

## Hedonic Damages as Compensation: A Reply to Bruce

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In a recent comment, Christopher Bruce challenged a paper published by W. Kip Viscusi in this journal (2000). He suggested that there was inconsistency between Viscusi's view that the value of life literature has valid uses in determining liability, but no valid uses in determining amounts to be awarded for compensation. Bruce's entire argument depends on a statement he makes on page 168: "If it is accepted that the underlying goal of tort law is to deter inefficient behavior by setting damages equal to external costs, it must then be asked, 'what is the appropriate level of damages?'"

Indeed, that is true, but that begs the question of what is "the" underlying goal of tort law. In law and economics analysis, there is not one underlying goal but two: deterrence and compensation. Bruce ignores the important treatment of compensation as optimal insurance and writes his note as if insurance issues can be ignored. Viscusi mentions optimal insurance on page 117 of his paper and that topic is covered in depth in Steven Shavell's *Economic Analysis of Accident Law* (1987) and also in Paul Rubin's *Tort Reform by Contract* (1993).

The compensation goal is to be achieved in terms of a framework in which it is understood that the cost of tort recoveries tend to be passed on by producers to customers and thus shared by the population at large. If tort recoveries are systematically larger, the cost of manufactured products increases to cover part or all of those costs. Likewise, if such recoveries in automobile accidents go up, the costs will be passed on by insurance companies to policy holders. Thus, the compensation question is what kinds of awards an individual would prefer ex ante, knowing that the award structure he or she chooses will apply after an injury, but also knowing that he or she will have to pay higher prices to fund those higher awards. Efficient compensation is compensation that maximizes the well-being of an individual making his or her choice before an accident has occurred.

Bruce did a good job of explaining the nature of the deterrence goal and I have nothing to add to his description, nor any important criticisms to make of it. My only criticism lies in his assumption that compensation is not also another important goal in the field of law and economics.

In actual litigation, however, the standard that is applied is neither efficient deterrence nor efficient compensation as legal theorists use those terms, but a much older concept that the fundamental purpose of tort law is to provide restitution—to restore the injured party, as closely as may be possible to his or her pre-injury condition. This concept comes from the common law, sweeping back almost to the dark ages. From this perspective, deterrence is not a central goal because the only issue juries are asked to consider is how much money it

will take to put the injured party back into a financial position equivalent to the financial position that existed before the injury. It may be that this accomplishes encouraging efficient behavior because of the incentives that are created, but the "goal" judges have in mind is restitution, not inducing efficient behavior with respect to precaution.

Viscusi's arguments in his *JFE* paper are reasonable from either a compensation objective within the law and economics model or from within the older principle of restitution. Bruce starts by assuming that the goal of tort law is what Bruce wants it to be and derives his criticism from the fact that Viscusi does not agree with Bruce's assumed goal of tort law. This was really an exercise in expressing a value judgment as if it were a fact, not a serious criticism of Kip Viscusi's paper.

### References

- Bruce, Christopher, "Hedonic Damages as Deterrent: A Reply to Viscusi," *Journal of Forensic Economics*, Spring/Summer 2001, 14(2), 167-173.  
Rubin, Paul H., *Tort Reform by Contract*. Washington, DC: The AEI Press, 1993.  
Shavell, Steven, *Economic Analysis of Accident Law*. Cambridge, MA: Harvard University Press, 1987.  
Viscusi, W. Kip, "Misuses and Proper Uses of Hedonic Values of Life in Legal Contexts," *Journal of Forensic Economics*, Spring/Summer 2000, 13(2), 111-125.

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