

Battleground States for Hedonic Damages Testimony

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While a plaintiff attorney might try to make an hedonic damages claim in any state, the battleground states in which a defense attorney is more likely to confront hedonic damages testimony are Arkansas, Arizona, Georgia, Montana, Ohio, Nevada and New Mexico. Until recently, Mississippi was also a major battleground state, but a tort reform act precluded any award for hedonic damages in a death case and precluded expert testimony about hedonic damages even in an injury case for cases filed after January 1, 2003. The next seven sections of this paper will briefly review the status of hedonic damages testimony in the battleground states of Arkansas, Arizona, Georgia, Montana, Ohio, Nevada and New Mexico.

Arkansas

In 2001, Arkansas added a new section to its survival statute Ark. Code Ann. § 16-62-101(b), stating that:

In addition to all other elements provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages.

Arkansas has a standard Wrongful Death Act that allows recovery by survivors of a decedent in the same way as most states. The 2001 amendment to the survival action, however, opened the door for claims of hedonic damages to be made. There has been only one reported decision regarding what this amendment means. In *Durham v. Marberry*, 36 Ark. 481; 156 S.W.3d 242 (AR 2004), the Arkansas Supreme Court held that the 2001 Arkansas survival action amendment created a new element of damages in circumstances of wrongful death called "loss of life" and that an injured plaintiff did not have to have survived beyond the fatal injury to have the right to recover this loss element. The *Durham* Court indicated that "loss of life" and "loss of enjoyment of life" are different elements even though "both are hedonic." The court did not clearly indicate what was meant by saying that "both are hedonic."

In drawing a distinction between "loss of life" and "loss of enjoyment of life," the *Durham* court cited *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (Del. 1990) and *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 141, 393 A.2d 1188 (1978) as drawing that same distinction. *Willinger* has been interpreted as not allowing recovery for lost enjoyment of life in death cases in Pennsylvania and *Sterner* is one of the decisions that precluded an economist from offering hedonic damages testimony in *Delaware*.

The *Durham* Court also appeared to indicate that it would probably not allow expert testimony about the amount of damages to be awarded for "loss of life." The court said:

Though the appellants do not argue this point on appeal, the appellees have noted that appellants retained an economist to provide expert testimony about loss-of-life damages. This expert testimony was the subject of a motion in limine filed by the appellees, requesting that the expert testimony be excluded. However, the trial

court did not reach the issue of the motion in limine because it granted summary judgment on the claim of loss-of-life damages. In a case decided three decades ago by this court, we determined that there is no hard and fast rule to determine compensatory damages for non-pecuniary losses:

“No rule has been established – and in the nature of things none can be – for determining what compensation should be paid for loss of life, for pain and suffering, for loss or decrease of earning power, for mental anguish accompanied by physical injury, for loss of companionship, and for the various elements entering into damage actions.”

Clark & Sons v. Elliot, 251 Ark. 853, 857, 475 S.W.2d 514, 517 (1972). While we do agree that the determination of damages is within the purview of the jury, without a trial court ruling or order before us on the issue of expert testimony, this issue is not ripe for consideration.

This section of the *Durham* decision appears to invite challenge to the admissibility of expert testimony concerning an award for “loss of life damages.” Arkansas has held that the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Cit. 2786 (1993) apply to the admissibility of expert testimony in Arkansas. In the draft affidavit provided as part of my materials, I demonstrate that hedonic damage testimony meets none of the four basic standards announced in the *Daubert* decision. The economist in the *Durham* decision was not named in the decision, but was Stan Smith. The economist for the defense was this author.

Arizona

Arizona has been a significant battleground state. This writer has had a large number of retentions in Arizona cases when Stan Smith has been the “expert” proffering hedonic damages testimony, particularly in medical malpractice actions. The flurry of cases seems to have been triggered by *Ogden v. J.M. Steel*, 31 P.3d 806 (2001), though it is not clear why that decision has caused plaintiff attorneys to think that Arizona is particularly likely to admit expert testimony on the amount of hedonic damages in personal injury actions. Hedonic damage testimony in Arizona wrongful death actions appears precluded by the lack of damage claim for a decedent’s enjoyment of life element. In the *Ogden* decision, Arizona ruled only that “loss of enjoyment of life” damages were different from “pain and suffering damages.” The *Ogden* court cited the decision of the South Carolina Supreme Court in *Boan v. Blackwell*, 353 S.C. 498 (2001) as reaching this same conclusion a few months earlier, but the *Boan* decision has not apparently resulted in making South Carolina a battleground state regarding hedonic damages testimony. States are divided between those that recognize “loss of enjoyment of life” damages in personal injuries as a separate element of damages and those that hold either that general damages should not be divided into subcategories or that “loss of enjoyment of life” is part of “pain and suffering” damages. However, the issue of whether expert testimony is admissible on the issue of hedonic damages is separate from whether “loss of enjoyment of life” testimony by an economist

is admissible. Hawaii, as noted earlier, has specifically held that “loss of enjoyment of life” is an allowable damage recovery element in a wrongful death action, but also held that expert testimony about that element is not admissible.

There is another important legal decision in Arizona that need to be addressed when confronting hedonic damages testimony even though it does not deal directly with hedonic damages. In *Logerquist v. McVey*, 1 P.3d 113 (2000), the Arizona Supreme Court retained the *Frye* standard for admission of expert testimony, rejecting *Daubert* in a 3 to 2 decision. (The two dissents strongly favored adopting *Daubert* standards.) The *Logerquist* Court held that even *Frye* does not apply when the nature of the testimony is not novel scientific evidence, saying: “*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior.” For example, the testimony of a treating physician is not required to meet *Frye* general acceptance standards in order to be able to testify about his patient’s medical conditions.

This is important with respect to the hedonic damage issue because a treating psychologist who testified about an injured person’s loss of enjoyment of life would fall under the *Logerquist* exception to the *Frye* standard. A psychologist could not provide dollar values for loss of enjoyment of life, but would be qualified to provide expert testimony based upon both professional observations and upon peer reviewed literature in the field of psychology relating to the objective measurement of happiness. See particularly, Daniel Kahneman’s lead essay on “Objective Happiness,” in Kahneman, Diener, & Schwartz, *Well-Being: The Foundations of Hedonic Psychology*, 1999, Russell Sage Foundation, New York. While “hedonic damages” are “junk science” in economics, hedonic psychology is an accepted part of the field of psychology. Daniel Kahneman is a psychologist who is a Nobel Laureate in Economics because of his important contributions to economics in this and other areas. Psychologists are, by education and training, prepared to measure happiness in a clinical context. Those measurements are not in dollar terms, but may well be useful to juries who are asked to make awards for loss of enjoyment of life.

Therefore, it is important for a defense economic expert to stress that there is nothing clinical about measurements of hedonic damages in the reports of plaintiff economic “experts” proffering hedonic damages testimony. Robert Johnson would have the same range of values for the enjoyment of anyone’s life, regardless of age, health, wealth, prior psychological condition or any other difference. Stan Smith would have the same \$130,000 per year in 2006 for the “whole” enjoyment of life of any individual regardless of age, health, wealth, prior psychological condition or any other difference. Stan Smith’s assumed percentage reductions for his personal injury calculations are based on sheer speculation on Stan Smith’s part, for which he has had no education or training in the field of economics. If the *Logerquist* exception for “when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior” does not apply, Arizona relies on the *Frye* “general acceptance in the profession” standard [*Frye v. United States*, 54 App. D.C. 46, 293 F 1013 (D.C. Cir. 1923)]. It can be easily demonstrated by a qualified economic expert that

“hedonic damages” testimony is not generally accepted in the field of economics.

Stan Smith will attempt to shift the question from whether his method for developing calculations for lost enjoyment of life is generally accepted to whether the VOL literature is accepted. However, but the issue is not whether the VOL literature is an accepted part of economic literature, but whether Stan Smith’s (or another “expert’s”) misuse of that literature to derive calculations is generally accepted. In the draft affidavit provided with this paper, that distinction is drawn at length. The role of affidavits in a motion in limine hearing will be discussed further below.

Georgia

Georgia has a unique wrongful death statute that treats damages as damages to the estate of a decedent, independent from losses that may be suffered by survivors of a decedent. With respect to lost earnings, the estate of a decedent may recover the “full life” of a decedent, but not for losses such as solatium, which includes “loss of society, comfort and companionship,” by survivors. [*Elsberry v. Lewis*, 140 Ga. App. 324, 231 S.E.2d 586 (Ga. App. 1971); *Consolidated Freightways v. Futrell*, 201 Ga.App. 233, 410 S.E.2d 751 (Ga. App. 1991)] Unlike most other states, Georgia does not subtract for a decedent’s personal consumption or maintenance from a projection of a decedent’s lost earnings. Possibly based on the “full life” concept in the Georgia Wrongful Death Act, efforts have been made to claim the hedonic damages for loss of enjoyment of life of decedents. However, no reported decision indicates that wrongful death damages include “loss of enjoyment of life” and no reported decision has admitted hedonic damages testimony in personal injury litigation involving surviving injury victims.

The Georgia legislature has recently adopted *Daubert* standards by statute, the probability of being able to defeat hedonic damages testimony at the motion in limine level has increased. There is also language in the statute indicating the witnesses whose testimony has been rejected by other states should not be permitted to testify in Georgia.

Montana

Montana has remained a battleground state apparently in large part due to horrific mistakes made by defense attorneys in *Hunt v. K-Mart*, 1999 MT 125, 294 Mont. 444, 981 P.2d 275 (MT 1999). In that case, the Hunts proffered the testimony of a psychologist, Dr. Velin, and an economist, Dr. Vinso, to testify about the Plaintiff’s hedonic damages losses. The sole issue on appeal was whether the district court erred in admitting hedonic damages testimony. The Montana Supreme Court said, in part:

The grounds upon which K-Mart lodged its objection first became apparent as early as September 9, 1997, when the Hunts disclosed their intention to present expert testimony regarding Norma’s hedonic damages at trial. However, K-Mart failed to file a motion in limine at that time seeking to have this evidence excluded. K-Mart had another opportunity to object to the introduction of this

evidence when the District Court issued its pre-trial order listing the witnesses and exhibits to be used at trial, but again, K-Mart did nothing.

K-Mart finally lodged its objection to the admission of expert testimony on the second day of trial, and a hearing on that objection was held at the time. At the hearing, the District Court inquired whether either party was aware of any appellate decisions regarding the use of expert testimony on hedonic damages. Counsel for the Hunts responded that “there have been decisions in other states . . . that have gone both ways on the subject. Counsel for the Hunts argued that the article relied on by the experts in this case had been published by the National Council of Clinical Economists and that both experts were qualified to testify with regard to that portion of the evidence related to their respective fields of expertise. . .

K-Mart did not dispute that it was aware of the Hunts’ intention to use expert testimony to demonstrate the amount of Norma’s hedonic damages, or that the District Court had required all motions in limine to have been filed by January, 1998. K-Mart did not cite any legal authority to the District Court in support of its position that this kind of testimony is not allowable in the courts of Montana or elsewhere and, when asked whether it was aware of any professional articles attacking the approach used by Drs. Velin and Vinso, K-Mart responded, “Nothing that directly attacks it; no, Judge.”

We conclude that the District Court did not abuse its discretion in allowing expert testimony regarding Norma’s hedonic damages due to the lack of timely and specific objection to the introduction of this evidence at trial.

The following rulings have been made regarding hedonic damages in decisions that were sometimes only reported by LEXIS. In *Hefflinger v. Baggenstos*, 1991 Montana Dist. LEXIS 5, hedonic damages were held not to be a compensable element under the Montana Wrongful Death Act. In *Estate of Bell v. Montana*, 1994 Mont. Dist. LEXIS 613, hedonic damages were held to be allowable for the fourteen hours between the injury and death of Donna Bell, but not thereafter. In *Odland v. Lewis*, 1996 Mont. Dist. LEXIS 635, a motion in limine to preclude the testimony of an unnamed witness to prove the extent and monetary value of an injured person’s hedonic damages was granted. In *Artuso v. State*, 1999 Mont. Dist. LEXIS 1119, the court held that hedonic damages were not permissible under Montana’s survival action. In *Wisseman v. City of Cut Bank*, 2001 ML 5022; 2001 Mont. Dist. LEXIS 2734, a motion in limine was granted precluding the hedonic damages testimony of Dr. Robert A. Velin, a psychologist. In *Christofferson v. City of Great Falls*, 2001 ML 2326; 2001 Mont. Dist. LEXIS 3560, the hedonic damages testimony of Stan Smith was excluded in a wrongful death action after a *Daubert* hearing in a wrongful death action. In *Buxbaum v Trustees of Indiana University*, 2002 ML 2937; 2002 Mont. Dist. LEXIS 3141, the testimony of Stan Smith was excluded by a judge who indicated in his order that he had admitted Smith’s testimony in 1997, but had now been

persuaded that the weight of evidence was against such testimony. *Buxbaum* was a wrongful death decision.

The appellate record with respect to the admissibility of hedonic damages testimony is indecisive. The decision allowing hedonic damages testimony in *Hunt v. K-Mart* (discussed above, *op. cit.*) to stand was based on failures of the defense to properly challenge the admissibility of that testimony. The Montana Supreme Court heard arguments for and against hedonic damages in *Christofferson v. City of Great Falls*, 2003 MT 189; 316 Mont. 469; 74 P.3d 1021; 2003 Mont. LEXIS 360, but upheld the defense verdict in that case and did not reach the issue of hedonic damages. In *Hendricksen v. State of Montana*, 2004 MT 20; 319 Mont. 307; 84 P. 3d 38 (2004), the Montana Supreme Court did not use the term “hedonic damages,” but held that:

Damages for the loss of ability to pursue an established course of life compensate for impairment of the ability to pursue one’s chosen pursuits in life, calculated separately from the loss of one’s earning capacity. . . A plaintiff is “entitled to recover, in the case of permanent injuries, a reasonable compensation for the destruction of his capacity to pursue an established course of life.” *Rasmussen v. Silbert*, (1969), 153 Mont. 286, 297, 456 P.2d 835, 841.

The most recent appellate decision regarding hedonic damages was *Dorn v. Burlington Northern Santa Fe Railroad Company*, 397 F.3d 1183 (9th Cir, 2005). In that decision, the trial court judge allowed Stan Smith to testify about hedonic damages in general, but not to offer specific calculations about the lost enjoyment of life of Larry Dorn. There had been previous judicial decisions to preclude hedonic damages testimony and attorneys for the defense probably felt that they would win without a great deal of trouble. They did not make the kinds of mistakes that the defense made in *Hunt v. K-Mart* (*op. cit.*). Defense attorneys were aware of prior Montana trial court decisions holding that hedonic damages testimony was inadmissible and they should have won with the motion in limine that they filed. However, the defense brief supporting the motion in limine to bar the testimony of Stan Smith could have been made stronger with input from their own economic expert.

The trial court decision in *Dorn* was reversed by the 9th Circuit on a number of grounds, one of which had to do with hedonic damages. However it considered several questions relating to hedonic damages. The first involved the availability of hedonic damages as an element of damages in a wrongful death case. On this issue, the 9th Circuit said that: “It appears that the Montana Supreme Court has not taken a firm position on the availability of hedonic damages.” The 9th Circuit therefore did not regard the trial court decision to allow testimony directed to that element to be reversible error. The 9th Circuit also questioned the usefulness of some aspects of Stan Smith’s testimony, but did not reverse on this ground either. The error the 9th Circuit found to be reversible error was that the trial court judge had not permitted Ireland’s testimony in opposition to hedonic damages. The trial court judge had concluded that Ireland’s opinions were an attack on the legal determination that Smith’s testimony was admissible. The 9th Circuit held

that it was error for the district court to bar Ireland's testimony.

Based on the decisions to date, hedonic damages can be challenged in Montana wrongful death and survival actions as damages that are not available, other than between the date of injury and date of death. Hedonic damages should also be challenged in Montana on the grounds that they are unscientific misuses of the VOL literature.

Ohio

Damages for the lost enjoyment of life of a decedent are not available under the Ohio Wrongful Death Act. Such damages are available under the Ohio Survival Action only between the date of injury and death, *Tinch v. City of Dayton*, 77 F. 3d 483 (6th Cir. 1996). Ohio does allow recovery for "loss of the ability to perform life's usual functions," *Fantozzi v. Sandusky Cement*, 64 Ohio St. 3d 601 (1992) in personal injuries with surviving and conscious injury victims. However, this element of damages is not available if the victim did not have time to form the ability to enjoy life, *Ramos v. Kuzas*, 65 Ohio st.3d 42 (1992), or if the victim is in a persistent vegetative state, *Watkins v. Cleveland Clinic Found.*, 130 Ohio App. 3d 262; 719 N.E.2d 1052 (Ohio App. 1999). A number of Ohio decisions have precluded expert testimony about hedonic damages in personal injury matters as being unscientific under a *Daubert* standard, particularly *Abbott v. Jarrett Reclamation Services*, 132 Ohio App., 3d 729, 726 N.E.2d 511 (Ohio App. 1999) and *McGarry v. Horlacher*, 2000 Ohio 3161 (Ohio App. 2002).

However, the only reported decision that has allowed hedonic damages testimony to stand under the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 125 L. Ed. 469 (1993) was an Ohio decision in *Lewis v. Alfa Lavel Separation, Inc.*, 128 Ohio App.3d 200 (1998). To the extent that Ohio remains a battleground state, it does so because of the *Lewis* decision. In *Lewis*, the trial court judge admitted the hedonic damages testimony of Dr. Michael Brookshire. The *Lewis* court cited a number of prior decisions rejecting hedonic damages testimony, but found that there was no abuse of discretion under *Daubert* by the trial court judge, suggesting that the admission fell within the "shaky but admissible" prong of *Daubert*. The *Lewis* Court repeated several times that the judges on that court would not have admitted Dr. Brookshire's testimony, but also suggested that the defense had failed to do its job, saying:

[W]e find no abuse of discretion with the trial court's decision to admit Dr. Brookshire's testimony. Although we might have chosen to exclude Dr. Brookshire's testimony, we find nothing unreasonable, arbitrary, or unconscionable with the trial court's decision to admit Dr. Brookshire's testimony. . . Appellant presented no evidence to prove that Dr. Brookshire's methodology was unscientific, not generally accepted, or otherwise infirm.

We acknowledge that although appellant presented no evidence to prove that Dr. Brookshire's methodology was flawed, appellant cited various federal district cases that excluded willingness-to-pay hedonic damages by Stan Smith, an economist who had apparently co-authored *Economic/Hedonic Damages: The*

Practice Book for Plaintiff and Defense Attorneys (1990) with Dr. Brookshire. . .

We also agree that these cases provide cogent reasons for excluding Dr. Brookshire's testimony in the case *sub judice*.

Nevada

Nevada has been a battleground state for the hedonic damages issue in personal injury matters with surviving victims for some time. Hedonic damages are not allowed in a Wrongful death case. Before 2004, there were no reported decisions concerning hedonic damages, but there were no strong appellate decisions regarding the admission of expert testimony that would have signaled that hedonic damages testimony was likely to be rejected.

In 2004, the Nevada Supreme Court held that the trial court was not in error for admitting the hedonic damages testimony of Robert Johnson in *Banks v. Sunrise Hospital*, 102 P.3d 52 (Nevada 2004). Johnson had testified that Banks' hedonic loss from being in a persistent vegetative state fell between \$2.5 million and \$8.7 million based on consumer purchase and wage-risk studies in the value of life literature. The *Banks* court said of Johnson's testimony:

Johnson's methodology for the valuation of hedonic damages assisted the jury to understand the amount of damages that would compensate James for the loss of his enjoyment of life. Johnson's valuation theories were matters within the scope of his specialized knowledge concerning the monetary value of intangibles. Moreover, the probative value of Johnson's testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, the district court properly exercised its discretion in qualifying Johnson as an expert and permitting him to testify concerning hedonic damages. We observe that Sunrise had the ability to use traditional methods of disputing Johnson's testimony, such as presenting witnesses on its behalf to persuade the jury that Johnson's methods were inaccurate or unreliable. The jury was then free to determine whether Johnson's valuation theories were credible and to weigh his testimony accordingly.

Based on this near endorsement of Robert Johnson's methodology, the focus of challenges to the admission of hedonic damages testimony should be on the lack of credibility of the methods being used. The affidavit attached as an exhibit to this paper provides an indication of the problems with the methods used by Dr. Stan Smith, but does not cover the methods used by Robert Johnson or the weaknesses of Mr. Johnson's credentials. The following points are important.

Robert Johnson has an M.B.A from Stanford University. He has never been involved in producing any value of life studies, nor would he have done so as part of obtaining his M.B.A. Since Mr. Johnson's initial valuation in the Banks case was from 1999, I believe that the Banks court incorrectly described how Mr. Johnson derived the range from \$2.5 million to \$8.7 million and that method used was the same as one used in Mr. Johnson's report for *Barden v. Griffiths*

on May 04, 2004. In Banks, Mr. Johnson relied on values of life taken from articles by Miller in 1990 and Moore and Viscusi in 1988. Today Robert Johnson is using a value from a different Viscusi article written in 2004 (as mentioned earlier). The information provided in the newer paper can be used even more effectively to challenge the legitimacy of Johnson's misuse of Dr. Viscusi's paper.

To support his method, Mr. Johnson used a "Bibliography" composed of five numbered publications. Two of those publications were the papers authored by Dr. Ted Miller and Drs. Moore and Viscusi from which Mr. Johnson derived the annual values of \$2.5 million (from Miller) and \$8.7 million (from Moore and Viscusi). Dr. Viscusi has testified and written published papers that make it clear that Dr. Viscusi does not believe that the value of life literature should be used in compensatory contexts for personal injury matters. Dr. Miller believes it is appropriate to do so. In the third listing, Mr. Johnson incorrectly cites a book by Dublin and Lotka, *The Money Value of a Man*, as having been published in 1940. There are two editions of that book, one from 1930 and one from 1945. There was no edition in 1940.

In the fourth listing, Mr. Johnson cited a paper by Thomas Schelling, a recent Nobel Laureate. Thomas Schelling (Nobel Laureate in 2005). Dr. Schelling was the expert called upon by the economics profession to write the entry on "the value of life" for *The New Palgrave Dictionary of Economics*, MacMillan Press, Ltd., New York, 1987. In his entry on the "Value of Life", Dr. Schelling had this to say:

It is not identified lives but statistical lives - the reduction of some mortal hazard to some part of the population - whose value is our topic. . . . Despite emphasis that our topic is *risk reduction*, there is temptation to talk about the value of a *life* saved. If an individual will pay annually (or forego in wages \$100 to reduce some mortal risk to himself from 1:10,000 annually to 1:20,000 - a reduction of 1:10,000 - it is convenient to say that he 'values his own life' at \$2 million. That sounds as if, confronted by certain death, he would come up with \$2 million to stay alive. But this is not what we meant, and it does not follow from the small-risk calculation. (In particular, there would be income effects if the risk-eliminating payment rose from \$100 to \$100,000.) What we mean is that 30,000 identical individuals identically at risk would collectively pay \$2 million for each yet unidentified averted death among ourselves. A terminological proposal is suggested by the unit of measure in part-time hiring, the FTE, 'full-time equivalent'; we can say that our subject values reducing the risk to his own life at \$2 million per FLE, 'full life equivalent.'

This description obviously does not support Mr. Johnson's use of Dr. Schelling's work.

As the fifth listing, Mr. Johnson cited a paper by C. P. Gillette and Thomas D. Hopkins. Dr.

Hopkins testified in his deposition in *Martel v. Levy*, Cause No. 892-2337, Circuit Court of the City of St. Louis, on October 31, 1991, that Dr. Smith's (not Mr. Banks') methods represented a misuse of Dr. Hopkins' work. The nature of Dr. Hopkins' criticism would carry over to Mr. Johnson's methods.

A motion in limine to preclude Mr. Johnson's testimony could have included the following points: Mr. Johnson is not an expert whose educational background and experience would include work with or use of the value of life literature. Mr. Johnson has done no value of life research in that area himself and his methods are rejected by those who have done that research. The information provided here about his citations should be sufficient to make it clear that Mr. Johnson's testimony could be misleading to a jury. There is no "economics of intangibles" that could fall "within the scope of [Mr. Johnson's] specialized knowledge concerning the monetary value of intangibles." There is no such specialized knowledge in the field of economics. The danger of unfair prejudice is high. Having an alleged expert testify that some range of dollar values is relevant to a decision predisposes a jury to think in terms of that range, especially when the testimony of the opposing expert is that the numbers being provided are meaningless.

As background, the *Banks* case was a retrial of an earlier decision that had been reversed and remanded by the Nevada Supreme Court. This writer was the defense expert before both trials. This writer was not consulted about points made in the motions in limine before either trial and was not consulted about points made in appeal motions after the first or second decision and has never seen copies of any of those motions. This writer testified in the first trial, and was flown to Las Vegas to testify in the second trial, but the defense made a strategic decision at the last minute not to have this writer testify in the second trial. This may or may not have made any difference.

New Mexico

In *Romero v. Byers*, 872 P.2d 840 (NM 1994), the New Mexico Supreme Court held that hedonic damages were available in a death case and that, at the discretion of the trial court judge, an economic expert could be admitted to testify about the dollar value of those damages. In the following year, the New Mexico Court of Appeals held that hedonic damages were also available and expert testimony about those damages in personal injuries was permissible in *Sena v. New Mexico State Police*, 119 N.M. 471 (NM App. 1995). This decision was reaffirmed in *Couch v. Astec Industries, Inc.*, 2002 NMCA 84 (NM App. 2002).

In *Couch*, Brian McDonald had testified at the trial court level that the value of a statistical life lies between \$500,000 and \$11 million, with \$3 million as the average. McDonald testified that this figure represented "the value of an entire life from cradle to grave and included earnings as well as intangible enjoyment." McDonald declined to specify a percentage of a whole life that the plaintiff lost because of his injuries. The defense appealed on the basis that failure to specify a percentage rendered his testimony unhelpful to a jury. The Court of Appeals responded: "To the contrary, if McDonald had complied and offered a specific value for Plaintiff's hedonic damages claim, he would have intruded improperly into the fact finder's domain." The *Couch* court cited *Smith v. Ingersoll-Rand*, 214 F.3d 1235 (10th Cir. 2000) as indicating that the role of an

economic expert regarding hedonic damages in New Mexico was one of explaining the general concept of hedonic damages and the nature of the statistical studies in the value of life literature.

The *Couch* decision implies that hedonic damages calculations of the sort prepared by Stan Smith, which provide specific annual values for life enjoyment in the range of \$130,000 per year, would invade the province of the jury. This might particularly be the case in a wrongful death action, given that Stan Smith's method results in one specific number.

In New Mexico, it seems likely that a trial court will permit an Ingersoll-Rand type of testimony that does not place specific dollar values on a decedent's life. It is not clear what types of testimony would be admitted in personal injuries involving surviving victims. Testimony focusing on the fact that the range of values found in the Teng study was between \$0 and \$99 trillion might be useful.