

A *Daubert* Hearing on the Admissibility of Hedonic Damage Testimony by an Economic Expert

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This paper is an overview description of the events and documents that were involved with a bifurcated *Daubert* hearing about the admissibility of proffered hedonic damages testimony by Dr. Stan V. Smith in the matter of *Christofferson v. City of Great Falls* in Montana. The hearing was held on the afternoon of June 4, 2001 and the morning of June 6, 2001. An appeal of this case is pending before the Montana Supreme Court. The materials themselves are not included, but will be published as part of a CD-ROM by Lawyers & Judges Publishing Company in Tucson, Arizona. Lawyers and Judges will own the copyright of the final draft of this overview paper. In the meantime, all publication rights to this paper are reserved by the author.

## A *Daubert* Hearing on the Admissibility of Hedonic Damage Testimony by an Economic Expert

Thomas R. Ireland October 19, 2001

### Introduction

On April 24, 2001, I was contacted by Robert F. James to work as an economic expert in the matter of *Janice Christofferson vs. City of Great Falls*, a case to be tried in the Montana Eighth Judicial District, Cascade County. Mr. James retained my services to counter the proffered “hedonic damage” testimony of Dr. Stan V. Smith of Chicago, Illinois. Robert James was the attorney for the defendant City of Great Falls, Montana and had filed a *motion in limine* and brief in support of that motion to preclude Dr. Smith from offering hedonic damage testimony in that matter. The plaintiff had filed a brief in response to the defendant’s motion on December 4, 2000 and the defendant had filed a Reply Brief in response to the plaintiff’s response brief on January 12, 2001. On the basis of these briefs, Judge Kenneth R. Neill had scheduled a *Daubert* hearing to be held at the start of trial on or about June 4, 2001. Mr. James asked me to testify in that *Daubert* hearing which I did in the first part of the *Daubert* hearing on the afternoon of June 4, 2001.

Because of travel considerations, the second part of the *Daubert* hearing was not held until Wednesday, June 6, 2001, when Dr. Smith testified. The bifurcation of the *Daubert* hearing meant that the plaintiff had time to have my testimony typed up by the court reporter for Dr. Smith to review. After hearing my testimony and Dr. Smith’s testimony and considering the parties’ briefs, Judge Neill decided not to permit Dr. Smith to testify about hedonic damages in the Christofferson case. There had been no challenge to Dr. Smith being allowed to testify to conventional economic damages such as lost financial support and lost household production, so

Dr. Smith did testify about those matters. Ultimately, the jury decided not to hold the defendant liable for any damages and the case is on appeal to the Montana Supreme Court as this is being written.

There are several reasons why this is an ideal case for materials to have been assembled about the *Daubert* hearing to determine the admissibility of hedonic damage testimony. First, Drs. Smith and I were the only witnesses in the hearing and the issue was straight forward--whether or not hedonic damage testimony met the scientific standards required for admissibility of that testimony in the trial. Second, because of the bifurcated nature of the hearing itself, Dr. Smith was able to address my testimony in his own testimony. Third, Judge Neill provided an extended narrative with his decision that hedonic damage testimony was not admissible. Fourth, the briefs on both sides seem well focused on the issues at hand. Both sides developed their positions in a straight forward way and a decision was made on the basis of the positions that were presented without distracting side issues.

The assembled set of materials include: (1) Defendant's Motion in Limine and Brief in Support; (2) Plaintiff's Response to Defendant's Motion in Limine; (3) Defendant's Reply Brief in Support of Defendant's Motion in Limine; (4) the portion of Judge Malloy's order in *Meisner v. Fujitsu Heavy Industries, Co., Ltd.* dated June 3, 1999 that discussed Stan Smith's testimony in that case; (5) Judge Neill's May 4, 2001 Order Re Pre-Trial Motions; (6) Judge Buyske's order in *Wissenman v. City of Cut Bank*, which was filed by Robert James as Defendant's Notice of Supplemental Authority on June 2, 2001; (7) Testimony of Thomas R. Ireland in the 6/4/01 half of Daubert Hearing; (8) Questions prepared by Thomas R. Ireland for himself and for Stan V. Smith; (9) Testimony of Stan V. Smith in 6/6/01 portion of *Daubert* hearing; (10) Order of Judge

Neill excluding Stan V. Smith's testimony on hedonic damages. These materials were all directly part of the legal process leading to the Daubert hearing.

This compilation also includes the following materials of related relevance: (11) "A 1999 Survey Study of Forensic Economists--Their Methods and Their Estimates of Forecast Variables" by Michael Brookshire and Frank Slesnick from the *Litigation Economics Digest*, 4(2), Fall 1999; (12) "Economic Science and Hedonic Damage Analysis in Light of Daubert v. Merrell Dow" by Thomas R. Ireland, Walter D. Johnson and Paul Taylor from the *Journal of Forensic Economics*, 10(2), 1997; (13) "Recent Legal Decisions Regarding Hedonic Damages: An Update" by Thomas R. Ireland from the *Journal of Forensic Economics*, 13(2), 2000; and (14) "Misuses and Proper Uses of Hedonic Values of Life in Legal Contexts" by W. Kip Viscusi in the *Journal of Forensic Economics*, 13(2), 2000.

#### **Document (1)**

The intent of document (1) is obvious. The plaintiff had proffered testimony by Dr. Stan V. Smith, who is a well known proponent of hedonic damage testimony. Dr. Smith was to testify about the dollar value of the loss of the enjoyment of life of Ronald O. Christofferson as a result of Ronald's death on April 20, 1998 and the loss of enjoyment of Janice Christofferson, as the result of Ronald's death on April 20, 1998. Ronald Christofferson had been born on September 15, 1936 and was 61.6 years of age at the time of his death. Dr. Smith's report in this matter, dated October 12, 2000, projected lost financial support at \$63,693, loss of household services at \$142,328, the value of Ronald Christofferson's "loss of the value of life" at \$2,232,616 and Janice Christofferson's loss of relationship at \$1,190,708. Thus, the traditional elements of loss had a total value of \$206,021 and the proffered hedonic elements had a total value of \$3,423,324. The

hedonic damages portion of damages was 94.3 percent of the total alleged damages.

The benefit of excluding this testimony was obviously great. Given the relative magnitudes, there were no challenges to Dr. Smith's testimony about loss of financial support or loss of household services. After Judge Neill indicated that Dr. Smith could not testify about hedonic damages, Dr. Smith was permitted to testify about lost support and lost household services and did so. It was the hedonic damage claim, however, that made this case important enough to warrant the expense of flying Dr. Smith and me to Great Falls, Montana from Chicago, Illinois and St. Louis, Missouri, respectively.

The Defendant's Motion was similar to many other defendant's motions with regard to hedonic damages that I have seen in the past.

#### **Document (2)**

The intent of document (2) is also obvious. Because Dr. Smith's testimony would have significantly increased the amount of damages testified to in the Christofferson matter, it was particularly important for Norman Newhall to make his best possible case for allowing Dr. Smith's testimony. Because Dr. Smith has been through efforts to have his hedonic damage testimony admitted a number of times, there are various materials that are regularly provided with such filings. One obvious exhibit is Dr. Smith's Curriculum Vitae, which lists his credentials as an economic expert. Another exhibit that is regularly provided in other cases is well is a document entitled, "Trial Testimony on Intangible Damages by Stan V. Smith Allowed in the Following Cases as of August 8, 2000." This is a document Dr. Smith maintains and updates, as do most forensic economists maintain as required under Rule 26 of the Federal Rules of Civil Procedure.

The next set of exhibits are affidavits from other economic experts who have supported

hedonic damage testimony. Included were two different affidavits provided by Stephen T. Riley dated February 24, 1997 and December 19, 1996, two from Roger Skurski dated February 27, 1997 and December 19, 1996, one each from John O. Ward dated February 17, 1997, Gary R. Albrecht, dated December 19, 1996, Roy F. Gilbert not notarized and not dated, Allan McCausland, dated December 18, 1996, Dr. Smith dated January 15, 1997, Charles W. deSeve dated May 16, 1991, Melville Z. Wolfson dated December 18, 1996, Michael L. Brookshire, dated May 16, 1991, Luvonia Casperson dated December 4, 1991, Everett Dillman dated December 2, 1991, and Patrick A. Gaughan dated December 17, 1991. There are also two letters indicating that Drs. Robert Bream of the University of Wisconsin-Superior and Frank Slesnick of Bellarmine College in Louisville Kentucky had used *Economic/Hedonic Damages*, a 1990 book by Michael Brookshire and Stan Smith, as a required book in a course on forensic economics at their respective universities. Also included with this document is a transcript of several pages from Dr. Smith's testimony in the case of *Charles Fisch vs. Montana Rail Link, Inc., and Burlington Northern Santa Fe Railroad Co*, dated February 28, 2000.

### **Document (3)**

Document 3 is the Defendant's Reply Brief, which challenges some of the claims made in the Plaintiff's Brief in response to the original motion to exclude.

### **Document (4)**

Both the Plaintiff's Response (2) and Defendant's Response (3) interpreted Judge Malloy's ruling about the scope of Stan Smith's testimony in *Meisner v. Fuji Heavy Industries, Ltd.* Therefore, the portion of Judge Malloy's Order that addressed Dr. Smith's testimony is included. This is of particular interest because of the conflicting interpretations of the order.

**Document (5)**

Document (5) is Judge Neill's May 4, 2001 Order Re Pre-Trial Motions establishing the framework for the *Daubert* hearing.

**Document (6)**

Document (6) is Judge Buyske's order in *Wissenman v. City of Cut Bank*. This order precluding Stan Smith's testimony in another Montana case had been issued less than four weeks before the June 4, 2001 *Daubert* hearing and was therefore of significant interest to the defense.

**Document (7)**

Document (7) is the transcript of my testimony in the *Daubert* hearing and is self explanatory.

**Document (8)**

Document (8) is an extended set of questions I prepared at the request of Robert James, both for my own testimony and for cross examining Dr. Smith. Only some of my suggestions were used, but it is common for an economic expert to be asked to prepare such questions. This provides an example of the kinds of questions an economic expert can prepare.

**Document (9)**

Document (9) is the transcript of Stan Smith's testimony in the *Daubert* hearing. It is of interest that my testimony had apparently been transcribed and Stan Smith had been able to read it before his testimony. Another interesting incident had happened along the way. Dr. Smith called Dr. John O. Ward early on the morning of June 6, 2001 to ask Dr. Ward what was his current position with respect to hedonic damage testimony. Dr. Ward sent a message to me by e-mail later that morning clarifying what his position was. Dr. Ward's message was consistent with my

understanding that Dr. Ward was no longer willing to provide hedonic damage testimony because of prior court decisions, but still generally regarded it as a reasonable approach from an intellectual standpoint. This set of communications is indicative of the fact that economic expert witnesses are increasingly aware of each other and their opposing opinions. The names of a fairly large number of other economic experts appear at various points in the materials for this case.

#### **Document (10)**

Document (10) is the order of Judge Neill not permitting hedonic damage testimony by Dr. Smith. It is seven pages in length and indicates substantial thought by Judge Neill in reaching his conclusion that Dr. Smith's testimony should not be admitted. By comparison with the orders or parts of orders of other judges that were introduced in this case, Judge Neill's order represents a substantial statement.

#### **Document (11)**

Document (11) is "A 1999 Survey Study of Forensic Economists--Their Methods and Their Estimates of Forecast Variables" by Michael Brookshire and Frank Slesnick from the *Litigation Economics Digest*, 4(2), Fall 1999. Both experts discussed this survey and it had relevant survey information about the opinions of over two hundred members of the National Association of Forensic Economic about hedonic damages. It is therefore being provided as a part of this collection.

#### **Document (12)**

Document (12) is "Economic Science and Hedonic Damage Analysis in Light of *Daubert v. Merrell Dow*" by Thomas R. Ireland, Walter D. Johnson and Paul Taylor from the *Journal of Forensic Economics*, 10(2), 1997. This paper provides additional information about reported

legal decisions involving hedonic damages between the *Daubert* decision in June, 1993 and early 1997.

### **Document (13)**

Document (13) is “Recent Legal Decisions Regarding Hedonic Damages: An Update” by Thomas R. Ireland from the *Journal of Forensic Economics*, 13(2), 2000. This paper updated Document (12) from early 1997 to early 2000 and developed several themes that were not covered in Document (12) with respect to hedonic damages. A particularly important section of this paper in the context of the *Christofferson* case is the section that relates to the requirement of consciousness for hedonic damages to be awarded in a personal injury case. Both this paper and the one following by W. Kip Viscusi were part of a symposium on hedonic damages testimony that was held in January 2000 in Boston, Massachusetts and ultimately published in the summer of 2001 (in spite of the date of issue on the journal). The other papers were not directly relevant to the *Christofferson* case, including one by Dr. Smith derived from his doctoral dissertation at the University of Chicago.

### **Document (14)**

Document (14) is “Misuses and Proper Uses of Hedonic Values of Life in Legal Contexts” by W. Kip Viscusi in the *Journal of Forensic Economics*, 13(2), 2000. As is indicated by the fact that both experts discussed the opinions of Dr. Viscusi, he has been a leading researcher in the development of the “value of life” literature that Dr. Smith relies upon to develop hedonic damage testimony. Since this paper is directly on point about how that literature should be used in testimony, including it was a way to allow Dr. Viscusi to speak for himself.

I hope that readers will find this collection as fascinating as I have found it.

