

Hedonic Damages as Economic Junk Science – Defending Against Claims to Measure Lost Pleasures of Life, Loss of Society and Other Intangibles

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Biographical Information

Thomas R. Ireland, Ph.D., is a professor emeritus of economics with the University of Missouri at St. Louis. He has worked as a forensic economic consultant since 1974 and has a consulting practice that is fairly evenly divided between plaintiff and defense assignments. Dr. Ireland is a well-known opponent of “hedonic damages” testimony by economic experts. He is a former president of the American Academy of Economic and Financial Experts, a former president of the American Rehabilitation Economics Association, and a former vice president of the National Association of Forensic Economics. He is a former Associate Editor of the *Journal of Forensic Economics* and former editor and current associate editor of *The Earnings Analyst*. He has published 12 books and more than 120 papers in forensic economics journals.

Background

“Hedonic Damages” became part of the lexicon of damages analysis on December 12, 1988 when the Wall Street Journal ran a front page story entitled, “Price of Pleasure – New Legal Theorists Attach a Dollar Value to the Joys of Living – ‘Hedonic’ Damage Argument by Economist Stan Smith Stirs Debate in Death Suits,” by Paul M. Barrett. In 1985, Stan Smith had used values from the Value of Life (VOL) literature in economics to provide dollar values for the death of Ronald Sherrod, a 19 year old male who was killed by Joliet, Illinois policemen. In that case, Stan Smith had testified that the “central tendency” for both the dollar value of Ronald Sherrod’s enjoyment of life and the value to his parents of Ronald Sherrod’s society was \$1.5 million. By December 12, 1988, he had testified in several additional trials using similar methods. The front page story made gave Stan Smith national coverage.

In the aftermath of that story, several other offshoots sprung up with other “experts” alleging to have become experts on valuing lost enjoyment of life. One was a weekend workshop developed by Richard A. Palfin and Brent B. Danninger that used a packet of materials combined into a notebook with the title, *Proving*

the Value of Human Life. They were subsequently to convert those materials into a 1990 book published by Michie Press with the title *Hedonic Damages: Providing Damages for Lost Enjoyment of Living*. Michael Brookshire and Stan Smith also published a book in 1990 entitled *Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys* with Anderson Publishing. A vocational expert named Jeff Magrowski set up a “Hedonology Institute.” In December 1989, the National Association of Forensic Economics (NAFE) offered a session on “Hedonic Damages and the Value of Life” at the Allied Social Science Meetings with papers for and against the concept by W. Kip Viscusi, Ted R. Miller, Stan V. Smith, and William Dickens. 1990 was the heyday for the concept of hedonic damages.

From the beginning, however, there were strong voices that opposed the admissibility of this concept in courts of law. Strong criticism began to appear from prominent forensic economists who felt that economic science could not measure mind states such as the enjoyment of life or the love that one person had for another person. One of the earliest strong criticisms came in 1992 the form of a paper on “Why Hedonic Damages Are Irrelevant to Wrongful Death Litigation” by this writer, Walter D. Johnson and James D. Rodgers. The argument in that paper was simple: Death precludes compensation. As a general rule, wrongful death acts focus on losses suffered by survivors of a decedent, not the decedent. If a death occurs, no amount of money is going to bring the decedent back to life and no amount of money awarded to an estate is going to compensate a decedent for loss of life enjoyment caused by death. In 1992, John O. Ward published *A Hedonics Primer for Economists and Attorneys* with Lawyers & Judges Publishing. This primer included the papers that had been presented at the 1989 NAFE session plus a number of other papers that were favorable to or strongly opposed to hedonic damages testimony.

In 1996, Ward and Ireland published a *New Hedonics Primer for Lawyers and Attorneys*, but it had become harder to maintain a balanced presentation between favorable and unfavorable views of hedonic damages. The “hedonic damages” concept had begun to lose many of its earlier adherents. By 2000, there was no longer sufficient interest in the concept to warrant publication of a third *Primer*. NAFE sponsored one last session on hedonic damages in January 2000 on “Hedonic Damages – Ten Years Later,” organized by this author and Peter Marks. Stan Smith presented a paper in that session that was based on his doctoral dissertation arguing that jury verdicts in Illinois had produced results consistent with his “hedonic damages” concept. Ted Miller presented a paper on Quality Adjusted Life Years, not hedonic damages. Papers by W. Kip Viscusi, by J. Paul Leigh and Jorge Garcia, and by Thomas Ireland were all opposed to use of hedonic damages testimony in courts of law. Papers presented in that session were subsequently published in the *Journal of Forensic Economics*, but nothing has been published about hedonic damages in the journals of forensic economics since that symposium was published in May, 2001.

However, hedonic damages have not disappeared from the courtroom. Stan Smith of Chicago, the originator of the concept, still has a thriving practice that included preparing reports and presenting testimony when allowed about hedonic damages. Richard Palfin and Brent Danninger are no longer providing such testimony, but Robert Johnson of Palo Alto, California is still providing hedonic damages testimony. Michael Brookshire, Stan Smith's co-author is still providing hedonic damages testimony, as are Richard Thompson, George Carver, Ike Mather, Roger Skurski, Allen Parkman and Brian McDonald, and others. From this writer's own experience, however, the lion's share of such testimonies is being proffered by Stan V. Smith or Robert Johnson.

Dangers Posed by Hedonic Damages Testimony

Alleged economic experts with reports of "loss of life enjoyment" or "loss of society" are relatively rare in litigation. However, such reports and claims for damages that are based on them can radically increase the risk faced by a defendant. As will be discussed later, most instances of hedonic damage claims are made in a relatively small number of states. However, there is always some chance that a given trial court judge will allow such testimony, even in legal venues in which an admission of such testimony is highly unlikely. This writer has more than once been called by a defense attorney who has just been provided with one of Stan Smith's hedonic damages reports. The report claimed loss of enjoyment of life for a decedent, loss of society for immediate family members, loss of advice and counsel for family members, and loss of "accompaniment services" for family members, along with the conventional damages of lost earnings, lost fringe benefits and loss of household services. In a case the defense attorney had valued between \$300,000 and \$400,000, the defense attorney now had a plaintiff economic expert report providing calculations that purported to show \$10 million in damages. Having received the attorney's call, this writer explained what was wrong with the unusual calculations in Stan Smith's report. This writer explained that Stan Smith's defense reports use much different growth rates and discount rates. At the end of the conversation, however, this writer still had the feeling that the defense attorney would have been happy to settle the case for the \$400,000 top end of what the attorney thought was the probable bargaining range before receiving Stan Smith's report. The first danger is taking the report too seriously. A report of hedonic damages can be attacked on a number of levels, including, in the case of Stan Smith, his willingness to use radically different discount rates and work-life expectancies when on defense from those he uses when on the plaintiff side.

The second danger is just the opposite. Having gotten a report containing hedonic damages and other usual "relationship damages" calculations, the defense attorney makes a judgment that a judge is not going to admit that testimony and does not do the kind of work that is needed to maximize the chances of winning at the motion *in limine* level. The defense ultimately won in *Dorn v. Burlington Northern Santa Fe Railroad Company*, 397 F.3d 1183 (9th Cir, 2005), but it is

possible that the defense could have prevented the admission of hedonic damages testimony at the motion *in limine* level by using expert economic assistance the defense had already obtained. In that Federal Employers Liability Act (FELA) action, the Plaintiff had retained two economic experts, Stan Smith who presented hedonic damages testimony and another local expert who was much less controversial. This writer was retained by the defense, whose attorneys asked that their expert pay more attention to the other less controversial economic expert, thinking they would win on a motion *in limine* to preclude hedonic damages. The defense attorneys were apparently so confident that they did not bother to consult with their economic expert before filing their motion *in limine* to exclude hedonic damages.

To their surprise, the judge ruled that Stan Smith could provide hedonic damage testimony. Later, the judge also ruled that the right level for this writer's testimony was during the motion *in limine* hearing and that my testimony would have the effect of telling the jury that the judge had made a mistake in admitting Stan Smith's testimony. The 9th Circuit held that the trial judge made reversible error by making the decision not to allow this writer's testimony. There were also other reversible errors that had nothing to do with hedonic damages, but the case the defense had made to the trial court judge for excluding hedonic damages testimony was weaker than if this writer had been permitted to offer suggestions before their motion was filed. Another example of failure to use available resources occurred in another case this writer was involved with, which has made hedonic damages a major issue in the state of Nevada, as will be discussed below.

When hedonic damage claims or other unusual relationship claims are made by an economic "expert," the most important fight should be at the level of the motion *in limine*. The questions that juries are asked to answer are impossible questions to answer: How much money should be awarded in to survivors who have lost the care and comfort of a wrongfully killed family member? How much money should be awarded to an injury victim who has lost the use of one of his legs because of an injury? An economist can specify a sum of money that would replace probable lost wages, lost medical insurance, and lost retirement benefits. An economist can specify the cost of replacing household services or the cost of a life care plan. Appropriate values exist in the commercial marketplace for making such comparisons. Inaccurate testimony can be countered by producing accurate testimony. In the case of hedonic damages, however, alternative numbers cannot be produced. The problem is good experts know they cannot provide numbers of any size, using valid economic science. That means that the best the defense can do is provide testimony about what is wrong with the numbers provided by the plaintiff. Good experts cannot provide lower, more reasonable numbers because all numbers produced by alleged experts are equally meaningless, high or low. However, testimony from alleged economic experts can influence how jurors decide impossible questions, even when jurors don't find the alleged expert's report credible. Hedonic damages "experts" may not convince jurors of the accuracy of their numbers, but they set a range within which jurors may feel that

such damages may be assessed. For lost earnings, lost benefits, costs of household services or costs of life care plans, a defense expert can provide alternatives. For the same reason that economists cannot place dollar values on intangible aspects of relationships, it is very difficult for jurors to do so. The legal system may call for awards to be made, particularly in personal injury cases with surviving injury victims, but monetary awards for intangible mind states do not serve a true compensatory purpose in that money cannot make a person “whole” with respect to losses of this type. No one can purchase a pound or yard or box of happiness or ten gallons of love. Thus, there is no obvious way for a jury to determine how much of an award for intangible losses is appropriate. If an economic expert has the sanction of a court to offer a figure, even on an absurd basis, the number may have an influence even if rejected by the jury as not persuasive.

Three Categories of Hedonic Damages Testimony

Hedonic damages testimony has been offered in three different damage circumstances: (1) In claims for a decedent’s loss of enjoyment of life in wrongful death litigation; (2) In claims for a Plaintiff’s loss of enjoyment of life in personal injury litigation in which the Plaintiff has survived his/her injury with permanent injury limitations; and (3) loss of society by family members of either a wrongfully killed decedent or an injured Plaintiff who has been permanently injured.

The original decision involving hedonic damages based on the VOL literature was *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985). Stan Smith was the plaintiff economic expert in the *Sherrod* case. In most discussions of that case, the emphasis has been on the loss of enjoyment of life of the decedent, Ronald Sherrod, a 19 year old who had been killed while fleeing the police in Joliet, Illinois. However, Stan Smith made two uses of the hedonic damages testimony he provided in that case. Smith’s testimony consisted of presenting a range of values from the Value of Life (VOL) literature from \$66,000 to \$11.8 Million and argued that the loss of both Ronald Sherrod’s enjoyment of life and his father’s loss could be worth more than \$1.5 million “based on academic and government data” (Barrett, “Price of Pleasure,” op. cit.). The jury awarded \$850,000 for Ronald Sherrod’s loss of enjoyment of life and \$450,000 to Ronald’s father Lucien Sherrod for loss of “parental companionship with his son.” It was the loss of enjoyment of life component of the use of the VOL literature that attracted major attention and that has been characterized as “hedonic damages,” but Stan Smith’s method for testifying about Lucien Sherrod’s loss of society with his son was identical to his method for testifying about Ronald Sherrod’s loss of enjoyment of life.

In the period from 1985 until 1989, the focus of discussions of hedonic damages testimony was in the context of persons who had been wrongfully killed. This largely overlooked Stan Smith’s loss of society calculations in the *Sherrod* case. In 1989, a paper by Berlá, Brookshire and Smith on “Hedonic Damages and

Personal Injury: A Conceptual Approach,” *Journal of Forensic Economics*, 1989, 3(1):1-8, proposed that a similar approach could be taken to valuing loss of enjoyment of life by injured plaintiffs who are still living. Subsequently, Stan Smith also began to project loss of society for family members of injured plaintiffs who are still living.

Similar Relationship Calculations

In addition to true hedonic damages calculations, a variety of other alleged methods for “converting intangibles into tangibles” have been offered by a small number of purveyors. Stan Smith also calculates values for “Loss of Advice and Counsel” and “Loss of Accompaniment Services.” Everett Dillman uses *per diem* arguments for which present values can be calculated based on \$1 per minute of lost life, and so forth. This paper will not deal with those calculations, but they can also be used to generate testimony putting forth large damages numbers. Much of the advice offered in this paper can be applied to those damages categories as well.

Legal Parameters for the Three Types of Hedonic Damages Testimony

In most states, a claim for “lost enjoyment of life” of a decedent fails to address an allowable element for recover in a wrongful death action. It can be easily disposed of by pointing that out. In most states with survival actions that address the period between injury and death, there may be a small claim for lost enjoyment of life between the date of injury and death. However, even at Stan Smith’s current annual dollar value for the enjoyment of life in the range of \$130,000 per year, 100 percent loss of enjoyment during a two month period would result in a claim for \$10,333 for a decedent’s loss of enjoyment of life for that two month period. In a few states, however, such claims can be made. New Mexico [*Romero v. Byers*, 872 P.2d 840 (N.M. 1994)] and Mississippi [*Choctaw v. Hailey*, 822 So. 2d 911, (2002) (prior to January 1, 2003)] have or had Supreme Court rulings both that loss of enjoyment was recoverable in death actions and that expert economic testimony about amounts to be awarded were admissible at the discretion of the trial court judge. Hawaii [*Montalvo v. Lapez*, 884 P.2d 354 (HI 1994)] allowed such damages to be awarded in death cases, but precluded expert economic testimony about amounts to be awarded. Pennsylvania could have been an exception because of its Survival Act, which like Tennessee’s Survival Act, is paired with its Wrongful Death Act, but Pennsylvania has held that consciousness is a prerequisite for making a claim for lost enjoyment of life [*Willinger v. Mercy Cath. Med. Ctr., Etc.*, 482 Pa. 441 (1978)]. Since death precludes consciousness, no claim for lost enjoyment of life can be made for a dead person. Similarly, Connecticut allows recovery by an estate for economic losses though a normal life expectancy, but Connecticut has not been a battleground state regarding hedonic damages.

By contrast, most states allow claims to be made for lost enjoyment of life in personal injury actions in which the plaintiff is still living, either as a separate claim or as part of a claim for general damages or pain and suffering. In some states, it has been held that a Plaintiff must be conscious to make a claim for lost enjoyment of life. Pennsylvania is one state with this requirement that was discussed above. Ohio is another. See *Ramos v. Kuzas* [65 Ohio St.3d 42, 600 N.E.2d 241, 243 (1992)]. Thus, the representative of a person in a persistent vegetative state in Pennsylvania or Ohio cannot pursue hedonic damages. Nevada, on the other hand, allowed a Plaintiff in a persistent vegetative state to recover hedonic damages [*Banks v. Sunrise Hospital*, 102 P.3d 52 (2004)]. Similarly, many states that do not allow claims for lost of enjoyment of life by a decedent, do allow claims for lost society. In general, these claims in personal injury cases with surviving injury victims stem from the common law, but Louisiana [*McGee v. A C and S, Inc.*, 933 So. 2d 770 (2006), South Carolina [*Boan v. Blackwell*, 353 S.C. 498 (2001)], Arizona [*Ogden v. J. M. Steel Erecting, Inc.*, 31 P.3d 806 (2001)] have recently ruled explicitly that lost enjoyment of life is recoverable as a separate element damages in personal injury litigation. None of those decisions, however, involved a decision about the admissibility of an economic expert testifying about such damages. The *McGee* decision in Louisiana appears to rule out expert testimony about lost enjoyment of life in a personal injury, but does not say that explicitly.

As will be discussed below, arguments for hedonic damages in death cases have been made in Arkansas, Arizona, Georgia, Montana, but explicit rulings in those states have not been reached about whether hedonic damages claims are permissible in death circumstances and whether expert testimony is permitted if it is permitted. Nevada and Ohio are also important battleground states in which I have been retained in cases, but for different reasons. It is my understanding that lost enjoyment of a decedent cannot be claimed in either Nevada or Ohio.

Generating Dollar Values for Hedonic Damages Testimony

Because they have been the most frequent purveyors of hedonic damages testimony in my experience, I will use the methods of Stan Smith (since 2000) and Robert Johnson to illustrate differences in methods used to derive specific dollar values for hedonic damages testimony. Other persons offering hedonic damage testimony use some variation of the methods used by either Smith or Johnson. It should be noted that Stan Smith used the general method now used by Robert Johnson in *Sherrod v. Berry* (op. cit.) in 1985. Over the years, Stan Smith has continued to change his methods of calculation, but the \$2.3 million figure for the present value of life enjoyment for an average person as of 1988 has been a constant element in his calculations since about 1990. The account in this paper of Stan Smith's methods is the method he started using in or slightly before January 2000 in *Tonsgard v. State of Alaska*, a case in which this writer was the economic expert for the defense. Smith had used an earlier version of his method in his trial testimony in *Wright v. Vons Industries* (Nevada) in the fall of 1999, another case

in which this writer was the economic expert. Robert Johnson is using the same general method he used in 1990, but has recently changed the study he uses to arrive at the top end of his range.

All of the uses of the Value of Life (VOL) literature to project lost enjoyment of life or loss of society begin with the same starting point. The hedonic damages “expert” reviews the VOL literature and selects a starting value of life or range of values of life from that literature. The VOL literature contains hundreds of studies that might be included, each with different methods, different survey groups, and a wide range of different values of life. In *Sherrod v. Berry* (op. cit.), Stan Smith testified to a range from \$66,000 to \$11.8 million as of 1985. Depending on how one defines the literature, the actual range today is from \$0 to \$100 million, or more. In some fashion or another, the first step in any development of hedonic damages testimony is the selection of either a single value from that literature or two values from that literature that will constitute the alleged expert’s range of life enjoyment values for an average person.

Stan Smith (since 1999) claimed to have reviewed the VOL literature in the fall of 1987 and arrived at his professional judgment that \$3.1 million as of 1988 was about the right value of life. (There are reasons to believe that this account is not accurate in ways that can be used to impeach the credibility of his testimony, but those reasons are not covered in this paper.) Smith has described himself as having looked at various studies in the VOL literature in the fall of 1987 and having concluded that \$3.1 million as of 1988 was the “central tendency” in the VOL literature, which apparently was not the mean, median or mode of that literature but something else. He has claimed to have no notes from this survey and no list of the literature he considered, but has said that they were essentially the same articles that were reviewed by Dr. Ted Miller in his 1990 paper, “The Plausible Range for the Value of Life,” *Journal of Forensic Economics*, 3(3):17-40. (This can be proven not to be true by an exhibit Stan Smith provided at his deposition on February 29, 1988 in *Adams v. O’Leary*.)

Stan Smith has claimed that he regarded the \$3.1 million figure as the present value of the “whole life” of an individual at the average age of about 36 years in the population. From \$3.1, he subtracted \$800,000 (exactly) for the “human capital” (including earnings, fringe benefits and household services) of the average person to find a residual figure of \$2.3 million for value of the life enjoyment of the average person. This figure appears as a hypothetical example in most of his reports today, but its importance other than as an example is not explained. Smith then adds a Consumer Price Level adjustment to that figure, which brings that figure in 2006 up to \$3.8 million. He then determines the annual value of life in the current year by working back from the \$3.8 million to a starting value in 2006 that would yield a present value of \$3.8 million over an average 45 year life expectancy. That figure for 2006 is in the range of \$130,000. [By comparison, see Tengs, et al, “Five-Hundred Life-Saving Interventions and Their Cost-Effectiveness,” *Risk Analysis*, 1995, 15(3):369-390. Tammy Tengs

and five co-authors reviewed 500 studies of the value of life as of 1995 and found a range in annual values in studies used by federal government agencies from \$23,000 by the Federal Aviation Agency to \$7.6 million per life year by the Environmental Protection Agency. Among the 500 studies, there were figures from \$0 to \$99 trillion.]

Starting from \$130,000 per year for the dollar value of life enjoyment for every person alive today, Stan Smith calculates the lost value of life enjoyment of a decedent from the data of death to the end of the decedent's normal life expectancy, as taken from the U.S. Life Tables. He reduces that stream of \$130,000 annual values by his estimate of the real discount rate, currently 1.85 percent in Plaintiff cases, but significantly higher in defense cases (see his defense hedonic damages testimony in *Brown v. Cirque de Soleil*, Case No. A44850, Clark County, Nevada, 6/13/05). If a decedent had a normal life expectancy of 30 years before his death, Stan Smith's table would show a stream of 30 annual future payments of \$130,000 for thirty years, with declining present values for each year because of increased discounting as years become further and further into the future. (This account does not explain past losses from the date of death to the date of report, but Stan Smith works back from his 2006 value in the range of \$130,000 to find past values by making CPI reductions for each year prior to 2006.)

For a calculation in a personal injury, Stan Smith selects lower and upper percentages for the injury victim's lost enjoyment of life. In one case the lower the percentage might be 40% and the upper percentage might be 60%, but many other percentages are used. His report is likely to contain language like: "Tables 8 through 13 are based on several factors." One of those factors is "An assumed impairment rating by the trier-of-fact of 40 percent to 60 percent in the ability to lead a normal life." In other words, Stan Smith makes up lower and higher percentages that he thinks a jury might find reasonable and appealing in light of the individual's injury and then prepares tables based on those percentages of his annual life value in the range of \$130,000. A loss of 40% from \$130,000 would be \$52,000 per year. A loss of 60% from \$130,000 would be \$78,000 per year. Stan Smith then calculates one present value based on \$52,000 per year, reduced by his plaintiff real discount rate of 1.85 percent per year for the life expectancy of the plaintiff and another based on \$78,000 per year.

Stan Smith's loss of society calculations are similar to his personal injury calculations, but he ordinarily provides only one percentage rather than upper and lower percentages. A typical percentage would be 40% of 130,000 for the spouse of a decedent and 20% for each child of a decedent. Using an annual value of life of \$130,000, a loss of 40% would be \$52,000 per year and a loss of 20% would be \$26,000 per year. To prepare these calculations, Stan Smith will then project these values for the normal life expectancies of the spouse and each child of the decedent. This is true even when the decedent, as would always be the case with a child of the decedent, has a longer life expectancy than the decedent. In such

calculations, the survivor's "loss of society and relationship" is projected to continue long after the decedent would normally have been expected to die. Smith has testified to his "theory of prematurity" that the premature death (or injury) of the decedent or injured person would cause a permanent reduction in the surviving spouse's and children's ability to enjoy their own lives. Thus, their loss of society with the decedent would continue long after the end of the decedent's normal life expectancy.

Robert Johnson, on the other hand, has always had a much simpler approach to hedonic damages testimony. Robert Johnson now relies upon two papers from the VOL literature, one from Ted R. Miller in 1990 entitled "The Plausible Range for the Value of Life," *Journal of Forensic Economics*, 3(3):17-40, with a value based on 1988 of \$2.2 million, and one from W. Kip Viscusi, entitled "The Value of Life: Estimates with Risks by Occupation and Industry," *Economic Inquiry*, 2004, 42(1):29-48, with a midpoint values as of 1997 of \$8.9 million. (Until very recently Johnson relied on a different paper by Viscusi and Moore for the top of his range.) Johnson's approach is much like the approach originally taken by Smith in *Sherrod v. Berry* (op. cit.) in 1985. He poses two values from the value of life literature, increased by the Consumer Price Index from the years in which the two figures were taken. He makes no subtraction for "human capital" like Smith and makes no attempt to calculate annual values of life enjoyment like Smith. His two numbers are currently \$3,000,000 and \$10,800,000. Those are the only two numbers he presents, suggesting that a decedent should be awarded between \$3,000,000 and \$10,800,000 in a 2006 case. Johnson prepares a standard six page report for each case that is separate from his calculations for lost earnings, fringe benefits and household services.

Johnson has used his two value method in at least one personal injury matter, which resulted in an important decision of the Nevada Supreme Court in *Banks v. Sunrise Hospital*, 102 P.3d 52 (2004). In that case, the plaintiff, Otho James Banks, was in a persistent vegetative state. 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." This decision will be discussed further below.

The Approach in *Smith v. Ingersoll-Rand*

In *Smith v. Ingersoll-Rand*, [1997 U.S. Dist. LEXIS 23443 (D.N.M. 1997)] Stan Smith (no relation) was permitted to explain the legal distinction between hedonic damages and pain and suffering damages, but not to provide specific dollar values. Judge Vasquez wrote:

Stan Smith would testify based upon economic studies that he has applied to a valuation of hedonic damages. This testimony is not one that requires the rigors of the scientific process; it falls into the category of social science, a discipline dealing with human behavior and societal values that does not easily lend itself to scientific evaluation. Stan Smith is a nonscientific expert whose credentials include substantial formal instruction in the techniques of a discipline. . . The Court finds, therefore that *Daubert* does not apply in this case, and that the proper analysis of the proposed testimony lies under rule 702. . .

Stan Smith can help the jury, without referring to monetary values, understand the meaning of hedonic damages.

A discussion of the elements of hedonic damages is appropriate. Hedonic damages are a recent addition to New Mexico law. Romero, 117 N.M. 422, 872 P.2d 840 (1994); Sena, 119 N.M. 471, 892 P.2d 604 (Ct. App. 1995). Testimony explaining hedonic damages and how they differ from other damages, particularly pain and suffering, from someone who has spent a significant amount of time studying the issue of hedonic damages would assist the trier of facts in this case.

The trial court decision in *Smith v. Ingersoll-Rand* admit Stan Smith to explain the difference between hedonic damages and pain and suffering was upheld by the 10th Circuit [214 F.3d 1235 (10th Cir. 2000)]. The 10th Circuit cited a number of cases in which Stan Smith's numerical calculations had been excluded, but said:

Stan Smith testified only 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." Stan Smith further testified that in valuing the loss of enjoyment of life he considers the effect the jury has on "the ability to enjoy the occupation of your choice," "activities of daily living," "social leisure activities," and "internal well-being."

Stan Smith did nothing more than explain his interpretation of the meaning of hedonic damages and offer four broad areas of human

experience which he would consider in determining those damages. Importantly, Stan Smith made no attempt to apply the facts of this case to the criteria he proffered to the jury; the jury remained free to exercise its fact-finding function.

An economic expert has no background, training, or personal experience that would enable that expert to have any special knowledge about any of the categories mentioned by the 10th Circuit. Economists have no special knowledge about how much individuals enjoy being able to work in the occupation of their choices. Economists do not study activities of daily living in terms of how they might be affected by injuries. Economists have no special knowledge about leisure activities, nor do they have training that allows them to have expert opinions about “internal well-being.” This decision appears to have converted Stan Smith into a psychologist rather than an economist. Without being allowed to testify about large dollar values for these areas of non expertise for economists, however, Stan Smith is unlikely to have testified to any aspect of life that an average juror would not have already understood.

The real danger in this approach lies in the possibility that Stan Smith could slip in specific million dollar figures from the VOL literature. Further, while this was apparently not an issue in *Smith v. Ingersoll-Rand*, this decision could be stretched to suggest that testimony about million dollar figures in the VOL literature would be acceptable as long as the figures were not represented as specific to the lost enjoyment of life of a particular individual. That ruling was made by the trial court judge in *Dorn v. BNSF*, 397 F.3d 1183 (9th Cir, 2005), an important Montana decision to be discussed below.

Battleground States for Hedonic Damages Testimony

While a plaintiff attorney might try to make an hedonic damages claim in any state, the battleground states in which a defense attorney is more likely to confront hedonic damages testimony are Arkansas, Arizona, Georgia, Montana, Ohio, Nevada and New Mexico. Until recently, Mississippi was also a major battleground state, but a tort reform act precluded any award for hedonic damages in a death case and precluded expert testimony about hedonic damages even in an injury case for cases filed after January 1, 2003. The next seven sections of this paper will briefly review the status of hedonic damages testimony in the battleground states of Arkansas, Arizona, Georgia, Montana, Ohio, Nevada and New Mexico.

Arkansas

In 2001, Arkansas added a new section to its survival statute Ark. Code Ann. § 16-62-101(b), stating that:

In addition to all other elements provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages.

Arkansas has a standard Wrongful Death Act that allows recovery by survivors of a decedent in the same way as most states. The 2001 amendment to the survival action, however, opened the door for claims of hedonic damages to be made. There has been only one reported decision regarding what this amendment means. In *Durham v. Marberry*, 36 Ark. 481; 156 S.W.3d 242 (AR 2004), the Arkansas Supreme Court held that the 2001 Arkansas survival action amendment created a new element of damages in circumstances of wrongful death called "loss of life" and that an injured plaintiff did not have to have survived beyond the fatal injury to have the right to recover this loss element. The *Durham* Court indicated that "loss of life" and "loss of enjoyment of life" are different elements even though "both are hedonic." The court did not clearly indicate what was meant by saying that "both are hedonic."

In drawing a distinction between "loss of life" and "loss of enjoyment of life," the *Durham* court cited *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (Del. 1990) and *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 141, 393 A.2d 1188 (1978) as drawing as drawing that same distinction. *Willinger* has been interpreted as not allowing recovery for lost enjoyment of life in death cases in Pennsylvania and *Sterner* is one of the decisions that precluded an economist from offering hedonic damages testimony in *Delaware*.

The *Durham* Court also 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 said:

Though the appellants do not argue this point on appeal, the appellees have noted that appellants retained an economist to provide expert testimony about loss-of-life damages. This expert testimony was the subject of a motion in limine filed by the appellees, requesting that the expert testimony be excluded. However, the trial court did not reach the issue of the motion in limine because it granted summary judgment on the claim of loss-of-life damages. In a case decided three decades ago by this court, we determined that there is no hard and fast rule to determine compensatory damages for non-pecuniary losses:

"No rule has been established – and in the nature of things none can be – for determining what compensation should be paid for loss of life, for pain and suffering, for loss or decrease of earning power, for mental anguish accompanied by physical injury, for loss of companionship, and for the various elements entering into damage actions."

Clark & Sons v. Elliot, 251 Ark. 853, 857, 475 S.W.2d 514, 517 (1972). While we do agree that the determination of damages is

within the purview of the jury, without a trial court ruling or order before us on the issue of expert testimony, this issue is not ripe for consideration.

This section of the *Durham* decision appears to invite challenge to the admissibility of expert testimony concerning an award for “loss of life damages.” Arkansas has held that the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Cit. 2786 (1993) apply to the admissibility of expert testimony in Arkansas. In the draft affidavit provided as part of my materials, I demonstrate that hedonic damage testimony meets none of the four basic standards announced in the *Daubert* decision. The economist in the *Durham* decision was not named in the decision, but was Stan Smith. The economist for the defense was this author.

Arizona

Arizona has been a significant battleground state. This writer has had a large number of retentions in Arizona cases when Stan Smith has been the “expert” proffering hedonic damages testimony, particularly in medical malpractice actions. The flurry of cases seems to have been triggered by *Ogden v. J.M. Steel*, 31 P.3d 806 (2001), though it is not clear why that decision has caused plaintiff attorneys to think that Arizona is particularly likely to admit expert testimony on the amount of hedonic damages in personal injury actions. Hedonic damage testimony in Arizona wrongful death actions appears precluded by the lack of damage claim for a decedent’s enjoyment of life element. In the *Ogden* decision, Arizona ruled only that “loss of enjoyment of life” damages were different from “pain and suffering damages.” The *Ogden* court cited the decision of the South Carolina Supreme Court in *Boan v. Blackwell*, 353 S.C. 498 (2001) as reaching this same conclusion a few months earlier, but the *Boan* decision has not apparently resulted in making South Carolina a battleground state regarding hedonic damages testimony. States are divided between those that recognize “loss of enjoyment of life” damages in personal injuries as a separate element of damages and those that hold either that general damages should not be divided into subcategories or that “loss of enjoyment of life” is part of “pain and suffering” damages. However, the issue of whether expert testimony is admissible on the issue of hedonic damages is separate from whether “loss of enjoyment of life” testimony by an economist is admissible. Hawaii, as noted earlier, has specifically held that “loss of enjoyment of life” is an allowable damage recovery element in a wrongful death action, but also held that expert testimony about that element is not admissible.

There is another important legal decision in Arizona that need to be addressed when confronting hedonic damages testimony even though it does not deal directly with hedonic damages. In *Logerquist v. McVey*, 1 P.3d 113 (2000), the Arizona Supreme Court retained the *Frye* standard for admission of expert testimony, rejecting *Daubert* in a 3 to 2 decision. (The two dissents strongly favored adopting *Daubert* standards.) The *Logerquist* Court held that even *Frye*

does not apply when the nature of the testimony is not novel scientific evidence, saying: “*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior.” For example, the testimony of a treating physician is not required to meet *Frye* general acceptance standards in order to be able to testify about his patient’s medical conditions.

This is important with respect to the hedonic damage issue because a treating psychologist who testified about an injured person’s loss of enjoyment of life would fall under the *Logerquist* exception to the *Frye* standard. A psychologist could not provide dollar values for loss of enjoyment of life, but would be qualified to provide expert testimony based upon both professional observations and upon peer reviewed literature in the field of psychology relating to the objective measurement of happiness. See particularly, Daniel Kahneman’s lead essay on “Objective Happiness,” in Kahneman, Diener, & Schwartz, *Well-Being: The Foundations of Hedonic Psychology*, 1999, Russell Sage Foundation, New York. While “hedonic damages” are “junk science” in economics, hedonic psychology is an accepted part of the field of psychology. Daniel Kahneman is a psychologist who is a Nobel Laureate in Economics because of his important contributions to economics in this and other areas. Psychologists are, by education and training, prepared to measure happiness in a clinical context. Those measurements are not in dollar terms, but may well be useful to juries who are asked to make awards for loss of enjoyment of life.

Therefore, it is important for a defense economic expert to stress that there is nothing clinical about measurements of hedonic damages in the reports of plaintiff economic “experts” proffering hedonic damages testimony. Robert Johnson would have the same range of values for the enjoyment of anyone’s life, regardless of age, health, wealth, prior psychological condition or any other difference. Stan Smith would have the same \$130,000 per year in 2006 for the “whole” enjoyment of life of any individual regardless of age, health, wealth, prior psychological condition or any other difference. Stan Smith’s assumed percentage reductions for his personal injury calculations are based on sheer speculation on Stan Smith’s part, for which he has had no education or training in the field of economics. If the *Logerquist* exception for “when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior” does not apply, Arizona relies on the *Frye* “general acceptance in the profession” standard [*Frye v. United States*, 54 App. D.C. 46, 293 F 1013 (D.C. Cir. 1923)]. It can be easily demonstrated by a qualified economic expert that “hedonic damages” testimony is not generally accepted in the field of economics.

Stan Smith will attempt to shift the question from whether his method for developing calculations for lost enjoyment of life is generally accepted to whether the VOL literature is accepted. However, but the issue is not whether the VOL literature is an accepted part of economic literature, but whether Stan Smith’s (or

another “expert’s”) misuse of that literature to derive calculations is generally accepted. In the draft affidavit provided with this paper, that distinction is drawn at length. The role of affidavits in a motion in limine hearing will be discussed further below.

Georgia

Georgia has a unique wrongful death statute that treats damages as damages to the estate of a decedent, independent from losses that may be suffered by survivors of a decedent. With respect to lost earnings, the estate of a decedent may recover the “full life” of a decedent, but not for losses such as solatium, which includes “loss of society, comfort and companionship,” by survivors. [*Elsberry v. Lewis*, 140 Ga. App. 324, 231 S.E.2d 586 (Ga. App. 1971); *Consolidated Freightways v. Futrell*, 201 Ga.App. 233, 410 S.E.2d 751 (Ga. App. 1991)] Unlike most other states, Georgia does not subtract for a decedent’s personal consumption or maintenance from a projection of a decedent’s lost earnings. Possibly based on the “full life” concept in the Georgia Wrongful Death Act, efforts have been made to claim the hedonic damages for loss of enjoyment of life of decedents. However, no reported decision indicates that wrongful death damages include “loss of enjoyment of life” and no reported decision has admitted hedonic damages testimony in personal injury litigation involving surviving injury victims.

The Georgia legislature has recently adopted *Daubert* standards by statute, the probability of being able to defeat hedonic damages testimony at the motion in limine level has increased. There is also language in the statute indicating the witnesses whose testimony has been rejected by other states should not be permitted to testify in Georgia.

Montana

Montana has remained a battleground state apparently in large part due to horrific mistakes made by defense attorneys in *Hunt v. K-Mart*, 1999 MT 125, 294 Mont. 444, 981 P.2d 275 (MT 1999). In that case, the Hunts proffered the testimony of a psychologist, Dr. Velin, and an economist, Dr. Vinso, to testify about the Plaintiff’s hedonic damages losses. The sole issue on appeal was whether the district court erred in admitting hedonic damages testimony. The Montana Supreme Court said, in part:

The grounds upon which K-Mart lodged its objection first became apparent as early as September 9, 1997, when the Hunts disclosed their intention to present expert testimony regarding Norma’s hedonic damages at trial. However, K-Mart failed to file a motion in limine at that time seeking to have this evidence excluded. K-Mart had another opportunity to object to the introduction of this evidence when the District Court issued its pre-trial order listing

the witnesses and exhibits to be used at trial, but again, K-Mart did nothing.

K-Mart finally lodged its objection to the admission of expert testimony on the second day of trial, and a hearing on that objection was held at the time. At the hearing, the District Court inquired whether either party was aware of any appellate decisions regarding the use of expert testimony on hedonic damages. Counsel for the Hunts responded that “there have been decisions in other states . . . that have gone both ways on the subject. Counsel for the Hunts argued that the article relied on by the experts in this case had been published by the National Council of Clinical Economists and that both experts were qualified to testify with regard to that portion of the evidence related to their respective fields of expertise. . .

K-Mart did not dispute that it was aware of the Hunts’ intention to use expert testimony to demonstrate the amount of Norma’s hedonic damages, or that the District Court had required all motions in limine to have been filed by January, 1998. K-Mart did not cite any legal authority to the District Court in support of its position that this kind of testimony is not allowable in the courts of Montana or elsewhere and, when asked whether it was aware of any professional articles attacking the approach used by Drs. Velin and Vinso, K-Mart responded, “Nothing that directly attacks it; no, Judge.”

We conclude that the District Court did not abuse its discretion in allowing expert testimony regarding Norma’s hedonic damages due to the lack of timely and specific objection to the introduction of this evidence at trial.

The following rulings have been made regarding hedonic damages in decisions that were sometimes only reported by LEXIS. In *Heffeling v. Baggenstos*, 1991 Montana Dist. LEXIS 5, hedonic damages were held not to be a compensable element under the Montana Wrongful Death Act. In *Estate of Bell v. Montana*, 1994 Mont. Dist. LEXIS 613, hedonic damages were held to be allowable for the fourteen hours between the injury and death of Donna Bell, but not thereafter. In *Odland v. Lewis*, 1996 Mont. Dist. LEXIS 635, a motion in limine to preclude the testimony of an unnamed witness to prove the extent and monetary value of an injured person’s hedonic damages was granted. In *Artuso v. State*, 1999 Mont. Dist. LEXIS 1119, the court held that hedonic damages were not permissible under Montana’s survival action. In *Wisseman v. City of Cut Bank*, 2001 ML 5022; 2001 Mont. Dist. LEXIS 2734, a motion in limine was granted precluding the hedonic damages testimony of Dr. Robert A. Velin, a psychologist. In *Christofferson v. City of Great Falls*, 2001 ML 2326; 2001 Mont. Dist. LEXIS

3560, the hedonic damages testimony of Stan Smith was excluded in a wrongful death action after a *Daubert* hearing in a wrongful death action. In *Buxbaum v Trustees of Indiana University*, 2002 ML 2937; 2002 Mont. Dist. LEXIS 3141, the testimony of Stan Smith was excluded by a judge who indicated in his order that he had admitted Smith's testimony in 1997, but had now been persuaded that the weight of evidence was against such testimony. *Buxbaum* was a wrongful death decision.

The appellate record with respect to the admissibility of hedonic damages testimony is indecisive. The decision allowing hedonic damages testimony in *Hunt v. K-Mart* (discussed above, *op. cit.*) to stand was based on failures of the defense to properly challenge the admissibility of that testimony. The Montana Supreme Court heard arguments for and against hedonic damages in *Christofferson v. City of Great Falls*, 2003 MT 189; 316 Mont. 469; 74 P.3d 1021; 2003 Mont. LEXIS 360, but upheld the defense verdict in that case and did not reach the issue of hedonic damages. In *Hendricksen v. State of Montana*, 2004 MT 20; 319 Mont. 307; 84 P. 3d 38 (2004), the Montana Supreme Court did not use the term "hedonic damages," but held that:

Damages for the loss of ability to pursue an established course of life compensate for impairment of the ability to pursue one's chosen pursuits in life, calculated separately from the loss of one's earning capacity. . . A plaintiff is "entitled to recover, in the case of permanent injuries, a reasonable compensation for the destruction of his capacity to pursue an established course of life." *Rasmussen v. Silbert*, (1969), 153 Mont. 286, 297, 456 P.2d 835, 841.

The most recent appellate decision regarding hedonic damages was *Dorn v. Burlington Northern Santa Fe Railroad Company*, 397 F.3d 1183 (9th Cir, 2005). In that decision, the trial court judge allowed Stan Smith to testify about hedonic damages in general, but not to offer specific calculations about the lost enjoyment of life of Larry Dorn. There had been previous judicial decisions to preclude hedonic damages testimony and attorneys for the defense probably felt that they would win without a great deal of trouble. They did not make the kinds of mistakes that the defense made in *Hunt v. K-Mart* (*op. cit.*). Defense attorneys were aware of prior Montana trial court decisions holding that hedonic damages testimony was inadmissible and they should have won with the motion in limine that they filed. However, the defense brief supporting the motion in limine to bar the testimony of Stan Smith could have been made stronger with input from their own economic expert.

The trial court decision in *Dorn* was reversed by the 9th Circuit on a number of grounds, one of which had to do with hedonic damages. However it considered several questions relating to hedonic damages. The first involved the availability of hedonic damages as an element of damages in a wrongful death case. On this

issue, the 9th Circuit said that: “It appears that the Montana Supreme Court has not taken a firm position on the availability of hedonic damages.” The 9th Circuit therefore did not regard the trial court decision to allow testimony directed to that element to be reversible error. The 9th Circuit also questioned the usefulness of some aspects of Stan Smith’s testimony, but did not reverse on this ground either. The error the 9th Circuit found to be reversible error was that the trial court judge had not permitted Ireland’s testimony in opposition to hedonic damages. The trial court judge had concluded that Ireland’s opinions were an attack on the legal determination that Smith’s testimony was admissible. The 9th Circuit held that it was error for the district court to bar Ireland’s testimony.

Based on the decisions to date, hedonic damages can be challenged in Montana wrongful death and survival actions as damages that are not available, other than between the date of injury and date of death. Hedonic damages should also be challenged in Montana on the grounds that they are unscientific misuses of the VOL literature.

Ohio

Damages for the lost enjoyment of life of a decedent are not available under the Ohio Wrongful Death Act. Such damages are available under the Ohio Survival Action only between the date of injury and death, *Tinch v. City of Dayton*, 77 F. 3d 483 (6th Cir. 1996). Ohio does allow recovery for “loss of the ability to perform life’s usual functions,” *Fantozzi v. Sandusky Cement*, 64 Ohio St. 3d 601 (1992) in personal injuries with surviving and conscious injury victims. However, this element of damages is not available if the victim did not have time to form the ability to enjoy life, *Ramos v. Kuzas*, 65 Ohio st.3d 42 (1992), or if the victim is in a persistent vegetative state, *Watkins v. Cleveland Clinic Found.*, 130 Ohio App. 3d 262; 719 N.E.2d 1052 (Ohio App. 1999). A number of Ohio decisions have precluded expert testimony about hedonic damages in personal injury matters as being unscientific under a *Daubert* standard, particularly *Abbott v. Jarrett Reclamation Services*, 132 Ohio App., 3d 729, 726 N.E.2d 511 (Ohio App. 1999) and *McGarry v. Horlacher*, 2000 Ohio 3161 (Ohio App. 2002).

However, the only reported decision that has allowed hedonic damages testimony to stand under the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 125 L. Ed. 469 (1993) was an Ohio decision in *Lewis v. Alfa Laval Separation, Inc.*, 128 Ohio App.3d 200 (1998). To the extent that Ohio remains a battleground state, it does so because of the *Lewis* decision. In *Lewis*, the trial court judge admitted the hedonic damages testimony of Dr. Michael Brookshire. The *Lewis* court cited a number of prior decisions rejecting hedonic damages testimony, but found that there was no abuse of discretion under *Daubert* by the trial court judge, suggesting that the admission fell within the “shaky but admissible” prong of *Daubert*. The Lewis Court repeated several times that the judges on that court would not have admitted Dr. Brookshire’s testimony, but also suggested that the defense had failed to do its job, saying:

[W]e find no abuse of discretion with the trial court's decision to admit Dr. Brookshire's testimony. Although we might have chosen to exclude Dr. Brookshire's testimony, we find nothing unreasonable, arbitrary, or unconscionable with the trial court's decision to admit Dr. Brookshire's testimony. . . Appellant presented no evidence to prove that Dr. Brookshire's methodology was unscientific, not generally accepted, or otherwise infirm.

We acknowledge that although appellant presented no evidence to prove that Dr. Brookshire's methodology was flawed, appellant cited various federal district cases that excluded willingness-to-pay hedonic damages by Stan Smith, an economist who had apparently co-authored *Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys* (1990) with Dr. Brookshire. . .

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

Nevada

Nevada has been a battleground state for the hedonic damages issue in personal injury matters with surviving victims for some time. Hedonic damages are not allowed in a Wrongful death case. Before 2004, there were no reported decisions concerning hedonic damages, but there were no strong appellate decisions regarding the admission of expert testimony that would have signaled that hedonic damages testimony was likely to be rejected.

In 2004, the Nevada Supreme Court held that the trial court was not in error for admitting the hedonic damages testimony of Robert Johnson in *Banks v. Sunrise Hospital*, 102 P.3d 52 (Nevada 2004). Johnson had testified 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 *Banks* court said of Johnson's testimony:

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.

Based on this near endorsement of Robert Johnson's methodology, the focus of challenges to the admission of hedonic damages testimony should be on the lack of credibility of the methods being used. The affidavit attached as an exhibit to this paper provides an indication of the problems with the methods used by Dr. Stan Smith, but does not cover the methods used by Robert Johnson or the weaknesses of Mr. Johnson's credentials. The following points are important. Robert Johnson has an M.B.A from Stanford University. He has never been involved in producing any value of life studies, nor would he have done so as part of obtaining his M.B.A. Since Mr. Johnson's initial valuation in the Banks case was from 1999, I believe that the Banks court incorrectly described how Mr. Johnson derived the range from \$2.5 million to \$8.7 million and that method used was the same as one used in Mr. Johnson's report for *Barden v. Griffiths* on May 04, 2004. In Banks, Mr. Johnson relied on values of life taken from articles by Miller in 1990 and Moore and Viscusi in 1988. Today Robert Johnson is using a value from a different Viscusi article written in 2004 (as mentioned earlier). The information provided in the newer paper can be used even more effectively to challenge the legitimacy of Johnson's misuse of Dr. Viscusi's paper.

To support his method, Mr. Johnson used a "Bibliography" composed of five numbered publications. Two of those publications were the papers authored by Dr. Ted Miller and Drs. Moore and Viscusi from which Mr. Johnson derived the annual values of \$2.5 million (from Miller) and \$8.7 million (from Moore and Viscusi). Dr. Viscusi has testified and written published papers that make it clear that Dr. Viscusi does not believe that the value of life literature should be used in compensatory contexts for personal injury matters. Dr. Miller believes it is appropriate to do so. In the third listing, Mr. Johnson incorrectly cites a book by Dublin and Lotka, *The Money Value of a Man*, as having been published in 1940. There are two editions of that book, one from 1930 and one from 1945. There was no edition in 1940.

In the fourth listing, Mr. Johnson cited a paper by Thomas Schelling, a recent Nobel Laureate. Thomas Schelling (Nobel Laureate in 2005). Dr. Schelling was the expert called upon by the economics profession to write the entry on "the value of life" for *The New Palgrave Dictionary of Economics*, MacMillan Press, Ltd., New York, 1987. In his entry on the "Value of Life", Dr. Schelling had this to say:

It is not identified lives but statistical lives - the reduction of some mortal hazard to some part of the population - whose value is our topic. . . Despite emphasis that our topic is *risk reduction*, there is temptation to talk about the value of a *life* saved. If an individual will pay annually (or forego in wages \$100 to reduce some mortal risk to himself from

1:10,000 annually to 1:20,000 - a reduction of 1:10,000 - it is convenient to say that he 'values his own life' at \$2 million. That sounds as if, confronted by certain death, he would come up with \$2 million to stay alive. But this is not what we meant, and it does not follow from the small-risk calculation. (In particular, there would be income effects if the risk-eliminating payment rose from \$100 to \$100,000.) What we mean is that 30,000 identical individuals identically at risk would collectively pay \$2 million for each yet unidentified averted death among ourselves. A terminological proposal is suggested by the unit of measure in part-time hiring, the FTE, 'full-time equivalent'; we can say that our subject values reducing the risk to his own life at \$2 million per FLE, 'full life equivalent.'

This description obviously does not support Mr. Johnson's use of Dr. Schelling's work.

As the fifth listing, Mr. Johnson cited a paper by C. P. Gillette and Thomas D. Hopkins. Dr. Hopkins testified in his deposition in *Martel v. Levy*, Cause No. 892-2337, Circuit Court of the City of St. Louis, on October 31, 1991, that Dr. Smith's (not Mr. Banks') methods represented a misuse of Dr. Hopkins' work. The nature of Dr. Hopkins' criticism would carry over to Mr. Johnson's methods.

A motion in limine to preclude Mr. Johnson's testimony could have included the following points: Mr. Johnson is not an expert whose educational background and experience would include work with or use of the value of life literature. Mr. Johnson has done no value of life research in that area himself and his methods are rejected by those who have done that research. The information provided here about his citations should be sufficient to make it clear that Mr. Johnson's testimony could be misleading to a jury. There is no "economics of intangibles" that could fall "within the scope of [Mr. Johnson's] specialized knowledge concerning the monetary value of intangibles." There is no such specialized knowledge in the field of economics. The danger of unfair prejudice is high. Having an alleged expert testify that some range of dollar values is relevant to a decision predisposes a jury to think in terms of that range, especially when the testimony of the opposing expert is that the numbers being provided are meaningless.

As background, the *Banks* case was a retrial of an earlier decision that had been reversed and remanded by the Nevada Supreme Court. This writer was the defense expert before both trials. This writer was not consulted about points made in the motions in limine before either trial and was not consulted about points

made in appeal motions after the first or second decision and has never seen copies of any of those motions. This writer testified in the first trial, and was flown to Las Vegas to testify in the second trial, but the defense made a strategic decision at the last minute not to have this writer testify in the second trial. This may or may not have made any difference.

New Mexico

In *Romero v. Byers*, 872 P.2d 840 (NM 1994), the New Mexico Supreme Court held that hedonic damages were available in a death case and that, at the discretion of the trial court judge, an economic expert could be admitted to testify about the dollar value of those damages. In the following year, the New Mexico Court of Appeals held that hedonic damages were also available and expert testimony about those damages in personal injuries was permissible in *Sena v. New Mexico State Police*, 119 N.M. 471 (NM App. 1995). This decision was reaffirmed in *Couch v. Astec Industries, Inc.*, 2002 NMCA 84 (NM App. 2002). In *Couch*, 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 *Couch* court cited *Smith v. Ingersoll-Rand*, 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.

The *Couch* decision implies that hedonic damages calculations of the sort prepared by Stan Smith, which provide specific annual values for life enjoyment in the range of \$130,000 per year, would invade the province of the jury. This might particularly be the case in a wrongful death action, given that Stan Smith’s method results in one specific number.

In New Mexico, it seems likely that a trial court will permit an Ingersoll-Rand type of testimony that does not place specific dollar values on a decedent’s life. It is not clear what types of testimony would be admitted in personal injuries involving surviving victims. Testimony focusing on the fact that the range of values found in the Teng study was between \$0 and \$99 trillion might be useful.

Winning at the Motion in Limine Level

In most states, the real battle should be at the motion in limine level. Even badly presented hedonic damages testimony that is not believed by a jury can influence

a jury to think in terms of larger values for mind-states like loss of enjoyment of life and loss of society and/or relationship. Court systems sometimes call upon juries to award damages in these categories without giving juries any real guidance in determining how much money would constitute compensation. In effect, the admission of a court-acknowledged “expert” provides implicit guidance, even if the testimony provided is, as it is with hedonic damages, totally bogus. The standards of *Daubert* and *Frye* set up barriers that can be used to challenge this kind of bogus testimony before it is heard by a jury. The Draft Affidavit that is provided with this paper provides coverage of many of the scientific grounds upon which this kind of testimony can be challenged. To maximize the chances of preventing such testimony from being admitted and appealing the trial court decision if it is, attorneys should retain and use experienced qualified economic experts.

In the case of Stan Smith, an attorney will need to be ready to respond to a variety of materials he will provide to the plaintiff attorney that will be designed to suggest that there is no difference between calculations of hedonic damages and calculations of lost earnings and household services, to suggest that the Value of Life literature itself uses the same methodology as Stan Smith, to suggest that a number of forensic economists consider the method reasonable and reliable, and so forth. Stan Smith regularly provides plaintiff attorneys with a thick stack of allegedly supporting materials. It requires a defense expert who has substantial knowledge in this area to provide guidance with respect to how to counter these materials. One of the sets of materials Stan Smith provides to plaintiff attorneys is a stack of up to 13 affidavits from various economic experts who were at one time willing to provide hedonic damage testimony under some circumstances. In recent filings this writer has seen, none of the affidavits were more recent than 2002. Some of them date from as early as 1992. None of them provide detailed economic analysis for why their writers support hedonic damages. On three occasions in the past year, this writer has assembled groups of five or six of the most highly regarded forensic economists in the country to provide affidavits for particular pending hearings. In each instance, the cases settled before the scheduled *Daubert* or *Frye* motion in limine hearing.

Attorneys should consider retaining experts like David Jones (ddj44@comcast.net) in Minnesota, Gary Skoog (gskoog@umich.edu) in Illinois, James D. Rodgers (jdr@psu.edu) in Pennsylvania, Michael Piette (piette@nettally.com) in Florida, Frank Slesnick (fslesnick@bellarmine.edu) in Florida, Jerry Martin (janus@san.rr.com) in California, or this writer. W. Kip Viscusi, now of the Law and Economics program at Vanderbilt University, who is the most recognized expert on the value of life literature, has been willing to write affidavits opposing the admission of testimony by Stan Smith in the past and has recently indicated a willingness to do so. Other participants in the VOL literature have similar views and would presumably be willing to support efforts to prevent the admission of hedonic damages testimony in courts of law. John O. Ward (ward@johnwardeconomics.com) of Missouri was the author of one of the

thirteen affidavits Stan Smith has distributed in the past, but has recently provided two affidavits indicating why he no longer supports hedonic damages testimony. (This list is not intended to be exhaustive, but these are individuals this writer knows have experience with this issue and have substantial knowledge of the relevant literature.)

Making the Best of a Bad Situation at Trial

If a trial court judge admits the testimony of an alleged hedonic damages expert, a good part of the battle has already been lost. Under most circumstances, a defense expert can only tell a jury why the numbers provided by the plaintiff expert are meaningless. It is probably still worthwhile to have testimony from a defense expert to that effect for possible appeals, and perhaps to convince a jury that the plaintiff's case is overreaching. If so, it is important to use the defense expert to establish the lack of scientific accuracy and lack of reliability of the testimony the jury has heard.

There is one partial exception to the general rule that qualified defense experts cannot provide alternative values. This partial exception relates to personal injuries with surviving victims. Many of the articles in the value of life literature also contain values for avoiding injuries. If the value of life literature was valid for assigning values to individual human lives, which it is not, it follows that since injury values exist, they should be used in place of values of life if the willingness to pay methodology is being used for someone who is still alive and injured, but not dead. The Stan Smith approach to personal injuries is to start from an assumed whole value of life, derive a net value of life enjoyment and then use higher and lower assumed percentages of loss to arrive at values for lost enjoyment of life. If this method was reliable, it would be much simpler to start with values from the same literature for the avoidance of injuries. Not surprisingly, those values for the avoidance of injuries are much smaller than values for the avoidance of death. It remains true that a qualified defense expert could not argue that values for the avoidance of injuries accurately measure loss of enjoyment of life due to injuries, but at least this point could be made with injury values from the willingness-to-pay literature.

Other Materials Provided With This Paper

Two items are included with this paper that may be useful to defense attorney's confronting claims for hedonic damages losses. The first is Draft Affidavit, a final version of which was used in the case of *Walden v. Kingsman, M.D.*, in the state of Georgia. It covers a large number of the arguments that can be made about the unscientific nature of hedonic damages testimony in much greater detail than is provided in this paper. The second is a "Bibliography of Published Writings" of this writer. Many of the more recent papers on that list and some unpublished papers relating to Stan Smith can be found at www.umsl.edu/~ireland. A second website maintained by this writer may also be helpful. The University of

Missouri-St. Louis provides a web page composed of short statements about legal decisions of interest to forensic economists at <http://www.umsl.edu/forensiceconomics/CasesFE.html>. Decisions involving hedonic damages are included for most states, federal Courts of Appeals and District courts.