

Hedonic Damages – One More Time: A Symposium

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I. Background for the Symposium

On January 5, 2008, the National Association of Forensic Economics (NAFE) sponsored its third symposium on “hedonic damages,” this time entitled “Hedonic Damages – One More Time.” The first symposium on hedonic damages was presented at the December 1989 Allied Social Sciences meetings in Atlanta, Georgia with the title “Hedonic Damages and the Value of Life.” Papers from that session by W. Kip Viscusi, Ted R. Miller, Stan V. Smith, and William T. Dickens were published in Volume 3, No. 3 of this journal (1990). The second symposium on hedonic damages was presented at the January 2000 Allied Social Sciences meetings in Boston, Massachusetts with the title “Hedonic Damages Ten Years Later.” Papers from that session by W. Kip Viscusi, J. Paul Leigh and Jorge A. Garcia, Ted R. Miller, Stan V. Smith and Thomas R. Ireland, along with an introduction by Peter Marks and Thomas R. Ireland were published in Volume 13, No. 2 of this journal (2000). W. Kip Viscusi and Ted R. Miller returned as presenters for a third time at the January, 2008 symposium, along with Brian McDonald and John O. Ward. Thomas Ireland acted as the organizer of the 2008 symposium and Peter Marks served as its chair.

The term “hedonic damages” first entered general public consciousness on December 12, 1988 with a front page story in the *Wall Street Journal* by Paul M Barrett on “The Price of Pleasure,” featuring Stan V. Smith and his successful presentation of hedonic damages testimony in the case of *Sherrod v. Berry* (1985, 1987, and 1988). Two federal judges in Illinois had commented favorably about Smith’s testimony in the original opinion and one of the appeals decisions before the case was reversed on other grounds in 1988. The NAFE symposium in December of 1989 was designed to explore this interesting new development in the field of forensic economics.

As of the 2000 symposium hedonic damages testimony had enjoyed several successes in individual states, but had been rejected by the courts in a number of reported decisions, particularly at the federal level. The threat of *Daubert* and *Frye* standards for admission of expert testimony being applied negatively to hedonic damage testimony had become one of the central features in the debate over this concept.

As of 2008 hedonic damages testimony had become much more specialized. Because hedonic damages testimony had been rejected in a number of legal decisions, fewer and fewer forensic economists were involved, but Stan Smith, Robert Johnson, Brian McDonald, as well as several other economic experts

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were still very much involved in presenting hedonic damages testimony. This was particularly the case in a few key battleground states including Arizona, Arkansas, Georgia, Montana, Nevada, and New Mexico, where statutes or legal decisions made the legal environment appear more promising for hedonic damages testimony. Shortly after the 2000 symposium, the Mississippi Supreme Court made several rulings that were very favorable to hedonic damages testimony, but those successes were quickly reversed by the Mississippi legislature. Thus, as of 2008, hedonic damages could be viewed as a narrower topic than it had been in the first two symposia in that fewer experts were offering this testimony and that it was being accepted in fewer states.

In the 2008 symposium, the papers by Miller and McDonald were deemed by the organizers to be presenters who were favorable to the hedonic damages concept, while Viscusi and Ward were deemed to be unfavorable or less favorable. Miller has never testified as a forensic economist, but has always been sympathetic to the idea that this could be a useful improvement in tort litigation. Brian McDonald's paper in this symposium, on the other hand, is very specific with respect to how hedonic damages testimony is permitted in the state of New Mexico, one of the two remaining states whose Supreme Court has ruled favorably about the concept. Kip Viscusi's paper is much more obviously opposed to any use of hedonic testimony in compensation contexts. Jack Ward's paper is not opposed to hedonic damages testimony, as such, but argues for an alternative way to place pecuniary values on lost time resulting from either injury or death. That approach raises issues of its own in terms of admissibility in tort actions, but, as Ward points out, for the past few years we have had good detailed information about time use through the American Time Use Survey (ATUS).

At the end of the session in New Orleans, both Kip Viscusi and Ted Miller expressed hope that there would be another "Hedonic Damage Symposium" in the future because they are so much fun. Whether that will happen remains to be seen. One of us (Tom Ireland) is still devoting approximately one third of his consulting time to dealing with hedonic damages issues. Ireland made a presentation on hedonic damages to an organization of defense attorneys in Arkansas in the summer of 2008 and has a number of hedonic damage cases in a variety of states, but primarily Arkansas, Arizona, Nevada, and New Mexico. Whether hedonic damage testimony will still be a topic worth exploring eight years from now remains to be seen. We think, however, that you will find the four papers in this symposium to be well worth reading and thinking about. The remaining two sections of this overview will provide a brief description of the four papers in the symposium and the discussion by presenters and the audience after the presentation of the four papers.

II. A Brief Description of Papers in the Symposium

The first paper was presented by W. Kip Viscusi. As the leading researcher in the value of life literature, Viscusi is a strong supporter of that literature, but does not think it should be used in compensatory contexts in personal injury or wrongful death litigation. Viscusi's paper repeats points that Viscusi

made in his 2000 symposium paper (Viscusi, 2000) about the appropriate uses of the Value of Statistical Life (henceforth "VSL") literature in litigation, but it is also Viscusi's response to a paper by Posner and Sunstein (2005) that attempted to resurrect old arguments that awards of hedonic damages are needed to somehow restore the "make whole" principle in wrongful death actions. Viscusi clearly states his position that hedonic damages "have no role to play in setting compensatory damages amounts" and proceeded to dissect the arguments made by Posner and Sunstein in a series of simple thought experiments. Posner and Sunstein heavily relied upon deterrence values in their paper. Viscusi pointed out that reported decisions concerning hedonic damages have seldom been concerned with the deterrence issue.

Posner and Sunstein refer to using "the government number" for the VSL when adding VSL-based amounts to awards. Viscusi pointed out that there is no one number that could be called "the government number." Posner and Sunstein suggested an approach for how juries might discover the hedonic loss of an individual as a result of an injury or death. Viscusi pointed out that even the question Posner and Sunstein would like jurors to answer is meaningless in the context of death or catastrophic injuries because there is no sum of money that will make a dead person or a catastrophically injured person as well off as if the injury had not occurred. Posner and Sunstein recommend that jurors could be provided with VSL numbers to guide them in choosing a number. Viscusi pointed out that this assumed that an average jury could understand the nuances of the VSL literature well enough to make choices among parts of the VSL literature.

Viscusi also addresses the concept of disability scales for determining how much hedonic loss a given physical injury has caused. Viscusi points out that to his knowledge no government agency has ever used disability scales in conjunction with VSL values for policy purposes. Viscusi points out that "happiness scores generally address short-term well-being, not long-term well-being." He also criticizes the use of QALY (Quality Adjusted Life Year) scales, which was a significant difference with Ted Miller, who is a strong advocate for such scales. Here again, Viscusi points out the significant differences between short-term and long-term values in QALY measurements.

The Viscusi paper deals with the notion of optimal insurance. Viscusi argued that there should be no compensation for loss of enjoyment of life and other intangible damages like "pain and suffering" and "grief and bereavement" in that individuals do not purchase insurance for such purposes. He points out that even for ordinary economic damages, individuals have an incentive to purchase less than the full replacement value of economic losses. This is because serious injuries reduce the marginal utility of income. For that reason, one would value income dollars before an injury more than dollars after an injury. Viscusi argues that the optimal replacement rate is about 0.85 of lost earnings. Similarly, he points out that people would not purchase insurance to compensate for the grief that will result from the death of a spouse or child.

The second paper was delivered by Ted Miller of the Pacific Institute for Research and Evaluation. Dr. Miller participated in the 2000 symposium and

this paper is an extension of the one delivered at that time and it explains much of the genesis of his present positions on Hedonic damages and Value of Statistical Life issues. He also noted the importance of the use of Quality-adjusted life years (QALY) in order to produce replicable value functional capacity loss in standardized non-monetary units that would be related to individual utility. Miller then listed four main reasons he believes hedonic damages testimony has been barred from courtrooms and briefly addressed those reasons.

First mentioned was the charge that VSL is junk science and thus not a permitted basis for courtroom testimony. Miller pointed out that this is clearly false since the method has appeared in numerous peer review journals over a period of more than 45 years. Miller said that the VSL literature is well-developed and accepted by most main stream economists. Second, Miller addressed the charge that empirical estimates are unreliable. Again this charge is refuted by Miller who notes that there is substantial consistency in the numerous VSL estimates. While it is true that the range of estimates might be wider than desired, the range is not so wide as to invalidate the use of VSL estimates in the courtroom.

The third criticism of VSL normally encountered is since the value of life post priori is limitless, a priori VSL is meaningless. He notes that there is still ongoing debate on this subject, but he believes that VSL is a good candidate for a lower bound for such cases. It provides, he argues, a sound basis for "providing that compensation which derives from economic theory and estimates the values that people would have placed on preserving their quality of life prior to the tort." Finally, Miller addresses the claim that VSL is not germane to the issue of compensation in wrongful death and personal injury cases, particularly in wrongful death circumstances in which deterrence is the primary concern. Miller argues that the sheer number of different types of injuries and different severities of those injuries precludes developing specific willingness-to-pay injury values that would be valid. For that reason, he recommends using percentage reductions based on VSL values rather than specific injury values.

Miller had an extensive discussion relating to the need for selecting a standardized QALY instrument. He listed five criteria to be used in selecting an instrument including: 1) Avoidance of subjective self-support and of items that are likely to vary with circumstances unrelated to the plaintiff's disability; 2) degree of detail and breadth of coverage; 3) minimization of redundancy; 4) availability of population norms on the instrument for the relevant diagnosis; and 5) inter-professional reproducibility. The need for appropriate scoring for these assessment instruments was emphasized.

One interesting issue discussed was the fact that disabled individuals often adapt to their problems and judge them as less severe than do others. For this reason QALY instrument scorings are sometimes based on interviews with the disabled, rather than the general population.

Miller raised the question "are all QALY's equal?" After a brief review of how VSL's are typically calculated based on studies of wages workers receive to take risky jobs or studies of traffic safety behavior, it was concluded that there are still a number of unresolved issues both as to what QALY's represent and about whether the QALY is constant across personal circumstances. According

to Miller, the state of the art has finally made it possible to vary VSL with income and/or other demographics. A number of articles have made it clear that VSL does vary with income, although the size of this variation is still unclear. It is also clear that VSL needs to be tailored by age.

The penultimate section of Miller's paper asks "what damages are subsumed in the VSL?" One important consideration, according to Miller, is that VSL is a family value, rather than an individual one. A related issue is whether to add hedonic damages and claims for pain and suffering prior to death. This is a difficult question as some, but not all, such pain and suffering is implicitly factored into the VSL. Miller indicates that persons presenting hedonic damage testimony incorrectly ignore these aspects of the VSL literature.

Miller's conclusion is that he still believes that VSL and QALY's provide a sound basis for legal uses in measuring lost enjoyment. He notes the extensive use of VSL in regulatory decision making and believes that the VSL would give a good lower bound as to damages in personal injury and wrongful death calculations.

The third paper was by John O. (Jack) Ward. Ward's paper is not a paper on hedonic damages, as such, but a paper that offers Ward's alternative of valuing lost time of a decedent in a wrongful death action. Ward's paper provides an up-to-date summary of literature regarding such loss elements as "advice and counsel," "Wentling Damages" in Kansas and other services of similar type that courts have held as possessing "pecuniary value." Ward cites the definition of "pecuniary losses" provided by Steven Shavell (2004) as follows:

Pecuniary losses are those that either are monetary or are losses of goods that can be purchased in markets, in which case the measure of the losses comprises the replacement costs. Non-pecuniary losses correspond to the losses in utility suffered when irreplaceable things have been destroyed, such as family portraits or other unique objects. (p. 242)

The issue under consideration in Ward's paper is how should the economist value pecuniary damages other than lost income and lost household services? Ward noted that in recent decades several states have attempted to refine the lists of pecuniary losses of survivors and then separate those losses from non-pecuniary losses by statute. Testimony by forensic economists as to losses other than lost wages and household services is still rare. Ward notes that Posner, over 30 years ago, observed that the courts had "solved" the problem of the proper valuation of a life by ignoring it. As Ward notes, a major hurdle faced by both courts and forensic economists has been finding common ground in defining categories. The basic purpose of Ward's paper was to examine two responses to Posner's challenge to expand the scope of wrongful death damages that have evolved in our literature: the hedonic approach and the whole time method.

Few economists disagree that the enjoyment of life is a component of the value of life. This value is normally equated with the value of leisure. Because we constantly make trade-offs between leisure activities and work or household services, there is an implied valuation of that leisure activity. The hedonic

approach looks at this trade-off through the willingness to pay lens. The second method, the whole time approach, involves the direct measurement of the three components of life: work, services, and leisure. Ward proceeds to discuss the hedonic approach, both as to the methodology and some history, before moving to the main thrust of his paper, time valuation.

Ward discusses the method of time valuation in great detail. He notes that the beginning point for this discussion was Gary Becker's "Theory of the Allocation of Time," (1965). Without replicating that discussion, Ward concludes that "to a family member, the relational value of a unit of time might be very large, but not calculable using economic reason. All we can measure is a replacement cost for the physical activity itself."

A starting point for calculating wrongful death damages beyond lost earnings and household services, according to Ward, would be to have the survivors enumerate the hours the decedent spent with them in the activities of advice, counsel, care etc., while alive. He raises the issue that such measures would be static and thus not reflect the changing nature of familial relationships over time. He then notes the contributions of several forensic economists to this issue. He notes that the "whole time valuation approach to wrongful death damages, like hedonic damages, has represented an effort to expand the concept of damages beyond the traditional pecuniary damages of lost earnings and household services."

In 2003, as Ward notes, the ability to value non-market services was vastly improved with the publication of the first results of the American Time Use Survey (ATUS) conducted by the Bureau of Labor Statistics (BLS). This is an extremely large sample and growing steadily. The results of the ATUS have been summarized and published in *The Dollar Value of a Day* (DVD).

The contents of DVD are discussed and a number of examples are provided. Ward draws an important distinction between the hedonic damages concept and the whole time approach. Obviously, he believes the latter approach is more promising.

The fourth paper was presented by M. Brian McDonald. This paper was very different from the Viscusi and Miller papers in that it focused on the specific way that he (and others) have presented hedonic damages testimony in the state of New Mexico. New Mexico is one of the six states, along with Arizona, Arkansas, Georgia, Montana and Nevada in which one of us (Ireland) has been retained most frequently to oppose hedonic damages testimony. While we have no statistics to indicate the frequency of hedonic damage claims being made in the 50 states, the six states named above appear to be the states in which more effort has been made to put forth such claims. Unlike the first hedonic damages symposium in 1989 or even the second hedonic symposium in 2000, the hedonic damages issue is being framed in unique ways in each of those states. Among the small number of states where such testimony is frequently accepted, there are major differences that are based on unique statutes and case law. Litigation involving hedonic damages is increasingly a state-by-state phenomenon in a small number of states rather than being distributed nationally. As a result, McDonald's paper has many similarities with the pa-

pers in the “state series” edited by James D. Rodgers and Robert Male for this journal.

McDonald began by pointing out that the New Mexico Supreme Court put New Mexico on the map as allowing hedonic damages in a wrongful death action in *Romero v. Byers* in 1994. *Romero* held specifically that an economic expert could be admitted at the discretion of a trial court judge to testify about dollar values for the lost enjoyment of a decedent’s life in a New Mexico Wrongful Death action. McDonald pointed out that the New Mexico Court of Appeals followed this decision a year later in *Sena v. New Mexico State Police* (1995) by holding that, by inference, a trial court judge could admit hedonic damages testimony in a personal injury matter. To set the stage for these decisions, McDonald reviewed the statutory basis for damages in a New Mexico wrongful death action, which are unique to New Mexico. New Mexico uses a loss to the estate standard, which is different from the majority of states that use a loss to survivor’s standard. Lost earnings are reduced for both taxes and what New Mexico calls personal consumption. As a result, it is logically consistent for New Mexico to consider allowing an estate to recover for loss of enjoyment of life damages in a death case, just as New Mexico (and most states) allow such recovery in personal injury matters.

In the context of a personal injury, New Mexico is unique only in that the *Sena* decision specifically allows expert testimony by an economist at the discretion of a trial court judge to place dollar values on the amount of lost enjoyment of life. McDonald points out, however, that as case law has evolved in New Mexico, and the nature of the testimony by an economist that is allowed is not open-ended, as it currently is in Nevada. McDonald points to *Couch v. Astec Industries* (2002) as a key decision that sets the stage for how hedonic damage testimony must be presented. *Couch* was a case in which McDonald was the plaintiff economist proffering hedonic damage testimony in a personal injury matter. His review of the *Couch* decision leads directly into McDonald’s view of the way an economist must now testify about hedonic damages in New Mexico. Specifically, McDonald points out that an economic expert in New Mexico is not permitted to place a specific dollar value on either the life enjoyment of an injury victim or a decedent in a New Mexico wrongful death action. An economist is permitted to testify about values found in the VSL literature and to provide a jury with an indication of the range of values found in that literature. McDonald goes on to discuss the 2005 decision of Judge James Hall of the First Judicial District in Santa Fe, New Mexico, to exclude expert testimony on value of life damages, and argues that Judge Hall is in conflict with a reported New Mexico Court of Appeals decision.

McDonald reviews a number of other legal decisions in New Mexico that have an influence on the kind of hedonic damages testimony that judges are currently allowing in New Mexico cases in which McDonald has been retained by plaintiffs. Thus in contrast to the broad themes considered in the papers by Viscusi and Miller, McDonald’s paper is very specific to one legal venue and provides narrowly specific information that would be of significant value to a forensic economist handling a first case in the state of New Mexico.

III. Discussion by Presenters and the Audience

At the conclusion of the final paper, the floor was opened for discussion by the panelists for a brief time, to be followed by opening the floor to the audience. At the outset of this discussion Ted Miller was asked “does your willingness to accept [risk] consider that the worker might perceive that he/she had no choice?” Miller’s response indicated that he considered that matter irrelevant. It became clear during their discussion that Miller and Viscusi were in very substantial agreement on all the issues relating to the VSL literature except one. Miller continued to contend that hedonic damages were relevant in tort calculations, while Viscusi objected to their use. Perhaps this difference in opinion stems from their differing conceptions of the purpose of law suits. Brian McDonald completed the panel’s discussion with observations on the practical applications of hedonic damages in courtroom contexts raised during the morning’s session.

The discussion then moved to comments and questions by the audience. Larry Spizman and David Schap not only gave us permission to include their comments, but took the time to e-mail summaries of their comments. One member of the audience questioned Ted Miller as to the possibility of finding QALYs by race and gender. Miller responded that different tables by race would be unsound public policy. Miller was asked a question about the relationship between cost of care and the enjoyment of life. Miller indicated that he knew of no such relationship.

David Schap made a number of comments related to the issue of “grief, mental duress, loss of companionship” and similar issues as mentioned by both Viscusi and Miller in their presentations. Schap argued that a person might indeed factor in concerns about a surviving spouse when deciding which job to pick as suggested by both Miller and Viscusi. However, Schap argued that the same individuals would also factor in concerns about friends and surviving relatives. These latter groups, however, have no legal standing in a cause of action for wrongful death. Schap pointed out that in some jurisdictions case law calls for special damages when a spouse actually witnesses the demise of a partner. That would suggest that (at least in those jurisdictions) the law’s concern is partially for an ex post appraisal of the loss actually suffered rather than strictly an ex ante statistical appraisal.

Schap argued that to the extent that the tort system provides a surviving spouse the opportunity to recover damages, the tort system, itself, currently provides insurance. In addition, the worker, knowing that the tort system will likely compensate a surviving spouse, can ignore the spouse’s feelings in deciding whether to bear the incremental risk of death at a workplace. Miller responded that the witnessing of a spouse’s death is not subsumed in VSL and that the VSL does reflect a family-based decision. Viscusi added that most studies take into account workman’s compensation benefits and that it is impossible to simply add up the categories.

Thomas Ireland also noted that in Nevada the wrongful death act states that the survivor cannot collect hedonic damages and that in Pennsylvania you cannot claim loss of enjoyment if the injured party is dead because loss of en-

joyment must be experienced to be compensated. Larry Spizman asked whether VSL research could be used by professional medical societies such as the American Society of Anesthesiologists to determine the amount of resources they should allocate to educate medical doctors in order to reduce errors while performing operations and thus reduce legal actions and lowering medical insurance premiums? Viscusi answered in the affirmative but with some suggestions.

Peter Marks strongly questioned Miller's argument that VSL values are family-based rather than individual-based. Marks pointed out that while this may be true in many, if not most, some individuals do not have close family members. For others, the alternative to the risk of occupational fatalities is another kind of risk. Marks gave the example of the coal miner who clearly recognizes the risk of his occupation, but feels that putting his family at risk to suffer abject poverty is a worse risk.

Another participant pointed out that when considering some nasty jobs, the issue was more than extra risk of injury or death. This might lead to double counting as there are too many subjective issues involved. Gary Skoog noted that when manufacturers utilized VSL to determine how much safety to build in, there was a tendency for juries to hammer them if something did happen. Viscusi indicated agreement with Skoog's observation. Another participant noted that one reason not to use VSL as a basis of deterrence is that few know about these cases so there is really no deterrence outside of court. It was also noted that in the U.S. the trend is to treat medical malpractice differently, especially with respect to caps on punitive damages. This leads to less incentive to improve safety.

The session ended as the first two symposia had ended, with a number of unresolved questions. Miller and Viscusi both indicated that they hoped there would be a fourth session on hedonic damages down the road.

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