

*Huncovsky v. The Gates Rubber Company:*  
A 1990 Case That Still Has Currency in 2019 6/12/19

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**Abstract**

This note provides a summary of the issues involved with economic testimony on the issue of pain and suffering resulting from the burning death of Jason Huncovsky in a case that was settled in April of 1991. It provides a discussion that explains why this seemingly obscure case has had continuing relevance in litigation regarding hedonic damages testimony.

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## **I. Introduction**

This will be an account of *Huncovsky v. The Gates Rubber Company* (1990), a wrongful death case in St. Louis County, Missouri. It involved Dr. W. Kip Viscusi as the plaintiff's economic expert and this author as the named defense economic expert. Unknown to either of the named experts in the case or even the defense attorney, Dr. Stan V. Smith had been directly retained by the Gates Rubber Company as an unnamed consultant to advise the Gates Rubber Company regarding Viscusi's and Ireland's opinions. The case settled before trial in April of 1991, and had no further impact for another nine years, but since 2000 has had a significance that could not have been anticipated in the years before 2000. This paper will discuss the roles of Ireland, Smith and Viscusi prior to April of 1991, and then discuss how and why this case again became significant after late December of 1989 and continues to have significance as of 2019.

Section II will deal with case details in the matter of *Huncovsky v. Gates Rubber Company*. Section III will deal with the plaintiff's legal theory behind Viscusi's testimony regarding the pain and suffering of Jason Huncovsky. Section IV will deal with Viscusi's and Ireland's opinions regarding the pain and suffering of Jason Huncovsky. Section V will deal with questions in Viscusi's Huncovsky deposition regarding Viscusi's previous testimonial history. Section VI will deal with a near-concurrent joint appearance of Smith and Viscusi at forensic economic symposium on hedonic damages testimony. Section VII will deal with current uses of the Huncovsky transcript in ongoing cases involving hedonic damages testimony.

## **II. Case Details of *Huncovsky v. Gates Rubber Company***

On October 10, 1990, Ireland retained by the law firm of Evans & Dixon to respond as a defense economic expert to the plaintiff economic testimony of Dr. W. Kip Viscusi in the matter of *Huncovsky v. The Gates Rubber Company*. The case had been filed sometime earlier as a wrongful death action in the Circuit Court of St. Louis County, Cause Number 568478, Team B. The case resulted from the fact that Jason Huncovsky had died in a chemical fire on May 21, 1986 at the age of 25 while working for that Gates Rubber Company. This action had been brought by his widow, Brenda Huncovsky, for her losses and the losses of her minor children under the Missouri Wrongful Death Act, § 537.090 of Missouri Revised Statutes. Viscusi had been retained by the Hulverson Law Firm to calculate Brenda Huncovsky's loss in the form of the wages and benefits that were lost by Jason Huncovsky because of his death. Viscusi had also been asked to provide testimony relevant to the pain and suffering experienced by Jason Huncovski in the process of burning to death in a chemical fire.

Viscusi had not issued a formal report of damages in *Huncovsky* case, but his deposition had been taken on July 24, 1990. Ireland was asked to develop his opinions regarding Viscusi's deposition testimony based upon the November 30, 1989 deposition transcript of Brenda Huncovsky and the Viscusi's transcript, including exhibits to Viscusi's deposition. Ireland was

also provided with tax returns for Jason and Brenda Huncovsky for 1984 through 1986, the year Jason was killed. Based on those materials, Ireland issued two separate reports. His first report evaluated Viscusi's "pain and suffering" testimony and dated December 2, 1990. His second report on December 17, 1990 evaluated Viscusi's opinions regarding earnings loss and lost fringe benefits. Ireland's deposition was taken on December 18, 1990. The *Huncovsky* case was set for trial in April of 1991, but settled before trial. Ireland's deposition transcript was never produced and Ireland was never provided with a copy of the transcript.

Viscusi's calculations regarding lost earnings and lost fringe benefits were not remarkable and have not had the continuing relevance that Dr. Viscusi's testimony regarding the pain and suffering involved with a burning death have had. As such, differences between Drs. Ireland and Viscusi in that with respect to losses of earnings and fringe benefits will not be discussed in this note. The focus will be on both the purpose and substance of Viscusi's "pain and suffering" testimony, and on why Viscusi's testimony on pain and suffering has resulted in this case having continuing currency in cases still being litigated as of 2019.

### **III. The Legal Theory Behind Viscusi's Testimony**

The Missouri Wrongful Death Act was modified on August 28, 2006, but not in ways that affected the *Huncovsky* case. It allows a survivor with standing to bring an action to claim:

[T]he pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support. *In addition, the trier of facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for which the deceased might have maintained an action had death not ensued.*" (Italics added for emphasis.)

It is the latter sentence that had presumably motivated the Hulverson attorneys to request Viscusi's testimony regarding the pain and suffering of Jason Huncovsky in the process of his burning death. Jason Huncovsky survived the burning fire long enough to be taken to a hospital, where he died shortly thereafter. He was conscious enough during that period to have suffered great pain and suffering.

What a jury would have done with respect to this specific element of damage to the estate of Jason Huncovsky will never be known because of the settlement, but Viscusi's testimony was directed toward that damages element. The continuing references to this case to the present have to do with "loss of enjoyment of life," not pain and suffering caused by a burning death. It is notable that the Missouri Wrongful Death act did not and still does not authorize damages for either a decedent's loss of enjoyment of life or a statutory survivor's reduced enjoyment of life resulting from the death of the decedent. The Missouri Wrongful Death Act is focused on specific pecuniary losses of survivors and not losses and not generally losses to the estate of a decedent. However, the act creates a special exception that allows recovery by the estate of the

decedent for the pain and suffering of the decedent in the process of dying. However, the act does not indicate any specific way that a jury should determine the amount of an award for that purpose. This author is not aware of any legal decision before or after the *Huncovsky* case that has provided any guidance in that regard. While not relevant to the current note, the Missouri Wrongful Death Act also allows punitive damages that are also not based upon pecuniary losses of statutory survivors.

#### **IV. Viscusi's and Ireland's Opinions Regarding Pain and Suffering**

On page 15 of Viscusi's deposition transcript, Viscusi identified the purpose of his testimony relevant to pain and suffering damages for the burning death of Jason Huncovsky as "a general methodology the jury might use to think about this issue." Viscusi also indicated that he would provide "reference points, specific estimates of pain and suffering." His summary of his opinions appears on pages 16 and 17 of his transcript and is succinct:

[T]he first estimate is the estimated value of life, and this includes not only pain and suffering, but a lost value of enjoyment of life as well as loss of earnings, this figure would assume all of the losses. This number is 5.06 million dollars. The second statistic I have as a reference point value just to get at the pain and suffering component, and although I don't know the exact pain and suffering for a fatal burn injury, I have a methodology I developed in the use of the Environmental Protection Agency, an estimate of the pain and suffering and non-monetary losses due to chronic bronchitis, which I think most people would agree is less painful than being burned to death, that loss is four hundred and fifty-seven thousand dollars. The third reference point is an estimate of the actual pain and suffering that people receive for fatal burn injuries, and I have calculated this based on a sample of over ten thousand product liability claims, and this includes claims settled as well as court verdicts, so, it tends to be downward biased, my estimate of pain and suffering using these data was a number of a hundred and fifty thousand. I regard this number as the floor for pain and suffering.

The basis for Viscusi's value of life at \$5.06 million was his extensive publications on that subject identified in his curriculum vitae, which was marked as Exhibit 2 of his transcript. The basis for Viscusi's four hundred and fifty-seven thousand dollar figure for chronic bronchitis was his paper with Wesley A. Magat and Joel Huber on "Pricing Environmental Health Risks: Survey Assessments of Risk-Risk and Risk-Dollar Trade-offs for Chronic Bronchitis," revised as of October, 1989. (That paper was subsequently published in the *Journal of Environmental Economics and Management* in 1991, 21(1):32-51.) The basis for Viscusi's value for burning death at one hundred and fifty thousand was his paper on "Pain and Suffering In Product Liability Cases: Systematic Compensation or Capricious Awards?" that had already been published in the *International Review of Law and Economics*, 1988, 8:203-220.

The next thirty pages (17-46) of Dr. Viscusi's transcript explored his past research for his IRLE paper and other related papers.

Ireland responded in both his December 2, 1990 report and his December 18, 1990 deposition that the whole life value in Dr. Viscusi's testimony of \$5.06 million was not relevant to the pain and suffering involved in a burning death, that suffering from bronchitis had no apparent relationship to pain and suffering in a burning death, and that Viscusi's use of his third estimate of \$150,000 was seemingly unrelated to anything other than prior jury awards and settlement values.

### **V. Deposition Questions about Viscusi's Testimonial History**

Starting at page 47 of the transcript, questions began to focus on Viscusi's previous experience testifying as an economic expert testifying in courts of law. On page 51, Viscusi was asked whether he had given previous testimony in St. Louis. Viscusi indicated that he had done so. At the bottom that page, Viscusi was asked: "How many times have you testified for the Hulverson Law Firm?" After clarification that the question included testimony by either testimony or trial, Viscusi responded:

I don't know the exact count here. If I were to make an estimate, I would say about ten times, five, ten times.

Viscusi's answer, for reasons discussed below, has subsequently become an issue in litigation continuing to the present.

Viscusi's deposition transcript was ninety-five pages long, not including exhibits.

### **VI. The December 1989 NAFE Hedonics Symposium**

Viscusi's deposition was taken six months after another seemingly unrelated event. Both W. Kip Viscusi and Stan V. Smith, along with Ted R. Miller and William T. Dickins presented papers at symposium sponsored by the National Association of Forensic Economics in conjunction with the Allied Social Sciences Meetings held in Atlanta, Georgia from December 28<sup>th</sup> through 30<sup>th</sup>. Viscusi presented two papers at the symposium. The symposium was jointly organized by Thomas Havrilesky and Ted Miller. The four symposium papers were subsequently published in the Fall 1990 issue of the *Journal of Forensic Economics*, along with a short paper by Havrilesky providing his opinions regarding the four papers. There was an audience of 80 to 100 persons at this symposium, including Ireland. Viscusi's first paper focused on legitimate uses of the Value of Statistical Life (VSL) concept as that concept relates to safety incentives. Viscusi's second paper focused on the econometric basis for estimates of the value of life.

During the discussion period after the presentation of the papers at the symposium, Smith claimed in a memorandum dated January 6, 1991 that:

[A]t that meeting, during the discussion period, I pressed Viscusi to respond to what values he would provide to a jury whose task it was to award compensation for the past value of life. Dr. Michael Brookshire has recorded his recollection of that public exchange in a separate memo. My recollection is that Viscusi stated, when pressed, that while reluctant to do so, he too would provide these same whole life costs.

On May 6, 1992, Michael Brookshire issued a memorandum that Smith was presumably referring to (though the dates conflict), saying:

Viscusi maintained that he believed these estimates of the value of life should be used only in product liability cases. When pressed by Smith as to what figures Viscusi would provide to a jury if and when a jury was allowed to award for the value of life in non-product cases, Viscusi replied: “Well then I would provide your figures, Stan.”

Ireland has maintained since first learning of these claims that Viscusi made no such statements during his presentation or the discussion period. In conjunction with Ireland’s work on defense in the case of *Reyes v. Last Chance Liquors*, Case No. CV2005-353-1, Circuit Court of Benton County, Arkansas, Ireland requested in late 2005 that Viscusi respond to Brookshire’s May 6, 1992 memorandum. Viscusi responded in a letter dated January 3, 2006 that:

[I]t strikes me as odd that about three years after the NAFE conference that Michael Brookshire is supposedly reconstructing verbatim comments that I made in response to some undefined question regarding my conference presentation. I know I never said those exact words as an answer to any question so that this reconstructed quote is not actually a quote. More important, the memo does not provide the question that was being asked. Without the question text, it is impossible to interpret the response.

In his January 3, 2006 letter, Viscusi went on to say that “the memo says that I discussed ‘whole life costs’ at the conference.” I have never used that terminology in any article or conference presentation.”

## **VI. Current Uses of the Huncovsky Transcript in Hedonic Damages Litigation**

The connection between statements about what Viscusi said in the Smith and Brookshire memoranda and the case of *Huncovsky v. Gates Rubber Company* become evident in the paragraph of Smith’s January 6, 1991 memorandum that immediately followed the paragraph quoted above:

Moreover, in *Brenda Huncovske (sic) v. Gates Rubber Company* in a deposition on behalf of a deceased plaintiff, Viscusi provided several estimates of the loss of

the value of life based upon the whole life costs he has published. Additionally, he stated in that deposition, that he has similarly represented plaintiff attorneys in wrongful death cases and provided such deposition testimony numerous times in the past.

As can be seen from Viscusi's actual answers in his July 24, 1990 transcript, Viscusi's testimony in his Huncovsky related to providing general guidance to a jury that might be used for the purpose of awarding a dollar amount for the pain and suffering involved in the burning death of Jason Huncovsky, not Jason Hucovsky's loss of enjoyment of life. It did not involve any discussion of "whole life costs" as referenced in both the Brookshire and Smith memoranda.

One of the important criticisms that Smith has had to deal with from both Ireland and others is that Viscusi is generally recognized as the leading economic researcher in the Value of Statistical Life (VSL) literature. When confronted with Viscusi's opposition to Smith's use of hedonic damage calculations, Smith has regularly made various claims about Viscusi's past testimonies that are reflected in Smith's January 6, 1991 memorandum. These claims appear in Smith's deposition transcripts when Smith is asked about Viscusi's known opposition to hedonic damages testimony. One claim has been what Viscusi supposedly said during the discussion period following paper presentations at the December 1989 NAFE hedonic damages symposium. The other claim is that Viscusi once used the same method Smith uses and that Smith has a deposition transcript in which Viscusi did so. Smith has also claimed that in that transcript Viscusi testified that he had done so ten times previously. Smith identified that transcript on the NAFE-L, an electronic list for members of the National Association of Forensic Economics (NAFE), as based on the Huncovsky transcript (April 23, 2002).

In a posting on April 23, 2002, Ireland posted a message regarding the Huncovsky transcript under the subject line "Uses of Two Economists" that said:

I was retained as a named defense economist and Stan Smith was apparently retained as an undisclosed defense economist, possibly for a different co-defendant.

Smith responded to Ireland's message by saying in his own message on April 23, 2002 that:

I was retained directly by defendant Gates Rubber, in Denver, I believe; Gates manufactured the hose that ruptured and killed the worker with hot oil, an unusual circumstance. Usually I am retained by the defense law firm, not the defendant corporation. However, often I am retained by the insurance companies directly. I am frequently retained by State Farm because they are in my back yard, and also by Liberty Mutual, for defense purposes. At times I will get a letter from an insurance company directing the defense law firm to retain me.

It is likely, however, that the case of *Hunkovsky v. Gates Rubber Company* will continue to come up in future cases when Dr. Smith has projected values for “loss of enjoyment” of life or “loss of relationship.” Smith is still being retained in a number of cases to provide hedonic damages testimony. Ireland, among others, is still being retained on defense to counter Smith’s hedonic damages testimony. Viscusi’s known opposition to hedonic damages testimony will continue to be asked about at Smith’s depositions. In response to those questions, Smith seems likely to continue to reference the Huncovsky deposition transcript in claiming that Viscusi has sometimes provided hedonic damages testimony himself, along with statements and copies of memoranda about what Viscusi supposedly said at the NAFE Symposium on Hedonic Damages in December of 1989.

## VII. Ending Notes

This paper has been reviewed for accuracy by Kip Viscusi, who provided the following comments in an e-mailed message on June 4, 2019:

(1) [Huncovsky] was the only time I have ever testified in a wrongful death case and discussed possible approaches to nonmonetary loss components such as pain and suffering and loss of enjoyment of life. I have consistently opposed hedonic damages. VSL could come up if the case was in terms of valuing the risk of death as opposed to the death outcome, but that is not what is the norm in wrongful death cases. . . .

(2) VSL is actually a lower bound on how much you would have to pay people to be compensated for being dead. As the Brookshire memo attests, I said [at the NAFE Hedonic Damages Symposium in December 1989] it should only be used in product liability cases. Why would that statement make any sense? He left out the purpose for which it should be used in product liability cases, which is assessing negligence not assessing damages. That same theme shows up in my articles in that the VSL sets a reference point for how much companies should be required to spend on safety, not how great damages should be.

(3) I do support the use of VSL in setting punitive damages.

All documents referenced in this paper other than papers from the Hedonic Damages Symposium in December 1989 will be provided upon request made to [ireland@umsl.edu](mailto:ireland@umsl.edu).



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