

This paper was prepared for presentation at the NAFE Session on Hedonic Damages at the meetings of the Western Economic Association International on 6/30/09 from 2:30 to 4:15 p.m. in The Sheraton Vancouver Wall Centre, Vancouver, British Columbia. While this draft is preliminary and may be changed in the future, it may be quoted if it is useful to do so.

The Last of Hedonic Damages: Nevada, New Mexico, and Running a Bluff

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Introduction

This is not a paper about whether hedonic damages *should be* admitted in courts of law, but about whether hedonic damages testimony *will be* admitted in courts of law in which states and under what circumstances. In March of 2007, I presented a paper at the meetings of the American Academy of Economic and Financial Experts on “The Seven Battleground States Regarding Admissibility of Hedonic Damages Testimony and Why They are Battleground States.” That paper has never been published (or even submitted for publication), but can be downloaded from my web site as paper #63 at <http://www.umsl.edu/~irelandt/working.html>. At that time, the seven states I listed were Arkansas, Arizona, Georgia, Montana, Ohio, Nevada and New Mexico. I now think that list should be narrowed to two states, Nevada and New Mexico. However I am still contacted for assistance in opposing the admissibility of hedonic damages in occasional cases in a number of other states. The title of this paper is intended to suggest that only two states, Nevada and New Mexico, should still be regarded as “battleground states.” The title should also suggest that I think that hedonic damages testimony will be largely eliminated in both of those states over the next few years. However, I also think that a few plaintiff attorneys will continue to hire the few remaining economic experts who are willing to prepare hedonic damages calculations and testify about those calculations in courts of law in a number of states as part of “running a bluff” in bargaining for higher settlements before trial. The first section of this paper will deal with basic definitions for hedonic damages testimony. The second section will deal with Nevada. The third section will deal with New Mexico. The fourth section will deal why I no longer consider Arkansas, Arizona, Georgia, Montana and Ohio as battleground states. The final section will deal with the “running a bluff” strategy of plaintiff attorneys in all states and legal venues.

Forms of Hedonic Damages Testimony

For purposes of this paper, the term “hedonic damages testimony” will refer to any type of testimony that attempts to place a dollar value on either “lost enjoyment of life” or “loss of society or relationship. An extensive literature on this topic exists and will not be repeated here,

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but see Ireland and Ward (1996) and papers presented in two hedonic damages symposiums published in the *Journal of Forensic Economics* (2000 and 2007). In terms of testimony that is offered in courts of law, there are four basic types of hedonic damages testimony that might be offered in either personal injury or wrongful death circumstances, depending on whether or not state law allowed recovery by an estate for the lost enjoyment of life of a decedent..

(1) Testimony that is based on a presumed ability to derive an annual dollar value for life enjoyment from the Value of Statistical Life (VSL) literature.

(2) Per diem testimony based on an assumed “benchmark” annual value for life enjoyment that is not derived from the VSL literature.

(3) Testimony that introduces one or two values or a range of values from the VSL literature, but does not attempt to derive any particular annual value of life.

(4) Testimony that explains the difference between loss of life enjoyment and pain and suffering, but without introducing numbers for either annual values or total values.

Nevada

Nevada is still a battleground state because of the decision of the Nevada Supreme Court in *Banks v. Sunrise Hospital* (2004). I do not think it will continue to be a battleground state because of the decision of the Nevada Supreme Court in *Hallmark v. Eldredge* (2008). In the Banks decision, the Nevada Supreme Court held that the trial court was not in error for admitting the hedonic damages testimony of Robert Johnson 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 court said:

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.

Several factors probably played into the *Banks* decision. This was a second appeal of a trial court

verdict to the Nevada Supreme Court. The Court had reversed the first trial court decision and remanded for a second trial. Since the first trial court judge had admitted hedonic damages testimony, the second trial court judge was disinclined to reconsider whether the hedonic damages testimony of Robert Johnson was admissible. The defense had used an opposing defense expert in the first trial, but elected not to do so in the second trial. The fact that Otho Lee Banks was in a persistent vegetative state eliminated the problem of scaling the percentage of life enjoyment that he had lost as the result of his injury. Whatever amount of life enjoyment the Plaintiff may have had before his injury had been completely eliminated by the injury. Finally, defense attorneys did not consult with their economic expert before filing its appeal briefs after either of the trials. Whether those appeal briefs raised any of the scientific issues have dominated reasons for rejections of hedonic damages testimony in other states is unknown, but those issues were probably not raised effectively without assistance from an economic expert.

The method used by Robert Johnson was simplistic. Johnson's testimony consisted of presenting two values from the VSL literature. Those values were taken from a 1988 paper by Moore and Viscusi and a 1990 paper by Ted Miller. Each value was increased by the CPI to current equivalent at the time of each of the trials to arrive at the \$2.5 million and \$8.7 million figures Johnson testified to as the low and high ends of the range for the "intangible value of human life." Johnson did not even provide a "Human Impact Report" as the basis for his testimony even though he had done so in a number of other previous cases. However, the sanction given to Johnson's testimony by the *Banks* decision opened the floodgates to a cottage industry of persons ready to provide hedonic damages testimony using a variety of methods with a wide range of values. The issue of whether hedonic damages testimony should be admissible and under what circumstances has not been reconsidered since the *Banks* decision.

However, the basis upon which expert testimony is admissible in Nevada was reconsidered in what I regard to be a landmark case in *Hallmark v. Eldredge* (2008). The *Hallmark* case did not deal with the admissibility of testimony by an economist. The decision was to reverse the trial court's decision to allow a physician with an engineering background to testify as a biomechanical expert as an abuse of the trial court judge's discretion. Nevada has never adopted the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) as the standard in Nevada, but the Nevada Supreme Court had previously authorized citation of the *Daubert* and progeny. In *Hallmark*, the Nevada Supreme Court incorporated the four *Daubert* standards and added an additional standard of its own, saying:

In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. If the expert formed his or her opinion based upon the results of a technique, experiment or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled

by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute. We again note that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case.

The first three types of hedonic damages testimony described at the outset of this paper are based entirely on “assumption, conjecture (and) generalization.” The only “particularized fact” used in the first two methods is the life expectancy of the Plaintiff. Even that “particularized fact” was not used by Robert Johnson in the *Banks* case. From that standpoint, it is hard to imagine that the Supreme Court that adopted *Hallmark* would continue to sanction the “anything goes” variety of methods for hedonic damages testimony that has continued in Nevada since the *Banks* decision. For that reason, I do not think that Nevada will continue to be a battleground state regarding the admission of hedonic damages testimony.

New Mexico

In 2008, I had the opportunity to watch Brian McDonald present hedonic damages testimony in a personal injury case in Albuquerque. The case involved a man who had been injured in an altercation in the parking lot of a McDonald’s Restaurant. As the result of his injuries, he had a permanent limp and ongoing pain. The result was a defense verdict, but I was told that my testimony had been particularly effective. Brian testified about the VSL literature and the fact that it is used by many federal government agencies for placing dollar values on the prevention of loss of human life. He testified that it was his opinion that he considered values in the range between \$5 million and \$6 million to be the appropriate range to consider for the value of life in the VSL literature. As I watched Brian testify, I also watched the reaction of the jury, which was largely one of puzzlement. Even if one accepted the notion that appropriate values in the VSL literature were confined to the \$5 million to \$6 million range, how could one get from assuming that value of life for a dead person would be in that range to a specific value the jury would award to the plaintiff for having a permanent limp and pain issues that might or might not resolve over the future?

When I testified the next day, I disagreed that the reasonable range for the VSL literature was bounded by \$5 million and \$6 million, but that there were respected studies with values in that range. I pointed out that the range of values could be anywhere from \$0 to \$99 billion. My testimony was that values from the VSL literature were not in any way relevant to what the jury had to decide since the numbers were numbers based on large groups of people subjected to tiny amounts of risk of death. Since the plaintiff was still alive, those numbers did not have any conceivable relationship to the plaintiff. I also said that I did not consider myself to have any more expertise in making the decision that the jury had to make about an award to compensate the plaintiff for his limp and pain issues than did any of the jurors. My impression is that jurors appreciated that testimony. I felt that Brian McDonald’s testimony had been straight forward and that the jury felt respect for McDonald, but that they did not see how his testimony would assist

in any decision that they had to make.

New Mexico continues as a battleground state for the admission of hedonic damages testimony because the New Mexico Supreme Court in *Romero v. Byers* (1994) specifically authorized admission of economic expert testimony on the subject of value of life damages in New Mexico wrongful death actions at the discretion of the trial court judge. This decision was followed two years later by a decision of the New Mexico Court of appeals in *Sena v. New Mexico Police* (1995) holding that economic expert testimony regarding loss of enjoyment of life could be admitted in personal injury actions at the discretion of the trial court judge. These decisions, however, did not define what kinds of expert testimony were admissible or what the standards were for admission of a particular expert with particular methodologies for developing hedonic damages testimony.

Over time the scope of allowable testimony has been defined by subsequent decisions, particularly including *Smith v. Ingersoll-Rand* (1997 and 2000) and *Couch v. Astec Industries* (2002). Brian McDonald (2007) has published an even more detailed account of judicial decisions regarding hedonic damages in New Mexico that includes both reported, semi-reported (LEXIS and WestLaw) and unreported decisions. *Smith v. Ingersoll-Rand* involved Stan V. Smith as the expert who provided hedonic damages testimony. District court Martha Vasquez did not permit Smith to provide specific dollar values for the plaintiff, but permitted Smith to explain to the jury the difference between loss of enjoyment of life damages and pain and suffering damages. This decision was appealed to the 10th Circuit Court of Appeals, which upheld the decision to admit Smith's testimony for this purpose. In *Couch v. Astec Industries*, Brian McDonald was permitted to testify that the range for the value of life was between \$500,000 and \$11 million, with \$3 million as the average, and that this range was for "the value of an entire life from cradle to grave and included earnings as well as intangible enjoyment."

It recently appears to have become part of the general standard for admission of hedonic damages testimony in New Mexico that an economic expert can explain the difference between loss of enjoyment of life damages and pain and suffering damages. It also appears to have become part of the general standard that the economic expert can explain the nature of the Value of Statistical Life (VSL) literature and the fact that many federal agencies use values from that literature for placing dollar values on the saving of human lives in regulation and cost-benefit planning. McDonald (2007) points out that some judges have not been willing to admit hedonic damages testimony, notably Judge James Hall, but that most judges have been willing to do so. In many such cases, judges have permitted an economic expert to testify about the range of values in the VSL literature and to provide their own opinions about central values in that range, as was shown in a number of the 2007 and 2008 decisions decided in the Federal District Court of New Mexico under New Mexico law.

However, one particular 2008 decision in a case that has not been reported, even by LEXIS and WestLaw, seems likely to set the standard for the future. In *BNSF Railway Company v. Valencia* (November, 2008), Judge M. Christina Armijo went a step further and specifically precluded any

mention of any dollar values in the testimony of plaintiff experts Brian McDonald and Allen Parkman (and also defense expert W. Kip Viscusi), Judge Armijo wrote:

[E]ach of the parties' experts will be permitted to offer . . .generalized testimony about the *concept* of hedonic damages, and their motions in limine are denied in part insofar as they seek to exclude expert opinion on this aspect of hedonic damages.

The majority rule in federal courts, however, is that expert testimony which places a *dollar figure* before the jury in an attempt to *quantify* the value of human life is inadmissible and does not meet the relevance and reliability factors set forth in Daubert and its progeny. . . I construe this rule as applying to any opinion testimony which attempts to quantify (or place a monetary value on) the particular decedent's hedonic damages, *as well as* any opinion testimony which places before the jury a dollar figure or numeric formula as a so-called "benchmark figure," "guideline," or "range of values" to be used in calculating such damages. In my view, the latter approach to opining about a dollar-figure or numeric formula is just a "trojan horse" aimed at getting the same type of inadmissible information before the jury under a different label. The fact remains that the underlying methodology used to arrive at such quantitative measurements of the value of human life does not meet the relevance and reliability requirements of Daubert and its progeny and will not assist the jury, regardless of whether the figure, formula, or "range of values" in question is assigned to a specific decedent, a hypothetical individual, a statistical person, or a generic benchmark or guideline. Accordingly, the parties's motions in limine are granted in part insofar as they seek to exclude opinion testimony from any expert that places a quantitative measurement of hedonic damages (or the value of human life) before the jury under any of these labels. (Italics and underlining are as in the original.)

The evolution from *Romero v. Byers* in 1994 to *BNSF v. Valencia* in 2008 does not promise a long life for the cottage industry that provides hedonic damages testimony in New Mexico. The advantage to a plaintiff attorney in having an economic expert testify about hedonic damages is the advantage of framing the issue so that a jury thinks in terms of larger numbers instead of smaller numbers. Having an economic expert explain the difference between pain and suffering and loss of enjoyment of life has little value. The distinction is a legal distinction for which economic expertise provides no value-added in credibility. Explaining this distinction could presumably be handled by a judge with little objection from the parties. Paying an economist's expert witness fees doesn't seem to make sense from a plaintiff attorney's standpoint. There is also little-value added in having an economic expert explain that federal agencies use unspecified dollar values for human lives when making decisions about regulations and in cost-benefit studies. Again, it does not seem that it would be worthwhile to pay an economic expert to introduce the obvious fact that the literature exists and that parts of it are used by federal agencies. If an economic expert cannot present dollar values, the advantage of using an economic

expert is removed.

I still consider New Mexico to be a battleground state with respect to the admissibility of hedonic damages testimony as I write this, but I do not expect New Mexico to remain a battleground state for longer than a few more years, except in the sense of “running a bluff,” which I will describe later in this paper.

Old Battleground States

In this section, I will describe why I do not think Arizona, Arkansas, Georgia, Ohio or Montana remain true battleground states with respect to the admission of hedonic damages testimony. My comments about each state will be relatively brief.

Arizona. Arizona appeared to become a battleground state for admission of hedonic damages testimony after the decision of the Arizona Supreme Court in *Ogden v. J. M. Steel*, 31 P.3d 806 (2001). That decision, however, only held that loss of enjoyment of life in a personal injury case with a surviving injure plaintiff could be claimed separately from pain and suffering caused by an injury. This seemed to stimulate a number of cases in which plaintiff attorneys hired experts to make hedonic damages calculations. However, to date there have been no reported decisions in Arizona that have sanctioned the admission of expert testimony for valuing hedonic damages. I have been retained to oppose the admissibility of hedonic damages testimony in about one case per year, but those cases appear to have been “running a bluff” cases in the sense described in the last section of this paper.

Arkansas. Arkansas became a battleground state for admission of hedonic damages testimony with the adoption of a new survival statute Ark. Code Ann. § 16-62-101 (Supp. 2003) in 2001. The language of the new statute created an element of damages in circumstances of wrongful death called “loss of life” and specified that an injured plaintiff did not have to have survived beyond the fatal injury to have the right to recover this loss element. This adoption appeared to have been related to “right to life” sentiments of the legislature, but created a damage element without guidance as to what it really meant. It was an invitation to plaintiff attorneys to try to have the new statute interpreted to allow hedonic damages testimony in wrongful death actions and a number of such efforts were tried. The first holding of the Arkansas Supreme Court interpreting how this new statute should be interpreted was in *Durham v. Marberry* (2004). That decision did not give clear guidance about whether expert testimony about hedonic damages would be admissible under the new statute in Arkansas. Subsequently, the decision in *Durham v. Marberry* was interpreted by Judge Eisele in *McMullin v. United States* (2007) to suggest that an award must be based on particularized facts about the life of the decedent, suggesting (but not stating explicitly) that generalized hedonic damages testimony of an economic expert would not be permitted.

In *One National Bank v. Pope* (2008), the Arkansas Supreme Court accepted the interpretation of *Durham v. Marberry* that had been made in *McMullin v. United States*. Of the five states I had

included in 2007 as battleground states, but no longer consider a battleground state, *Arkansas* was the closest call. However, it is my opinion that if ever presented with a clearly framed challenge to the admissibility of hedonic damages testimony by an economic expert, the Arkansas Supreme Court will rule that it is not admissible. It is also my impression that plaintiff attorneys are not likely to challenge trial court decisions to reject hedonic damages testimony at the appeals level because of the expectation that they would lose at that level. On that basis, I regard the efforts to gain admission of hedonic damages testimony in Arkansas to be “running a bluff.”

Georgia. Georgia has a unique Wrongful Death Act such that the estate of a decedent may recover for the entirety of a decedent’s lost earnings without reduction for personal consumption. That standard appeared to potentially open the door for recovery of hedonic damages in a wrongful death action, but no reported Georgia decision has ever been reached with respect to the admissibility of hedonic damages testimony. About two years ago, the Georgia legislature adopted a new tort reform act that specified, among other requirements, that types of expert testimony that have been rejected in other states and federal courts should not be admitted in Georgia. Since hedonic damages testimony has been rejected by courts in a number of other states and in federal courts, it seems very unlikely that hedonic damages testimony by an economic expert will be found to be admissible in Georgia. In addition, no reported wrongful death decision in Georgia has ever held that an estate had the right to recover for hedonic damage losses of a decedent, even without expert testimony. As of two years ago, I had been involved in several recent Georgia cases based on attempts by plaintiff attorneys to claim hedonic damages. I have not had any cases in Georgia involving hedonic damages during the past two years.

Ohio. The only reported legal decision in which *Daubert* standards have been applied to hedonic damages testimony with rejection of hedonic damage testimony as admissible in a court of law was the decision of the Ohio Court of Appeals in *Lewis v. Alpha Level Separation, Inc.* (1998). In *Lewis*, the Court of Appeals strongly indicated that they would not have admitted the testimony themselves, but that the trial court judge had acted within his discretion in admitting the hedonic damages testimony of Michael Brookshire as falling within the “shaky, but admissible” wing of *Daubert*. While this decision was not a stirring endorsement, it appeared to offer some incentive to offer such testimony in the future. However, other Ohio courts continued to reject hedonic damages testimony. The last reported decision of an Ohio court was in *McGarry v. Horlacker, M.D.* (2002). The rejection of hedonic damages testimony in that case was quite strong and there have been no Ohio decisions regarding the admissibility hedonic damages since 2002. Based on the *Lewis* decision, I regarded Ohio as a battleground state for hedonic damages as of two years ago, but no longer consider Ohio as a battleground state given no further indication that hedonic damage testimony would be admissible in Ohio. I have been involved in about one hedonic damages case per year in Ohio, but have felt that they were “running a bluff” cases, as described in the last section of this paper.

Montana. In the case of *Hunt v. K-Mart* (1999), the Montana Supreme Court allowed a trial court decision admitting the hedonic damages testimony of Dr. Robert A. Velin in a personal injury

action to stand on the ground that the defense had not challenged Dr. Velin's testimony at the trial court level in a timely and specific fashion and thus had no standing to challenge that testimony after the trial. In that decision, the Montana Supreme Court gave no indication how it would have ruled on a timely objection to the admission of hedonic damages testimony if the objection had been properly made at the trial court level. Subsequent to that decision, three reported district court decisions held that hedonic damages testimony was not admissible: *Christofferson v. City of Great Falls* (2001); *Wisseman v. City of Cut Bank* (2001); and *Buxbaum v. Trustees of Indiana University* (2002).

In an unreported trial court decision in 2002 or 2003, federal district judge Richard Cebull allowed Stan Smith to testify about hedonic damages in a railroad case that was then appealed to the 9th Circuit in *Dorn v. Burlington Northern Santa Fe Railroad Company* (2005). I was involved with that case, but Judge Cebull did not allow me to provide testimony counter to the testimony of Stan Smith on the ground that I would essentially be testifying that the judge had made a mistake in admitting the testimony of Stan Smith. The 9th Circuit reversed the trial court decision on a number of grounds, one of which was that if the trial court admitted the hedonic damages testimony of Stan Smith, it had to admit my testimony as well. The 9th Circuit avoided reaching a conclusion about whether the Montana Supreme Court would allow hedonic damage testimony to be admitted in a direct challenge to that testimony. However, no plaintiff attorney has apparently thus far tried to make that challenge. Given the number of district court decisions following *Hunt* that have rejected hedonic damages testimony without such challenge and the absence of any reported decision admitting hedonic damages testimony that could have been challenged, it does not appear that Montana has remained a battleground state with respect to the issue of admitting hedonic damages testimony. I have been asked for help in one Montana case involving hedonic damages testimony in the past two years, but that case appeared to have been a "running a bluff" case that settled before trial.

Running a Bluff

Last year and into January 2009, one of my consulting cases was *Slater v. Jelinek*, No. 8:06 CV 00638, in the United States District Court for the District of Nebraska. This case was being tried under Nebraska law. Nebraska and West Virginia are the two states whose Supreme Courts have ruled that hedonic damages testimony is not admissible in their respective states. The economic expert proffering hedonic damages testimony in Nebraska was Stan Smith. Stan Smith was the expert proffering hedonic damages in not one, but two decisions of the Nebraska Supreme Court holding that hedonic damages testimony was not admissible in Nebraska cases. The cases were *Anderson v. Nebraska Department of Social Services* (1995) and *Talle v. Nebraska Department of Social Services* (1995). Nevertheless, Stan Smith had issued prior versions of his reports projecting hedonic damages losses. Stan Smith issued a third report on December 30, 2008 on the eve of trial that dropped calculations of hedonic damages. The case settled before trial.

At first glance, one may wonder why a plaintiff attorney would have hired Stan Smith to produce hedonic damages calculation in a case in which the chances of getting of getting those

calculations admitted were vanishingly small. I suspect, however, that this was not necessarily a bad strategic decision on the part of the plaintiff attorney. The cost of having Stan Smith produce hedonic damages calculations was probably in the range of three or four thousand dollars. The attorney had Dr. Smith produce other more ordinary calculations along with the hedonic damages calculations. The hedonic damages calculations added between \$3.2 and \$4.7 million for the hedonic damages of Abigail Slater along with another \$2.4 million in “loss of society and relationship” calculations for the parents of Abigail Slater (which are premised on their losses of life enjoyment based on the injured condition of their daughter). At most, the plaintiff attorney paid Stan Smith three or four thousand dollars to provide between \$5.6 and \$7.1 million dollars worth of additional damage claims. The plaintiff attorney was running a bluff and the defense attorney called the bluff by hiring me.

From a financial perspective, the issue of whether it is useful or not useful to have an expert calculate damages should be thought of more in terms of settlement value than in terms of trial value. Since most cases settle before trial, consequences for settlement are more important than trial consequences. In my Nebraska case, the trial consequences of having the trial court judge make a ruling limiting what damages an expert testifies to would probably have had a negative impact, albeit probably minor, on the trial outcome. Until the eve of trial, however, having an extra \$5.6 million to \$7.1 million in damages to give up in the process of settlement negotiations may well have been worth the \$4,000 Stan Smith probably charged for preparing such calculations. For this to have been worth the money, it would only have to have increased the settlement achieved in the case by \$4,001.

Over the past ten years, I have had many conversations with defense attorneys who have retained me shortly after receiving a Stan Smith report containing hedonic damage calculations. At the outset of such conversations, it has seemed clear to me that the plaintiff attorney has gotten the attention of the defense attorney with Stan Smith’s report. Attorneys weight case values in terms of the probability that a jury will find the defendant liable and in terms of the probable amount of damages that would normally be expected if liability was found. If a case has a normally expected case value of between \$300,000 and \$400,000, negotiations and many litigation steps by the plaintiff attorney are aimed at arriving at a settlement value as close to \$400,000 as possible. Negotiation and litigation steps of the defense attorney are aimed at arriving at a settlement value as close to \$300,000 as possible. To make the example more concrete, assume that ordinary economic damages are estimated at \$700,000 with a 40 percent to 60 percent probability that a jury will find liability. This would produce range from \$280,000 to \$420,000 and be reasonably consistent with a \$300,000 to \$400,000 bargaining range. Now assume into this picture that Stan Smith has calculated from \$2 million to \$4 million in hedonic damages resulting from the injury in addition to \$800,000 in projected wage loss plus household services. This is going to get the defense attorney’s attention.

By the time the defense attorney has called me, the defense attorney has learned something about hedonic damages. The defense attorney probably knows that the odds do not favor the acceptance of hedonic damages testimony at trial, but the defense attorney also knows that his client is now

facing the possibility of a much larger jury award than had been previously considered. As the defense attorney and I talk, the attorney is becoming more at ease with the more dramatic task being confronted. As we go through the steps needed for a solid defense, confidence begins to replace uncertainty. Nevertheless, I have typically been left with the feeling that the defense attorney has become significantly less resistant to settlement at the \$400,000 level than before the Stan Smith report with between \$2 million and \$4 million in hedonic damages arrived, though less so after the recent conversation with me. I have probably also been well worth what I will charge the attorney for my time working on this case, but Stan Smith has been worth what the plaintiff attorney has paid him – even in states where the chances of having the testimony admitted at trial are quite small.

Only two state supreme courts have thus far ruled that hedonic damages testimony is specifically not allowed. Mississippi's legislature has rewritten its Wrongful Death Act so that hedonic damages cannot be awarded in death cases and legislatively mandated that an economist cannot testify about hedonic damages in a personal injury. However, even in those states, a plaintiff attorney may run a bluff by hiring an economic expert who will provide hedonic damages calculations in his or her reports. In most states there have been no definitive rulings at the appellate level that such calculations cannot be testified to. Most attorneys on both sides in most states "know" that hedonic damages testimony will not be admitted, but no one knows that with absolute certainty. As long as that is true, there will still be occasional attempts by plaintiff attorneys to run a bluff by hiring an economic expert who will include hedonic damages calculations as an element of damages. I am not suggesting that will stop in the near future. I am only suggesting that the number of states in which there is any serious possibility of hedonic damages testimony being allowed in the vast majority of cases is coming to a close. Stan Smith and Robert Johnson are both in their 60's. I am in my 60's. I do not think that effective young economic experts will come along as the "new" Stan Smith or the "new" Robert Johnson. I also would not advise any young and effective economic expert to become as knowledgeable in opposing hedonic damages as I have become or that Dave Jones, Jim Rodgers or Gary Skoog have become. The period of time during which hedonic damages testimony has been important in forensic economics is coming to an end.

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Sena v. New Mexico State Police, 119 N.M. 471 (N.M.App. 1995)
Romero v. Byers, 872 P.2d 840 (N.M. 1994).
Lewis v. Alpha Lavel Separation, Inc., 128 Ohio App.3d 200 (1998)
McGarry v. Horlacker, M.D., 2002 Ohio 3161 (Ohio App. 2002)

Appendix – Legal Decisions Relevant to Hedonic Damages in Nevada and New Mexico

Nevada

Hallmark v. Eldredge, 189 P.3d 646 (Nev. 2008). The Nevada Supreme Court reversed a district court decision on the basis of abuse of discretion in admitting a physician with an engineering background to testify as a biomechanical expert and stated standards for admission of expert testimony in Nevada under Nevada's NRS 50.275, which the Court said closely tracked Rule 702 of the Federal Rules of Evidence. The Court said: "In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. If the expert formed his or her opinion based upon the results of a technique, experiment or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute. We again note that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case." The Nevada Supreme Court also noted: "To date . . . this court has not adopted the United States Supreme Court of FRE 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* But, as we have stated, *Daubert* and the federal court decisions discussing it may provide persuasive authority in determining whether expert testimony should be admitted in Nevada Courts."

Banks v. Sunrise Hospital, 102 P.3d 52; 2004 Nev. LEXIS 121 (Nevada 2004). This decision held that the trial court was not in error for admitting the hedonic damages testimony of Robert Johnson 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 court said: "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."

Pittman v. Thorndike, 762 F.Supp. 870 (D. Nev. 1991) This federal district case, interpreting Nevada law, precluded an award of hedonic damages under the Nevada Wrongful Death Act. The

Pittman Court held that damages in a wrongful death are limited to damages mentioned in the wrongful death statute. The Court also held that the only possible element of damages in the wrongful death statute that could conceivably be interpreted to allow hedonic damages for a decedent was the provision for recovery for pain and suffering. The court said: "Pain and suffering, to be compensable in a Nevada wrongful death action, must be consciously experienced. Thus, under the provision for pain and suffering, plaintiffs can only recover for that part of the decedent's "loss of the hedonic value of human life," that was consciously experienced before death. Furthermore, as the list of recoverable damages is exclusive, and pain and suffering is the only term that could encompass this loss, plaintiffs cannot recover for any other part of the loss."

New Mexico

Couch v. Astec Industries, Inc., 2002 NMCA 84 (New Mexico Court of Appeals 2002). This decision reconfirms that a trial court judge can admit testimony by an economic expert about hedonic damages in a personal injury case in New Mexico. 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 court cited *Smith v. Ingersoll-Rand Co*, 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.

Romero v. Byers, 872 P.2d 840 (N.M. 1994). This decision in a consolidated case held that New Mexico would henceforth recognize a claim for spousal consortium and household services in a wrongful death action. It also held that a claim could be made in a wrongful death action for "loss of the value of life itself." The Court said: "We hold that the value of life itself is compensable under our Act. Whether or not expert testimony is admitted for the purpose of providing that value is a matter best left to the rules of evidence of the applicable court." The Court held that task before a jury is to award "fair and just damages" taking into account both pecuniary and nonpecuniary damages suffered by the decedent, defining non pecuniary damages as follows: "There are two aspects of nonpecuniary damages that make up 'fair and just' compensation. Pain and suffering devolves from (1) that which the victim must newly endure and (2) that which the victim may no longer enjoy. The language of the Act clearly contemplates damages that encompass more than the pecuniary loss to th beneficiaries because of the loss to the deceased. In our opinion, the Act goes beyond the loss of decedent's wages, and encompasses all damages that are fair and just." The Court also specifically said with respect to the loss of guidance and counsel that a decedent might have provided to minor children: "Loss of guidance and counseling may be

considered by a jury in fixing pecuniary loss to the survivors. The jury should be allowed to assess this loss as part of the value of the decedent's life."

Sena v. New Mexico State Police, 119 N.M. 471 (N.M.App. 1995). New Mexico Court of Appeals held that economic testimony about lost enjoyment of life in a personal injury could be admitted at the discretion of a trial court judge. The Court said: "Consistent with the rule in *Romero*, we think it is clear that New Mexico permits proof of nonpecuniary damages resulting from the loss of enjoyment of life in tort actions involving permanent injuries. *Romero*, 117 N.M. at 428; 872 P.2d at 846; see also *Hoskie v. United States*, 666 F.2d 1353 (10th Cir. 1981). Similarly, we conclude that where an expert witness has been properly qualified, it is not improper for the trial court to permit an economist to testify regarding his or her opinion concerning the economic value of a plaintiff's loss of enjoyment of life," noting that a "trial court has wide discretion in determining whether witness is qualified to give expert testimony."

Smith v. Ingersoll-Rand, 1997 U.S. Dist. LEXIS 23443 (D.N.M. 1997); aff'd 214 F.3d 1235 (2000). Stan V. Smith was correctly admitted to explain the concept of hedonic damages based on New Mexico law, but without providing specific calculations for the plaintiff. See 214 F.3d 1235 under 10th Circuit for more details.

Smith v. Ingersoll-Rand, 214 F.3d 1235 (2000). The 10th Circuit described the trial court decision in detail in affirming the trial court decision to allow Stan V. Smith to explain the concept of hedonic damages, but without providing specific calculations for the plaintiff. The 10th Circuit indicated that the trial court had been in error in assuming that *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) did not apply to Smith's testimony, but that this was not reversible error because Smith had not provided specific numbers in explaining the conceptual meaning of hedonic damages. The 10th Circuit said: "The concept of hedonic damages is premised on what we take to be the rather noncontroversial assumption that the value of an individual's life exceeds the sum of that individual's economic productivity. In other words, one's life is worth more than what one is compensated for one's work. The assumption that life is worth more than the sum of economic productivity leads to the equally noncontroversial conclusion that compensatory awards based solely on lost earnings will under-compensate tort victims. The theory of hedonic damages becomes highly controversial when one attempts to monetize that portion of the value of life which is not captured by measures of economic productivity. Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in wake of *Daubert* have unanimously held quantifications of such damages inadmissible. . . Here, Stan Smith only testified to the definition of loss of enjoyment of life, which he described as 'an estimate of the value of a person's being for enjoyment of life as opposed to the value of a person's doing or their economic productive capacity, whether it's in the marketplace, in the business, or in the household as a service.' . . As the district court correctly noted, New Mexico state law permits both recover of hedonic damages and allows 'an economist to testify regarding his or her opinion concerning the economic value of a plaintiff's loss of

enjoyment of life. . . The district court also made an appropriate decision regarding reliability, excluding the quantification which has troubled both courts and academics, but allowing an explanation adequate to insure the jury did not ignore a component of damages allowable under state law.”

McGuire v. City of Santa Fe, 954 F.Supp. 230 (D.N.M. 1996). This order of Judge Bruce D. Black granted defendant’s motion in limine to bar the testimony of Dr. Patricia Murphy, a psychologist, and Dr. John Myers, an economist on hedonic damages in a wrongful termination case. At a *Daubert* hearing, Dr. Murphy did not testify, but the Court said: “Dr. Myers testified that Dr. Murphy interviewed Plaintiff to determine the extent of Plaintiff’s lost enjoyment of life. Dr. Murphy then applied the data she collected from her interview to her Lost Pleasure of Life Scale and arrived at a percentage value of Plaintiff’s lost enjoyment of life. Dr. Myers testified that it was Dr. Murphy’s role to ‘determine the part of the enjoyment of life that has been lost,’ while it was his role to address what the monetary value of the lost enjoyment is worth.” Dr. Myers testified that the value of a human life varied from \$928,000 to \$18,464,000, and that the reduction in the value of Plaintiff’s enjoyment of life caused by Defendant’s alleged harassment and termination was between \$1,430,000 and \$2,300,000. Judge Black subjected this method to *Daubert* tests. He pointed out that neither of the experts had suggested any widely suggested standards for uniformly measuring the value of lost pleasure. The Court also pointed out that the foundations for such analysis had been assailed as lacking any verifiable basis by respected economists, including W. Kip Viscusi, Ted Miller and Thomas Havrilesky, citing papers by those authors in the *Journal of Forensic Economics*. The Court pointed out that Dr. Murphy’s “Lost Pleasure of Life Scale” had no known error rate. He finally determined by reference to a number of articles that the theory underlying the hedonic damage calculations had not been “generally accepted. The Court also noted that: “Permitting ‘expert’ testimony on hedonic damages would seem particularly inappropriate in a wrongful termination suit like that at bar.”

Harris v. United States, 2007 U.S. Dist. LEXIS 96157 (D. N.M 2007). Judge James A. Parker granted a Motion to Preclude Testimony by Plaintiff’s Economic Expert Regarding Computation of Hedonic Damages.” The precluded economic expert was Dr. Brian McDonald. Judge Parker said: “Generally, to be considered reliable, the expert’s proposed testimony must be based on more than a subjective belief or unsupported speculation. *Daubert*, 509 U.S. at 590. While the United States Supreme Court in *Daubert*, 509 U.S. at 592-594, established basic standards by which courts may assess reliability, the Court here need not reach those factors as Dr. McDonald’s description of the proposed benchmark evinces the speculative and subjective nature of that proposed benchmark.” McDonald’s report was described as follows: “Much of Dr. McDonald’s report focuses on various studies concerning the value of a statistical life studies (sic) and the valuation figures contained therein. The brief discussion of the benchmark figure (\$50,000 per year for life expectancy) is intermingled with the discussion of statistical life studies despite having ‘no connection’ to them. The report contains no discussion of how Dr. McDonald generated the proposed benchmark figure or any citation to credible sources that support such a figure. As such, the basis of the benchmark figure appears largely arbitrary.” Judge Parker then cites decisions of two other judges in unreported cases as having arrived at similar conclusions

with respect to Dr. McDonald's approach.

Mitchell v. Board of County Commissioners, 2007 U.S. Dist. LEXIS 55674 (D. N.M. 2007). This was a decision that a person who had been injured after arrest could not unilaterally withdraw his demand for a jury trial for the purpose of assessing damages so that the Court did not award damages at the current time. However, Judge Browning's order described in some detail the damages calculations of "William Jennings Patterson, III, a forensic economist." The order said: "Patterson has been the sole proprietor of the firm, Legal Economics, since 2000 and has been employed by the firm since 1986. . . Patterson has a bachelor's degree in economics, and has testified as an expert in state and federal courts in New Mexico and Texas." The order discusses details of Patterson's calculations for "incurred and future medical expenses," household services, and "pleasure of life." In the latter category, Patterson testified about the value of life literature, testifying that "in calculating the present value of lost value of life, it is his practice to calculate a benchmark similar to the figures he calculated related to medical expenses and household services. . . . Patterson calculated that the present value per \$10,000 per year lost is \$353,254. . . . Patterson did not, however, calculate the specific value for any pleasure of life Mitchell may have lost; Patterson expressed that, in his opinion, this valuation is an issue for the finder of fact. . . . Patterson also stated that he did not compute any value for Mitchell's pain and suffering, because economists do not have a marketplace or reliable statistical study to base such calculations."

Martinez v. Caterpillar, Inc., 2007 U.S. Dist. LEXIS 97414 (D.N.M. 2007). This is an order of Judge Robert Haynes Scott granting a motion in limine to bar the hedonic damages testimony of William Patterson, who offered the present value for \$10,000 of lost pleasure of life over the lifetime of the plaintiff as a "benchmark" value. Judge Scott wrote that: "This type of expert opinion testimony invades the province of the jury and fails to meet the criterial for admission as expert testimony as set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). . . [N]owhere in his report does Mr. Patterson explain how or why he selected this particular value. Indeed, Plaintiff 'acknowledge[s] that [the \$10,000 value] is a hypothetical figure.' Thus, the basis of the benchmark value appears to be almost entirely arbitrary. . . [T]he Court does not understand the need to use a hypothetical 'benchmark value' when common mathematical equations and symbols serve the same purpose."

Cruz v. Bridgestone/Firestone North American Tire, 2008 U.S. Dist. LEXIS 107379 (D.N.M. 2008). This order of Judge Bruce D. Black grants the part of defendants motion in limine to preclude the hedonic damages testimony of M. Brian McDonald and William J. Patterson in a case involving an automobile accident that killed two illegal immigrants and injured a number of others. McDonald offered testimony to the effect that the appropriate range for the value of life in the Value of Statistical Life (VSL) literature was between \$5 million and \$6 million, but did not offer annual values for lost life enjoyment. Patterson offered testimony that the value of life ranged from \$500,000 to \$11 million, with an average of about \$3 million. The focus of the judge's decision was on the applicability of the U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc., v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275 (2002). That decision "prohibits any use of Department of Labor statistics or statutory minimum wages for

undocumented workers as it is illegal for any employer in the United States to hire or pay Plaintiffs.” Judge Black said: “Whether or not Dr. McDonald’s risk premium or Mr. Patterson’s labor versus leisure theories are valid, then, begs the question in this case. Both theories create a significant range of values. More significantly, however, both are based exclusively on wage scale and consumer choices in the United States. Several of the Plaintiffs had spent the majority of their working career employed in Mexico and were only sporadically in the United States. . . . Neither Dr. McDonald nor Mr. Patterson made any attempt to acknowledge the Mexican citizenship of the Plaintiffs or the legal barriers to their earning the average American wages which are the foundation of both experts’ studies. This court finds that *Daubert* requires a much more tailored approach.” Judge Black went on to say, however, that he would be willing to consider testimony based on wage losses of workers “similar to Plaintiffs and which were previously disclosed in the Rule 26 reports.”