

This handout was prepared for the American Rehabilitation Economics Association program on the morning of Saturday, June 13, 2009 at the Ambassador East Hotel, Chicago Illinois.

An Economist's Role Defending Against Hedonic Damage Testimony

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Gary Skoog and I will explain the role of an economist for the defense in defending against hedonic damages testimony. On at least one occasion I am aware of, Stan Smith was retained by a defendant to present alternative dollar values for hedonic damages in contrast to a plaintiff economic expert who presented higher hedonic damages numbers than Stan did. Gary and I will not be talking about that kind of defense role. Both of us have long been convinced that hedonic damages testimony has no scientific validity in the field of economic science. Gary's role in this program will be to talk about ongoing research in the Value of Statistical Life (VSL) and will provide a list of intellectual reasons for opposing the admissibility of hedonic damages testimony in a court of law. My role will assume that the economist believes that hedonic damages testimony is scientifically without merit and has been hired to oppose the admissibility of hedonic damages testimony. I will, however, note that it is a fundamental principle of economic theory that an economist operating within the bounds of economic science does not make interpersonal utility comparisons. Any method for presenting hedonic damages implies the ability to arrive at reliable interpersonal utility comparisons. For that reason alone, I would be opposed to the admission of hedonic damages testimony by an economic expert.

The Framing Issue

The primary reason why plaintiff attorneys want to have economic experts present hedonic damages testimony is to frame in a jury's mind the notion that the appropriate amount of damages to award for loss of enjoyment of life or for loss of society and relationships is a large number. My experience has been that if a judge permits an economic expert to present large dollar values it can have the effect of causing juries to award large amounts even if the jury does not regard the plaintiff expert presenting hedonic damages to be particularly credible and even if the jury regards the testimony in opposition to hedonic damage figures as very credible. The question of how many dollars to award for loss of enjoyment of life or for the loss of society of a family member with a decedent is a very difficult question. It is easy for a jury to latch onto any type of guidance in making that decision, even if the guidance has no merit.

It is for that reason that I tell attorneys who have retained me that the real battle is at the level of the motion in limine – the motion defense attorneys put forth to preclude plaintiff attorneys from having an economic expert testify about dollar amounts that the jury should award for either loss

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of enjoyment of life or loss of society in the event that the defendant is found liable. If the battle at the level of the motion in limine is lost, it still makes sense for a defendant to present an economic expert to testify about the invalidity of the calculations of a plaintiff economist for loss of enjoyment of life or loss of society damages. However, that outcome is making the best of a bad situation for the defense. Gary's presentation will provide some insight into what can be said at that point in trial testimony, but a defense economic expert is in a very bad position. In most types of cases, a defense expert has reasons why he or she thinks that the numbers provided by the plaintiff overstate the reasonable amount of damages. The role of a defense expert is to convince a jury that the lower numbers are more accurate than the higher numbers offered by the plaintiff expert. That is not the case with hedonic damages. The position of the defense expert is that an economist cannot reliably develop any numbers that could reasonably measure anyone's loss of enjoyment of life or less of society damages. It is not that the plaintiff expert's numbers are too high or too low, but that they are meaningless and should be disregarded altogether. Thus, the defense expert has no numbers to offer as an alternative when the judge has already permitted the plaintiff expert to offer numbers. This is not a good situation.

The primary role of a defense expert therefore is to prevent this situation from occurring. That means winning at the motion in limine level, where a win either means that the plaintiff economic expert is precluded from offering hedonic damages testimony or allowed to testify under circumstances in which the plaintiff economic expert cannot provide any dollar amounts for loss of enjoyment of life or loss of society damages. I should add that if the plaintiff expert has offered conventional loss categories such as loss of earnings, loss of financial support, loss of job-related fringe benefits, loss of household services or determining a present value for the costs of a life care plan, the defense is not likely to challenge the admissibility of the plaintiff economic expert's testimony about dollar values for those damages. For those damages, the defense will typically have a defense economic expert present alternative dollar values rather than challenge the admissibility of the numbers the plaintiff expert has developed.

Assisting a Defense Attorney at the Motion in Limine Level

The fact that the real battle over admissibility of hedonic damages testimony is at the level of the motion in limine to preclude hedonic damages testimony significantly changes the role of an economist for the defense. What follows is a list of ways an economist can assist an attorney at the motion in limine level.

(1) Be aware of differences in the standards of for admissibility of expert witness testimony between the various states and the federal government. Know the language of Federal Rule of Procedure Rule 702 or its state equivalent in the state your case is venued. If your case is in state court, know whether your state has accepted *Daubert v. Merrell Dow Phamaceuticals, Inc.*, 113 S.Ct. (1993) and progeny, still relies on the *Frye* test, from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), or something else. Arizona, for example, still relies on the *Frye* test, but with an exemption for treating physicians, psychologists and other circumstances in which an expert has special knowledge through providing treatment to plaintiffs or decedents. The *Frye* test, in

simple terms, is whether the methods used by an expert are generally accepted in the expert's field. To assist an attorney in preventing hedonic damages testimony, you need to be aware of the language that will guide a judge in making his decision.

(2) Ask to read all legal briefs your attorney plans to file with respect to the admissibility of hedonic damages before they are filed. Attorneys often leave out important arguments that you can at least suggest should be included. Read other legal briefs for and against the admission of hedonic damages testimony to the extent you can obtain copies.

(3) Be familiar with all *reported* legal decisions in which judges have rejected (and in a few states accepted) hedonic damages testimony. Read these decisions more than once. Pay special attention to any decisions that have been reached in the state in which your case is being tried. Federal decisions from districts within that state and the decisions of the federal circuit court that includes that state are especially important. Be aware that some legal decisions made in federal court are based on the federal judge's interpretation of state law and that some decisions made by state judges are based on the state judge's interpretation of federal law. Know what it means to say that a legal decision is "reported," but also be aware that many judicial decisions, particularly at the state court level, are not reported. Be aware that decisions that may be found using LEXIS and WestLaw are reported in the sense that you can find and read them by using LEXIS and WestLaw search engines, but are not "reported" in the precedential sense of that term. Also be aware that judges can obtain copies of orders of other judges for decisions that have not been "reported" in the precedential sense of that term or even be obtainable through LEXIS and WestLaw. Sometimes those "unreported" decisions can be very important in influencing other judges. Bear in mind that decisions of other judges can be much more important than a minor article by an economist that is critical of hedonic damages testimony.

(4) Understand differences between different types of hedonic damages testimony. Has the expert, as in the case of Robert Johnson, provided two inflation-adjusted values from the Value of Statistical Life (VSL) literature? Has he provided, as in the case of Stan Smith, an annual dollar values for life enjoyment that is allegedly derived from the VSL literature. Has he provided, as in the case of Everett Dillman, a randomly selected benchmark annual values such as \$50,000 per year or \$10 per hour to "illustrate" the present value of lost enjoyment over the remainder of the plaintiff's (or survivor's) lifetime? Each of these methods requires a different approach to counter its admissibility.

(5) Spend time familiarizing yourself with the VSL literature. Know the types of studies (human capital, consumer purchase, wage risk, and contingent valuation) that exist within that literature. Know why different studies should produce different values based on the underlying populations from whom data has been developed. Be aware of ongoing VSL research (a topic Gary Skoog will expand upon).

(6) Know a great deal about the history of the opposing economic expert's reports and testimony in depositions or trials about hedonic damages testimony. That history should be provided to

your attorney through your reports, affidavits and declarations.

(7) Know how to counter materials the opposing expert is likely to provide to his retaining attorney to support hedonic damages testimony. Stan Smith, as an extreme example, provides attorneys with a 3.5 inch thick “Admissibility Packet.” The packet includes articles that have favored hedonic damages testimony, legal memoranda allowing hedonic damages testimony, an alleged list of unreported legal decisions in which judges have accepted hedonic damages testimony, affidavits from 15 economic experts from 1991 to about 2002 supporting hedonic damages testimony, and so forth. I am able to describe something about the backgrounds of each of the 15 persons who signed those affidavits, including which persons among them are dead or no longer willing to provide hedonic damages testimony. I can also respond to every other document in that admissibility packet.

(8) Know how to compose an affidavit or declaration. Some states, including Nevada, Arizona and Washington allow declarations, which are essentially affidavits that don’t require notarization. It is likely that your attorney will want for you to provide an affidavit or declaration in support of his or her briefs to oppose the admissibility of hedonic damages testimony. You should become familiar with the style of writing that is required for affidavits or declarations. In Nevada, for example, a declaration must have a sentence saying that no one’s Social Security number is included anywhere within the declaration, while an affidavit in Nevada does not have this requirement.

(9) Be ready to ask for help from other knowledgeable economic experts. Most experts who regularly oppose hedonic damages testimony are willing to provide assistance upon request. In a number of cases, I have solicited supporting affidavits from other recognized economic experts who oppose hedonic damages testimony, including affidavits from Jack Ward who once signed one of the 15 affidavits in Stan Smith’s admissibility packets. You need to know which other experts oppose hedonic damages testimony and who would be likely to be willing to provide supporting affidavits or declarations if your attorney wants them. Most experts, of course, expect to be paid for their time in producing affidavits.

When to Bring in Another Economist with More Background than You Have

The nine ways I have just described that an economic expert can assist an attorney at the motion in limine level imply obtaining a considerable amount of knowledge. It may not be efficient for you to invest in obtaining that level of knowledge in order to be effective in just a few cases. Only a few economic experts are providing a large majority of reports containing hedonic damages calculations. Similarly, only a few economic experts have obtained the level of knowledge to oppose the admission of hedonic damages testimony that I have described. Over the years, a number of economic experts who lack knowledge at this level of detail have suggested that attorneys bring me into cases to counter only the hedonic damages and related portion of claims made by the economic expert for the plaintiff. In such cases, the economic expert who has suggested that I become involved handles lost earnings, lost financial support,

fringe benefits, ordinary household services, and life care cost calculations of the plaintiff's economic expert, while I handle hedonic damages, loss of relationship, loss of guidance and counsel, and loss of companionship services. The same sometimes happens on the plaintiff side. I have been involved in cases in which the plaintiff attorney has retained one economic expert to handle ordinary damages elements, but another economic expert to handle hedonic damages.

An economic expert should be careful, however, in bringing in another economic expert. In one instance, one of my friends was involved on the plaintiff side in a case in which the plaintiff attorney decided to bring in a well-known economic expert to provide hedonic damages testimony. The other expert offered to provide alternative and higher values for ordinary economic damages without cost to the attorney. The purpose of the hedonic damages expert was presumably to attract business away from my friend. Inherently, there is a risk of losing business if one brings in another expert who does a good job for the retaining attorney. I have done everything I could to keep that from happening when I have been brought into a case. I do not want to supplant a local expert who suggests that my help would be useful in a case. Over the years, a number of AREA members along with a number of other economic experts have suggested that I become involved in their cases. I don't think I have ever taken business away from another expert who has recommended that I become involved. I have done my best to see to it that does not happen.

It is now Gary Skoog's turn.