



Measuring The Loss of Enjoyment of Life in Personal Injury Cases - Hedonic Damages

Stan V. Smith, Ph.D.

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, except in Georgia, Connecticut, Mississippi and New Mexico, and in Section 1983 cases, if you are killed and thus lose all your future enjoyment of life, but have no lost income, your estate or your survivors cannot collect 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 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 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 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

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The Brain Injury Association Announces 2000 Symposium

The Brain Injury Association is holding its annual symposium in Chicago, July 29-August 1, 2000, entitled "At the Crossroads: The Future of Brain Injury 2000 and Beyond". This Symposium offers a unique opportunity to hear research and clinical updates on a variety of topics. The Symposium committees have developed an innovative program which will focus on Best Practice in Research and Clinical Application, Public Policy and Advocacy. Emphasis will be placed on the presentation of advanced information for enhancing service delivery to persons with TBI and their families. This year for the first time, four subcommittees reviewed potential speakers and topics and invited a number of respected speakers to present updates in their area of expertise. These subcommittees also developed four tracks for the Symposium: 1) Acute Care, 2) Rehabilitation, 3) Reintegration to Community and 4) Pediatrics. Additional information is available at BIA's web site at: www.biausa.org or by calling BIA at (703) 236-6000.

The Passing of L. Don Lehmkuhl, PhD

The Neurolaw Letter is sad to report of the passing of L. Don Lehmkuhl, PhD. Don was one of the founding editorial advisory board members of this newsletter almost a decade ago. Don served on the faculty of Baylor College of Medicine in various capacities for 20 years. He was the Director of Brain Injury Research and Principal Investigator of the Traumatic Brain Injury Model System Research Program prior to his retirement in 1998. A prolific writer and editor, he made significant contributions in the fields of physical therapy, spinal cord injury and brain injury. Among his numerous awards, Don received the Mary McMillan Lecture Award from the American Physical Therapy Association, and in 1999 received the Gold Key Award from the American Congress of Rehabilitation Medicine. Don was a man of vision who approached every task with boundless energy and enthusiasm. He will be greatly missed.

Recent Developments

On March 20, 2000, the United States paid \$4 million to settle thirteen remaining Federal Tort Claims Act (FTCA) cases brought by members of a British rugby team and their families. One plaintiff with traumatic brain injury and his wife recovered over \$2 million in damages. Previously, the government had paid over \$2 million to resolve four companion cases. Thus, the total amount paid to resolve all 17 FTCA actions exceeded \$6 million.

This settlement concludes all actions related to *Whitley v. United States*, 170 F3d 1061 (11th Cir. 1999), the first decision upholding the right of foreign military personnel to recover damages under the FTCA.

Plaintiffs were represented by *NLL* editor-in-chief J. Sherrod Taylor and *NLL* executive editor Tyron Elliott. Both attorneys were associated to handle the cases by British solicitors Raymond Donn and Hilary Meredith, Donns Solicitors, Manchester, United Kingdom. Donn and Meredith participated in the trial of the *Whitley* case that was held in the United States District Court for the Northern District of Georgia.

Earlier this year, nationally syndicated columnist, James J. Kilpatrick, authored an editorial about the *Whitley* case. In that editorial, Kilpatrick highlighted the injustice of the United States Supreme Court's 1950 *Feres* decision saying, "It's time to toss *Feres* on the dump heap of decisions that no longer apply."

Ask the Doctor

Dear Dr. Zasler: What are the best measures of possible malingering by CHI (MTBI) patients in litigating cases? Dr. L. Smith, Michigan

Dear Dr. Smith:

Thank you for your question. My own position is that the best "measure" of malingering is a thorough clinical assessment including a comprehensive history and record review. In reality, the only two ways to know that someone is malingering is for them to tell you that they are malingering or to catch them doing something that they say they cannot do. A prime example of the latter is that a patient presents with a gait disturbance in a clinician's office and then the professional observes them out of their office window and they walked normally.

One of the problems that we face in medicine is that as physicians we are not only trained to believe our patients, but we are also trained to evaluate disease as opposed to "non-disease." That is, most physicians, regardless of specialty, receive little to no training in assessing such conditions as symptom exaggeration, malingering and/or psychiatric disorders that may present with symptoms that may be misinterpreted as being consistent with MTBI related impairment. This latter set of disorders would include such conditions as conversion disorder, somatoform pain disorder, factitious disorder and malingering. Additionally, it is important to realize that many conditions that may be causally related to injury may be misinterpreted as generating symptoms associated with MTBI. Examples of these include chronic pain disorders and depression as the two most common conditions that I have seen produce an array of symptoms that are misattributed to MTBI. You would likely be interested to know that both Dr. Martelli and I were asked to write the impairment rating and guides for the American Medical Association for MTBI. These were published in the November/December 1998 issue of *Guides Newsletter* which is available from the AMA.

I would note that the best way to get to the issue of response biased, that is presenting one's self either better or worse off than they actually are, requires time and information. Some of the approaches that seem to work better with regard to response bias detection include looking for inconsistencies within and between various factors including reported symptoms, test performance and clinical presentation, to name just a few. Over-impaired performance in the presence of tasks that should be "doable" may be an indication of malingering behavior, such as very poor performance on easy tasks presented as diffi-

cult or failing tasks that very severely impaired persons with ABI perform easily. Certainly, a lack of objective signs of neurologic impairment would also lead one to conclude that there might be a possibility of symptom exaggeration or malingering, just as inconsistent signs of impairment might also lead one to this conclusion. There are also specific tests from both a medical and neuropsychological perspective that can be administered to assess for exaggeration/malingering behavior with the acknowledgement that symptom exaggeration may have very many different underpinnings than malingering.

Interview evidence and physical exam findings must also serve as a foundation for making a determination of impairment organicity versus non-organicity. Interview evidence that would suggest malingering include non-organic temporal relationships of symptoms to injury, as well as, non-organic symptoms that are improbable or absurd, given the clinical condition in question. A disparate examinee history of complaints in relation to corroboratory interview(s) would also make one wonder about the veracity of the claim being made. Physical exam findings that may suggest non-organicity including malingering behavior are non-organic sensorimotor findings, pseudoneurological findings, inconsistent exam findings or failure on physical exam procedures designed to specifically assess so-called response bias.

It is uncommon in my experience, both as a clinician, as well as an independent medical examiner, to see physicians perform tests to rule out malingering. It is my opinion that one test does not make or break a diagnosis of malingering but may increase one's suspicion that at least on that given test, someone performed in a manner that suggests conscious amplification of problems, whether they be cognitive or physical, or for that matter, behavioral. There is still much debate on the utility of "faking bad" tests relative to their utility in terms of specificity and sensitivity for malingering. The overall diagnosis of malingering should be based on a "total look" at the patient or examinee including pre-injury, injury, and post-injury factors, not on one or two "malingering tests".

I would refer you to the *AMA Guides Newsletter* of November and December 1998 regarding "Assessing MTBI" cowritten by Michael Martelli, PhD and I for further information on assessment of MTBI relative to detection of response bias. Additionally, you might find some of my prior writings helpful with regard to MTBI assessment and treatment. Feel free to request these through my office by calling (804) 346-1803. Thanks again for your question.

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Ask the Doctor is a regular feature of *The Neurolaw Letter*. No question is too basic or esoteric. Submit questions by fax: (713) 526-7787, or by mail to: HDI Publishers, P.O. Box 131401, Houston, Texas 77219.

Literature Review

Forensic Neuropsychology: Fundamentals and Practice

Jerry J. Sweet, Editor. Swets & Zeitlinger Publishers
ISBN 90 265 1544 8, 1999. Single copies: \$119.00

This volume describes the current practice of forensic neuropsychology in the United States. It is designed especially to serve the needs of clinicians and trial lawyers who become involved in traumatic brain injury litigation.

Part of Swets & Zeitlinger's series *Studies in Neuropsychology, Development, and Cognition*, this collection of essays provides practical information about the field of neuropsychology in the forensic setting. Fifteen well-written chapters cover the fundamentals of neuropsychology, practice expertise, relevant populations and the parameters of the forensic area.

Edited by **Jerry J. Sweet**, Ph.D., ABPP-CN, Director of the Neuropsychology Service at Evanston Hospital, Evanston, Illinois, this text includes contributions from many top experts. **Stanley Berent** and **Christine L. Swartz** ("Essential Psychometrics") examine the heart of formal neuropsychological assessments. **W. Drew Gouvier** ("Baserates and Clinical Decision Making in Neuropsychology") emphasizes the essential task of considering baserates during the clinical process. **Steven H. Putnam**, **Joseph H. Ricker**, **Scott R. Ross** and **John E. Kurtz** ("Considering Premorbid Functioning") discuss the latest methods for determining preinjury status. **Eugene J. Rankin** and **Russell L. Adams** ("The Neuropsychological Evaluation") describe the clinical and scientific foundations of assessment. **Linus A. Bieliauskus** ("The Measurement of Personality and Emotional Functioning") delineates the assessment of personality and emotional functioning relevant to forensic cases. **Thomas Kay** ("Interpreting Apparent Neuropsychological Deficits") seeks to answer the question, 'what's really wrong?' with litigating patients. **David C. Osmon** ("Complexities in the Evaluation of Executive Functions") reviews theoretical and functional neuroanatomical issues related to executive functions. **Robert J. Sbordone** and **Thomas J. Guilmette** ("Ecological Validity") offer guidance for the prediction of everyday and vocational functioning using test data. **Jerry J.**

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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 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 preexisting 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.

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.

References

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*, 1990. This book and other materials are available from my office: Corporate Financial Group, Ltd., 1165 N. Clark St., Ste 600, Chicago, IL 60610; Phone 312-943-1551 or Fax 312-943-1016.

Professor Stan V. Smith, Ph.D., is an economist trained at the University of Chicago, and a former Adjunct Professor at DePaul University College of Law where he lectured 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," and for the first time in U. S. courts presented testimony to a jury on how to value life. He is co-author of Economic/Hedonic Damages: A Practice Book for Plaintiff and Defense Attorneys, published by Anderson, Cincinnati, Ohio.

Literature Review, continued from page 47

Sweet ("Malingering: Differential Diagnosis") examines the issue of malingering in the neuropsychological setting. **J. Peter Rosenfeld** and **Joel W. Ellwanger** ("Cognitive Psychophysiology in Detection of Malingered Cognitive Deficit") chronicle an innovative research program used to uncover malingering. **Ronald M. Ruff** and **Ann M. Richardson** ("Mild Traumatic Brain Injury") discuss the most common form of brain dysfunction. **David E. Hartman** ["Neuropsychology and the (Neuro)-Toxic Tort"] present valuable information related to toxicology. **Rudy Lorber** and **Helen Yurk** ("Special Pediatric Issues") elaborate on the litigation issues that are unique to cases involving children. **J. Sherrod Taylor** ("The Legal Environment Pertaining to Clinical Neuropsychology") reviews neuropsychological evidence in the courtroom. **Paul R. Lees-Haley** and **Larry J. Cohen** ("The Neuropsychologist as Expert Witness") discuss the presentation of expert testimony.

This book is highly recommended for all clinical and legal practitioners concerned with the medicolegal implications of neuropsychology.

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