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Reviews and Cases of Note

Trends in Legal Decisions Involving Hedonic Damages from 2000 to 2012

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I. Introduction

This paper evaluates trends in legal decisions from January 1, 2000 to October 21, 2012 that involved either economic experts testifying about "loss of enjoyment of life" or "hedonic damages" or discussions of the circumstances under which those damages can be awarded. The primary method used to find these decisions was searches using the search capacities of LexisNexis® Academic with the keywords "hedonic" and "loss of enjoyment of life." All decisions covered in this paper can be found using those keywords in searches of the LexisNexis database. The searches themselves were conducted on almost a daily basis over the past 12 years, but a comprehensive search was made as part of the preparation of this paper. Many of the descriptions that appear in the third section of this paper were written contemporaneously as decisions were reached and posted on LEXIS, and were made available at www.umsl.edu/~irelandt/Hedonic Damages.htm, but many of the descriptions have been revised in preparation of this paper.

The number of cases that can be retrieved using the LexisNexis database and the keywords "hedonic" and "loss of enjoyment of life" was 2840. Only 47 of those decisions (1.65%) contained discussion of economic experts testifying about hedonic damages or were concerned with the circumstances under which awards can be made using either term. The vast majority of decisions containing one of those damage terms mentioned claims made by plaintiffs requesting those damages

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or amounts awarded by juries for one of those terms, but did not involve an economic expert and did not raise questions about whether or not it was proper for awards to be made for those categories. A ruling that "hedonic damages" are not available in a wrongful death action would be included. A ruling that hedonic damages are not available to a comatose personal injury victim would be included. A ruling that $35,000 was awarded for "hedonic damages" in a personal injury case would not be included in this paper. A ruling that New York does not allow an award for hedonic damages separate from pain and suffering damages would not be included if it was only interpreting decisions prior to 2000. It would be included if it changed some aspect of New York law. For purposes of this paper, the terms will be used interchangeably as referring to the same loss of enjoyment of life.

This paper is partially an update to two papers that this author either authored or co-authored (Ireland, Johnson and Taylor, 1997, and Ireland, 2000). Some decisions in the set of descriptions provided here were also discussed in Ireland (2009). The author has been personally involved in some of the decisions described in this paper opposing the admission of hedonic damages testimony, which readers should consider in reading descriptions of those cases. No claim is made that this paper has covered all decisions that have discussed hedonic damages between 2000 and 2012. While that is hopefully not the case, it is possible that important decisions have been left out of this review. For anyone who has had to deal with the issue of hedonic damages in any consulting case work, however, it is likely that this set of descriptions will be of interest. Observations about trends indicated by those decisions comes next, followed by the descriptions of 47 decisions involving hedonic damages that were reached during the period from January 1, 2000 through October 21, 2012.

II. Trends Indicated in Legal Decisions from 2000 to 2012

In the descriptions of legal decision regarding hedonic damages that are provided in the next section, there were three decisions of Federal Circuit Courts, 16 decisions of Federal District Courts other than New Mexico, 9 decisions of Federal District Courts in the District of New Mexico, two appellate decisions in Arizona, three appellate decisions in Arkansas, one appellate decision in California, one in Louisiana, three in Mississippi, three in Montana, two in New Mexico, two in New Hampshire, one in Ohio, one in South Carolina, and one in Nevada. Since many of the federal decisions discussed state law of the states in which the decisions were made, it is probably more relevant to list states whose law was considered relevant. From that

standpoint, the state whose law was discussed most often by a large margin (11 decisions) was New Mexico. The next largest number was in Montana with four decisions. Arizona, Arkansas and Kentucky standards were discussed in three decisions each. The other seven states whose law was discussed in the reported decisions were mentioned only once.

Perhaps the single most important trend between 2000 and 2012 is that nothing has been said about the law of 38 of the 50 states in any reported decision. This does not mean that efforts were not made in those 38 states to claim hedonic damages. Some trial courts may have made rulings that have contrasted with rulings described in this paper. However, such decisions were not reported, cannot be found by normal search engines, and thus have relatively little impact on what might happen in future decisions. The remainder of this section will consist of observations about decisions made in federal courts and in each of the 12 states in which decisions were reached that were based on the law of those 12 states. Affected states will be discussed alphabetically. There will also be one last general observation about attempts to extend the concept of hedonic damages from personal injury/wrongful death contexts to other types of litigation in which plaintiffs may have suffered some loss of life enjoyment.

(1) *Federal Courts*. The primary trend in federal cases has been continuing rejection of hedonic damages testimony, largely in a manner consistent with the trend that existed before 2000. This is shown in a number of the federal decisions reported above. There is one exception that began with *Smith v. Ingersoll-Rand* (10th Cir. 2000). In that decision, the 10th Circuit did not reverse the trial court's decision to allow economic expert Stan Smith (not related to the plaintiff) to discuss the value of statistical life literature in economics and to explain to the jury the difference between pain and suffering and loss of enjoyment of life. The trial court did not permit Smith to testify to any specific dollar values for "loss of enjoyment of life." This type of testimony without specific dollar values has been permitted in a number of federal cases in New Mexico and in one federal district court decision in Illinois (*Richman v. Burgeson*, 2008). There still has never been a reported federal decision decided under *Daubert* in which a trial court permitted hedonic damages testimony involving specific dollar values for the plaintiff.

(2) *Arkansas*. Prior to 2008, a small number of decisions involving hedonic damages testimony were reported in Arkansas. Arkansas had modified its Survival Action statute in 2001. In 2004, the ruling of the Arkansas Supreme Court in *Durham v. Marberry*, gave

some hope that economic testimony regarding hedonic damages testimony by an economist might be admissible. However, the subsequent decision of the Arkansas Supreme Court in *One National Bank v. Pope* (2008) defined the type of allowable testimony about the value of an individual's life in such a way that it is unlikely that testimony by an economic expert would qualify. In *Pope*, the Arkansas Supreme Court held that in *McMullen v. United States* (D. AR 2007), Judge Eisele had correctly interpreted *Durham v. Marberry* as requiring a jury to consider unique facts about the life of a decedent in arriving at a value for life under the new Arkansas Survival Act. That decision has the effect of precluding testimony about the value of life or life enjoyment generally. Whether it precludes all types of testimony by an economist that might be relevant to the value of a particular human being's life remains to be determined, but it is unlikely that any testimony based on the Value of Statistical Life (VSL) literature would be deemed admissible since those values are not specific to an individual decedent in any manner other than with respect to life expectancy in some types of hedonic damages testimony.

(3) *Arizona*. The two relevant decisions interpreting Arizona law between 2000 and 2012 were focused on defining circumstances under which hedonic damages could be claimed in Arizona. *Quintero v. Rodgers* (AZ App. 2008) held that loss of enjoyment of life is not allowed in death cases. *Ogden v. J.M. Steel*, 31 P.3d 806 (AZ 2001) held that loss of enjoyment of life is a separate category of damages from pain and suffering. No decisions were reached that determined whether or not an economic expert could testify about loss of enjoyment of life. No Arizona decisions have ever been reached on that question.

(4) *California*. Appellate decisions prior to 2000 had precluded hedonic damages testimony by economic experts. The only decision interpreting California law after 2000 was *Dubose v. City of San Diego* (2002), in which a federal district court judge held that the proposed hedonic damages testimony of Robert Johnson was inadmissible under California law. This was not a change in California law, but an affirmation of earlier decisions.

(5) *Kentucky*. The three federal district court decisions interpreting Kentucky law after 2000 were all decisions that related to the circumstances under which recovery is allowed for loss of enjoyment of life in wrongful death actions. *Estate of Shearer v. T & W. Tool and Die* (2010) held that damages are not allowed for the loss of enjoyment of life of decedents. The two most recent decisions in *Hinkle v. Ford Motor Company* (2012) and *Spaulding v. Tate* (2012) were both

concerned with whether an award could be made in a wrongful death action for loss of enjoyment of life between the instant of a fatal automobile crash and the instant of the death of the decedent. Both cases were in federal district court, but substantively governed by standards for recovery under Kentucky law. In both cases, it was held that under Kentucky law, hedonic damages must be treated as part of an award for pain and suffering, that a person must have been conscious and alive for at least an instant after a fatal crash, and that the award can only be from the instant of the crash to the instant of death.

(6) *Louisiana*. Prior to 2000, a number of legal decisions involving the admissibility of testimony by economists about loss of enjoyment of life in the state of Louisiana were reported. Reported decisions of that type ended in 2006 with the *McGee* decision. *McGee* specified that hedonic damages testimony was allowed, but that the type of hedonic damages testimony that should be provided was of a type that would be provided by character witnesses and not experts. No economist was involved in McGee and the McGee decision did not specifically exclude hedonic damages testimony by an economist. However, after *McGee*, there have been no further decisions involving having economic experts testify about hedonic damages in Louisiana.

(7) *Mississippi*. Early in 2000, several Mississippi decisions accepted trial court decisions to allow economic testimony by economic experts. *Kansas City Southern Railway Company, Inc. v. Johnson* (2001) and *Choctaw v. Hailey* (2002) were major successes for the hedonic damages concept, allowing economic testimony about "loss of the enjoyment of life" in both personal injury and wrongful death circumstances. An act of the Mississippi legislature, however, specifically adopted the *Daubert* standard, held by statute that hedonic damages testimony by an economist was not allowed, and prohibited hedonic damages from being awarded in death cases filed after January 1, 2003. Hedonic damages testimony by an economic expert is no longer being admitted in Mississippi.

(8) *Montana*. Montana had a number of decisions regarding hedonic damages before 2000 and had three decisions in 2001 and 2002 excluding hedonic damages, but no subsequent decisions. In *Dorn v. BNSF* (2004), the 9th Circuit pointed out that the Montana Supreme Court had not yet ruled on the admissibility of hedonic damages testimony, which remains the case. Trial court decisions in Montana have usually excluded hedonic damages testimony by economic experts, but the Montana Supreme Court has never ruled on the scientific merits of hedonic damages testimony. However, the 9th

Circuit held that the defense should have been allowed to provide rebuttal testimony if the trial court permitted the plaintiff to present hedonic damages testimony by an economic expert.

(9) *New Hampshire. Bennett v. Lembo* (NH 2001) affirmed a prior decision that "loss of enjoyment of life" of a decedent was a recoverable damage in a wrongful death action in New Hampshire. An economic expert was not involved in that decision and no decision was made about whether economic testimony about loss of enjoyment of life is allowed in New Hampshire.

(10) *Ohio*. In the 1990's a number of reported decisions in Ohio were concerned with the circumstances under which damages could be awarded for "loss of the ability to perform life's usual functions." Several of those decisions had ruled for and against testimony regarding such damages by an economic expert (Ireland 2000). After the decision in *McGarry v. Horlacker, M.D.* (2002), however, no further decisions regarding "loss of enjoyment of life," "hedonic damages" or "loss of ability to perform life's usual functions" have been reported. *McGarry* appears to have largely determined that testimony about hedonic damages in Ohio will not be admitted.

(11) *Nevada*. In *Banks v. Sunrise Hospital* (2004), Nevada held that the trial court was not in error for permitting the testimony of economic expert Robert Johnson. Johnson testified to a range in the value of a statistical life literature for a jury to consider in awarding damages for loss of enjoyment of life in the case of Otho Lee Banks, who was in a near persistent vegetative state. The Banks court held that hedonic damages are a part of pain and suffering in Nevada, but that it was not error for loss of enjoyment of life to have been considered separately. The *Banks* court also held that the defense should have presented rebuttal testimony and that being conscious is not required for recovery of loss of enjoyment of life in personal injury cases. Most other states, however, have held that consciousness of an injury victim is a prerequisite for recovery of "loss of enjoyment of life" damages. While there have been no other reported Nevada decisions regarding "hedonic damages," a federal district court interpreting Nevada law followed *Banks* in *Matlock v. Greyhound Lines, Inc.* (2010). However, *Matlock* did not involve the use of an economic expert.

(12) *New Mexico*. In New Mexico, decisions involving the admissibility of hedonic damages testimony have both allowed and denied such testimony. In federal district court cases in New Mexico, economic testimony regarding hedonic damages is typically not admitted. In cases in state court, such testimony has been admitted

more often than not, but has been increasingly circumscribed. In such cases, an economic expert is permitted to explain the difference between pain and suffering and loss of enjoyment of life and to explain the nature of the value of statistical life literature in economics, but not to offer any specific opinion about a plaintiff's loss of enjoyment of life. Prior to the *Couch* decision in 2002, economic experts were typically allowed to project present values for $50,000 per year (or other amounts) based on a decedent's life expectancy. After *Couch*, providing specific dollar values was generally not allowed, but specific dollar amounts were allowed in *Gurule v. Ford Motor Company* (2011).

(13) *South Carolina*. The only South Carolina decision concerning "loss of enjoyment of life" or "hedonic damages" during the period from 2000 to the present was *Boan v. Blackwell* in 2001. *Boan* held that "hedonic damages" are a separate category of damages from "pain and suffering," and that damage awards can include damages for each category. The issue of whether or not an economist could testify about hedonic damages was not involved in that decision.

(14) *Extensions beyond personal injury and wrongful death*. An effort has been made to extend the use of loss of enjoyment of life testimony by economists to other types of cases. *Anastacion v. Credit Service of Logan, Inc*. (2011) was an effort to extend loss of enjoyment of life testimony by an economist into a case involving a plaintiff's credit expectancy. *Smith v. Jenkins* (2011) was an effort to extend hedonic damages into a case involving fraud. *Dossat v. Hoffman-La Roche, Inc*. (2012) was an effort to extend "loss of enjoyment of life" testimony by an economist into wrongful termination litigation. In each of those decisions, courts ruled against having an economic expert testify about "loss of enjoyment of life" when no physical injury was involved. This author has also been retained in other cases in which an effort was made to bring economic testimony about loss of enjoyment of life into cases in which no physical injury has occurred. Thus far, efforts to extend hedonic damages testimony in to areas that did not involve physical injuries have apparently not been successful.

III. Descriptions of Decisions Regarding Hedonic Damages

The final section of this paper provides the 47 decisions between January 1, 2000 and October 21, 2012 that either discussed economic testimony regarding hedonic damages or loss of enjoyment of life or discussed circumstances in which awards could

be made for either of those categories. The decisions are presented chronologically by year, but not within each year. The order of decisions within each year is essentially random. The largest number of decisions reached in any year was nine decisions in 2002. There was at least one decision in each year, but several years with only one decision.

A. 2000

Baron v. Sayre Memorial Hospital, 2000 U.S. App. LEXIS 17731 (10th Cir. 2000). The 10th Circuit Court of Appeals quoted the trial court decision: "It takes a 'discerning mind . . . to make a strict differentiation between hedonic damages and the loss of pleasure of life as a pain and suffering – mental pain and suffering component, but certainly damages are contemplated in law for the latter.' " This did not involve the admissibility of an expert witness to testify about hedonic damages.

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 recovery 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.

Bennett v. Lembo, 761 A.2d 494 (NH 2000). New Hampshire's Supreme Court ruled that hedonic damages can be recovered in cases of personal injury with a permanent impairment. Whether expert testimony would be allowed based on willingness-to-pay literature was not addressed.

B. 2001

Christofferson v. City of Great Falls, 2001 ML 2326; 2001 Mont. Dist. LEXIS 3560. (Mont. Dist. 2001). This is an order of Judge Kenneth Neill granting a motion in limine barring the hedonic damages testimony of Dr. Stan V. Smith after a Daubert hearing, with specific considerations of: (A) Testability; (B) Peer Review; (C) Potential Rate of Error; and (D) Degree of Acceptance. Under "Testibility,"the Court said:

> Dr. Ireland testified that the methodology could not be tested. Dr. Smith admitted only that the underlying studies . . .could or had been tested. Dr. Ireland further pointed out that while many of the predictions of economists in damages testimony can be validated in retrospect if not otherwise (for example, predicted rates of inflation, salary escalations, etc.), no such retrospective validation is possible with hedonic damages.

Under "Peer Review," the Court said: "Publication . . . does not equate to peer review." Under "Potential Rate of Error," the Court cited *Hein v. Merck & Co*, 868 F. Supp. 230 (M.D. Tenn. 1994) in saying that "Expert valuation in hedonic damages has been roundly criticized for the wide variation reached by various experts in

calculating values of an anonymous life, from for example $100,000 to $12,000,000." Under "Degree of Acceptance," the Court said:

> Dr. Ireland cites to a 1999 survey of forensic economists in which only 25% indicated they were willing to consider presenting hedonic damage testimony and 75% would not. . . Certainly a cottage industry has sprung up around this theory of hedonic damages in which numerous forensic economists are willing to come forward and testify for one side or the other. Any time there is a market for a particular type of expert testimony as there clearly is here, one should not be surprised that there will be experts ready to avail themselves of that market. A review of the cases and literature cited in the cases reveals that there is anything but a professional consensus that Dr. Smith's theory is valid.

The Court also concluded that hedonic damages testimony failed a separate "relevance" test based on the fact that purchases of smoke detectors were not relevant to measure the quality of someone's life.

Boan v. Blackwell, 343 S.C. 498 (SC 2001). The South Carolina Supreme Court held that hedonic damages are a separate element of damages from pain and suffering. No issue was raised about whether expert testimony about hedonic damages was allowable.

Ogden v. J.M. Steel, 31 P.3d 806 (AZ 2001). The Arizona Supreme Court held that hedonic damages are a separate element of damages from pain and suffering. No issue was raised about whether expert testimony about hedonic damages was allowable.

Kansas City Southern Railway Company, Inc. v. Johnson, 798 So.2d 374 (MS 2001). The trial court judge had admitted the hedonic damages testimony of Stan V. Smith. This decision held that hedonic damage testimony in a personal injury case could be admitted at the discretion of the trial court judge and affirmed the trial court. This decision was later rendered obsolete by passage of legislation to specifically preclude hedonic damages testimony by an economic expert.

Wisseman v. City of Cut Bank, 2001 ML 5022; 2001 Mont. Dist. LEXIS 2734 (Mt. Dist. 2001). A motion to exclude the testimony of Robert Velin on hedonic damages was granted.

C. 2002

Anderson v. Hale, 2002 U.S. Dist. LEXIS 28281 (W.D. Ok. 2002). This memorandum evaluates the admissibility of an economic damages report by Dr. James Horrell that provided projections for lost

earnings, lost household services and hedonic damages. Judge Friot sets out a 12-step process for evaluating the admissibility of the lost earnings and lost household services projections of Dr. Horrell under F.R.Civ.P. Rule 26(a)(2). Judge Friot found that the requirements for those calculations were met, however inadequately. Judge Friot then applied *Daubert-Kumho* standards to Dr. Horrell's hedonic damages calculation. That calculation consisted of assuming that the value of enjoyment of life had a value of $3,000,000 and that the plaintiff had lost 20% of that amount based on his injury, with a corresponding loss of $600,000. Judge Friot concluded:

> [N]either Dr. Horrell's equation or the numbers he plugs into that equation are substantiated by his report. Moreover, the approach to hedonic damages which Dr. Horrell advocates is demonstrably lacking in "fit" with either the facts of the case or Oklahoma law.

Buxbaum v. Trustees of Indiana University, 2002 ML 2937; 2002 Mont. Dist. LEXIS 3141 (Mt Dist. 2002). A motion to exclude the testimony of Stan Smith on hedonic damages was granted.

Choctaw v. Hailey, 822 So. 2d 911 (Miss. 2002). The Mississippi Supreme Court held that the enjoyment of life was recoverable in a wrongful death action. The decision was made with respect to whether or not it was in error to have had character witnesses testify about the decedent's enjoyment of life and no economic expert was involved. A subsequent act of the Mississippi legislature precluded hedonic damages in a death case and also precluded an expert witness from testifying about hedonic damages in a personal injury action.

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:

> We disagree. McDonald's testimony regarding a statistical life gave the jury a range of monetary values that likely proved helpful in evaluating Plaintiff's claim. He also provided concrete guidance to the jury in determining a percentage of the monetary value that

> might reasonably compensate plaintiff. . .[I]f 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.

Davis v. Rocor International, 226 F.Supp.2d 839 (S.D.Miss. 2002). A *Daubert* standard was applied to the proffered expert testimony of Dr. Stan Smith in several areas. The hedonic damages testimony of Stan Smith was rejected on the grounds of not assisting the trier of fact to understand or determine an issue in this case. The loss of society testimony of Stan Smith was rejected on the basis of a lack of evidence showing anyone had a loss of society based on percentages used in this personal injury action. It was also rejected and on the basis that Smith, as an economist, has not been shown to be qualified as an expert with respect to relationship values. The loss of household services testimony of Stan Smith, projected on the basis of 40 percent of the plaintiff's pre-injury capacity, was rejected because there was no showing that Smith, as an economist, is independently qualified to make that determination and that Plaintiffs had not shown that Smith's opinion would assist the trier of fact in understanding the evidence presented at trial.

Dubose v. City of San Diego, 2002 U.S. Dist. LEXIS 28297 (S.D. Ca. 2002). Judge James Lornenz granted defendant's motion in limine to exclude the hedonic damages testimony of economic expert Robert Johnson, applying federal *Daubert-Kumho* standards and precedents rather than California precedents.

McGarry v. Horlacker, M.D., 2002 Ohio 3161 (Ohio App. 2002). The Ohio Court of Appeals upheld a trial court refusal to admit the hedonic damages testimony of John Burke, an economist. The trial court judge conducted a *Daubert* hearing to determine the admissibility of his hedonic damage testimony in a personal injury case. Burke was allowed to testify about McGarry's lost earning capacity and the value of her services as a homemaker, but not hedonic damages. The trial court judge was quoted as having said:

> Now, I am aware that . . . under Daubert there are areas of science that are shaky but admissible that can be introduced, but I just

> don't think this is in the shaky but admissible category. . . It may obtain that with more study in the near future, but I just don't believe it is there now. . . Burke attempted to assign a monetary value to a random American woman's qualitative enjoyment of life at McGarry's age. He admitted that, because his calculations were based on a random American, his method would assign the same hedonic damages to a woman who had been sentenced to life in prison as to a woman living a normal, healthy life with her family.

Dorrough v. Wilkes, 817 So. 2d 567 (MS 2002). The Court held that hedonic damages were allowable in a death case if pain and suffering was lengthy before death as in the Dorrough case, but struck the hedonic damages testimony of economic expert Robert Johnson after Johnson's testimony. The jury was told they could award hedonic damages, but should ignore Robert Johnson's testimony in arriving at its award. This decision predates Mississippi tort reform legislation precluding hedonic damages in a death case and holding that there can be no expert opinion about hedonic damages.

Gradia v. Tanner, 2002 U.S. Dist. LEXIS 28446 (D. N.M. 2002). U.S. Magistrate Judge William Deaton granted a motion to limit the hedonic damages testimony of Dr. Allen Parkman, as follows:

> This matter comes before the Court upon Defendants' Motion in Limine to Exclude the Testimony of Dr. Allen Parkman Regarding Loss of Value of Life or Hedonic Damages [docket no. 27]. In responding to Defendants' motion, Plaintiff relies in part on *Smith v. Ingersoll-Rand Co.*, 1997 U.S. Dist. LEXIS 23443, which is attached to his response. In *Smith*, Judge Vazquez found that the economic studies which purportedly would allow valuation of hedonic damages by an expert would fall into the category of social science and would not require a *Daubert* analysis of the proposed testimony since the proper analysis would be under Fed. R. Evid. 702. Judge Vazquez went on to find that the use of the economist's testimony for purposes of placing a value on hedonic damages would not be reliable and that it would be unhelpful and confusing to the jury; therefore, Judge Vazquez did not allow the economist to place a value on the hedonic damages suffered by the Smiths. However, Judge Vazquez did allow the expert in her case to give testimony explaining hedonic damages. I agree with the approach and logic taken by Judge Vazquez in the *Smith* case. While I will not allow the expert in this cause, Dr. Allen Parkman, an economist, to testify regarding the value of the hedonic damages suffered by Plaintiff's deceased, I

will allow him to explain the nature of hedonic damages. Also, Dr. Parkman may give his opinion as to the economic loss to the estate caused by the death of Jay Gradia.

D. 2003

Beller v. United States, 2003 U.S. Dist. LEXIS 25562, (D.N.M. 2002). Plaintiffs had moved to require the defendants to present only one expert witness in the area of damages. Defendants intended to present both David Johnson, a certified public accountant, and Dr. George Rhodes, an economist, on damages. Defendants explained in their reply brief that David Johnson, if called as a witness, will testify about economic losses such as lost earnings and household services, while Dr. Rhodes, if called as a witness, would testify about aggravating circumstances damages and hedonic damages. The district court rejected the motion to prevent the defendant from offering these two witnesses.

McLaughin v. Fisher Engineering, 150 N.H. 195; 834 A.2d 258 (N.H. 2003). The New Hampshire Supreme Court affirmed the decision of the trial court to admit evidence of a decedent's drug abuse and prior incarceration as relevant to both the estate's claim for hedonic damages and loss of income, but only as relevant to economic issues. The trial court gave a cautionary instruction that this information was "only to be used for the purpose of considering the issues such as economics in this matter." It was not to be used in lowering the award because the jury felt the decedent was a bad person. At trial, Fisher had asked the plaintiff's economist, John Romps, whether plaintiffs had provided him with McLaughlin's treatment record following an arrest for driving while intoxicated and other periods of incarceration. Romps indicated being aware of the decedent's felony conviction, but that it did not change his opinion. There is no indication in the decision that Romps presented hedonic damages testimony along with his calculation of lost earning capacity.

E. 2004

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 economic expert 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.

Durham v. Marberry, 356 Ark. 481; 156 S.W.3d 242 (Ark. 2004). The Arkansas Supreme Court held that a 2001 Arkansas survival action Ark. Code Ann. § 16-62-101 (Supp. 2003) created a new element of damages in circumstances of wrongful death called "loss of life" and that an injured plaintiff did not have to survive beyond the fatal injury to have the right to recover this loss element. The Court indicated that "loss of life" and "loss of enjoyment of life" are different elements even though "both are hedonic." The Court appeared to indicate that it would probably not allow expert testimony about the amount of damages to be awarded for "loss of life." The Court cited its own decision in *Clark & Sons v. Elliot*, 251 Ark. 853 (1972), as indicating "there is no hard and fast rule to determine compensatory damages for non-pecuniary losses."

F. 2005

Dorn v. Burlington Northern Santa Fe Railroad Company, 2005 U.S. App. 1887 (9th Cir. 2005). This was an appeal of a wrongful death decision under Montana law, not a Federal Employers Liability (FELA) action involving a railroad worker. The trial court judge had permitted Stan V. Smith to present hedonic damages testimony, but had not allowed Thomas R. Ireland to testify in opposition to the validity of hedonic damages testimony. As one of a number of errors that resulted in a reversal of the trial court decision, the 9th Circuit held that it was reversible error for the trial court not to have admitted Ireland's testimony. The 9th Circuit evaluated Montana's position on hedonic damages and the admissibility of expert testimony on hedonic damages as ambiguous and therefore did not hold that the admission of Smith's hedonic damages testimony was reversible error.

G. 2006

McGee v. A C and S, Inc., 933 So. 2d 770; 2006 La LEXIS 2139 (La. 2006). This decision of the Louisiana Supreme Court held in favor of allowing an award for hedonic damages as a separate category from other intangible losses such as pain and suffering in a wrongful death action, but limiting these types of damages (including hedonic damages) to the period during which the decedent was still alive. It provides a very clear discussion of the difference between "special damages" ("those which have a 'ready market value,' such that the amount of damages may be determined with relative certainty, including medical expenses and lost wages") and "general damages" ("general damages are inherently speculative and cannot be calculated with mathematical certainty"). The decision points out that "loss of the enjoyment of life falls within the definition of general damages because it involves the quality of a person's life, which is inherently speculative and cannot be measured definitively in terms of money." It offers this comparison:

> Consider, for example, two boys, one athletic and the other artistic, who are both involved in an accident and suffer similar injuries. Presumably each boy should be awarded a similar quantum of damages for pain and suffering. However, the same injury may affect the boys very differently. The artist's lifestyle was not drastically altered by the accident, as he was able to resume his artistic activities after the accident, whereas the athlete's lifestyle is altered significantly, as he has to resign from his team and can no longer participate in athletics.

This decision involved the wrongful death of James McGee from exposure to asbestos. The court pointed out that there was no right to recover for James McGee's loss of enjoyment of life under Louisiana's wrongful death act, but that right existed under Louisiana's survival action. The decision provides a clear discussion of the differences between the two acts. The right to recover for loss of enjoyment of life under the survival action was limited to the period McGee remained alive and thus suffered his loss of enjoyment of life. The decision also considered decisions on this issue reached in a number of other states.

H. 2007

In Re: Jacoby Airplane Crash Litigation, 2006 U.S. Dist. LEXIS 87816 (D.N.J. 2006). This memorandum reviews New Jersey case law about the length of time a decedent must have survived to trigger an ability to claim pain and suffering damages, hedonic damages and punitive damages. It also deals with distinctions between pre and post impact damages in terms of the airplane crash. After this evaluation,

the court denied defendant's motions to exclude evidence of the Jacobys' pre-impact fright and motions to exclude any statements implying that the Jacobys survived impact. The court said:

> While the court continues to eye with circumspection the quantum of damages reasonably recoverable, New Jersey courts' decision to adopt a 'split second' definition of what constitutes a non-instantaneous death, along with the presumption of continuing life, leaves this Court with no alternative but to allow Plaintiffs to submit such evidence to the trier of fact for a factual determination as to how much those seconds, or tenths of a second, are worth.

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.

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 economic expert 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 criteria 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.

McCloud v. Goodyear Dunlop Tires N. Am., Ltd., 2007 U.S. Dist. LEXIS 1501, (C.D. IL 2007). The Court ruled:

> Defendant has brought a Renewed Motion to Strike the Second Expert Report of Stan Smith - Plaintiff's expert on the issue of hedonic damages. Plaintiff does not oppose the merits of the Motion since Plaintiff is no longer pursuing hedonic damages. Accordingly, Defendant's Motion is GRANTED.

McMullin v. United States, 515 F. Supp. 2d 914, 2007 U.S. Dist. Lexis 77933 (E.D. Ark. 2007). This is a judicial ruling in a Federal Tort Claims Act (FTCA) case involving a medical malpractice wrongful death action. An economist was apparently not involved in this case. Judge Eisele held that the Arkansas Survival Action statute applies to medical malpractice in spite of some controversy in the Arkansas Courts about whether the Arkansas Medical Malpractice Act changed this application. This meant that Judge Eisele had to make an award under Ark. Code. Ann. § 16-62-101(b), which says: "In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damage (as modified in 2001)." Judge Eisele reviewed the decision in *Durham v. Marberry*, 356 Ark, 481 (2004) which is the only appellate interpretation of the 2001 addition to the Survival Act. He found no guidance in that decision. He indicated that he had found two U.S. District Court decisions in which interpretations of this section were made. In one of the two, the judge awarded $400,000, but spoke of the vagueness of the new statutory language. In the other, the judge had permitted the testimony of Dr. Stan V. Smith, but that judge did not find Smith's testimony "persuasive" and awarded amounts of $81,068.91 and $71,463.91. Judge Eisele also discussed a 2006 note by Ali M. Brady, "The Measure of Life: Determining the Value of Lost Years after *Durham v. Marberry*," 59 Ark. L. Rev. 125 at some length.

After extensive discussion, Judge Eisele awarded $600,000 for loss-of-life damages.

Mitchell v. Board of County Commissioners, 2007 U.S. Dist. LEXIS 55674 (D. N.M. 2007). Without ruling on the admissibility of economic expert William Patterson's lost value of life testimony, Judge Browning's order described in some detail economic expert William 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:

> [I]n calculating the present value of lost value of life, it is his [Patterson's] 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.

I. 2008

Richman v. Burgeson, 2008 U. S. Dist. LEXIS 48349 (N.D. Ill. 2008). This was a memorandum by Judge Joan B. Gottschall ruling on a number of motions in limine, including one to exclude the hedonic damages testimony of Stan V. Smith, Ph.D. The motion with respect to Dr. Smith was granted in part and denied in part in a wrongful death case under Section § 1983 of the Federal Civil Rights Act. The judge held that Dr. Smith could testify about the concept of the value of life, but could not give dollar values which, the judge held, were not sufficient reliable or helpful to a jury. Dr. Smith was permitted to opine "that ascertaining the value of life requires consideration of Jack Richman's leadership role in his community, his love of music, and his environmental activism."

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 defendant's 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. Judge Black said:

> [T]he Court notes both of these methods attempt to place a dollar value on how Americans value their leisure as well as the overall statistical value we place on our lives. Federal courts have frequently rejected such testimony on the quantification of life under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) . . .
>
> Whether or not Dr. McDonald's risk premium or Mr. Patterson's labor versus leisure theories are valid . . . 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.

One National Bank v. Pope, 372 Ark. 208, 272 S.W.3d 98, 2008 Ark. LEXIS 62 (Ark. 2008). This decision interpreted the meaning of Arkansas's 2005 survival action language in Ark § 16-62-101(b) (Repl.2005), which says: "(b) In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages." The Court referenced its own decision in *Durham v. Marberry*, 356 Ark. 481 (2004) as maintaining a distinction between "loss-of-enjoyment-of-life damages" and "loss-of-life damages" as damages that are "pre-death" and damages that "only begin accruing when life is lost, at death[.]" The Court noted that in the *Durham* decision it had quoted *Katsetos v. Nolan*, 170 Conn. 637 (1976) as being instructive about how the Court viewed "loss-of-life" damages. The Court also indicated that the interpretation made in *McMullin v. United States*, 515 F. Supp. 2d 914 (E.D. Ark. 2007) of the *Durham* decision was correct in that "many types of evidence may be presented as evidence of loss-of-life damages." The Court held that "an estate seeking loss-of-life damages pursuant to section 16-62-101(b) must present *some* evidence that the decedent valued his or her life from which a jury could infer and derive that value and on which it could base an award of damages." There was no indication in the decision that the estate had tried to present an economic expert to place a dollar value on "loss-of-life" damages, nor that the Court would have felt it appropriate for the estate to have done so.

Quintero v. Rodgers, 2008 WL 4916554 (Ariz. App. Div. 1). This decision held that Arizona's survival action statute (A.R.S § 14–3110) does not allow for the estate of a decedent to recover for hedonic damages suffered by the decedent. There is no indication in the decision that an economist had attempted to quantify hedonic damages.

J. 2009

BNSF Railway Co. v. LaFarge Southwest, Inc., Civ. No 06–1076, 2009 WL 4279849 (D.N.M. 2009). Judge M. Christina Armijo granted in part a motion in limine to exclude the reports and testimony of Brian McDonald and Allen Parkman for the plaintiff and W. Kip Viscusi for the defendant. She held that the majority rule in federal courts "is that any attempt to quantify the value of a human life is inadmissible and does not meet the relevance and reliability factors set forth in Daubert and progeny." She said:

> I construe this rule as applying to any testimony which attempts to quantify (or place a monetary value on) a 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.

Viscusi's role in the case was to rebut testimony provided by McDonald and Parkman and Judge Armijo ruled that there was no need for the jury to hear rebuttal testimony, given her ruling.

Ferguson v. Valero Energy Corp.,2009 U.S. Dist. LEXIS 34888 (E.D. Pa. 2009). This is an opinion by Judge Mary A. McLaughlin interpreting Delaware's Wrongful Death Act and Survivor's Act as they apply to categories of damages. There is no discussion of an economic expert in the decision. The case involved the death of a single adult man who was living with, but not financially supporting his father. The father was suing for damages under the Delaware Wrongful Death Act. The decedent's brother was suing for damages under Delaware's Survival Act. The judge held there was sufficient evidence that the decedent had provided household services to assist his father, but there was no evidence to suggest the decedent had financially supported his father. The judge also said: "Delaware courts have consistently held that the Wrongful Death Act allows the recovery of that portion of the decedent's lost earnings that would have been saved, over and above the decedent's spending on his maintenance, and passed on to his estate." The plaintiffs had sought "any and all hedonic damages allowed for the loss of the decedent's

life and enjoyment of future life as permitted by Delaware law or as evidence of the pain and suffering and mental anguish" of the decedent. Judge McLaughlin's discussion of hedonic damages under the Survivor's Act relied heavily on the decision in *Sterner v. Wesley College Inc.*, 747 F. Supp. 263 (D.Del. 1990). Under Delaware law, any claim for hedonic damages has to be as a part of pain and suffering and not as an independent category of damages "at least under circumstances like those in *Sterner* and here, where only a brief interval occurred between decedent's injury and death. . . ." The Court therefore predicts that if Delaware law were to allow for the recovery of hedonic damages for life's pleasures and loss of enjoyment of life, then the Survivor's Act would allow recovery of such damages only to the extent they were suffered for the period of time between the injury at issue and the decedent's death.

Garner v. United States, 2009 U.S. Dist. LEXIS 16350 (E.D. Ark. 2009). This order interpreted Tennessee law as not allowing an award for the lost enjoyment of life in a wrongful death action and therefore excluded the direct hedonic damages portion of the economic expert report of Dr. Stan V. Smith, but did not exclude his values for lost consortium, holding that Tennessee law allowed for such damages to be awarded to survivors.

K. 2010

Estate of Shearer v. T & W. Tool and Die Corporation, 2010 WL 2870266; 2010 U.S. Dist. LEXIS 73197 (E.D.KY 2010). The Court held that the hedonic damages testimony and loss of relationship testimony of economic expert Dr. Stan V. Smith was not admissible under Federal Rule 702 and *Daubert* Standards. The reason given for non-admissibility, however, was that there is no right to recover for loss of enjoyment of life or loss of relationship in a Kentucky wrongful death action. Thus, Smith's testimony was precluded as irrelevant to the issues to be resolved in litigation. There was no assessment of the scientific merits of hedonic damages testimony.

Matlock v. Greyhound Lines, Inc. 2010 U.S. Dist. LEXIS 92359 (D. Nev. 2010). The defendant argued that hedonic damages are a component of pain and suffering and are not a separate and distinct compensatory award, and that expert testimony is required to support a claim for hedonic damages. The Court said:

> The Court does not agree. Hedonic damages are 'monetary remedies awarded to compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment of life.' *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d

52, 61–64 (2004). In *Banks* the Nevada Supreme Court found that expert testimony is not required, but may be utilized to assist a jury in making its determination of hedonic damages. Additionally, the *Banks* court found that awards for hedonic damages are typically not permitted separate and apart from pain and suffering damages. As in *Banks* however, the award here was not prejudicial 'because the jury could have easily added the value of the hedonic loss to the pain and suffering award.'

L. 2011

Gurule v. Ford Motor Company, 2011 N. M. Unpubl. LEXIS 51 (N.M. App. 2011). The New Mexico Court of Appeals held that it was not in error for the trial court judge to have admitted the hedonic damages testimony of economic expertWilliam Patterson. The Court said:

> While we recognize that most courts have found quantifying the value of a human life, including the loss of enjoyment component, to be based on an unreliable methodology post-*Daubert*, we do not believe that the district court erred in finding Patterson's testimony reliable. . . Contrary to Defendant's characterization of Patterson's testimony, Patterson's testimony was mostly definitional in nature as to the types of considerations that can be taken into account when an economic value is placed on the enjoyment of a human life. He testified that economists have used several differing methods in valuing a human life, including the enjoyment component, and that application of these methods has led to a wide disparity in the dollar amounts that economists have provided as benchmarks. He then provided a very broad range of values for an individual Gurule's age, based on present value calculations of an annual range determined by a meta-study that averaged 67 individual studies to exemplify the wide divergence between economists in determining the value of the enjoyment of life. We cannot say that the district court abused its discretion in finding that this testimony had a reliable basis. . . Patterson testified only as to the theories and techniques economists use in determining the value of a human life, and his calculations were not based on his personal perceptions on the value of enjoyment of life, but instead were based on values derived from a benchmark meta-study. . . Based on the nature of Patterson's testimony and his background, we cannot say that the district court abused its discretion in finding that Patterson was qualified as an expert.

Smith v. Jenkins, 2011 U.S. Dist. LEXIS 47742 (D. MA 2011). In a case involving a claim of fraud, defendants appealed partly on the

basis that economic testimony by Stan V. Smith should not have been excluded. The court said:

> Smith's damages were based solely on the expert testimony of Dr. Stanley Smith, a forensic economist (who is not related to the plaintiff), which defendants argue should not have been admitted. It is true that Dr. Smith's testimony was hardly a model of exactitude, and in retrospect, it perhaps should have been excluded, but it is equally true that from every appearance, the jury did not base its damages award on those portions of Dr. Smith's relatively brief testimony that veered from the mundane into the purely speculative. (The court instructed the jury to disregard Dr. Smith's attempt to import a wholly conjectural potential tax liability into his "willingness to pay" econometric model and refused to admit his written report in evidence). It appears rather that the jury based its far less ambitious awards against those defendants it found liable on a common-sense assessment of the impact that the ruin of Smith's credit had (and will have) on his emotional health and future earning prospects. . .

As the court is of the view that Dr. Smith's testimony (to the extent the jury was permitted to consider it) had no pernicious influence on the damages award, it will reject this argument.

Anastacion v. Credit Service of Logan, Inc., 2011 U.S. Dist. LEXIS 116271 (D. UT 2011). The Court granted a motion in limine to exclude the hedonic damages testimony of Stan V. Smith in a credit loss case involving no physical injury. The Court said:

> [W]ith respect to Dr. Smith's testimony regarding reduction in the value of Plaintiff's life, or hedonic damages, the Court will grant Defendant's Motion. Plaintiff argues in her Reply that this evidence should be admissible, arguing that Dr. Smith is extremely qualified, that his testimony is based on reliable economic and scientific methods, and that it has received extensive peer review and acceptance. Plaintiff further states that hedonic damages are "used by every federal regulatory agency." However convincing these arguments may be, they do not change the fact that hedonic damages are used to approximate the loss of the value of life, and therefore are used in cases involving death or injury. As Plaintiff herself states, when "every federal regulatory agency" uses hedonic damages, it is "in analyzing the potential impact to life or limb." Furthermore, the three Tenth Circuit cases that have mentioned hedonic damages all involve either physical injury or loss of life. As Plaintiff has not suffered the loss of life or limb,

> testimony regarding hedonic damages will not assist the trier of fact. Therefore, the Court will grant Defendant's Motion with respect to this testimony. (Footnotes omitted.)

M. 2012

Chavez v. Marten Transport, LTD, 2012 U.S. Dist. LEXIS 39586 (D.N.M. 2012). Judge Martha Vázquez held that Brian McDonald "will be permitted to testify at trial as to the concept and meaning of hedonic damages, and the areas of experience that should be considered in determining those damages for Chavez, but will not be permitted to testify at trial as to the value of a statistical life, or the range of the value of a statistical life in the United States, or otherwise present the jury with a quantitative measurement of hedonic damages."

Dossat v. Hoffman-La Roche, Inc., 2012 U.S. Dist. LEXIS 21002 (D. NV 2012). This is was a judicial ruling on 11 motions in limine in an employment discrimination suit, one of which was a defense motion to exclude hedonic damages testimony. The court said:

> To the extent Plaintiff seeks to introduce evidence of reduction of value of life, or "hedonic" damages, such evidence is not relevant where Plaintiffs termination is not properly before the Court. Plaintiffs expert testimony is speculative and unreliable and will not be helpful to the jury. The jury would be able to make its own decision on damages if it finds intentional infliction of emotional distress. Accordingly, Defendants' Motion in Limine No. 2 is granted.

Flowers v. Lea Power Partners, 2012 U.S. Dist. LEXIS 67359 (D.N.M. 2012). Judge James Parker held that Dr. Brian McDonald could testify about the definition of hedonic damages and the components of life that may be considered in calculating hedonic damages, but may not testify about an dollar range of values attributable to a statistical life. The plaintiff had also argued that the Court should strike an affidavit by Dr. Thomas Ireland in the case of *Esquibel v. John Q. Hammons, LLC*, that the defendant had attached to the defendant's motion in limine. The judge held that because the affidavit was relevant to hedonic damages, the affidavit would be considered in ruling on defendant's motion. Judge Parker then quoted Ireland's affidavit extensively in his decision.

Bailey v. Nyloncraft, Inc., 2012 U.S. Dist. LEXIS 122120 (E.D. MI 2012). Judge George Caram Steeh granted defendant's Daubert motion in limine to exclude the "loss of society" testimony of Stan V.

Smith, pointing out that "plaintiffs do not cite a single published opinion in which Smith's loss of society/companionship testimony has been admitted over a Daubert challenge." The decision reviews claims made by the plaintiffs in favor of hedonic damages testimony, including 19 affidavits from economists "that purportedly reflect a general consensus in the relevant community that evaluation of loss of society damages can be ascertained with a reasonable degree of scientific certainty." The judge added that:

> [M]any of the affidavits do not address the use of 'value of life' figures to calculate the value of loss of society damages, many are duplicates and some are from Stan Smith himself. These affidavits do not negate the economists' responses in a 2009 survey in the *Journal of Forensic Economics* which asked economists if they would be willing to calculate hedonic damages in an injury case. Of the economists who responded, 83.6% responded because such damages 'are far too speculative to quantify' and '[t]his should be left up to the trier of fact.'

Judge Steeh concluded that: "Smith's testimony concerning loss of society damages is inadmissible because it is irrelevant and unreliable."

Hinkle v. Ford Motor Company, 2012 U.S. Dist. LEXIS 127302 (E.D. KY). The Court said, in part quoting another decision, that: "'Under Kentucky law, recovery may be made for injuries suffered during the period of time between injury and death,' provided the injured person was conscious for part or all of the time." This case involved the estates of three decedents, all of whom were killed in an automobile crash. The estate of Hinkle claimed loss of hedonic damages for the short period between injury and death. There was an issue of fact whether Hinkle had any period of consciousness before expiring and the estate's claim was allowed to proceed on that basis. No economic expert was involved.

Spaulding v. Tate, 2012 U.S. Dist. LEXIS 125669 (E.D. KY). This case involved the death of Judy Carol Spaulding in an automobile accident. The court said:

> The Supreme Court of Kentucky has held that damages for pain and suffering are not proper for a person who remained unconscious from the time of injury until the time of death. *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). "Damages for pain and suffering may be awarded; however, if the injured person was partly conscious, had intervals of consciousness, or was conscious for a short time before death." *Id.* (internal quotation marks omitted). The question, then, is whether there is

a genuine issue of material fact regarding the consciousness of Mrs. Spaulding during the period between the accident and her death.

In Kentucky, even a brief period of consciousness may suffice to warrant the recovery of damages for pain and suffering.

The Court held that there was a material issue of fact about whether Ms. Spaulding had an instant of consciousness during which pain and suffering, including hedonic damages, could have occurred. No economist was involved.