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Hedonic Damages in Wrongful Death Cases

BY STANLEY V. SMITH

Life," Blackstone said, "is the immediate gift of God, a right inherent by nature in every individual."

In wrongful death, what is the appropriate compensation for the loss of a human life?

The issue of life's value has occupied a central position throughout the history of man's inquiry into his own nature. The Babylonian Code of Hammurabi included compensation for wrongful death; later civilizations have attempted to do likewise. Since 1937, English courts have allowed separate recovery for the "loss of expectation of life." Traditional measures restricted to financial damages significantly underestimate the pecuniary value of the lost life.

A recent U.S. Court of Appeals decision has changed that.

In 1976, the Connecticut Supreme Court recognized that state law allows an estate to recover damages for the loss of the ability to live and

enjoy life's activities, and upheld a general award of \$400,000, which also included compensation for pain and suffering and lost future earnings. *Katsetos v. Nolan*, 368 A.2d 172 (1976).

Last year, the U.S. Court of Appeals for the 7th Circuit affirmed a decision in *Sherrod v. Berry*, 629 F. Supp. 159, in the Northern District of Illinois to allow for the first time expert witness testimony on the theory that life has a measurable pecuniary value greater than that derived from traditional financial damages formulae. It upheld an award to the deceased's estate of \$850,000 for the loss of life and loss of the pleasure of living, the "hedonic" component of the pecuniary value of life, and an award of \$300,000 for lost earnings. 827 F.2d 195 (1987).

The court supported the plaintiff's view that the hedonic value of life encompasses the totality of a person's existence, including the moral and philosophical value that society places on life.

The expansion of the measure of pecuniary loss to the estate means that in states such as Connecticut, Illinois, California, Alaska and others, plaintiffs should now be able to include measurement of the hedonic component of life as an element in

proving pecuniary damages. The testimony can serve as a valuable guideline for jurors who can incorporate the economist's views with other evidence and their own sense of the value of life.

"[T]he loss of life means more than being deprived of the right to exist, or of the ability to earn a living, it includes the deprivation of the pleasures of life," U.S. District Judge George Leighton wrote in *Sherrod*. The economist's "expert testimony enabled the jury to consider this important aspect of injury. ... The fact that the hedonic value of a human life is difficult to measure did not make ... the damages speculative. ... [U]ncertainty which affects merely the measure or extent of the injury suffered does not bar recovery."

The total award consisted of \$450,000 for loss of parental association, \$850,000 to the estate for hedonic loss of life, \$300,000 for financial loss to the estate, and \$1,700 for funeral expenses.

Few would disagree that we are worth more than we earn. Most of us have the sense that Gen. George Washington was worth much more than his salary. But how much more? And to whom? What constitutes the hedonic value of life? Can

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economists help juries arrive at a just award?

Economists distinguish between the hedonic attributes of life, which relate to the pleasure of being alive, and the monetary attributes of life.

Hedonic attributes may include air quality, proximity to major airports, quality of schools, amount of snow, and so on. Thus a job in Boston may have the same financial attributes as a similar job in San Diego, but most people would not give equal value to the hedonic attributes of the two positions.

These hedonic attributes do not have specific financial characteristics, but are valued by people nonetheless, and in evaluating jobs, many people do put an explicit monetary value on their hedonic attributes. And, while we all have the sense of a dollar's value, we will disagree substantially about the hedonic value of having a 24-hour coffee shop in our neighborhood.

In order to simplify the jury's analysis of hedonic value, it should be asked to consider several assumptions. These assumptions are not provable, but, ultimately, no mathematician can prove that one plus one equals two without relying on other unprovable assumptions. Assumptions greatly assist a juror in forming an opinion; jurors may agree with them or not, but they lead to questioning, thinking, and framing the issue of hedonic loss.

The first of these assumptions is that the hedonic value of a human life does not necessarily depend upon its financial value. This means that the hedonic value of life to a person with high earnings is not necessarily greater or less than the hedonic value of life to a person who has little income, or is on welfare.

Certainly the life of someone with no ability to earn money—certain ill individuals or infants, for example—would not be valued at absolutely zero. There is, however, evidence of some correlation between the hedonic value of life and income. This is important for a jury to consider with respect to what is referred to as the willingness-to-pay approach.

The second assumption is that the hedonic value of a human being is independent of social rank, education, wealth, gender, family posi-

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tion or other such characteristics. Economists cannot say that the value of Picasso's life is greater or less than the value of the life of a painter of outdoor advertising signs.

The third assumption is that the hedonic value of a human being is related to life expectancy. Someone who is 20 years old has, on average, a greater hedonic value than someone who is 88 years old. But any future year of expected life has the same hedonic value to a person at any age. A 48-year-old person's 49th year has the same expected value to that person as his 51st year is expected to have when he is 50 years old, and a year of life 20 years hence has the same value as one 19 years away. People value each future year the same.

And finally, while we typically discount future dollars by a present value factor, so that a dollar expected next year might be worth, say, 95 cents to us today, we assume that the hedonic value of life of each future year has a zero real discount rate. Why is that? First, the monthly returns to U.S. Treasury Bills from 1926 to the present have been almost in-

distinguishable from inflation: The real rate of interest is almost precisely zero.

Second, economists assert that every asset has broad substitutability. While we value things, we frequently substitute them for other things of equal or greater value. We trade in our labor for money and our money for goods and services. Sometimes we trade our health for pleasure (smoking) and visa versa (quitting), depending on how we value each.

But a 25-year-old cannot give away or sell or substitute the pleasure of living his 27th year, for example. We must take our years, one by one, and we cannot replace them once lost. Sometimes we can add to them by buying an operation or living healthily, but we cannot store them up or use them any faster than they occur.

Once these assertions are explained to a jury, the next task is to tell jurors how economists have measured the value of life in different ways. These measurements reflect how society values life. Data from dozens of studies can be categorized into four broad sources: questionnaire data, governmental spending, private spending, and income compensation data.

None of these studies can tell us how much a human being is worth, but they can give us enormous insight into the issue of value because they reflect the attitudes and opinions of our American culture.

Economists have asked people, for example, how much extra they would pay to fly on safer airlines. From this information the implicit value that the respondent places on his or her own life may be inferred.

A second category of information comes from what government spends on the prevention of loss of life. While sometimes as little as a few cents may result in significant life saving, the question is not how little can be spent, but how much is willing to be spent. In deciding how much to spend on safety measures, some government agencies are guided by explicit standards on the value of life. Undoubtedly, NASA now has such a standard, for political if not solely humanitarian reasons.

A third set of data comes from what private citizens spend on safety

items such as air bags, large tires, smoke detectors, and so on. These statistics reflect actual market values and transactions.

A final set of data comes from the labor market. Economists measure just how much extra a worker must be paid to perform a job with a measurable life-risk, such as coal mining, or high-beam welding. The extra compensation is a measure of the value the individual places on his or her own life.

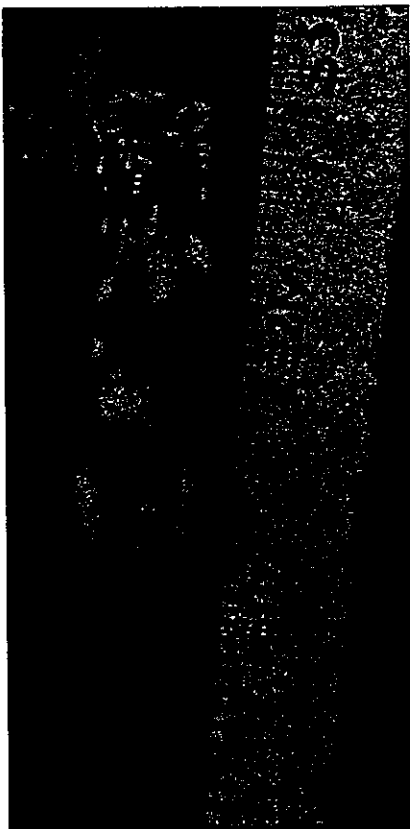
Despite the imperfections inherent in any data set, these studies reveal vital information. The life-value estimates range from just under \$100,000 to upward of \$2 billion. That is a very, very broad range.

But by taking the jury through the various estimates and the studies on which they are based—and the assumptions behind them—it is possible to demonstrate that considerable clustering takes place between \$500,000 and \$3.5 million. The upper end of this range, for example, is a figure that OSHA used to evaluate expenditures on industry safety measures.

This economic evidence can serve as a guideline that the jurors can integrate with their own moral, social, philosophical and religious backgrounds to arrive at an appropriate conclusion.

The jurors must then weigh the evidence that the defense and the plaintiffs present on the quality of life the deceased person had and on his or her ability to enjoy life. An economist can present a probable range for the value of life, but only the jury can decide where on that range any given individual falls.

Here are the facts on which the *Sherrod* jury reached its decision. Lucien Sherrod, individually, and as administrator of the estate of his deceased son, Ronald Sherrod, sued the City of Joliet, Ill., its police chief and a police officer (Berry), claiming in its first count that the defendants violated 42 U.S.C. § 1983, and in its second count that Lucien was deprived of his right to the enjoyment of the result of rearing a child. Ron was a 19-year-old black male living at home with his parents, working in partnership with his father and brother in an automotive repair facility that the family owned.



On Dec. 8, 1979, Berry stopped Ron's car while he was driving a passenger, Gary Duckworth, to jump-start another car. Ron did not know it, but Duckworth was being sought for stealing \$50 to \$80 from a local store earlier in the day, discarding the money as the owner chased him. Duckworth had gone to Sherrod's auto repair shop seeking a jump-start for a car Duckworth left near the scene of the robbery.

As Berry approached Ron's car, Ron moved his right hand to retrieve his driver's license from his inside coat pocket; he was unarmed. Berry misinterpreted Ron's movement and fired his gun directly at his left temple, killing him instantly. The jury determined that the police chief and the city were liable for use of excessive force.

Using traditional economic methods, the prospective financial loss to the father due to the death of his son and partner (with whom he had agreed to sell the business) was estimated to be \$513,000, based on the records of the business, the economy of Joliet, and the economics of the automotive repair industry.

The jury awarded Lucien Sherrod \$450,000 for the loss of the relationship with his son, which included the economic loss, and \$1,700 in funeral expenses.

Again using traditional economic methods, the financial loss to the decedent's estate, based on the same information and life expectancy tables, was estimated to be \$598,000. The jury awarded \$300,000 for this loss.

The novel component of the damages testimony related to the assertion that Ron Sherrod's life had a value greater than the financial loss, and that the incremental amount, the hedonic component, was substantial. The hedonic component was shown to be from three times to upward of 30 times the financial component—the lower end of this range was more appropriate for the jury's consideration than the higher end, for various technical reasons.

The jury awarded \$850,000 for the hedonic loss.

Similar hedonic testimony has subsequently been given in other federal district courts and in a number of state courts.

The hedonic value of life is a powerful concept. It can also be used to help assess damages for a shortened life expectancy or for pain and suffering.

Further, in product liability cases, the amount spent on life saving can be compared to societal norms. It may be that a 25-cent part can save one life for every 10 million products sold, implying that the manufacturer values life at \$2.5 million.

This comparison may help a jury determine the appropriateness of assessing compensatory or punitive damages, and it might even help them assess liability.

For example, it might be determined that a manufacturer that had spent only \$100 per hypothetical life saved could reasonably have spent more and thus be held liable for punitive as well as compensatory damages. Another manufacturer that had spent \$500,000 might be liable only for compensatory damages, and one that had spent \$5 million per life saved might be exempt from liability. Of course, what expenditure is considered sufficient will vary according to local culture and its societal norms. ■

