. In a serious injury case, a loss of being able to enjoy life is recoverable by the injured person. A spouse has a derivative claim for his/her loss of being deprived of the activities of life he/she enjoyed before the injury with the spouse. In a death case, the joy of living element of damage is that loss to the heir for the death of their relative.

Testimony on how to measure hedonic damages is very helpful to a trier of fact. The facts of each case are decided by the trier of fact. Providing expert testimony aids the trier of fact in deciding the facts. In serious injury or death cases, providing the trier of fact with expert economic testimony on how to value hedonic damages will provide the lawyer with a better op-



Darrel W. Aherin graduated from C u l d e s a c (Idaho) High School in 1964, Lewis-Clark State College (Lewiston, Idaho) in 1969, and the University of Idaho College of Law (J.D.) in 1973. He began a solo practice in January 1974 and there are now three attorneys in the firm. Mr. Aherin's primary areas of practice are personal injury (auto, premises, professional and product liability), insurance bad faith, and commercial/business torts. He was admitted to practice in Idaho and the US District Court of Idaho in 1973; the US Court of Appeals, 9th Circuit, and the US Supreme Court in 1980; the US Tax Court in 1992; the US Claims Court in 1983,

INTRODUCTION By Darrel W. Aherin

For Idaho attorneys working on cases involving serious injury or death, presenting the trier of fact with expert help on economic damages is essential.

Hedonic damages is a concept for evaluating the joy of living. The joy of seeing a sunset is an example of enjoying life. The joy of knowing your loved one is there is what is lost by an heir when a loved one is dead. This is a different element of damage than society and companionship. It is measuring the joy of knowing that you have a loved one.

To illustrate, think of an adult child who lives several hundred miles

portunity to obtain fair and reasonable compensation for the client.

EXPERT ECONOMIC ANALYSIS

By Stan V. Smith

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 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.

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 this loss, and thus many courts in many states have allowed my 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, my economic model can, and has, been used to value the loss of society and companionship to survivors.

Most states do allow injury victims to recover for the lost pleasure 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. In *Ranta v. Rake*, 91 Idaho 376, 421 P.2d 747 (1967), a judgment for loss of enjoyment of life's activities was upheld as a separate element of damages.

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 tes-

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timony on hedonic damages can help argue against sky-high claims for losses, thus preventing excessive 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 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.

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?²

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.

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 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 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.

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 my 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 my economic analysis to be used to value the loss of society and companionship to survivors.

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.

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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.

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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 Attorneys*. Δ