

Trends in Legal Decisions Involving Hedonic Damages from March 1, 2018
to July 1, 2022
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Abstract

This paper provides discussion of the forty-seven decisions reported on LEXIS regarding hedonic damages testimony by economic experts from March 1, 2018, to July 1, 2022. It is an update to previous papers by the author in 2012 and 2018 looking at decisions involving hedonic damages from 2000 to 2012 and 2013 to February 28, 2018. The trend has been that hedonic damage calculations showing specific dollar values for either loss of enjoyment of life, loss of value of life, and/or loss of “Society and Relationship” have continued to be rejected, but explanations for the concept of hedonic damages and discussion of the Value of Statistical Life literature have continued to be allowed in the state of New Mexico.

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I. Introduction

This set of descriptions of legal decisions updates a series of previous papers regarding trends in legal decisions regarding hedonic damages after the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* in 1993. The first of those papers was Ireland, Johnson and Taylor (1997), followed by update papers by Ireland in 2000, 2012, and 2018. The 1997 and 2000 papers were selective in legal decisions that were covered, but the 2012 and 2018 papers covered all decisions this author was able to find during the periods from 2000 to 2012, and January 1, 2013 to February 28, 2018. This set of decisions includes all decisions covered by *LEXIS* that involved economic experts testifying about hedonic damages from March 1, 2018 to the July 1, 2022. Decisions are presented in year-by-year groups and are generally but not always listed chronologically within years. Legal decisions that were described are numbered from one to forty-seven.

The term “hedonic damages” is used in this paper to refer to any attempt to measure or describe in dollar values the loss of enjoyment of life of any individual based on the Value of Statistical Life (VSL) literature in economics. Loss of enjoyment of life could be loss to an injured person, loss to a decedent in a wrongful death action, or loss to an individual affected by the injury to or death of a family member. The terms used to describe this type of damage are “loss of enjoyment of life”, “loss of life, loss of ability to maintain a normal life,” and “loss of society and relationship.”

II. General Summary

As of July 1, 2022, 47 decisions had been reached since March 1, 2018 regarding economic testimony by an economic expert about the value of life or enjoyment of life. (The 47 decisions are numbered below from 1 to 47 for ease in referencing individual decisions.) There were no marked changes in rejection of such testimony by the courts described in Ireland, Johnson and Taylor (2017), Ireland (2000), Ireland (2012), and Ireland (2018). Thirty-eight of the forty decisions named an economic expert who either proffered hedonic damages testimony, or had done so in the past. Twenty-four of those decisions listed Dr. Stan V. Smith of Chicago (2, 5, 7, 12, 13, 14, 16, 17, 20, 21, 23, 24, 25, 29, 30,33, 34, 35, 37, 39, 42, 45, 46, and 47). Five decisions listed Dr. M. Brian McDonald (8, 22, 26, 27, 31). Two decisions listed Dr. Allen Parkman (9, 15) . One decision each listed William Patterson (6), Dr. Rebecca Summary (10), Dr. Ann Adair (19), Dr. Ralph Scott (36), and Robert Johnson (44). Dr. William Rogers (38) offered per hour dollar values for loss of life enjoyment based on the Value of Statistical Life literature. Two non-economists were also excluded from providing hedonic damages testimony, Dr. Cheryl Willis, M.D. (1), and Martin Cunniff (32), an attorney.

Seven of the decisions did not list an expert proffered to testify about hedonic damages, but focused on circumstances in which hedonic damages were recoverable independently from whether an expert could testify about those damages. In *Castro* (4), for example, the Hawaii Supreme Court held that the estate of an unborn fetus could sue for hedonic damages. Economists are not permitted to testify about hedonic damages in Hawaii, so admissibility of economic testimony was not an issue. *Soria* (12), *Cramer* (16), and *Synder* involved credit injuries rather than physical injuries. *Doe* (23) involved male university student's alleged loss of enjoyment of life resulting from being falsely accused of rape.

In *Lessert* (30), the defendant tried to have Dr. Stan V. Smith excluded based on his hedonic damages testimony in other cases, but Smith had not offered hedonic damages in that case. In *Warner* (42) and *McGee*, Smith was not excluded because the case was a judge-tried case. The judge held that *Daubert* criteria were not relevant in judge-tried cases, but took no position about the cogency of Smith's calculations. Eight of the forty-seven decisions were from federal courts in New Mexico, all of which allowed economic experts to explain the concepts of hedonic damages and the Value of Statistical Life (VSL) literature in economics, but not to offer opinions about dollar values or ranges of dollar values for either the enjoyment of life or the value of life of individual human beings. In all respects, including the large number of cases from Dr. Stan Smith and from New Mexico, recent trends continued in way described previously in Ireland (2012) and Ireland (2018). Hedonic damages have continued not to be accepted by courts in decisions reported on LEXIS. There were, however, two elements in this set of decisions that were not present in Ireland (2012) and Ireland (2018), but the second of which was described in Ireland (2009).

The first new element in this set of decisions not discussed in Ireland (2012) and Ireland (2018) is the existence of three federal judge-decided cases in which the *Daubert* standard was not applied. In two of the cases, *Warner* (42) and *McGee* (45), the judge denied a defense motion to exclude the testimony of Stan Smith, explaining that *Daubert* applies to expert testimonies before juries, but not in judge-tried cases in which the judge and trier of facts is the same person and can decide what is credible and within the law without separate judicial guidance. The third case, *Miller* (46), was a judicial decision under the Anti-Terrorism Act (ATA) in which plaintiffs killed and injured by the Juarez Cartel in Mexico were being sued for damages, and there was no defendant to mount a *Daubert* motion in limine standard to preclude the admission of hedonic damages.

The second new element was indicated in *Soria* (12) and *Warner* (42). In both decisions, there was reference to hedonic damages testimony by Stan Smith being withdrawn by the plaintiff prior to a judge's ruling with regard to admissibility of that testimony. In both instances, the judge went on to rule on whether remaining damages estimates proffered by Smith were admissible, some of which were admissible and some of which were not. In Ireland (2009), *Slater v. Jelinek* (2008) was used as a third example in which the plaintiff attorney withdrew Smith's testimony. *Slater* was omitted in Ireland (2012) because Ireland was unaware of the LEXIS record of the decision but Ireland was the defense economists in that case. In *Slater*, the

plaintiff attorney had withdrawn Smith's hedonic damages and loss of society damages shortly before the expected decision of Federal District Judge Lyle E. Strom's ruling in response to defendant's motions in limine. Ireland (2009) used Slater as an example of a "running a bluff" strategy by a plaintiff attorney using hedonic damages and loss of society calculations to obtain higher settlement values, but withdrawing those claims when trial appeared imminent. This author has seen that happen in other cases as well that did not go on to be reported by LEXIS.

From this point forward, the paper provides short descriptions of the 47 decisions from March 1, 2018 through July 1, 2022.

2018 (after March 1, 2018)

(1) *Bevan v. Valencia*, 2018 U.S. Dist. LEXIS 108196 (D. NM 2018). This decision excluded the defense hedonic damages testimony of Cheryl D. Willis, M.D., a forensic adolescent psychiatrist, who was going to testify about dollar value of the loss of life enjoyment of an adolescent who had committed suicide. The court said: "Nowhere in her report does Willis explain her methodology or its reliability, or how her expertise led to her opinions."

(2) *Diperna v. Chicago School of Professional Psychology*, 893 F.3d 1001 (IL App. 2018). One of the parts of this decision was to uphold the trial court's decision that Stan Smith's hedonic damages testimony would not be helpful to the jury. Jennifer DiPerna was a student pursuing a master's degree in clinical psychology at The Chicago School of Professional Psychology (TCSPP), a private, non-profit institution. After TCSPP disciplined DiPerna for posting an image to her personal Instagram account that TCSPP considered offensive, DiPerna filed this lawsuit alleging breach of contract and negligence. Subsequently, DiPerna was dismissed from the program for plagiarism. [Stan V.] Smith calculated DiPerna's loss of enjoyment of life resulting from these events. The trial court granted summary judgment to the defendant on all counts, including the trial court's determination that loss of enjoyment of life damages were not available in a case of this sort.

(3) *Smith v. Auto-Owner's Insurance Company*, 2018 U.S. Dist. LEXIS 6970 (D. N.M 2018). This was an order of Federal Judge Stephan D. Vidmar that responded to a number of different motions in limine, one of which was a request to exclude "any expert testimony or evidence attempting to quantify hedonic damages." Judge Vidmar indicated that the plaintiff made no substantive argument in opposition to this or eight other proposed exclusions and granted all nine exclusions asked for by the defendant. The real focus of this order was on testimony by medical providers, which was discussed in greater detail. There was no indication in the decision that the plaintiff had retained an economic expert to testify about hedonic damages.

(4) *Castro v. Melchor*, 2018 Haw. LEXIS 60 (HI 2018). This decision held that it was in error for the trial court to have awarded hedonic (loss of enjoyment of life) damages to the estate of an unborn fetus, but affirmed all other aspects of the trial court decision. The trial court had awarded \$250,000 for the hedonic damages of an unborn fetus carried by Leah Castro, an inmate at a state

correctional facility. The decision discussed the interaction of the state's survival act and wrongful death act at some length in arriving at this decision. An economist was not mentioned in the decision.

(5) *Glisson v. Correctional Medical Services, Inc.*, 2018 U.S. Dist. LEXIS 216420 (S.D. IN 2018). Judge Sarah Evans Barker granted a defense motion to exclude the hedonic damages testimony of Dr. Stan V. Smith. Judge Barker held that Dr. Smith had not reliably explained how he had arrived at an annual value of \$131,199 per year for life enjoyment from the Value of Statistical Life literature, but also emphasized that:

[E]ven if Dr. Smith's methods of calculation were reliable, the VSL studies on which his expert opinion depends establish only how the overall value of a life is measured in the field of economics, not how enjoyment of life is measured, which is the relevant question the jury must resolve in awarding hedonic damages.

(6) *Walker v. Spina*, 2019 U.S. Dist. LEXIS 5275 (D. N.M. 2019). In response to a motion in limine to exclude the hedonic damages testimony of William Patterson, Federal Judge James O. Browning, interpreting New Mexico law, allowed Patterson to explain the general concept of hedonic damages, but relying upon *Smith v. Ingersoll-Rand*, 214 F.3d 1235 (2000), limited Patterson's testimony as follows:

The Court, therefore, will allow Patterson to describe hedonic damages, but not to quantify Walker's hedonic damages, e.g., Patterson may not state that S. Walker's "lost value of the pleasure of life is \$102,707" or that she lost \$10,000.00 in her value of life, or discuss his worksheet showing his calculations for such figures.

(7) *Families Advocate v. Corp. V*, U.S. Dist. LEXIS 56845 (D. N.D. 2019). This was an order excluding the testimony of economic expert Dr. Stan V. Smith, who had proffered testimony about loss of enjoyment of life, loss of relationship, loss of advice and counsel, and loss of accompaniment services, all of which were previously recommended for exclusion in a report of the magistrate judge. Federal Judge Timothy L. Brooks said in conclusion:

Dr. Smith's opinions are marinated in a proprietary blend of theoretical "studies" (developed for use in other contexts), and peppered with arbitrary "benchmarks" a la ipse dixit, and, finally, tabulated with present value spreadsheets to give the illusion of forensically precise calculations in D.M.'s specific case. Beyond the illusion, the reality is more akin to hocus pocus. And this Court is certainly not alone in finding Dr. Smith's methodologies suspect and unreliable. Dr. Smith's calculations are based on arbitrary figures and assumptions that are unrelated to the facts of the case. An expert's calculations should be excluded when they are "so fundamentally unsupported that [they] can offer no assistance to the jury." *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997) (citations omitted).

The problem here is not so much whether Dr. Smith reviewed and incorporated facts

from D.M.'s medical findings, as it is Dr. Smith's unreliable methodology--which cannot be properly applied to the facts in this case, at least not in any meaningful or reproducible manner.

(8) *Murphy v. Sandoval Cty.*, 2019 U.S. Dist. LEXIS 229986 (D. NM 2019). This memorandum decision of U.S. District Judge Scott W. Skavdahl limited the hedonic damages testimony of Dr. M. Brian McDonald as follows:

[T]his Court will grant County Defendants' Motion to the extent that while Dr. McDonald may discuss the concept of and factors to be considered in determining hedonic damages, he shall not attempt to place any dollar figure for or quantify hedonic damages and will limit any opinion testimony accordingly.

Dr. McDonald was permitted to testify about lost earnings without limitation.

(9) *Millward v. Bd. of Cty. Comm'rs of Teton*, 2018 U.S. Dist. LEXIS 23107 (D. WY 2018). Federal District Judge Scott W. Skavdahl limited the hedonic damages testimony of Dr. Allan Parkman as follows:

[T]he Court finds that Parkman is qualified to offer expert testimony as to the *concept* of hedonic damages, to the extent it relates to any viable damage claim under 42 U.S.C. § 1983. He may not however offer any monetary value, specific or otherwise of Mr. Millward's hedonic damages or express any opinion testimony regarding a numeric formula such as "benchmark figure," "guideline," or "range of values" to be used in calculating such damages. *See Fancher v. Barrientos*, 2015 U.S. Dist. LEXIS 179990, 2015 WL 11142939 (July 1, 2015) (citing *BNSF Ry. Co. v. LaFarge Southwest, Inc.*, *supra.*)

(10) *Hannibal v. TRW Vehicle Safety Sys., Inc.*, 2018 U.S. Dist. LEXIS 134318 WL 377500 (E.D. AR 2018). The value of life testimony of Dr. Rebecca Summary was excluded by Federal District Judge J. Leon Holmes, saying:

No court applying Arkansas law has ruled as to whether expert testimony may be admitted to assist the jury in determining loss of life damages. An overwhelming majority of courts from other jurisdictions, however, have concluded that the methodology adopted by Dr. Summary does not meet the *Daubert* standards and may not be admitted into evidence. *Smith v. Jenkins*, 732 F.3d 51, 66 (1st Cir. 2013); *Kurncz v. Honda North America, Inc.*, 166 F.R.D. 386, 388-89 (W.D. Mich. 1996). . . ("Even assuming that Dr. [Stan V.] Smith's formula is a reliable measure of the value of life, it was of no assistance to the jury in calculating Smith's loss of enjoyment of life.").

2019

(12) *Soria v. United States Bank N.A.*, 2019 U.S. Dist LEXIS 70068 (C.D. CA 2019). This case

involved an injury to the credit of Samuel Soria because of identity theft by an employee of U.S. Bank. The plaintiff's economic expert was Dr. Stan V. Smith, who projected losses of credit expectancy and the value of the lost time Soria had spent dealing with inaccurate reporting. The court excluded Smith's testimony on loss of credit expectancy, describing Smith's testimony as follows:

According to Dr. Smith, Soria could have borrowed as much as \$60,000 in year 2016 dollars. (Dkt. 66-1 [Declaration of Dr. Stan V. Smith] Ex. 1 [Expert Report, hereinafter "Smith Rep."] at 5.) Because Soria's credit score declined from 735-740 to 524, however, Soria would have to pay a higher interest rate to obtain this line of credit. (Id. at 4-6.) Based on a peer-reviewed article that Dr. Smith coauthored, Dr. Smith estimated Soria would pay an increased 12 percent per year in costs as a result of his lower credit score. (Id.) The increased cost would last for seven years, the length of time a delinquency remains on a credit report. (Id.) Based on this, Dr. Smith calculated Soria's loss of credit expectancy to be \$28,252.

The Court indicated that this part of Dr. Smith's testimony was inadmissible because Smith provided no analysis regarding how he arrived at the figure of \$60,000, which was significantly in excess of Soria's annual earnings during the previous three years. However, the Court allowed Smith's testimony regarding Soria's allegedly lost time, valued at \$27.67 in 2017 dollars, indicating that the hourly value goes to the weight, but not the admissibility of Smith's testimony. Footnote three noted that U.S. Bank had also moved to exclude Smith's testimony on hedonic damages, but that Soria had withdrawn his request for hedonic damages..

(13) *Knaack v. Knight Transportation Inc.*, 2019 U.S. Dist. LEXIS 75480; 2019 WL 1982523 (D. NV 2019). In this case, the defense had moved to exclude Dr. Stan V. Smith's testimony about loss of family advice, counsel, guidance, instruction and training services and loss of accompaniment services. Federal Judge Larry R. Hicks denied the defense motion, saying that:

[Defendants also argue that hedonic damages (loss of relationship) should be excluded and the loss of accompaniment damages is really another way to obtain hedonic damages. In Dr. Smith's testimony, he articulates the difference between hedonic and other household services damages and why he finds them different. However, the record shows that plaintiffs do not intend to argue for hedonic damages, nor did Dr. Smith include this opinion in his report.

Plaintiffs argue that Dr. Smith and Mr. Weiner (defendants' expert) used a similar methodology for calculating loss of household/ family advice, counsel, guidance, instruction and training services and loss of accompaniment services, and came to similar conclusions. Finally, defendants also argue that hedonic damages (loss of relationship) should be excluded and the loss of accompaniment damages is really another way to obtain hedonic damages. In Dr. Smith's testimony, he articulates the difference between hedonic and other household services damages and why he finds them different. However, the record shows that plaintiffs do not intend to

argue for hedonic damages, nor did Dr. Smith include this opinion in his report.

(14) *Families Advocate, LLC v. Sanford Clinic N*, 2019 U.S. Dist. LEXIS 60438 (D. N.D. 2019). Magistrate Judge Alice R. Senechal recommended the exclusion of the testimony of Dr. Stan V. Smith in the areas of hedonic damages, loss of consortium, loss of guidance and counsel, and loss of accompaniment services. Her recommendation that Smith's testimony be excluded includes several pages describing the opinions of Dr. David D. Jones in support of the defense motion to exclude Smith's testimony. Judge Senechal's recommendation to exclude Smith's testimony was accepted by federal district Judge Timothy Brooks in *Families Advocate v. Corp. V*, U.S. Dist. LEXIS 56845 (D. N.D. 2019).

(15) *Lough v. BNSF*, 2019 U.S. Dist. LEXIS 119122 (D. N.M. 2019). Federal Judge Judith C. Herrera limited the hedonic damages testimony of Dr. Allen Parkman by indicating that he could provide no quantified values, even as benchmarks, but could testify about hedonic damages as follows:

Mr. Parkman may testify as to the four factors he utilized in valuing hedonic damages — specifically the effect that the injury had on "the ability to enjoy the occupation of your choice," "activities of daily life," social leisure activities," and "internal well-being." The Tenth Circuit permits expert testimony on these exact four "broad areas of human experience which [an expert] would consider in determining [hedonic] damages.

(16) *Cramer v. Equifax Info. Servs.*, 2019 U.S. Dist. LEXIS 161062 (E.D. MO 2019). This memorandum by Federal District Judge Charles A. Shaw excluded hedonic damages testimony by Dr. Stan V. Smith, plaintiff's economic expert. This was a case that involved an alleged injury to the plaintiff's credit caused by actions of Equifax Information Services under the Fair Credit Reporting Act (FCRA), but no physical injury was involved. Regarding hedonic damages, Judge Shaw said:

[E]ven if hedonic damages were appropriate in an FCRA case, plaintiff has not shown that Dr. Smith's testimony is necessary or reliable in assisting the trier of fact to understand or determine a fact in issue in this case. See *Saia v. Sears Roebuck & Co.*, 47 F. Supp. 2d 141, 149 (D. Mass. 1999) (expert testimony on hedonic damages, purporting to calculate injured plaintiff's loss of enjoyment of life based on "willingness to pay" model which considered consumer behavior, wage risk premiums, and regulatory cost-benefit analysis, was unreliable whether evaluated as scientific or as "technical or other specialized" knowledge) (citing to various federal courts rejecting expert testimony on hedonic damages, in particular Dr. Smith's); see also *Allen v. Bank of Am., N.A.*, 933 F. Supp. 2d 716, 734 (D. Md. 2013) ("The court is not convinced that an expert whose opinion is based almost entirely on asking laypersons how a particular event has affected their enjoyment of life would provide any assistance to the jury in making that determination for themselves."); *Kurncz v. Honda N. Am., Inc.*, 166 F.R.D. 386, 388 (W.D. Mich. 1996) ("The willingness to pay model on the issue of calculating hedonic

damages is a troubled science in the courtroom, with the vast majority of published opinions rejecting the evidence.""). For these reasons, Dr. Smith's testimony regarding hedonic damages will be excluded.

However, Judge Shaw also ruled that Smith would be permitted to testify about loss of credit expectancy if the plaintiff was able to develop a basis for arguing that there was some tangible loss and would be able to testify about the value of plaintiff's loss of time spent resolving her credit problems.

(17) *Michon v. Campbell*, 2019 U.S. Dist. LEXIS 230156 (N.D. IL 2019). The hedonic damages testimony of Dr. Stan V. Smith was excluded by Federal District Judge Harry D. Leinweber. Michon had asked the Court to adopt the "middle ground" approach taken in *Richman v. Burgeson*, 2008 U.S. Dist. LEXIS 48349 (N.D. Ill. June 24, 2008) of allowing Smith to testify about the general nature of hedonic damages without offering quantification. Judge Leinweber declined to do so and said:

As many, if not most, courts in this District and elsewhere have reasoned, Dr. Smith's methodology for ascertaining hedonic damages is not scientifically reliable. This Court agrees with that point and is not inclined to allow the testimony of hedonic damages generally when the underlying methodology is unsound. Moreover, such testimony will serve only to confuse the jury. The Court thus adopts the view held by the majority of courts in this District and finds that Dr. Smith's proffered testimony on hedonic damages fails to satisfy *Rule 702* and *Daubert*. Accordingly, Defendants' Motion to Exclude Expert Testimony (Dkt. No. 125) is granted.

(18) *Collado v. State of New York*, 396 F. Supp. 265 (S.D. NY 2019). This case involved the fatal shooting of John Collado by an undercover police officer. A jury had awarded \$2.5 million for Collado's wrongful death act. At issue was whether hedonic damages can be recovered in a Section § 1983 action under the Federal Civil Rights Act even though hedonic damages are not authorized under the New York Wrongful Death Act. Federal Circuit Judge Denny Chin, sitting by designation, held that hedonic damages could be awarded under Section § 1983, and affirmed the jury verdict of \$2.5 million. Judge Chin also said:

[I]t is difficult if not impossible to put a monetary value on the loss of a life or the loss of enjoyment of life. *See, e.g., Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1244-46 (10th Cir. 2000) (affirming district court's decision to allow expert to testify as to "the meaning of hedonic damages" but not to "quantify hedonic damages")

2020

(19) *Gibson v. United States*, 2020 U.S. Dist. LEXIS 8656; 2020 WL 241550 (D. MT

2020). This wrongful death decision by Federal Judge Brian Morris excluded loss of enjoyment of life (hedonic damages) testimony of Dr. Ann Adair, but permitted her testimony regarding the decedent's loss of earnings and the value of the decedent's lost household services. Adair testified that the U.S. Department of Transportation used an average figure of \$9.6 million for the value of a human life in 2016 and that the Environmental Protection Agency (EPA) valued a human life at \$7.4 million in 2006, both of which led to her conclusion that the value of a human life was \$9.4 million in October, 2019, when this case was tried. Judge Morris cited *Dorn v. BNSF*, 297 F. 3d 1183 (9th Cir. 2005), *Mercado v. Ahmed*, 974 F. 2d 863 (7th Cir. 1992), and *Starling v. Banner Health*, 2018 U.S. Dist. LEXIS 28747 (D. AZ 2018), in concluding that "Adair's testimony failed to satisfy the standards of reliability and relevance as required under FRE 702 and Daubert."

(20) *Jennings v. Nash*, 2020 U.S. Dist. LEXIS 26611 (W.D. MO 2020). Hedonic damages testimony of Stan V. Smith was excluded under the Daubert standard with citations to a number of other federal district court decisions reaching the same conclusion.

(21) *Banks v. Eighth Judicial Dist. Court of Nev.*, 2020 Nev. App. Unpub. LEXIS 30; 2020 WL 283402 (NV App. 2020). This one-page decision denies a writ of mandamus challenging, in part, an exclusion of portions of the testimony of economic expert Stan V. Smith. In denying the writ, the Court noted that:

[T]he district court's order does not foreclose the plaintiff's expert, Dr. Smith, from testifying at trial but only imposes certain conditions on his doing so, including that he lay a detailed foundation for his opinions.

The challenged order of Susan H. Johnson in *Banks v. Diaz* (Case No. A-18-773248-C, Dept. No. XXII, District Court of Clark County, Nevada) dated December 4, 2019 had allowed Smith to testify about Banks' past loss of earnings, but not to speculate about future wage loss or the value of housekeeping and home management services without having a factual basis. Smith was also precluded from testifying about Banks' alleged loss of value of life without having a basis other than an interview from Smith's staff and speculation that Banks had lost 20 to 40 percent of his ability to lead a normal life.

(22) *Anderson v. PorterCare Adentist Heath Sys.*, 2020 Colo Dist. LEXIS 231 (CO Dist. 2020). This decision of Federal District Judge Elizabeth Beebe Volz granted a defense motion to exclude the "value of life/loss of enjoyment of life" (hedonic damages) opinions of economic expert M. Brian McDonald. The decision relied heavily on *Scharrel v. Wal-Mart Stores*, 949 P2d 89 (CO App. 1997), *Smith v. Jenkins*, 732 F3d 51 (1st Cir 2013), and *Flowers v. Lea Power Partners*, 2012 WL 1795081 (D. NM 2012). McDonald's testimony would have been that a "statistical life" in the United States is worth between \$5.3 and \$13.4 million, with \$9.6 million as a "central tendency." McDonald offered opinions about lost earning capacity, household services and cost of a life care plan, which had not been challenged.

(23) *Doe v. Colgate Univ.*, 2020 U.S. Dist. LEXIS 75989 (N.D. N.Y. 2020). In this case, a Colgate male student was accused of raping a female student and sued for damages based on the violation of his right to defend himself. Stan Smith calculated hedonic damages for the accused male. Federal Judge Frederick J. Scullin, Jr., cited a number of other decisions excluding hedonic damages calculations and excluded Smith's proposed hedonic damages testimony.

(24) *Synder v. Bank of Am., N.A.*, 2020 U.S. Dist. LEXIS 206437 (N.D. CA 2020). This case involved a plaintiff not obtaining a National Mortgage Settlement (NMS)-Compliant loan modification order. Dr. Stan V. Smith was excluded from testifying based on incorrect assumptions and lack of specialized knowledge about the NMS. Smith projected that the plaintiff incurred \$373,235 in lost time, and between \$582,563 and \$1,165,124 in loss of enjoyment of life (hedonic damages). The court also cited multiple cases in which Smith's testimony has been rejected.

(25) *Wood v. Paccar, Inc.*, 2020 U.S. Dist. LEXIS 136846 (N.D. IA 2020). The defense moved to exclude Dr. Stan V. Smith's testimony regarding loss of enjoyment of life (hedonic damages), household services, and loss of wages and benefits. U.S. Magistrate Judge Mark A. Roberts excluded Smith regarding hedonic damages but denied excluding Smith's testimony regarding household services and loss of wages and benefits.

(26) *Martinez v. Cont'l Tire of the Ams., LLC*, 2020 U.S. Dist. LEXIS (D. NM 2020). Federal Judge Kea W. Riggs limited the hedonic damages testimony of Dr. Brian McDonald, as follows:

The majority of cases in this district limit expert testimony that attempts to place a dollar value on **hedonic damages** as unreliable, irrelevant, or unhelpful to the jury. ("Generally, New Mexico United States District Judges have excluded or limited expert testimony on **hedonic damages**."). . . ("The majority rule in federal courts, however, is that expert testimony which places a *dollar figure* before the jury in an attempt to *quantify* the value of a human life is inadmissible and does not meet the relevance and reliability factors set forth in *Daubert* and its progeny.") The Court agrees with these cases and concludes that attempts by an expert to quantify the **hedonic** value of life is unreliable, irrelevant, or does not assist the jury.

The Court, however, permitted McDonald to explain the concept and factors involved in determining hedonic damages, but without offering any quantitative values, including ranges and benchmarks. Judge Riggs also denied a defense motion to exclude McDonald's household services testimony.

(27) *Kuznetsov v. Long*, 2020 U.S. Dist. LEXIS 251687 (D. NM 2020). U.S. Magistrate Judge Gregory T. Fouratt limited the hedonic damages testimony of M. Brian McDonald, as follows:

The Court will permit Dr. McDonald to testify about (a) the current cost of

Plaintiff's future medical care and (b) a general explanation of the components of a person's life the jury may consider in deciding whether to award ***hedonic damages***. The Court will not permit Dr. McDonald to testify as to any specific values of any kind, whether by way of suggestion, example, or otherwise.

(28) *Estate of Smart v. Chaffee*, 2020 U.S. Dist. LEXIS 241444 (D. KS 2020). This case involved the fatal shooting of Marquez Smart by police officers in Wichita, Kansas, and was brought under Section § 1983 of the Federal Civil Rights Act. At issue was whether hedonic damages could be claimed in a wrongful death claim under Section § 1983 even though not authorized under the Kansas Wrongful Death Act. The Court cited a number of cases which held that hedonic damages were recoverable under Section § 1983, even though not authorized under the Kansas Wrongful Death Act. Expert testimony about hedonic damages was not addressed in this decision.

(29) *Santiago v. Fischer*, 2020 U.S. Dist. LEXIS 255479 (E.D. NY 2020). Federal District Judge Margo K. Brodie excluded the hedonic damages testimony of Dr. Stan V. Smith, saying:

Dr. Smith arrives at his initial value of life figure [\$4.6 million in 2016] through an analysis of studies from the 1980s of "consumer behavior and purchases of safety devices," "wage risk premiums to workers," and "cost-benefit analyses of regulations." (Smith Report 4.) While the Court understands that such studies are well-accepted and appropriate for use in a number of contexts, such as by government agencies or other entities conducting cost-benefit analyses, the Court finds, as other courts have, that they are not helpful in assisting a factfinder in evaluating the value of a unique human life.

Judge Brodie also cited many prior decisions excluding the hedonic damages testimony of Smith.

(30) *Lessert v. BNSF Ry. Co.*, 476 F. Supp. 3d 926; 2020 U.S. Dist. LEXIS 139672; 2020 WL 4500218 (S.D. 2020). This was a wrongful death action under the FELA. The defendant challenged the admissibility of Dr. Stan V. Smith's testimony based on hedonic damages testimony in other cases. Judge Jeffrey Liken said:

The court begins by addressing defendant's reliance on a number of other federal cases excluding Dr. Smith as an expert. Dr. Smith often opines on "hedonic damages" in litigation, which are damages that "attempt to compensate a victim for the loss of the pleasure of being alive[.]" *Families Advocate, LLC v. Sanford Clinic N., No. 16-CV-114*, 2019 U.S. Dist. LEXIS 56845, 2019 WL 1442162, at *1 (D.N.D. March 31, 2019). Quite a few federal courts have refused to permit Dr. Smith to testify concerning his method for calculating hedonic damages. *Smith v. Jenkins*, 732 F. 3d 51, 66 (1st Cir. 2013) (collecting cases). Here, however, plaintiff expressly disclaims any claim for hedonic damages. (Docket 194 at p. 23 n.15) ("[T]here is no claim for hedonic damages and no economic evaluation of

hedonic damages is proffered by Plaintiff or Dr. Smith."). The court therefore does not view the authority defendant cites as indicative of a uniform condemnation of Dr. Smith's testimony in the federal courts, as its objections insinuate.

2021

(31) *Herrera v. Berkley Reg'l Ins. Co.*, 2021 U.S. Dist. LEXIS 266; 2021 WL 24548 (D. NM 2021). In this decision, the defendant had moved to exclude the testimony of Dr. Brian McDonald, with a focus on Dr. McDonald's calculation of Mr. Herrera's lost earning capacity as \$484,779 and loss of household services at \$387,675, but also added "and he will testify about Mr. Herrera's value of life **damages**." Judge Carmen E. Garza described Dr. McDonald's calculations for lost earning capacity and lost household services, but there was no discussion of Dr. McDonald's testimony about value of life damages. This suggests that the defendant did not attempt to prevent Dr. McDonald's testimony about value of life damages. Such testimony is generally permitted in New Mexico as long as no dollar values are provided in the testimony.

(32) *Cardwell v. City of San Francisco*, 2021 U.S. Dist. LEXIS 72358 (CA 2021). Martin Cunniff, an attorney, was held not to be qualified to testify about the lost earning capacity, lost investment returns on retirement accounts, and hedonic damages, but was permitted to testify about the present value of medical treatments needed by the plaintiff. The Court held that Cunniff had no particular credential that would make him qualified on these matters, but included an extended discussion regarding why Cunniff's hedonic damages testimony was not admissible. Magistrate Judge Donna M. Ryu described Cunniff's hedonic damages testimony as that:

Cunniff opines that Caldwell suffered hedonic damages because of his wrongful imprisonment in the amount of \$749,400. Cunniff Expert Report at 12. Cunniff reaches this figure by examining the cost of "pay-to-stay" jails, which allow incarcerated people who can afford it to pay for a safer, cleaner facility. *Id.* Prices for these paid options vary by city, usually in the range of \$75-\$251 for California jails, but Cunniff settles on a rate of \$100 per day as a "useful proxy for how much a consumer would pay to still 'enjoy life' while incarcerated." *Id.* He states that it is a conservative price because presumably people would be willing to pay more to avoid jail altogether. *Id.* He calls this kind of calculation a "real world" market experiment. *Id.* Cunniff concludes that Caldwell's hedonic damages are \$100 per day multiplied by the 7,494 days he was wrongfully imprisoned, for a total of \$749,400.

She cited a number of legal decisions excluding expert testimony on the issue of hedonic damages and indicated that courts have been particularly skeptical of "willingness-to-pay" methods for calculating hedonic damages.

(33) *Balan v. Vestcor Fund Xxii*, 2021 U.S. Dist. LEXIS 99532 (M.D. FL 5-26-2021), Judge Maria Morales Howard excluded the hedonic damage testimony of Dr. Stan V. Smith, saying:

Upon review of a sampling of the federal court cases on Dr. Smith's List, the Court found none in which he provided testimony at trial before a United States District Court. Further, the Court's independent research revealed that Dr. Smith's testimony regarding hedonic damages has been found inadmissible by the vast majority of federal courts including some of the cases on his List. These findings and the reasoning of the courts excluding Dr. Smith's testimony on the value of hedonic damages further support the Court's conclusion that Dr. Smith's testimony would not be helpful to a jury. Moreover, the Court continues to be convinced that to the extent Dr. Smith's testimony has any probative value, it is outweighed by the risk that purported expert testimony putting a specific value on the Plaintiff's noneconomic damages will confuse and/or mislead the jury.

(34) *Moe v. Grinnell College*, 2021 U.S. Dist. LEXIS 239863 (D. IA 2021). Federal District Judge Rebecca Goodgame Ebinger granted a defense motion to exclude the hedonic damages testimony of Dr. Stan V. Smith, saying:

Smith's hedonic damages calculation is not sufficiently reliable for admission at trial because the method is not testable, has not been peer reviewed, lacks governing standards, and is not generally accepted by economists. Additionally, Smith's method to determine the percent reduction in the value of life is not based on objective indicia because it relies on self-reported percentages. Furthermore, hedonic damages are not relevant because Moe has not experienced physical injury or death. As a result, the portion of Smith's expert report and related testimony concerning hedonic damages is inadmissible under Rule 702. The probative value of Smith's expert report is also outweighed by the threat it poses of misleading the jury. The Court excludes the portion of Smith's expert report concerning hedonic damages and related testimony under Rule 403.

(35) *Hauck v. Wabash Nat'l Corp.*, 2021 U.S. Dist LEXIS 108943 (D. NM 2021). Federal District Judge Kenneth J. Gonzales excluded all testimony of Dr. Stan V. Smith regarding noneconomic damages on the basis of inappropriate behavior. Judge Gonzales said:

Ms. Hauck is prohibited from eliciting testimony from Dr. Smith regarding her entitlement to non-economic damages, including *hedonic*, loss of guidance, counselling, society, relationship, support, and accompaniment damages. In pertinent part, Dr. Smith's opinion assigning a dollar-amount to Ms. Chambers' *hedonic*-damage award is unreliable pursuant to *Daubert* and its progeny. Moreover, the Court concludes that Dr. Smith's failure to disclose his proposed testimony regarding the "general scope of *hedonic* damages" is incurable and prejudicial. Therefore, Dr. Smith's opinions quantifying a *hedonic*-damage award

and generally explaining the concept are both properly excluded. For these reasons, the Court grants Wabash's Motion to Exclude (Doc. 157).

(36) *Crouch v. Master Woodcraft Cabinetry, LLC*, 2021 U.S. Dist. LEXIS 172785 (E.D. AR 2021). Federal District Judge Kristine G. Baker excluded the value of life testimony of Dr. Ralph Scott, citing the decision in *Hannibal v. TRW Vehicle Safety Sys., Inc.*, WL 377500 (E.D. AR 2018) by Federal Judge J. Leon Holmes excluding the proposed value of life testimony of Dr. Rebecca Summary. The *Hannibal* decision included discussion of the exclusion of Dr. Stan V. Smith in *Smith v. Jenkins*, 732 F.3d 51 (D. MA 2013). Judge Baker said:

This Court adopts the same reasoning and, therefore, excludes Dr. Scott's proposed testimony that would present for the jury's "consideration the value that government agencies place on the statistical value of life," including the documents published by the United States Department of Transportation and the Environmental Protective Agency suggesting values of life (Dkt. No. 16-1, at 3).

(37) *Shipley v. Hunter Warfield, Inc.*, 2021 U.S. Dist. LEXIS 208718 (M.D. FL 2021). Dr. Stan V. Smith calculated five types of damages suffered by the plaintiff that resulted from an inadequate investigation for the plaintiff: (1) the loss of credit expectancy; (2) additional auto-loan interest; (3) the loss of mortgage expectancy; (4) the value of time spent; and (5) the reduction in value of life ("RVL"), also known as loss of enjoyment of life or "hedonic" damages." The defendant moved to exclude Smith's opinion in its entirety, but focused on hedonic damages. The plaintiff did not oppose exclusion of Smith's hedonic damages testimony and that testimony was excluded. Smith was also not permitted to testify about the value of the plaintiff's time trying to remedy the alleged inadequate investigation, but was permitted to testify about mortgage expectancy and interest rates available without the impact of the inadequate investigation.

(38) *Webb v. City of Maplewood*, 2021 U.S. Dist. LEXIS 222959 (E.D. MO 2021). This was an order denying motions in limine to exclude the testimonies of opposing economic experts Dr. William Rogers for the plaintiff and Dr. Thomas Ireland for the defendant. Rogers proposed two methods for compensating persons who were incarcerated in Maplewood jails for reasons deemed to be invalid.. One method was to use a \$23.89 per hour average in 2020 dollars per hour compensation of persons working as jailors in three local St. Louis municipalities . The second method was to use \$22.51 per hour in 2020 dollars derived from Quality Adjusted Life Years (QALYs) derived from the Value of Statistical Life (VSL) literature. Ireland argued that and that both methods were forms of hedonic damages because there is no market-based value comparable to the involuntary aspects of incarceration. Ireland was not permitted to testify about legal aspects of hedonic damages or that poverty might lead to a willingness to be incarcerated.

2022

(39) *In re Am. River Transp. Co.*, 2022 U.S. Dist. LEXIS 1733 (E.D. LA 2022). The Court

denied a defense motion under *Daubert v. Merrdell-Dow Pharmaceuticals*, 509 U.S. 79 (1993), to exclude the hedonic damages testimony of Dr. Stan V. Smith in boat accidents resulting in the deaths of three crewmen. Plaintiffs proffered the hedonic damages testimony of Smith, which defendants argued was not relevant to damages in a death case. The Court denied the motion because this was a bench trial and the purpose of *Daubert* to prevent unreliable scientific evidence from reaching a jury. The decision contained no discussion of the nature of or problems with the reliability of hedonic damages testimony.

(40) *Stella v. Davis Cnty.*, 2022 U.S. Dist. LEXIS 45628 (D. UT 2022). Defendants requested that plaintiffs be barred from suggesting any specific value for general damages, including pain and suffering, premature loss of life, and loss of consortium. Judge Jill N. Parish discussed the fact that general damages are difficult to calculate by any methodology, citing *Smith v. Ingersoll Rand*, 214 F.3d 1235, 1245 (10th Cir. 2000), as follows:

Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert* have unanimously held quantifications of such damages inadmissible.

Judge Parish did not exclude plaintiffs from providing per diem damages estimates, but with the added proviso:

[T]o the extent that Plaintiffs intend to suggest a per diem calculation predicated on a particular life expectancy to the jury, Plaintiffs must provide that calculation. Defendants are entitled to conduct discovery related to the foundation for the life expectancy calculation. Outside of the aforementioned discovery, the court sees no value to conducting discovery as to the admittedly arbitrary non-economic damages amount that Plaintiff's counsel selects to suggest to the jury.

(41) *Valenzuela v. City of Anaheim*, 2022 U.S. App. LEXIS 8471 (9th Cir. 2022). This decision concerned whether California's Wrongful Death Act was consistent with Section § 1983 of the federal Civil Rights Act. At issue was whether post-death hedonic damages were required under Section § 1983. The 9th Circuit said that an award of post-death hedonic damages was not required, saying also that:

"[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." Restatement (Second) of Torts, § 901, cmt. a. Because post-death "hedonic" damages are not awarded to the victim of the tort but are awarded only after the victim has died, the award is always enjoyed by the decedent's estate. Awards that go to the decedent's estate are never able to restore the decedent to his prior position of being alive nor do they provide substitute compensation

to the victim.

(42) *Warner v. Talos E R T L L C*, 2022 U.S. Dist. LEXIS 31316 (E.D. LA 2022). This case involved the wrongful death of Walter Jackson, who had a son in a previous marriage, and was now living with a different wife. Smith had been retained on behalf of the son, but had treated Jackson, his previous wife, and their son as a family unit for purposes of calculating the following damages of the son: (1) wages and employee benefits, (2) household and family services, (3) value of life, and (4) society and relationship. In response to Talos's motion, the plaintiff withdrew the third and fourth categories, but maintained (1) and (2). It appears that Smith was retained only on behalf of the son from the previous marriage and not the decedent's current wife, since only damages for the son were being considered. Judge James D. Cain, Jr, pointed out that the decedent's only relationship with the son was long distance telephone calls, and that decedent's only financial contributions in support of the son were payments "somewhere" between \$200 per month and \$1,000 per month, and limited the loss period to age 18 for the son. Smith was otherwise allowed to testify about lost wages and lost family services.

(43) *Roberts v. Tim Dahle Imps., Inc.*, 2022 U.S. Dist. LEXIS 98682 (D. UT 2022). The Court denied a defense motion to exclude or limit compensatory and punitive damages on the basis that calculations of those damages were not provided by the appropriate deadline. The court held that calculations of noneconomic damages, including hedonic damages, damages for emotional distress and punitive damages do not require specific calculations to be provided. The Court cited *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) regarding hedonic damages, as follows:

Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of Daubert have unanimously held quantifications of such damages inadmissible.

The Court added that: "Punitive damages are similarly left to the discretion of the jury and are not subject to concrete rules or calculation."

(44) *Sullivan v. City of Buena Park*, 2022 U.S. Dist. LEXIS 91684 (C.D. CA 2022). Federal District Judge Cormac J. Cadrney excluded the testimony of economic expert Robert Johnson regarding the value of the decedent, David Sullivan. Johnson's testimony would have been that the value of any human life fell within the range of \$3,900,000 to \$14,400,000 based on papers by Drs. Ted Miller and Kip Viscusi. Judge Cadrney commented on the fact that Johnson's testimony would apply to any decedent, "from a vagrant bum, an infant, spouse, or the local version of Dr. Jonas Salk." It was also noted that no justification was given for using the two papers by Miller and Viscusi rather than other studies with other values.

(45) *McGee v. Target Corp.*, 2022 U.S. Dist. LEXIS 109296 (D. NV 6-17-2022). Federal District Judge Kent J. Dawson denied a defense motion to exclude the hedonic damages testimony of Stan V. Smith, saying.

The Nevada Supreme Court has permitted economists to use various methods to arrive at their conclusions on hedonic loss, including a "willingness-to-pay method" similar to the one utilized by Smith in this case. *Id.* at 62-63. Smith uses his "willingness-to-pay method" but uses different data and sources to arrive at his conclusions than the expert in *Banks* [*Banks v. Sunrise Hospital*, 2004]. This difference is properly addressed on cross-examination. The Court is confident that Smith's testimony is not substantially more prejudicial than probative and that it will not confuse the issues or mislead the jury. As stated previously, Smith's report merely gives the jury a framework with which to determine a damages amount. Target will have the opportunity to attack Smith's data and calculations on cross-examination, but it will be up to the jury to determine the credibility of the witness and the weight to give his report.

(46) *Miller v. Juarez Cartel*, 2022 U.S. Dist. LEXIS 112463 (D. N.D. 6-24-2022). This was a judicial ruling by Federal Magistrate Judge Clare R. Hochhalter in an ATA (Anti-Terrorism Act) case involving deaths and injuries to two American families by the Juarez Cartel. The defendant was not represented and there was no expectation that the defendant would pay awarded damages. The case was bench-tried and expert reports were submitted in writing. Damage opinions of economic expert Stan V. Smith for one group of plaintiffs and by J. Matthew Sims for another group of plaintiffs were reported in the decision. Smith's opinions included loss of wages and benefits, loss of household services, loss of guidance and counsel, loss of accompaniment services, life care services of one decedent for a family member, value of life of decedents, or loss of society and relationship. Sim's damage opinions included loss of wages and benefits, household services and care for fellow family members, and cost of vocational rehabilitation for injured minor children. Sims did not include guidance and counsel, loss of accompaniment services, value of life, or loss of relationship, but Judge Hochhalter included amounts based on Smith's calculations for the first group of plaintiffs.

(47) *Gurvey v. Twp. of Montclair*, N.J., 2022 U.S. Dist. LEXIS 59815 (D. N.J. 3-31-2022). Gurvey's claim was that police officers entered his residence and forced him to have an unwanted psychiatric examination to determine whether Gurvey was suicidal. Stan Smith valued Gurley's alleged wages and benefits and Gurvey's reduction in value of life caused by this incident. This was part of a cross-motion for summary judgment that was denied. The judge denied a defense motion to exclude Smith's testimony without prejudice, meaning that the motion in limine could be refiled at a later stage of the litigation.

References

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