

Recent Legal Decisions Regarding Hedonic Damages: An Update

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Thomas R. Ireland
Department of Economics
University of Missouri at St. Louis
8001 Natural Bridge Road
St. Louis, MO 63121
Tel: 314/516-5558
Fax: 314/516-5352
E-Mail: ireland@jinx.umsl.edu

Abstract

This paper examines the trends in court decisions involving hedonic damages as a follow up to an earlier survey of cases described by Ireland, Johnson and Taylor in a 1997 article. The trend continues to be against the admissibility of expert economic testimony on hedonic damages or other methods for placing dollar values on intangible losses. However, there have been a few successes for hedonic damage testimony that receive special attention in this paper. The paper also addresses special factors that apply to decisions in the states of New Mexico, Louisiana, Mississippi, Ohio and Texas. It also examines the nexus between law and economics concerns about “value of life” issues in tort litigation and what judges are actually considering. Finally, it provides an analytic examination of a special “whole life” issue posed by the treatment of survival actions in New Mexico in conjunction with requirements of consciousness for awards of hedonic damages in other states.

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Introduction

In a 1997 paper, Walter D. Johnson, Paul Taylor and this author [Ireland, Johnson and Taylor, 1997; henceforth IJT] provided a review of reported legal decisions regarding the admissibility of testimony by economic experts on hedonic damages since the decision of the United States Supreme Court in *William Daubert et al v. Merrell Dow Pharmaceuticals, Inc.* (June 28, 1993).¹ The focus of that paper had been on how judges viewed the hedonic damage concept from the standpoint of the *Daubert* tests for admissibility of “scientific” expert testimony. That paper also covered one immediately pre *Daubert* case, *Livingston v. U.S.* (1993) to show that the *Daubert* decision represented a continuation of a trend in the federal courts toward closer examination of claims of scientific accuracy, particularly with respect to hedonic damage analysis. Appendix I of this paper provides a list of cases covered in IJT, including two 1996 decisions that were announced subsequent to the completion of the text and for which limited coverage had provided in the first footnote of that paper. The purposes of this paper are both to update that paper and to look at other issues in legal decisions regarding hedonic damages.

The Nature of the Lexis Search in this Paper

The basis of this paper is a Lexis search made during the month of November, 1999 using the keyword “hedonic.” The search period chosen was a six year time period from 1994 through most of 2000. The search on that basis found eight decisions of U.S. Federal Courts of Appeals, twenty six decisions at the federal district court level, and the following numbers of cases at the state level: California 2, Colorado 1, Hawaii 2, Idaho 1, Illinois 1, Kentucky 1, Louisiana 6,

Mississippi 2, Missouri 1, Montana 1, Nebraska 4, New Hampshire 1, New Jersey 2, Ohio 8, Pennsylvania 1, South Dakota 1, Tennessee 3, West Virginia 1, and Wyoming 1. While these numbers might seem large compared with the 14 cases covered in IJT that is not actually the case. The criteria for the searches reported in IJT was that the case specifically involve the admissibility of hedonic damage testimony by an economist and, with the exception of *Livingston*, have been reported after June 28, 1993. Most of the cases considered in the current search would not have met those criteria and would not have been covered for that reason.

It is important to remember that only a small number of cases are “reported.” The vast majority of state trial court decisions are not reported to any of the legal reference services, which means that they cannot be “found” in a search of the sort conducted for this paper. The 8th District Federal Court of Appeals decision in *Anastasoff v. United States* in May, 2000 recently ruled that unpublished opinions have precedential value, but cases must be identified before they can be taken into account. At this author’s request, Stan V. Smith provided a list of 128 of his own cases in which hedonic damages have been admitted.² However, since that list does not include cases involving other experts or cases in which Smith’s testimony was not admitted, it is not possible to evaluate the general direction of unpublished cases. In general, however, it presumably remains true that reported and published opinions have more precedential value than unpublished opinions.

The following observations emerged from this survey of cases:

(1) The general trend is that hedonic damage testimony by economic experts continues to be rejected by the courts.

The IJT paper reviewed a total of 13 cases and included brief coverage of two additional

cases in its first footnote. In all but two of those cases, the decision of the court was not to admit hedonic damage testimony by an economist. The two exceptions were both state court decisions in New Mexico, which also provided the only instance in the current search in which an economist was permitted to testify in a reported federal district court case.

The trend in the current search continues very strongly against hedonic damage testimony by an economist, particularly in federal courts. Among the 26 federal district court decisions found, 11 decisions involved the admissibility of economic testimony. Of the 11 cases, three were Louisiana cases, which do not hinge on narrowly scientific aspects of hedonic damage testimony, as was discussed in the previous section. One of those cases was the New Mexico case mentioned above, which will be discussed in the section on New Mexico law below. The other seven reported district court decisions rejected economic testimony by an economic expert on scientific grounds. Compared with the range of arguments presented in the IJT paper, no new ground was broken by the five of these decisions that were not included in IJT. None of the eight federal court of appeals decisions found in the current search involved admissibility of economic testimony by an economist.

The real magnitude of the problem in federal courts faced by proponents of hedonic damages is conveyed by two federal district court decisions that did involve any issue of hedonic damages. In the first, *U.S. v. Starzepyzel* (1995) the issue was the admissibility of a handwriting expert. Having considered and rejected the possibility that handwriting expertise might be considered “junk science,” the court stated [at *1029]:

Yet, as distinguished from such discredited ventures as hedonic damage expertise, clinical ecology, trauma-cancer expertise or the Benedictin plaintiffs’ statistical machinations, forensic documentation examination does involve true expertise, which may prove helpful

to a fact-finder. FDE expertise is not properly characterized as scientific, but as practical in character...

In the second, *Saffrani v. The Werner Company* (1997), the judge made a decision to admit the testimony of William C. DeBlasio pursuant to a *Daubert* challenge. DeBlasio was mechanical engineer with a masters degree and “has had considerable experience in the disciplines of structural deformation and dynamic testing.” In support of his decision, the judge cites the *U.S. v. Starzepyzel* decision as “distinguishing forensic science from such ‘discredited ventures as hedonic damage expertise, clinical ecology, trauma-cancer expertise..’” In both of these cases, hedonic damage expertise had become the primary example of “discredited junk science.”

Among the state cases found in the current search: The Colorado Court of Appeals rejected hedonic damage testimony by an economist on scientific grounds, *Scharrel v. Wal-Mart Stores, Inc.* (1997) One California case rejected hedonic damages on scientific grounds, *Loth v. Truck-a-way Corporation* (1998). Recent decisions of the Mississippi and Kentucky Supreme Courts are discussed below, but denied admissibility of hedonic damage testimony. The New Hampshire Supreme Court, in *Marcotte v. Timberlane/Hampstead Sch. Dist.* (1999) said:

Moreover, no one to our knowledge has been able to devise a formula by which the compensation for the loss of life can be determined with precision. Damages for this loss, like damages for pain and suffering, are too subjective to lend themselves to such exactness....Consequently, the trial court was correct in not permitting economic testimony to be used in computing loss of life damages. We rely heavily upon the jury and the trial court, who hear the testimony and weigh the facts, to reach a just result. While we might not have awarded the same amount of damages had we been the fact finder in this case, we cannot say that no reasonable person could have reached such a result.

(2) In spite of the general trend, there were a few qualified successes for proponents of hedonic damage testimony.

Hedonic damage testimony by an economic expert was admitted in one federal district

case in New Mexico tried under New Mexico law and upheld by a Federal Court of Appeals. The Montana Supreme Court refused to overturn a trial court decision to admit hedonic damages, though for reasons relating to the failure of the defense to maintain its objection. Hedonic damages at the trial court level in a personal injury were accepted in a decision of the Mississippi Court of Appeals even the Mississippi Supreme Court had rejected hedonic damages in a death case. There was also a Missouri case in which the Missouri Court of Appeals failed to overturn a trial court decision in which hedonic damages had been admitted, though suggesting that the reason was that the testimony of the economic expert was irrelevant to the outcome. Finally, the Ohio Court of Appeals accepted hedonic damages as “shaky but admissible evidence” in a personal injury case. Each of these cases is interesting in its own right and will be discussed below. The qualified nature of the admissions suggests continued difficulties for the hedonic damage concept in courts of law.

To adequately discuss these qualified exceptions to the general trend against allowing hedonic damage testimony, it is important to understand the contexts within which these decisions were reached. This will result in reviewing earlier decisions to set the stage for the more recent decisions:

New Mexico. As was indicated above, the one federal case in which hedonic damage testimony was admitted was tried under New Mexico law. Thus, the legal context for that case are prior cases in New Mexico. In the IJT paper, there had been only two reported decisions after the *Daubert* decision in 1993 that suggested that hedonic damage testimony by an economist might be admissible. The first of these cases was *Romero v. Byers* (1994). In *Romero*, the New Mexico Supreme Court ruled that, at the discretion of a trial court judge, an economist could be

permitted to provide hedonic damage testimony in a death case. The second was the New Mexico Court of Appeals decision in *Sena v. New Mexico State Police*. (1995) extending the *Romero* ruling to personal injury cases. IJT also briefly discussed a federal district court decision in *McGuire v. City of Sante Fe* (1996) which was similar to other federal cases in rejecting the concept of hedonic damages on scientific grounds. *McGuire* effectively ruled that while hedonic damages might be admissible under New Mexico state law, it could not meet federal standards for admissibility.

The current search turned up one new federal district case, *Smith v. Ingersoll-Rand* (1997), which was subsequently upheld by the 10th Circuit Federal Court of Appeals in *Smith v. Ingersoll-Rand* (2000).³ In the district court decision, the federal judge ruled that the plaintiff's economic expert Stan Smith (no relationship to the plaintiff) could explain the concept of hedonic damages, but not present specific estimates of the loss suffered by the plaintiff. She also indicated in her opinion that *Smith* is a diversity action in which New Mexico law and not federal law is applicable. In light of that distinction, the judge then considered whether the *Daubert* standard applied in *Smith* and concluded that *Daubert* did not apply. She said:

Stan Smith would testify based upon economic studies that he has applied to a valuation of hedonic damages. This testimony is not one that requires the rigors of the scientific process; it falls into the category of social science, a discipline dealing with human behavior and societal values that does not easily lend itself to scientific evaluation. Stan Smith is a nonscientific expert whose credentials include substantial formal instruction in the technique of a discipline. See, e.g., Edward J. Imwinkelried, "The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony," 15 Cardozo L. Rev. 2271, 2278 (1994). The Court finds, therefore, that Daubert does not apply in this case, and that the proper analysis of the proposed testimony lies in Rule 702.

Recognizing that the touchstone of Rule 702 is helpfulness to the trier of fact...the Court is nevertheless concerned here with the reliability of Stan Smith's proposed testimony.

Most troubling to the Court is that the starting points for Stan Smith's analysis are studies that greatly differ in their valuation of a statistical human life. See *Mercado v. Ahmed*, 756 F. Supp. 1097 (N.D.Ill 1991), *aff'd*, 974 F.2d 863 (7th Cir. 1992); *Mercado v. Ahmed*, 974 F.2d 863 (7th Cir. 1992); *Ayers v. Robinson*, 887 F.Supp. 1049, 1059 (N.D.Ill. 1995). This lack of reliability shows the potential for Stan Smith's valuation testimony to be both unhelpful and confusing to a jury. Thus, applying Rule 702 to the proposed testimony, the Court will not allow Stan Smith to place a value on Ron and Lucy Smith's hedonic damages.

The Court will not, however, completely exclude Stan Smith's testimony. Stan Smith can and should quantify for the jury, if appropriate, his opinion as to Ron Smith's loss of wages both as a function of an average work life and full time employment, and to the value of lost household services. Moreover, Stan Smith can also present his opinion as to the value of Lucy Smith's losses with respect to wages and household services. Lastly, Stan Smith can help the jury, without referring to monetary values, understand the meaning of hedonic damages.

The Court of Appeals for the Tenth Circuit affirmed the district court decision on June 6, 2000. The Court of Appeals decision made it clear that Smith was permitted to testify only for purposes of "explaining hedonic damages and how they differ from other damages, particularly pain and suffering." The Court of Appeals, however, went on to say:

Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as the court system. Troubled by the disparity of results reached in published value-of-life studies and [*20] skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert* have unanimously held quantifications of such damages inadmissible.

The Appeals Court then went on to cite a number of the cases discussed in the IJT paper and the current paper in establishing the validity of this characterization. It is to be noted that the 10th Circuit Court of Appeals has even more recently upheld in *Baron v. Sayre Memorial Hospital* (July 24, 2000) a trial court judge's opinions based on difficulties in distinguishing between hedonic damages and other types of damages. The *Baron* decision involved an Oklahoma case in which a district court judge had admitted evidence of the plaintiff's criminal record as it related to

an award for hedonic damages, but did not involve testimony by an economic expert on that subject. The Appeals Court in *Baron* quoted the district court decision that “it takes a discerning mind...to make a strict differentiation between hedonic damages as a separate category and the loss of pleasure of life as a pain and suffering--mental pain and suffering component...”

Montana. In *Hunt v. K-Mart* (1999), the Supreme Court of Montana refused to overturn the trial court judge’s decision to admit hedonic damage testimony. This case is interesting primarily in the degree of ineptitude of the attorneys for the defendant K-Mart. The Court refused to overturn the trial court’s admission of hedonic damage testimony, saying:

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 a timely and specific objection to the evidence at trial. Moreover, because the District Court did not err in allowing this evidence in the first instance, we hold that the District Court did not abuse its discretion in denying K-Mart’s motion for a new trial on the grounds that the admission of evidence resulted in an unfair trial and excessive damages.

The defense had been notified of the plaintiff’s intent to present hedonic damage testimony far in advance, but had failed to do any research in preparation for challenging this testimony at trial. The language of the *Hunt* Court appears to suggest that K-Mart might have prevailed with proper preparation to challenge the admissibility of hedonic damage expert testimony. The *Hunt* Court carefully documents this failure to prepare for challenge in its decision, pointing out that:

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 (the psychologist) and Vinso (the economist), K-Mart responded, ‘Nothing that directly attacks it; no, Judge.’

Missouri. In *Schuman v. Missouri Highway and Transportation Commission* (1995),⁴ the Missouri Court of Appeals for the Western District held that the trial court judgement was

affirmed. At the trial court, Jack (John O.) Ward, the plaintiff's economic expert, had been allowed to join a psychologist in testifying that Peter Schuman had hedonic damage losses of \$496,249. The challenge of the Commission was not that hedonic damage losses are a compensable element of general damages, but that the use of an expert witness to calculate these damages is improper. On this matter, the Court discussed the fact that Missouri has not yet taken a position on whether the *Daubert* decision superceded the decision in *Frye v. United* (1923).

The *Schuman* Court said about the hedonic damage element in the appeal of the trial court decision:

We need not decide the issue because we find that even if it was error to allow Dr. Ward's testimony (fn 9) there was no prejudice to the Commission. As noted previously, Dr. Ward calculated Schuman's lost enjoyment of life damages at \$496,249. This figure, of course, was being presented merely as an element of Schuman's general damages resulting from the injuries he sustained. It did not, nor was it intended to, comprise all elements of general damages. Yet the jury found only \$191,000 in total damages, of which only 70% was attributable to the Commission, resulting in a net judgment to Schuman of \$133,700 (and subsequently amended to the \$100,000 cap).

In this context, footnote 9 is quite revealing. The *Schuman* Court said: "While, as indicated, we do not decide whether expert testimony on hedonic damages is admissible, we observe that most jurisdictions addressing the issue have rejected such testimony." The Court then cites a long list of cases rejecting hedonic damage testimony, and adds:

Most of these cases applied the *Daubert* analysis. Schuman cites *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987), as a case where expert testimony on hedonic damages was approved. However, *Sherrod* was reversed by the court, en banc, on other grounds. 856 F.2d 802 (7th Cir. 1988) Moreover *Mercado* was decided later, and appears to have settled the issue and, in effect, overruled *Sherrod*. We have found no other cases approving this type of testimony.

Mississippi. In *K.M Leising, Inc. et al v. Butler* (1999), the Mississippi Court of Appeals ruled that the trial court had not committed reversible error in admitting hedonic damage

testimony by Stan Smith in a personal injury case. This was significant because it followed the *Upchurch* decision of the Mississippi Supreme Court specifically disallowing hedonic damage testimony in a wrongful death case (discussed below). The *Leising* Court specifically addressed the *Upchurch* decision [at *23]:

We can find no Mississippi case directly on point on the question of whether loss of enjoyment of life is an element of damages in a survival personal injury action. The Mississippi Supreme Court confronted this issue in the wrongful death context in *Upchurch v. Rotenberry*, 1998 Miss. LEXIS 524, 96-C A-01164-SCT (Miss. Oct. 15, 1998). While the teaching on the issue in wrongful death was obiter dictum, we nevertheless find the discussion helpful in the resolution of the issues before us.

The *Leising* Court then raises an issue (that will be discussed below in the section on the issue of “whole life”) concerning whether an individual who is not conscious can suffer hedonic losses. The *Leising* Court indicates that [at *26]:

We read *Upchurch* narrowly to hold only that hedonic or loss of enjoyment damages are not allowable in a wrongful death action absent some evidence that the decedent suffered a debilitating injury which persisted for a period of time prior to death and that in a proper case, evidence of loss of enjoyment of life damages might be admissible.

Then [at *28], the Court adds:

While the weight of authorities who have considered this issue have concluded that expert testimony is inadmissible, (fn 2) we chose here to pretermitt the issue and hold, for the reasons discussed below, that the admission of Stan Smith’s testimony was harmless error even if it should not have been allowed.

Footnote 2 provides a list of cases in which hedonic damage testimony was rejected and then also provides an even longer list in the Appendix to the case. The Court then goes on to argue that the amount of hedonic damages awarded in the case is justified by other evidence so that Smith’s testimony, even if in error, did not prejudice the case in a way that would have warranted reversal of the trial court decision. The dissent to this decision written by Justice McMillin and joined by

two other dissenting justices strongly argues that the admission of Smith’s testimony should have been reversible error, providing an extended discussion of his reasons for believing that Smith’s testimony was not scientifically accurate or reliable.

Ohio. In the current search, Ohio produced eight cases in response to the keyword “hedonic.” That was two more than the second highest, which was six cases in Louisiana. Nebraska had four cases, but no other state had more than two and only eighteen states had any at all. The first Ohio case ruled that hedonic damages were not available in a death case and hence that economic testimony could not be presented. The second, which will be discussed below, ruled that hedonic damages are not available to a person in a persistent vegetative state. The third case is the primary focus of this section. The fourth case was a “lost chance of survival case” in which testimony about lost earnings was allowed. The fifth case involved a grant of summary judgement. The sixth case was a legal malpractice case in which the court granted summary judgement. The seventh case mentioned a key underlying Ohio case, *Fantozzi v. Sandusky Cement* (1992), but did not involve an economist. The eighth case ruled that hedonic damages were recoverable in a personal injury, but did not involve an economist.

In the third Ohio case, *Lewis v. Alpha Lavel Separation, Inc.* (1998), the Ohio Court of Appeals overruled an objection from the defendant that Michael L. Brookshire had been permitted to present hedonic damage testimony in a personal injury case. The court cited the fact that in 1992, the Ohio Supreme Court in *Fantozzi* permitted recovery for “loss of the ability to perform the plaintiff’s usual functions.” The *Lewis* Court then cited a second 1992 case, *Ramos v. Kuzas* (1992) in summarizing *Fantozzi* as follows:⁵

In *Fantozzi*, we observed that the “loss of ability to perform the plaintiff’s usual functions”

(i.e., loss of enjoyment of life) damages can be categorized as either “basic” or “hedonic” in form. “Basic losses” or disability losses include the inability to perform the basic mechanical body movements of walking, climbing stairs, feeding oneself and driving a car. 64 Ohio St.3d at 614-615, 597 N.E.2d 241 at 484. “Hedonic losses” include the inability to perform the plaintiff’s usual specific activities which had given pleasure to this particular plaintiff, such as playing golf, dancing, bowling, playing musical instruments, and engaging in specific outdoor sports.

The *Lewis* court noted that the issue at hand was whether the trial court had abused its discretion in admitting Dr. Brookshire’s testimony. The court stated [at *10]:

...we 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 unfirm.

We acknowledge that although appellant presented no evidence to prove that Dr. Brookshire’s methodology was flawed, appellant cited various federal district court cases that excluded willingness-to-pay hedonic damages testimony 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....

The Court then cited a number of those cases and added:

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

The Court discussed those “cogent” reasons at length before repeating:

Once again we note that although we agree with appellant that the above cases provide cogent reasons for excluding Dr. Brookshire’s testimony, we find no abuse of discretion with the trial court’s decision in the case *sub judice* to admit Dr. Brookshire’s testimony. We cannot say that the trial court’s decision was arbitrary, unreasonable or unconscionable. We find that the evidence in question falls into the “shaky but admissible” category of evidence envisioned in *Daubert*.

The *Lewis* Court seemed to go out of its way to indicate that it would not have admitted Dr. Brookshire’s hedonic damage testimony, that it considered such testimony “shaky,” but that the shakiness did not rise to the level of an abuse of discretion that would have warranted

overturning the decision under a *Daubert* standard. While this was hardly a ringing endorsement, it was the first time in any case that any Court had ruled in a reported decision that hedonic damage testimony could pass a *Daubert* test, even on a “shaky” basis.⁶

(3) The legal definition of hedonic damages is no longer tied to economics.

It is important to understand the specific meaning of the term “hedonic” in the context of this search. Only one of the cases mentioned above was based on a use of the word “hedonic” other than in the context of “hedonic damages.” This was a federal court of appeals decision involving use of an hedonic price index that had nothing to do with the personal loss of enjoyment of any human being. Stan Smith’s use of the term “hedonic damages” in *Sherrod v. Berry* (1984, 1987, 1988) has made “hedonic damages” a term of art that serves in place of “loss of the enjoyment of life.”⁷ Both federal and state courts now appear to treat “hedonic damages” and “loss of the enjoyment of life” as equivalent terms. (Ohio also refers to the same phenomena as “loss of the ability to perform life’s usual functions.”) One of the ironies involved in this adoption of “hedonic damages” as a term of art in law is that courts regularly have ruled that hedonic damages are recoverable in personal injuries. However, in most legal venues expert economic testimony about the magnitude of those damages is not admissible. Thus an economist cannot testify about a type of damages for which the legal community uses a term invented by an economic expert.

Occasionally, “hedonic damages” is even used as a synonym for “intangible damages,” encompassing any type of loss that involves human emotions. In this broader usage, “pain and suffering,” “loss of love and affection,” and loss of consortium would all be included as types of “hedonic damages.” Stan Smith has used the same basic methodology he uses for “loss of

enjoyment of life” to measure the “loss of society” of other claimants with the injury or death victim. One clear implication of the current search is that hedonic damages is now a synonym for any type of measurement of life enjoyment, whether it involves the “willingness-to-pay” methodology or some other methodology. In most of the cases reviewed, the term “hedonic damages” or “hedonic losses” did not involve any issue of admitting economic testimony or any reliance on the “value of life” literature.

For example, the only mention of “hedonic damages” in the only reported decision from the state of Wyoming, *Whitney v. McDonough* (1995) is in the statement: “For past pain, suffering, mental anguish, loss of energy, strength, enjoyment of life, and hedonic damages in the sum of \$154,546.” It is not made clear what difference exists between “enjoyment of life” and “hedonic damages,” but the issue at hand was whether or not to reverse a default judgement against the defendant. The Wyoming Supreme Court did not consider the accuracy of the damages pled by the plaintiff, nor had the trial court judge done so.

(4) There are three very different kinds of reasons for rejecting hedonic damage testimony by an economic expert.

The IJT paper failed to draw important distinctions between three quite different judicial rationales for rejecting hedonic damage testimony. First, many of the decisions discovered in this search are, in fact, rulings that hedonic damages may not be recovered, thus rendering moot the issue of whether or not an economist can testify about them. Second, even when hedonic damages may be recovered, state law often prohibits expert testimony of any kind about them. Third, many courts have ruled that measurements of lost enjoyment derived from the willingness-to-pay/value of life literature are scientifically inaccurate for measuring those losses. Thus, even if

the damages are recoverable and expert testimony about those damages is admissible, economic expert testimony about lost enjoyment of life or lost society based on the willingness-to-pay methodology and/or the value of life literature is inadmissible. Each of these rationales will be discussed further below.

First Rationale: Hedonic damages are not recoverable. This is particularly true of wrongful death cases. Many rulings simply say that hedonic damages are not allowed in death cases in the states involved.⁸ In most states, lost enjoyment of a decedent is not a recoverable aspect of damages. Thus projections of hedonic damages based on a decedent's lost enjoyment of life are not admissible because they do not address a recoverable element of loss.

Second Rationale: Even when hedonic damages may be recovered, state law often prohibits expert testimony of any kind about them. This has been the basis of multiple rejections of hedonic damage testimony in the state of Louisiana and was the basis of rejections of hedonic damage testimony by the Supreme Courts of Kentucky and Mississippi.⁹ In *Adams v. Miller* (1995), the Kentucky Supreme quoted a definition of hedonic damages from Brookshire and Smith [1990], but then stated [at **12]:

The court recognizes that there is measurable value to one's life other than his or her earning capacity. However, this value is already recoverable in the recognized category of mental suffering. There is no need to allow for the recoupment of hedonic damages as a separate category of loss.

Likewise, in *Upchurch v. Rotenberry* (1998), the Mississippi Supreme Court upheld the trial court judge's decision that "no expert testimony was necessary to 'lend any assistance to the jury's function in arriving at that figure,' and that the testimony would be 'speculative in nature.'"

There is a scientific line of reasoning behind this second approach, but it is a quite different

line of reasoning than the third more specific *Daubert* rationale for denying expert testimony on “hedonic damages.” In effect, the Louisiana, Kentucky and Mississippi courts (and some Michigan courts) were making a judgment that expert testimony could not separate out the various components of intangible losses an individual suffers as a result of injury or death. These courts argued that intangible losses are not separable into individual loss components such as “pain and suffering” and “loss of enjoyment.” These courts also argued that intangible losses are highly idiosyncratic to the individual involved. Thus, there are no reliable ways to develop general rules for scientifically measuring the values of intangible damages.

In effect, this is a kind of meta-scientific judgment that there could not be a reliable method for measuring intangible damages. Therefore, a judge does not have to worry about whether the scientific method actually used meets *Daubert* standards. By law, no reliable scientific standard could exist to do what is scientifically impossible. This rationale is not even specific to economic experts because it would also prohibit psychologists from offering expert opinions about losses of enjoyment of life. It is a simple rule that is easy for the courts to implement: No expert testimony on the value of intangible losses is allowed, regardless of methodology.

Third Rationale: The hedonic damage methodology based on the willingness-to-pay methodology as reflected in the value of life literature is not a scientifically reliable method for measuring lost enjoyment of life or lost society. The third type of rejection was the one focused on by IJT and for which *Ayers v. Robinson* (1995) is the most compelling example. The focus is on the scientific merits of the method used by the economic expert to measure lost enjoyment of life. Judge Shadur in *Ayers* challenged the scientific validity of the value of life literature itself and

almost every aspect of Stan Smith's methodology for inferring a value of the enjoyment of life from that literature. How he did that and how other judges reached similar conclusions in other cases was fully developed in the IJT paper and will not be repeated here. This is, however, the type of rejection that has been involved in all reported federal cases rejecting hedonic damage testimony by economists and most state cases as well.

(5) There is almost no mention of deterrence issues in any of the legal decisions involving hedonic damages.

In the literature of law and economics, the twin goals of tort law are to provide efficient incentives for protecting human lives and to provide efficient insurance protections for tort victims. A good sample of such discussion in law and economics can be found in Richard Posner's *Economic Analysis of Law* (1998)¹⁰, a commonly used textbook for law and economics. From Posner's perspective, the primary role of the tort system is to provide adequate incentives for the protection of property rights, including human lives. Since the "value of life" literature is designed to measure the "efficient" incentive value for the protection of human life, Posner might advocate that awards in wrongful death actions contain special "life loss" values to provide greater incentives for precautionary behavior. Posner, however, avoids being clear on this issue. Others, particularly Steven Shavell [1987], suggest that another function of the tort system is to provide insurance coverages to tort victims in an efficient manner.

Whether or not tort awards are efficient ways to provide for efficient protection of human lives or provides for insurance for tort victims in an efficient manner are not issues that arise in hedonic damage cases, either in the current search or in previous searches. The standard for legal decisions depends on two factors: (1) what types of losses are recoverable by whom in what types

of cases; (2) the “make whole” principle the underlies tort law, but which often does not even provide “efficient compensation” from the standpoint developed by Steven Shavell [1987] and others. There seems to be no question that tort law *is* organized around the “make whole” principle--regardless of efficiency considerations.

(6) The consciousness of an injured plaintiff is an important issue in whether or not hedonic damages may be awarded.

Most states appear to have requirements that consciousness is a requirement for the recovery of hedonic damages. Thus, an injury victim who is still alive must have remained conscious to recover for hedonic damages in personal injury cases. That was an issue of relevance in the *Upchurch* decision in Mississippi in a death case. Since a death precludes consciousness, hedonic damages were not permitted. It was also relevant in an Ohio Appeals Court decision in *Watkins v. Cleveland Clinic Found.* (1998). In the *Watkins* case, the plaintiff could not recover hedonic damages because she was in a persistent vegetative state. This was also an issue in *Ramos v. Kuzas* (1992) in Ohio because a newborn had not had time to develop the ability to have hedonic damage losses.

An early key ruling decision in this regard is the Pennsylvania case, *Willinger v. Mercy Cath. Med. Ctr., Etc.* (1978) *Willinger* was a death case that established the principle that there can be no recovery for life itself in Pennsylvania. The Pennsylvania Supreme Court ruled that since a dead person is not conscious, there can be no recovery for the lost enjoyment of life. New Mexico allows recovery for the loss of the enjoyment of life of a decedent, but has not ruled whether there is a residual value of life in addition the value of life enjoyment that is lost by decedents. *Pittman v. Thorndike* (1991) is another Federal District decision based on Nevada law

that held that consciousness was a prerequisite for an award of hedonic damages.

General Conclusion

In reported decisions, judges have generally not looked with favor on the hedonic damage concept. This has particularly been true since the *Daubert* decision in 1993. However, there have been a few successes of the concept in recent years and there is no reason to suppose that this issue will disappear in the near future. In the meantime, the attempts of both the courts and forensic economists to deal with this issue has been a source of very useful analysis.

Endnotes

1. When the original IJT paper was published in 1997, the editor of the *Journal of Forensic Economics*, John O. Ward, received complaints from individuals whose names appeared as challenged witnesses in that article that they should not have been “named” in the article even though they had been named in the cases involved. IJT felt that redacting the names of experts that appeared in public records would be inappropriate. Use of names of other experts is not intended to convey the current author’s assessment of whether judicial comments about other individuals are accurate or inaccurate.

2. At this writer’s request, Stan V. Smith provided a catalogued list of 128 total cases in which he had been permitted to provide hedonic damages testimony in either deposition or at trial as of May 12, 2000. Of those cases, 59 were death actions and 71 were personal injury actions, including two cases that involved both death and personal injury. The Smith list included 19 states in which he had testified about hedonic damages in death cases and 21 states in which he had testified about hedonic damages in personal injury cases. This list includes a period beginning with *Sherrod v. Berry* on February 2, 1984 and ending on May 12, 2000. Some of these cases settled before trial and some were later reversed, like *Sherrod*, for other reasons than admissibility of hedonic damages. This list omits two or three cases in which Smith’s testimony was initially admitted, but was later rejected on appeal. While unreported cases have no precedential value, it is clear that some judges have been willing to admit hedonic damages testimony in a number of states over the period of the past sixteen years. Because these cases were not reported, they would not turn up in a LEXIS search.

3. This decision was reached after this paper was initially presented at the Allied Social Sciences meetings in Boston in January, 2000 and was therefore not included in earlier versions of this paper. The even more recent decision of the 10th Circuit Court of Appeals in *Baron v. Sayre Memorial Hospital* discussed in the text was also not included in the earlier paper.

4. The *Schuman* case was not discussed in the IJT paper because the issues in *Schuman* did not involve judicial commentary on the scientific merits or a direct admissibility of hedonic damages. However, it was known to IJT at the time that paper was written, unlike other cases discussed in this section of the current paper.

5. It is interesting to note that the specific ruling in *Ramos* was that “because a newborn injured in utero or at birth has not had adequate time to develop the ability to perform a pleasurable activity or hobby specific to his or her lifestyle, a newborn cannot suffer hedonic damages.”

6. In this context, it is important to remember that the New Mexico federal district court decision in *Smith v. Ingersoll Rand* (1997) involved a judicial determination that *Daubert* did not apply to New Mexico law and that therefore Stan Smith’s “non scientific” testimony could be admitted in a diversity action in a federal court in New Mexico under New Mexico law.

7. Indeed, one Ohio case found in this search did not even contain the word “hedonic” but did contain reference to “enjoyment of life.” This means that Lexis is set up to recognize “enjoyment of life” and “hedonic damages” as closely related concepts.

8. The Illinois legislature went one step further and passed a law stating that “there shall be no recovery for hedonic damages” in Illinois. See here the decision of the Supreme Court of Illinois in *Best v. Taylor Mach. Works* (1997). In this decision, the Supreme Court affirmed a circuit court decision consistent with the new Illinois law.

9. In the IJT paper, three of the cases listed as rejecting hedonic damage testimony by an economist were Louisiana cases following this line of reasoning. The underlying precedent for those three cases, for three federal district court cases in Louisiana and four six state cases in the current search is a pre *Daubert* 1992 ruling of the Louisiana Court of Appeals in *Foster v. Trafalgar House of Oil and Gas* (1992), which said: “any evidence, including expert testimony, that attempts to quantify or assign a specific monetary value for alleged loss of the pleasure of life (hedonic damages) is inadmissible.”

10. pp. 208-219.

Appendix I

Reported Decisions Involving Hedonic Damages Covered in IJT

Anderson v. Nebraska Department of Social Services, 538 N.W.2d 732 (Neb. 1995)

Ayers v. Robinson, 887 F.Supp. 1049 (N.D.Ill. 1995)

Hein v. Merck & Co, Inc, 868 F.Supp (M.D.Tenn. 1994)

Kurncz v. Honda Motor Company, Ltd, et al, 1996 U.S. Dist. Lexis 6132 (1996)

Laing v. American Honda Motor Co, Inc, 628 So.2d 196 (La.App.2 Cir. 1993)

Livingston v. U.S., 817 F.Supp. 601 (E.D.N.C. 1993)

Longman v. Allstate Ins. Co., 635 So.2d 343 (La.App. 4 Cir. 1994)

McGuire v. City of Sante Fe, 954 F.Supp. 230 (D.N.M. 1996)--in footnote 1 only.

Montalvo v. Lapez, 884 P.2d 345 (Hawaii 1994)

Romero v. Byers, 872 P.2d 840 (N.M. 1994)

Scharrel v. Wal-Mart Stores, Inc., 1997 WL 22808 (Colo.App.)-- in footnote 1 only.

Sena v. New Mexico State Police, 892 P.2d 604 (N.M.App. 1995)

Sullivan v. United States Gypsum Company, 862 F.Supp. 317 (D.Kan. 1994)

Trabucco v. Hilton Hotels Corporation, 1994 WL 419846 (E.D.LA.)

Wilt v. Burracker, 443 S.E.2d 196, 205 (W.VA. 1993)

References

- Brookshire, Michael L. and Stan V. Smith. 1990. *Economic/Hedonic Damages: The Practice Book for plaintiff and Defense Attorneys*. Anderson Publishing Company. Cincinnati, Ohio.
- Ireland, Thomas R. 1996. “‘Hedonic Damages’ and Alternatives to Hedonic Damages in Tort Litigation.” Reading #4 in *The New Hedonics Primer for Economists and Attorneys*, Lawyers & Judges Publishing Co., Tucson, AZ, pp. 37-40.
- , Walter D. Johnson and Paul F. Taylor. 1997. “Economic Science and Hedonic Damage Analysis in Light of *Daubert v. Merrell Dow*.” *Journal of Forensic Economics*. 10(2):139-156.
- Posner, Richard A. 1998. *An Economic Analysis of Law*, 5th Edition. Aspen Law & Business. New York.
- Schelling, Thomas C. 1987. “Value of life.” Entry on “value of life” in *The New Palgrave Dictionary of Economics*, Macmillan Press Ltd., New York, 1987. 793-96.
- Shavell, Steven. 1987. *An Economic Analysis of Accident Law*. Harvard University Press. Cambridge, Massachusetts.

Cases Discussed in the Text.

- Adams v. Miller*, 908 S.W.2d 112; 1995 Ky. LEXIS 122
- Anasoff v. United States*, 223 F.3d 898; 2000 U.S. App. LEXIS 21179; 56 U.S.P.Q.2D (BNA) 1621
- Ayers v. Robinson*, 887 F.Supp. 1049 (N.D.Ill. 1995)
- Best v. Taylor Mach. Works*, 179 Ill. 2d 367; 689 N.E.2d 1057, 1997 Ill. LEXIS 478

Daubert et al v. Merrell Dow Pharmaceuticals, Inc., 509 US ___, 113 S. Ct. 2786, 125 L. Ed 2d

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Fantozzi v. Sandusky Cement, (1992) 64 Ohio St.3d 601, 597 N.E.2d 474

Foster v. Trafalgar House of Oil and Gas, 603 So.2d 284 (La.App. 2d Cir.1992)

Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)

Hunt v. K-Mart, 1999 MT 125; 981 P.2d 275 (MT 1999)

K.M Leising, Inc. et al v. Butler, No. 97-CA-01344-COA, 1999 Miss. App. LEXIS 591

Lewis v. Alpha Lavel Separation, Inc, (1998) 128 Ohio App.3d 200

Livingston v. U.S. 817 F.Supp. 601 (E.D.N.C. 1993)

Loth, v. Truck-a-way Corporation 60 Cal. App. 4th 757; 1998 Cal. App. LEXIS 8 60 Cal. App.

4th 757; 1998 Cal. App. LEXIS 8

Marcotte v. Timberlane/Hampstead Sch. Dist. 733 A.2d 394; 1999 LEXIS 8

McGuire v. City of Sante Fe, 954 F. Supp 230 (D.N.M. 1996)

Pittman v. Thorndike, 762 F. Supp. 870 (1991).

Ramos v. Kuzas (1992), 65 Ohio St.3d 42, 43; 600 N.E.2d 241, 243

Romero v. Byers, 872 P.2d 840 (N.M. 1994)

Saffrani v. The Werner Company, 95 Civ. 1267 (LBS); 1997 U.S. Dist. LEXIS 18589

Scharrel v. Wal-Mart Stores, Inc., 1997 WL 22808 (Colo. App.)

Schuman v. Missouri Highway and Transportation Commission, 912 S.W.2d 548; 1995 Mo App.

LEXIS 1705

Sena v. New Mexico State Police. 892 P.2d 604 (N.M.App 1995)

Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987)

Smith v. Ingersoll-Rand, No. CIV 94-1083 MV/DJS (D.N.M. 1997); 214 F.3d 1235, 2000 U.S.

App. Lexis 12460 (June 7, 2000)

Upchurch v. Rotenberry, 1998 Miss. LEXIS 524, 96-C A-01164-SCT (Miss. Oct. 15, 1998)

U.S. v. Starzepyzel, 880 F. Supp. 1027; 1995 U.S. Dist. LEXIS 4216

Watkins v. Cleveland Clinic Found., No. 72838, Court of Appeals of Ohio, 7th Appellate District,

Bellmont County, 1999 Ohio App. LEXIS 5406, November 12, 1998.

Whitney v. McDonough, 892 P.2d 791; 1995 Wyo LEXIS 56

Willinger v. Mercy Cath. Med. Ctr., Etc., 482 Pa. 441 (1978)