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Hedonic Damages: To Value a Life or Not to Value a Life

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HEDONIC DAMAGES:
TO VALUE A LIFE OR NOT TO VALUE A LIFE?

DOUGLAS L. PRICE*

I. INTRODUCTION ........................... 1055

II. FLANNERY AND LOSS OF ENJOYMENT OF LIFE ...... 1057

III. PROGRESSION OF LOSS OF ENJOYMENT OF LIFE ...... 1060

IV. ADMISSIBILITY OF HEDONIC DAMAGES .............. 1063
   A. Personal Injury Claims .................... 1064
      1. Opinion Evidence ..................... 1067
      2. Per Diem Argument .................... 1072
      3. Province of the Jury and Speculation .... 1075
      4. Other Decisions ....................... 1079
   B. Wrongful Death Actions ................... 1082

V. CONCLUSION .............................. 1088

I. INTRODUCTION

A novel approach to the estimation of an element of a damage award has recently been proposed in the courts throughout this country. "Hedonic damages" as confronted by the judicial system involves an attempt to place a monetary figure on the value of the loss of enjoyment of life. In 1982, the Supreme Court of Appeals of West Virginia held that the loss of enjoyment of life was a separate and distinct element of damages which a jury may award an injured plaintiff. With that guidance from the court, and through further experimen-

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1055
tation in the calculation of damages, the latest theory to be confronted by the West Virginia courts has been the concept of hedonic damages.

In *Flannery v. United States*, the Supreme Court of Appeals of West Virginia recognized loss of enjoyment of life as a separate element of damages which can be awarded by the trier of fact in the courts of West Virginia. Since *Flannery*, from emerging case law, the term hedonic damages has been used and interpreted to represent not just the loss of enjoyment of life, but an economic principle of mathematical calculation and measurement by an economist of a dollar figure put on an individual's "lost enjoyment of life"—an element of damage typically thought to be within the province of the jury.

The term hedonic damages itself was first suggested by economist Stanley Smith in the case of *Sherrod v. Berry*. Hedonic damages derives its name from the Greek word "hedonikos" meaning pleasure or pleasurable. As interpreted by the courts around the United States, hedonic damages means either a loss of enjoyment of life or loss of life's pleasures.

The Supreme Court of Appeals of West Virginia has not yet addressed the propriety of expert testimony on hedonic damages. It will

1. 297 S.E.2d 433 (W. Va. 1982).
4. See James Brady, Comment, *Hedonic Damages*, 59 Miss. L.J. 497 (1989); Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. Ill. U. L. Rev. 543, 546 n.13 (1990). In fact, it is still in dispute as to the actual meaning of hedonic damages as used by the courts. Additionally, some predict that it will be many years before the term is fully and completely defined. For the purposes of this Article, the terms "loss of enjoyment of life," "loss of the value of life," "loss of the pleasure of life," and "hedonic damages" will be used interchangeably as the definition is not yet solidly defined, nor is it in its final form. Brady, *supra*, at 544-46 nn.6-13.
5. Yet, as this Article goes to publication, the Supreme Court of Appeals of West Virginia has accepted for appeal the case of *Liston v. West Virginia Univ.*, No. 922112 (W. Va. filed Nov. 23, 1992), wherein the court has decided to answer the following as-
be the purpose of this Article to trace the use of hedonic damages through state and federal case law, and to analyze West Virginia case law which has interpreted loss of enjoyment of life as an element of damages. Hedonic damages will also be viewed within the framework of how it has been introduced and confronted in personal injury actions and wrongful death actions. Additionally, the principles which underlie the presentation of hedonic damages will be examined. Consideration is given to the arguments for and the objections against the admissibility of quantifying hedonic damages from both the plaintiff and defense perspectives.

II. FLANNNERY AND LOSS OF ENJOYMENT OF LIFE

On October 27, 1974, Michael Flannery was driving his automobile in Huntington, West Virginia, when his vehicle was struck by an automobile owned by the United States Government and operated by a government employee in the normal course of employment. Michael Flannery was left permanently semi-comatose as a result of the injuries.

6. In addition to personal injury and wrongful death actions, hedonic damages have been used persuasively in civil rights actions under Title 42 U.S.C. § 1983, Jones' Act cases and Warsaw Convention cases. The most often-cited case used to support an argument for hedonic damages is a 42 U.S.C. § 1983, Civil Rights Action, Sherrod v. Berry, 629 F. Supp. at 159. It must be noted that the Sherrod case was based on strict statutory interpretation that "§ 1983 permits recovery on behalf of the victim's estate for the loss of life." Sherrod, 827 F.2d at 205. As will be explained more thoroughly in this Article, § 1983 damages are more clearly delineated and specifically statutorily provided which separates Sherrod from the typical personal injury or wrongful death action.


received in this accident. After administrative procedures were instituted and exhausted, a complaint was filed in federal district court and tried without a jury to determine the government's liability under the Federal Tort Claims Act. The court found the government negligent and included in its award $1,300,000 for the "impairment of Flannery's capacity to enjoy life." The government appealed on two grounds, only the first being pertinent to this Article. The appeal asked if impairment of one's capacity to enjoy life is an element of pain and suffering and, if so, is it like pain and suffering which is dependent upon Mr. Flannery's ability to sense and experience pain in order to be awarded. The Fourth Circuit, after a review of West Virginia case law, indicated that West Virginia did recognize the impairment of one's capacity to enjoy life as an element of damages, but was unsure whether a semi-comatose plaintiff would be entitled to recover for that injury. Accordingly, the federal court certified the question to the Supreme Court of Appeals of West Virginia: "Under West Virginia law, is a plaintiff in a personal injury action, who has been rendered permanently semi-comatose by his injuries and is therefore unable to sense his injuries, entitled to recover for the impairment of his capacity to enjoy life?"

In answering the certified question, the West Virginia Supreme Court first reviewed the basic principles for awarding damages, holding that when awarding damages, the basic goal is to compensate the plaintiff fairly and adequately for the injuries and losses sustained. The court noted that there are two basic categories to compensate a personal injury: tangible and intangible damages. Tangible damages,

8. Id.
10. Flannery, 649 F.2d at 271.
11. The second appealed ground not relevant to this Article asked: "Under West Virginia law, must the trial court, when sitting as the finder of fact in a personal injury action, deduct from the plaintiff's award for lost earning capacity an amount equal to the federal income taxes which would have been levied upon such income had it actually been earned?" Id. at 273.
12. Id. at 272.
13. Id.
14. Id. at 273. 
also known as liquidated or pecuniary damages, "represent some form of expense or economic loss that can be rendered reasonably certain monetarily by a mathematical figure or calculation." Included within tangible damages are present and future medical, hospital, nursing, dental, drug, and all other similar expenses for treating, curing, and alleviating the plaintiff's physical and mental injuries. Also included in this category are lost wages and lost earning capacity. The second category of compensatory damages, intangible damages, is better known as unliquidated or general damages, "in the sense that there is no precise monetary calculation that can be used to determine the amount of the loss. The most obvious of these is pain and suffering."

The Flannery court next looked to make sure that a permanent injury is firmly established before it allowed future expenses or damages to be awarded to allow one to function as a whole person. After permanency was established, the court proceeded to explore this new award of damages in determining whether loss of enjoyment of life can be awarded to a plaintiff who is not conscious of the fact that he has lost the ability to enjoy life. The court held that knowledge of the extent of loss of enjoyment of life is not a prerequisite because the underlying function of an award for loss of enjoyment of life is to measure the degree of permanent disability to the whole person arising from the injuries inflicted. The court noted that being conscious or having subjective knowledge of a permanent injury is not required, citing an example of an infant who has been blinded by excessive amounts of oxygen administered in an incubator. The infant still loses the "loss of enjoyment of life," even though the infant's ability to comprehend the loss of enjoyment of life is minimal.

16. Id.
17. Id.
18. Id. The court also noted that "[t]he two broad categories of personal injury damages, liquidated and unliquidated, can also be subdivided as to those damages which have presently accrued at the time of the trial and as to those which will necessarily be incurred in the future." Id. at n.3.
19. Id. at 436.
20. Id. at 438.
21. Id. at 438. The court also noted:
III. PROGRESSION OF LOSS OF ENJOYMENT OF LIFE

West Virginia has been somewhat fortunate to have a court express in such specific terms that loss of enjoyment of life is a separate compensable element in a damage award and clearly not part of pain and suffering. As noted earlier, the term hedonic damages first appeared in 1985 in a case asserting a claim under 42 U.S.C. § 1983, Sherrod v. Berry. The Sherrod case involved a civil rights suit

It is obvious that the loss of enjoyment of life is directly linked to the permanency of the plaintiff's injury and a jury in evaluating the nature and degree of the permanency of the plaintiff's injury will ascertain how such injury has affected his ability to perform and enjoy the ordinary functions of life. This loss of capacity to enjoy life is not a function of pain and suffering in the traditional sense of those words since one can lose his eyesight or a limb and be without physical pain. Yet, it is obvious that such injuries will impair the person's capacity to enjoy life.

Id. at 437.

22. The issue of whether loss of enjoyment of life should be a separate cognizable award has been debated by many courts across the country. There are three basic positions with regard to the loss of enjoyment of life as a separate recognizable category of injury.

A minority of jurisdictions refuse any recovery for loss of enjoyment of life. Most of these jurisdictions, however, base their positions on decisions rendered at the turn of the century that largely have been ignored. The majority position allows consideration of loss of enjoyment of life, but only as one of the numerous factors characterizing a general damage award for pain and suffering. Finally, proponents of a third position assert that loss of enjoyment of life is a proper element of damages, separate and distinct from pain and suffering, for which compensation should be awarded. The current debate surrounding loss of enjoyment of life centers around whether it should be treated as an integrated element of pain and suffering or as an independent element of damages.


23. 629 F. Supp. 159, 163 (N.D. Ill. 1985), aff'd, 827 F.2d 195 (7th Cir. 1987), rev'd, 856 F.2d 802 (7th Cir. 1988) (en banc). As noted earlier, the distinguishing factor of the Sherrod case is that:

A § 1983 action is a suit for tort damages, even though the duty the defendant is alleged to have breached is created by the Constitution or federal law . . . . This section was enacted by Congress to protect individuals against invasions of federally guaranteed rights through the misuse or abuse of powers derived from the state, . . . and to furnish a damage remedy, where proof is made, to those whose civil rights are violated but who cannot get relief in the courts or agencies of their state . . . . The basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional
brought by the decedent’s father to recover damages for the death of Ronald Sherrod who was shot and killed by a city police officer. Stanley Smith, an economist from the University of Chicago, was called to testify as an expert witness for the plaintiffs. Professor Smith used questionnaires, government spending data, private spending data, and income compensation studies to quantify a monetary figure for the hedonic value of life. In the end, the district court allowed expert testimony to place a figure on the hedonic damages, holding that “[e]vidence of all the facts and circumstances of the case having any legitimate tendency to show the damages, or their probable amount, may be admitted for the purpose of enabling the jury to make the most accurate and probable estimate that the nature of the case permits.”

Professor Smith testified from the guidelines he introduced that economists can look “at how society values what we call the hedonic aspect, the hedonic value of life, separate from economic productive value of an individual.” Although the mathematical formulas were not revealed in the Sherrod opinion, Professor Smith later stated that he did base his estimates for the value of hedonic damages on the evidence the jury heard, the estate of Ronald Sherrod could sue and recover damages for the loss of his life.


Although the Sherrod case is the most often cited case to support an argument to warrant a recovery of hedonic damages, it must be noted that Sherrod is not a typical personal injury or wrongful death action, but a civil rights suit brought under federal statute which specifically provides for the award of hedonic damages.

25. Id. at 164. Additionally, the court held:

The fact that the hedonic value of a human life is difficult to measure did not make either Smith’s testimony or the damages speculative. Damages are speculative when the probability that a circumstance as an element of compensation is conjectural. The rule against recovery of ‘speculative damages’ is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent. That is, if it is uncertain whether the defendant caused the damages, or whether the damages proved flowed from his act, there may be no recovery of such uncertain damages; whereas, uncertainty which affects merely the measure or extent of the injuries suffered does not bar a recovery.

Id.

26. Id. at 162.
on the "willingness-to-pay" approach. Under the "willingness-to-pay" method of evaluation, only a probable range of the value of lost enjoyment of life can be given. "The life-value estimates range from just under $100,000 to upward of $2 billion. That is a very, very broad range . . . . 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." As Professor Smith admits, only the jury can make the final determination of the award. This, of course, begs the question of whether hedonic damages are too speculative to be admissible in court.

Other attacks on the "willingness-to-pay" model have concluded that the underlying premise of paying for safety as a way of measuring the enjoyment of life is flawed. Jerome Staller, Ph.D, suggests that the "willingness-to-pay" model is based on guidelines for public safety

27. Stanley V. Smith, Hedonic Damages in Wrongful Death Cases, 74 A.B.A.J., September 1, 1988, at 70. For a comprehensive and detailed review of the willingness-to-pay model, see Michael L. Brookshire & Stanley V. Smith, Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys (1990) and Gary A. Magnarini & Stan V. Smith, Hedonic Damages, Wts. Law., Feb. 1991, at 17. Basically, the "willingness-to-pay" model, values life by measuring the amount of money an individual, business or government agency would pay in order to avoid or reduce the risk of injury or death to one or more persons.

Four factors comprise the willingness-to-pay model:
(1) Studies based on data regarding what private citizens spend on their own safety, e.g., how much people pay for air bags, smoke detectors;
(2) Questionnaire studies in which economists have determined how much extra money people would pay to remain safe; e.g., how much more would a person pay for a safer airline;
(3) Labor market studies in which economists measure how much extra a worker must be paid to work a job which has a higher measurable life risk; e.g., coal miner, window washer; and
(4) Studies of government regulations which require certain amount of money to be spent on the prevention of loss of life through regulation.


28. Smith, supra note 27, at 73.

29. It is interesting to note that according to Professor Smith, the value of an ordinary life of a median-aged person in 1989 dollars equals about $60,000 a year. Brookshire & Smith, supra note 27, at 172.
and not the value of an individual's loss of enjoyment of life. Dr. Staller proposes that a more precise method of valuing hedonic damages would be a "time method evaluation." Yet, Dr. Staller also admits that the valuation of hedonic damages "is at best a subjective exercise based on vague, if not outright inappropriate, economic theories." As other commentators have noted, there is not a recognized method for measuring hedonic loss. Although there is no single measure to precisely ascertain the value of loss of enjoyment of life, cases which offer expert testimony quantifying hedonic damages are becoming more prevalent.

IV. ADMISSIBILITY OF HEDONIC DAMAGES

The admissibility of proposed hedonic damages evidence depends on the case in which it is introduced. The presentation of hedonic damages will face various objections which are based primarily on whether the proposed testimony is introduced in a personal injury case or in a wrongful death action; the basic and elementary difference being that a personal injury action is not governed by statute as is a wrongful death action. Since a wrongful death action is based on statute, objections to hedonic damages begin with the construction of the wrongful death statute and its statutory interpretation, while objections

31. Id. at 9. In their book, Professors Brookshire and Smith go to considerable lengths to explain their calculations and defend their methodology against their critics. Brookshire & Smith, supra note 27, at 57-64 (Supp. 1992).
to hedonic damages in personal injury actions vary upon the evidentiary ground.

In case law throughout the country, objections to the proposed admissibility of expert testimony on hedonic damages have addressed issues such as the expert testimony on this subject being too speculative, excessive, and inconsistent verdicts are awarded when hedonic damages are introduced, the testimony invades the jury's domain, impermissible per diem arguments, and simply that hedonic damages cannot make the victim whole. Arguments for hedonic damages focus on the methodology, the fact that people and governments do value life in certain enumerated ways, and that placing a monetary value on life limits a possible excessive or inconsistent verdict, which in turn adds consistency to a litigious society.

Some courts are still entertaining objections that a hedonic damage award may be duplicative of a pain and suffering award or are included within the total damage award. However, the Supreme Court of Appeals of West Virginia has held that a hedonic damage award is not a duplication of the elements of pain and suffering, nor is it a part of pain and suffering, but is its own element of permanent injury. Under present law then, such an objection should be overruled by the trial and this Article, therefore, will not elaborate on this point.

A. Personal Injury Claims

In a personal injury action, loss of enjoyment of life damages can be awarded to an injured party "by ascertaining how the injury has deprived the plaintiff of his customary activities as a whole person."

34. "Per Diem" literally means "by the day." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). A per diem argument is an argument to the jury which places a specific dollar figure upon each minute, hour or day on an element of damages for the jury to make an award. For example, an argument asking the jury to award the plaintiff one dollar for each hour of pain the plaintiff will suffer for the next twenty years would be an impermissible per diem argument. See Crum v. Ward, 122 S.E.2d 18, syl. pt. 5 (W. Va. 1961); Illosky v. Michelin Tire Corp., 307 S.E.2d 603, 616 (W. Va. 1983); Hewett v. Frye, 401 S.E.2d 222, 226 (W. Va. 1990).


36. Id. at 436.
As noted earlier, the claim for loss of enjoyment of life damages, or hedonic damages, is based on the goal of the tort system to compensate an individual for all injuries suffered. For the most part, tort damages are based on the harm incurred by the individual without any limitation by statute.\(^3\)

The majority of jurisdictions are now following the leadership of the Flannery court in holding that hedonic damages are a separate element of damages and thus can be awarded in a personal injury action.\(^3\) Since hedonic damage testimony may be introduced as a part of a damage award in a personal injury action, there are basically two ways to present such testimony. First is the traditional method in which the lawyer puts the plaintiff on the stand to testify to his personal injury and his loss of enjoyment of life. Additionally, the plaintiff's family and friends can be called to substantiate and add to such testimony.\(^3\) As an example:

\(^3\) Yet, West Virginia Code § 55-7B-8 does provide a limitation or cap on liability of one million dollars for non-economic loss in a medical professional liability action brought against a health care provider. West Virginia Code § 55-7B-2(g) defines “non-economic loss” as “losses including, but not limited to, pain, suffering, mental anguish and grief.” The Flannery court held that damages for loss of enjoyment of life are found in the second category of damages, that is “intangible damages since they are ‘unliquidated’ in the sense that there is no precise monetary calculation that can be used to determine the amount of the loss.” Flannery, 297 S.E.2d at 435.

The particular importance of this statute is that an argument can be made, and has been made, that if expert testimony is allowed by the court to be introduced quantifying hedonic damages as a fixed monetary figure, hedonic damages could be categorized within “those damages which are termed ‘liquidated’ or ‘pecuniary’ in the sense that they represent some form of expense or economic loss that can be rendered reasonably certain monetarily by a mathematical figure or calculation.” Id; see Magnarini & Smith, supra note 27, at 56 n.5. Hedonic damages, classified as a reasonably certain monetary figure, may be characterized not as a “non-economic loss,” but as an economic loss which would then presumably take the hedonic damage testimony outside of the one million dollar liability cap set by West Virginia Code § 55-7B-8.

38. For the purposes of this Article, it is assumed that hedonic damages are non-economic, unliquidated damages in that the Flannery court began its discussions of loss of enjoyment of life damages by noting that it is comprised within “the second category . . . of intangible damages.” Flannery, 297 S.E.2d at 435-39.

39. See William J. Gillen & Bruce A. Olson, Economic and Legal Defenses Against Claims for Hedonic Damages, FOR THE DEF., Jan. 1991, at 18, 19. The traditional method to offer proof of the loss of enjoyment of life has been through testimony, such as:

—Physician comments on any physical limitations the injured plaintiff may suffer;
Juries have been permitted to consider the reduction in that person’s ability to enjoy both sensory perception as well as physical activities due to the individual’s injury. “Examples of provable elements are: inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and, inability to engage in the usual family activities.”

Of course, presenting hedonic damage testimony in this manner requires that counsel know their client, including all physical activities normally undertaken at home, at work, and in other significant areas of the client’s lifestyle. Counsel must satisfactorily elicit this testimony at trial and persuasively argue hedonic damages to the jury in closing argument.  

The second and most controversial manner in which hedonic damage testimony is elicited is through expert testimony. The idea of expert testimony quantifying hedonic damages is a relatively new concept. Since Sherrod v. Berry, the majority of reported cases in which expert testimony has been attempted to be introduced has been in the area of wrongful death actions and not in personal injury suits.

—Psychologists or psychiatrists to testify to any psychic trauma or lasting psychic effect afflicting the plaintiff;<br>—Family members testifying to personal observations on specific hedonic aspects;<br>and<br>—Friends, clergy, coworkers, and similar witnesses giving their own observations of the plaintiff’s diminished enjoyment of life.

Id. “The traditional proof focuses on the specific individual who has been harmed, and on testimony concerning the personal impact of the loss of the given individual.” Id.

40. Tabacchi, supra note 32, at 334-35.
41. Of course, counsel must make sure that they only make permissible arguments. For a more detailed discussion of permissible arguments, see Professor Cleckley’s article on arguing damages in West Virginia in an upcoming issue of the West Virginia Law Review. Also, for two recent articles discussing arguments for intangible damages, see William S. Bailey et al., Communicating About Pain, TRIAL, June 1992, at 110; Larry S. Stewart, Arguing Pain and Suffering Damages in Summation, TRIAL, Mar. 1992, at 55.
42. Although no reason can be found for this fact, the rationale may lie in the reasoning that in a personal injury action the plaintiff can testify and express his own loss, without the need of an economist to tell the jury the loss suffered by the plaintiff. In a wrongful death action, the recovery is statutory, and an economist is in a better position to quantify the loss of enjoyment of life than the decedent.
Although the West Virginia Supreme Court has yet to address the propriety of expert testimony quantifying hedonic damages, there are various evidentiary standards and objections to be confronted before such testimony should be admitted.

1. Opinion Evidence

The first objection to expert testimony quantifying hedonic damages is the standard for admissibility of expert testimony under Rule of Evidence 702. This rule holds that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."\(^{43}\) Traditionally for expert testimony to be admitted under Rule 702, the expert opinion must concern subject matter which is sufficiently complex as to be beyond the comprehension of the ordinary lay person, yet, not so complex, novel or speculative as to be outside the scope of general acceptance or have an unreliable scientific basis.

In West Virginia, the proposed admissibility of expert testimony on hedonic damages ultimately rests within the sound discretion of the trial court, and a trial court’s ruling will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.\(^{44}\) Historically, the West Virginia courts have liberally interpreted Rule 702 in favor of allowing an expert to testify if the expert has the proper qualifications, and his testimony will be helpful to the trier of fact.\(^{45}\) In fact, West Virginia has allowed the admissibility of expert testimony on a variety of scientific topics novel in their day, based on the simple holding that “the key test is whether the witness has specialized knowledge that will assist the trier of fact.”\(^{46}\)

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\(^{43}\) W. Va. R. Evid. 702. Rule 702 is identical to Federal Rule of Evidence 702.


\(^{45}\) FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 7.1 B(3) at 421-22 (2d ed. 1986).

\(^{46}\) Ventura v. Winegardner, 357 S.E.2d 764, 768 (W. Va. 1987). For cases in which novel theories were allowed to be presented, see State v. Dietz, 390 S.E.2d 15 (W. Va. 1990) (expert testimony admitted concerning psychosexual murder); State v. Woodall, 385
When reviewing the proposed admissibility of hedonic damages, two questions must be answered. First, whether the expert has the proper qualifications. In Ventura v. Winegardner, the West Virginia Supreme Court reviewed the qualifications of four expert witnesses who testified at trial concerning the injuries suffered by a college tennis player after she fell and injured her knee. The court noted that "Ventura's experts ran from the top to the bottom of the scale, superbly qualified; qualified, and unqualified." With regard to the qualified experts, the court held the testimony was properly admitted based on each expert's experience, education, and the liberality of Rule 702. The court then reviewed the last expert witness called, Mr. Thomas Serpento. Mr. Serpento was called to testify to the plaintiff's future earnings as a tennis professional. His background was in vocational and guidance counseling and he was employed by West Virginia University as Director of Human Resources. At trial, Mr. Serpento admitted he knew very little about tennis, had no training or experience as to the salaries of tennis professionals and arrived at his calculated opinion of the future earnings based on an article in an issue of Tennis Week Magazine.

The court held that Mr. Serpento was not qualified to give an opinion. He had no training in the field of professional sports and no


47. 357 S.E.2d 764 (W. Va. 1987).
48. Id. at 768.
49. Id.
50. Id.
51. Id.
52. Id.
expertise in the salary of tennis players.\textsuperscript{53} Also, he admittedly had little knowledge of the productive life of a tennis player, had reduced his economic figure to present value without showing the appropriate calculations, and had based his opinion on an issue of\textit{Tennis Week Magazine}, a publication not shown to be a reliable basis for expert opinion.\textsuperscript{54} The court held that experts may base their opinions on treatises and publications in their profession, but must first show the authoritative nature of the work.\textsuperscript{55} The scope of the\textit{ Ventura} ruling shows that the West Virginia court is liberal in admitting expert testimony, but it does have limits in admitting such evidence. In all cases, expert opinion must be based on proof that it is rendered with the proper qualifications, reliability, and authority.

In\textit{ Cargill v. Balloon Works, Inc.},\textsuperscript{56} the Supreme Court of Appeals of West Virginia reviewed a circuit court decision to exclude the plaintiff's expert as to a defective design in the manufacture of a hot air balloon which crashed and caused the death of its occupants. The court reviewed the liberal rules of evidence and held that the proposed expert had experience in repairs of balloons and was qualified by his knowledge, skill, experience, training or education as an expert.\textsuperscript{57} The court then noted that although Rule of Evidence 702 enunciates a standard, "[i]t cannot encompass every nuance of a specific factual matter or a particular individual sought to be qualified."\textsuperscript{58} Rule 702 cannot be interpreted to require that experience, education, or training be in complete congruence with the nature of the issues sought to be proven.\textsuperscript{59} "It is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine."\textsuperscript{60}

\textsuperscript{53} Id. at 768-69.
\textsuperscript{54} Id. at 769.
\textsuperscript{55} Id.
\textsuperscript{56} 405 S.E.2d 642 (W. Va. 1991).
\textsuperscript{57} Id. at 646.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 646-47.
\textsuperscript{60} Id. The court also held that "once introduction of an expert's testimony is permitted, the opposing party may exercise its right of cross-examination in which questions regarding the expert's credentials, training, experience, and qualifications may be raised and
When introducing an expert to testify on hedonic damages, counsel must present an individual who has training in economics and hedonic damages and possesses a thorough understanding of the economic model for determining the hedonic estimate. In almost all cases, an expert who can calculate and testify as to a hedonic value of life based on an appropriate economic model has the necessary educational qualifications to be admitted as an expert under Rule 702.

Yet, the corollary or second objection to the expert's qualifications under Rule 702 remains. The second question as to admissibility focuses on the authority of the expert's scientific basis. Specifically, whether the facts and basis of the expert's opinions are reliable, valid, or generally accepted in the scientific community.

With regard to admitting opinions based on novel scientific theories, the West Virginia Supreme Court, in State v. Armstrong, approved a more lenient standard of admissibility to judge novel scientific theories. For many years, the admissibility of new expert theories was governed by the well-known Frye test which allowed for the introduction of expert testimony which had gained general acceptance in its particular scientific field. In Armstrong, the court adopted the standard which is being followed by an increasing number of courts, as set forth in United States v. Downing.

In Downing, the United States Court of Appeals for the Third Circuit considered the admission of expert testimony in the field of human perception and memory and the reliability of eyewitness identification in a criminal case. The Third Circuit rejected the Frye test in favor of a three-point test to review the admission of novel scientific evidence under Rule 702 of the Federal Rules of Evidence. The Downing court held that the soundness and reliability of a novel theory should be the basis for the evidentiary standard and the critical element to judge admissibility. Additionally, a direct connection be-

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61. 369 S.E.2d 870 (W. Va. 1988).
63. Id. at 1014.
64. 753 F.2d 1224 (3d Cir. 1985).
65. Id. at 1226.
66. Id. at 1237-38. Specifically, the Downing court held that when reviewing the
tween the test and factual disputes in the case must be established and consideration must be given to the possible confusion of the jury. The Downing court concluded, “[E]ven if the proffered evidence satisfies Rule 702, the district court may decide nonetheless to invoke Rule 403 to exclude the evidence if the court finds its probative value to be substantially outweighed by other dangers, e.g., confusion of the issues or waste of time.”

The West Virginia court in Armstrong considered the Downing case and noted that “a scientific expert’s testimony is admissible if shown to involve relevant scientific tests which assist the trier of fact to understand the evidence, even if such tests and the underlying scientific principle(s) are not yet generally accepted in the particular scientific field.”

The Downing standard sets forth a sound test to guide the trial court to determine the admissibility of expert testimony on hedonic damages. First, plaintiff’s counsel must establish that the expert to testify to hedonic damages has the proper qualifications. Second, the testimony on hedonic damages must be shown to be reliable, valid, and helpful to the jury and the proponent of the evidence must prove to the court that the methodology to determine hedonic loss is solid. Defense counsel can challenge the theories and bases of hedonic damage expert testimony by closely looking at the studies and principles upon which the expert bases his range of values for hedonic damages.

The last evidentiary objection defense counsel has is the standard Rule 403 objection that even if probative, the testimony is substan-

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admissibility of a proposed theory, the court should:

- conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and the particular disputed factual issues in the case.

Id. at 1237.

67. Id. at 1238.

68. Id. at 1242-43.


70. W. VA. R. EVID. 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of
inally more prejudicial or misleading or would confuse the jury. But, considering the liberality of Rule 702, the scientific principles propounded, and the seeming authority of the hedonic experts being presented at trial, a trial court would have to closely scrutinize each expert and the authority before excluding such testimony upon this evidentiary ground. Yet, regardless of the expertise of the hedonic expert, the hurdle of Rule 403, combined with other objections, remains a significant impediment to the admissibility of expert opinion on hedonic damages.

2. Per Diem Argument

A second objection which may be put forth against hedonic damages in personal injury actions is that an economist testifying to specific monetary figures for loss of enjoyment of life damages would represent an impermissible per diem argument to the jury. In *Crum v. Ward*, the Supreme Court of Appeals of West Virginia ruled that plaintiff's counsel was barred during closing argument from attempting to place a monetary value on pain and suffering. In *Crum*, during closing argument, counsel for the plaintiff was permitted to write on a blackboard and present to the jury figures relative to the plaintiff's claim for pain and suffering which was calculated on a daily basis and a specific dollar figure. Defense counsel objected that this was a "per diem" argument for determining the value of pain and suffer-

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71. See State v. Woodall, 385 S.E.2d 253, 259-60 (W. Va. 1989). In fact, Professor Cleckley believes that when an expert makes an evaluation of a commonplace subject (as the value of life may be argued to be), and the expert witness supplants a jury's independent exercise of common sense, a necessary independent inquiry must be conducted under Rule 403 to exclude prejudicial evidence. CLECKLEY, supra note 45, § 7.1(B)(1) at 95 (Supp. 1989).


73. The *Crum* case was cited extensively by United States District Judge Copenhaver in a recent case from the Southern District of West Virginia in *Walker v. Brady*, infra note 78, in which Judge Copenhaver denied the plaintiffs from introducing Dr. Brookshire's testimony on hedonic damages.

74. *Crum*, 122 S.E.2d at 22-23.
The Crum court looked to other state court opinions and held that "[t]here is no measure by which the amount of pain and suffering endured by a particular human can be calculated, and no standard of value which can be applied." Additionally, "[t]o permit plaintiff's counsel to suggest and argue to the jury an amount to be allowed for pain, suffering, mental anguish and disability calculated on a daily or other fixed basis, allows him to invade the province of the jury and to get before it what does not appear in the evidence." The court then reviewed the diverse positions with regard to the range of permissible and impermissible closing arguments and held that "the amount of damages allowable for pain and suffering is peculiarly a jury question, and that no known method of arriving at any money value thereof exists, or could exist. No testimony as to any money value of pain and suffering is admissible in evidence, no matter how experienced or learned the witness." In that hedonic damages are classified as intangible damages, like pain and suffering, overcoming an objection that hedonic damage testimony may be a per diem argument appears to be a daunting task.

In a recent federal case, the United States District Court for the Southern District of West Virginia considered the question of proposed expert testimony on the issue of hedonic damages in *Walker v. Brady*. The court considered the admissibility of the testimony of Michael Brookshire, Ph.D., on the issue of hedonic damages. After reviewing the proposed expert testimony on hedonic damages, the court excluded Dr. Brookshire's testimony on the grounds that hedonic damages are intangible damages, and in that they are intangible, "just as no two people have the same sensitivity to pain, no two people have an identical appreciation for the joys of life," held that the expert

75. Id. at 23.
76. Id. at 23 (citing Botta v. Brunner, 138 A.2d 713 (N.J. 1958)).
77. Id. at 24 (citing Certified T.V. & Appliance Co. v. Harrington, 109 S.E.2d 126 (Va. 1959)).
78. Id. at 25.
80. Id. at 1.
testimony on hedonic damages is speculative and therefore inadmissible.\textsuperscript{81}

In \textit{Walker}, the court pointed out that the \textit{Crum} court cited an earlier West Virginia case, \textit{Yuncke v. Welker},\textsuperscript{82} which held that "\[i\]n an action for personal injuries, the damages are unliquidated and indeterminate in character, and the assessment of such damages is the peculiar and exclusive province of the jury."\textsuperscript{83} The \textit{Crum} court also held that "\[i\]n our view, the mathematical formula argument is based wholly on speculation, or imaginary inferences, not supported by facts, in reality by supposed facts which could not be received in evidence if offered. No effort, perhaps, would succeed in pointing out the almost innumerable variables necessarily existing or involved in such speculation."\textsuperscript{84} Judge Copenhaver concluded the \textit{Walker} opinion by holding that hedonic damage testimony by an expert is speculative and is not an element of damages which should be quantified by an economist, but should be left for the sound and collective minds of the average jury to ponder and calculate.

This sentiment was likewise held by an Illinois appellate court which suggested that an argument on hedonic damages would reach the parameters of a per diem argument. In \textit{Fetzer v. Wood},\textsuperscript{85} the Illinois Appellate Court for the Second District held:

\begin{quote}
\textit{(I)t is well settled that, with respect to damages for pain and suffering, \textit{i.e.,} nonpecuniary damages, it is improper for counsel to suggest that the jury calculate such damages by placing a dollar figure upon each minute,}
\end{quote}

\textsuperscript{81} \textit{Id.} at 17-19.
\textsuperscript{82} 36 S.E.2d 410 (W. Va. 1945).
\textsuperscript{83} \textit{Id.} at 411, syl. pt. 3.
\textsuperscript{84} \textit{Crum}, 122 S.E.2d at 26. The \textit{Crum} court also added an illustration:
\begin{quote}
\textit{(I)t may be suggested that any attempt to place a money value on pain for any definite unit of time is impossible of any sound basis, for no two persons, it is believed, bear the same sensitivity to pain. The severity or duration of pain, though resulting from the same cause, varies as to different individuals so greatly that the most experienced and learned physician find no method of measuring it, but, to a very large extent, must rely on representations of the patient.}
\end{quote}
\textit{Id.}

hour or day as to which pain and suffering was or will be experienced, since such argument presents an illusion of certainty.\textsuperscript{86}

On the one hand, a strong argument can be made that hedonic damages, by calculating the worth of a person’s life would be placing an impermissible price tag on the “enjoyment of life” and thus presenting an impermissible per diem argument. The counter argument is that the methodology behind hedonic damages looks to the value of the total worth of life, not to the specific value of a certain injury, and thus is not calculating a “per diem” argument.

3. Province of the Jury and Speculation

In \textit{Flannery}, the court held that loss of enjoyment of life damages are in the category of intangible damages since there is no precise monetary calculation to determine the amount of the loss.\textsuperscript{87}

Here, however, we have an element, a component, of damages that may be considered by a jury in determining the amount of its award. Just as a jury may consider the nature, effect and severity of pain when fixing damages for personal injury, or may consider mental anguish caused by scars and disfigurement, it may consider loss of enjoyment of life.\textsuperscript{88}

The \textit{Flannery} court implicitly stated, if not explicitly, that hedonic damages are solely in the jury’s deliberative wisdom. The \textit{Flannery} court cited \textit{Warth v. Jackson County Court},\textsuperscript{89} for the proposition that when the plaintiff is allowed a recovery for pain, mental anguish, and impairment of capacity to enjoy life, just compensation for the plaintiff’s injury is a matter for the reasonable judgment of the jury, and there is no rule by which to approximate these kinds of damages with anything like mathematical accuracy.\textsuperscript{90} The \textit{Flannery} court also favorably cited \textit{Nees v. Julian Goldman Stores},\textsuperscript{91} which held that:

\begin{quotation}
\textsuperscript{86} \textit{Id.} at 1246.
\textsuperscript{87} \textit{Flannery}, 297 S.E.2d at 435.
\textsuperscript{88} \textit{Id.} at 438.
\textsuperscript{89} 76 S.E. 420 (W. Va. 1912).
\textsuperscript{90} \textit{Id.} at 423.
\textsuperscript{91} 154 S.E. 769 (W. Va. 1930).
\end{quotation}
It would be very difficult, if not quite impossible, to lay down a yardstick, or measure, by which to compensate for pain and suffering, or the impairment of health . . . where the damages do not admit of definite or approximate estimate, there is no legal measure of damages, and the law leaves the amount entirely to the sound discretion of the jury . . . .

This opinion is consistent with the law of damages in West Virginia. In one of the recent cases on this subject, the Supreme Court of Appeals of West Virginia reiterated the rule that general or intangible damages are solely within the jury's domain and discretion:

An award for mental anguish is necessarily based upon a subjective evaluation by the jury of the injured individual and the evidence he presents. Likewise, an award for pain and suffering is necessarily based upon similar intangible and subjective evaluations. Thus, no mathematical calculation can be employed to determine an award for mental anguish or pain and suffering . . . Such awards must remain within the discretion of the jury . . . .

The objection to hedonic damages based on the reasoning that it invades the providence or domain of the jury and is speculative is possibly the most persuasive one against expert testimony on hedonic damages, and it is the toughest point for plaintiff's counsel to overcome. It is a unique fact in our court system that it is for the collective minds of the jury to determine the verdict on its own. Many West Virginia cases have held that in assessing damages for personal injuries based in part on pain and suffering, testimony which attempts to place a money value on pain and suffering is inadmissible. As Flannery held, hedonic damages are an intangible element of damages

92. id. at 773-74.
94. "Equally certain is that 'the law recognizes that the aggregate judgment of twelve duly selected and properly qualified jurors represents the best method yet devised for fixing the amount of just compensation to the injured plaintiffs in such cases [involving pain and suffering, mental anguish or other indeterminate damages].’” Roberts v. Stevens Clinic Hospital, Inc., 345 S.E.2d 791, 806 (W. Va. 1986) (McHugh J., dissenting) (citing Sargent v. Malcomb, 146 S.E.2d 561, 566 (W. Va. 1966)).
95. Crum v. Ward, 122 S.E.2d at 18, syl. pt. 4; see supra text accompanying note 95.
which are in the same category as pain and suffering. "The job of determining such intangible and subjective damages as personal humiliation, mental anguish, and indignity has always been the exclusive province of the jury . . . ."96

Recent West Virginia cases have continued to hold that expert testimony should be excluded if the opinion is an "invasion of the province of the jury" or reaches the "ultimate issue" of the case.97 In State v. Mitter,98 the court held that when the subject matter of expert testimony is within the common knowledge of the jury, expert opinion is ordinarily not admissible.99 Additionally, "[e]xpert opinion evidence concerning a matter as to which the jury are as competent to form an accurate opinion as the witness, is inadmissible."100

One hundred years ago in Overby v. Chesapeake & Ohio Railway Co.,101 the Supreme Court of Appeals of West Virginia held inadmissible the testimony of a witness whose answers were within the common knowledge of the jury. "When the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible."102

97. CLECKLEY, supra note 45, § 7.1 (B)(3) at 422.
99. Id. at 378.
100. Id. at 378 (citing Lawrence's Adm'r v. Hyde, 88 S.E. 45, syl. pt. 7 (W. Va. 1916)); see also McCroskey v. Proctor, 332 S.E.2d 646, 650 (W. Va. 1985). The United States Court of Appeals for the Fourth Circuit has held similarly. Persinger v. Norfolk & Western Ry. Co., 920 F.2d 1185, 1188 (4th Cir. 1990) ("Although expert testimony is generally presumed helpful to the jury, we have held that Rule 702 excludes expert testimony on matters within the common knowledge of jurors . . . . Other courts have interpreted Rule 702 similarly.").
101. 16 S.E. 813 (W. Va. 1893).
102. Id. at 817. The court also cited from Rogers on Expert Testimony, holding: If the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then the opinions of experts cannot be received in evidence . . . . The opinion of a witness who neither knows or can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, it not admissible.
Id.; see also Thrasher v. Amere Gas Utilities Company, 75 S.E.2d 376, 385 (W. Va. 1953): "Ordinarily it is not proper for a witness to express an opinion concerning a matter as to which the jury is as well qualified to form an opinion as is the witness."
In a recent case from the United States Court of Appeals for the Fourth Circuit, a wrongful death and negligent infliction of emotional distress claim was made in *El-Meswari v. Washington Gas Light Co.* The plaintiff tried to introduce expert testimony as to the mother’s emotional response to the death of her child.

The district court, concluding that the jury could assess the mother’s inner grief without expert guidance, excluded Dr. Ommaya’s testimony on that point. This decision represented a reasonable exercise of the trial judge’s broad discretion under Federal Rule of Evidence 702 to determine that a proposed expert will not significantly assist the arbiter of fact.

As has been held for many years, expert testimony which invades the jury’s domain is inadmissible. To counter this point, the plaintiff’s most persuasive argument for the introduction of expert testimony regarding hedonic damages is that such testimony helps act as a guide to aid the jury in making an award allowing consistency in verdicts where no parameters to guide the jury exist. “The testimony can give a jury a concrete basis for discussing and deciding upon an award. In a case where the injury is not physically obvious, such testimony can help a jury recognize the seriousness of the hidden loss.” Additionally, with the recent arguments for tort reform becoming more pervasive, and in light of the perceived explosion of “excessive” verdicts, expert testimony on hedonic damages adds an element of fairness, equality, and consistency to jury awards in that the hedonic value of life is systematically determined. “Such testimony can reduce the wide variation of such awards and assist juries in arriving at more fair and consistent verdicts.”

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103. 785 F.2d 483 (4th Cir. 1986).
104. Id. at 487.
105. Id.; see also *Lopez v. City Towing Assocs., Inc.*, 754 S.W.2d 254 (Tex. Ct. App. 1988), wherein the trial court was affirmed after “excluding the testimony of an economist regarding the value of lost guidance, counselling, love, affection, companionship and society suffered by the plaintiffs.” Id. at 259. The appellate court held this testimony was properly excluded because “the jury is equally competent to form an opinion regarding the ultimate fact issues, . . . [b]ased upon . . . the jury’s own experiences, we believe they were capable of placing a dollar figure on plaintiff’s damage elements.” Id. at 260.
107. Id. at 97, 104 (Supp. 1992). “We recommend that the concern that such testimony
studies may support a hedonic economist's testimony, before a hedonic expert is allowed to testify, there still remains the basic question of whether hedonic damages should be left to the jurors' collective wisdom.108

4. Other Decisions

After considering all of these issues, there have only been a few reported cases which have addressed hedonic damages evidence presented by expert testimony in personal injury actions. The first case which barred expert testimony in a personal injury action was Mercado v. Ahmed.109 The Mercado opinion represents a scholarly and insightful opinion regarding an economist's testimony as to hedonic damages and the theories and principles underlying the experts' opinions.110

In Mercado, the plaintiff's son was hit by a taxi and claimed medical injuries and loss of enjoyment of life damages.111 The jury awarded the plaintiff $79,000 in damages. The plaintiff appealed on the ground that the district judge improperly disallowed Professor Stanley Smith112 from testifying that the plaintiff's son's "lost pleasure of leads to unreasonably high verdicts be addressed by adopting conservative approaches to life valuation, consistent with our recommendation of a conservative approach in all damages estimation." Id. at 104.

108. In Roberts, Justice McHugh and Justice McGraw strongly dissented when the majority substituted their opinion for the collective opinion of the jury and ordered a remititutur of the verdict. Justice McHugh, citing an Arizona case, held: "No two persons are alike. No two injuries are alike. No two juries are alike. Unlike workers' compensation, awards for pain and suffering in personal injury actions or for solatium in wrongful death actions should not be based on pre-determined schedules. The worth and dignity of the individual is a milestone of our society." 345 S.E.2d at 810 n.13 (citing Wry v. Dial, 503 P.2d 979, 990-91 (Ariz. Ct. App. 1972)).


110. The memorandum opinion by District Judge Zagel in Mercado has been the only opinion which specifically addressed the reliability and validity of an expert opinion on hedonic damages. District Judge Zagel recognized that although new scientific theories or principles arise, although they may be valid theories, their reliability has yet to be tested. Id. at 1098. District Judge Zagel held that to date, as to hedonic damages, "[i]here is a lack of reliability," and overall, the evidence may fail to assist the trier of fact. Id. at 1103.

111. Mercado, 974 F.2d at 865.

112. Prof. Smith is the same expert who testified in the seminal case on expert opinion on hedonic damages, Sharrod v. Berry, 629 F. Supp. 59 (N.D. Ill. 1985); see supra notes
living due to the injuries he suffered in the taxi accident was
$2,207,827 to $2,762,227.”113

The district court in Mercado held that there was no basic agree-
ment among economists as to what data or elements go into the evalu-
atation of hedonic damages.

What is wrong here is not that the evidence is founded on consensus or
agreement, it is that the consensus is that of persons who are no more ex-
pert than are the jurors on the value of the lost pleasures of life. Even if
reliable and valid, the evidence may fail to ‘assist the trier of fact to un-
derstand the evidence or determine a fact in issue’ in a way more mean-
ningful than would occur if the jury asked a group of wise courtroom by-
standers for their opinions.114

The United States Court of Appeals for the Seventh Circuit recent-
ly affirmed the district court’s opinion in Mercado, finding that the
jury verdict was not inconsistent with the evidence at trial. Specifi-
cally, when the court of appeals addressed the hedonic damage expert
testimony, the court asked, “[D]oes Stanley Smith, supported by his
extensive willingness-to-pay research, know better than the average ju-
ror how much life is worth?”115 When reviewing Professor Smith’s
method of evaluating life, the court held that the testimony was prop-
erly excluded. “This conclusion may be less a reflection of the flaws
in Smith’s methodology than on the impossibility of any person
achieving unique knowledge of the value of life.”116 As the court of

113. Id. at 869.
114. Mercado, 756 F. Supp. at 1103; see also Fetzer v. Wood, 569 N.E.2d 1237, 1247
(Ill. App. Ct. 1991) (holding Professor Smith’s testimony inadmissible because the “present
expert economic testimony on damages which, by their very nature, are not amenable to
such analytical precision” and “the proposed economic expert testimony would be overly
speculative and would serve to invade the province of the jury”); Southlake Limousine, Inc.
v. Brock, 578 N.E.2d 677, 681 (Ind. Ct. App. 1991) (holding that expert testimony “is not
permissible unless the subject is difficult of comprehension or evaluation”).
115. Mercado, 974 F.2d at 870.
116. Id. at 871. The Seventh Circuit also looked to Stanley Smith’s premise of valuing
life and stated “we have serious doubts about his assertion that the studies he relies upon
actually measure how much Americans value life.” Id. The Seventh Circuit noted that
Smith’s studies may not truly reflect the value of life.
appeals alluded to in Mercado, when confronted with a personal injury action, professing an economic standard for the value of life is a daunting task.117

Since hedonic damages by use and definition are general and unliquidated, and there is no definite measure of damages for unliquidated damages such as pain and suffering, the amount of compensation therefore seemingly should be left to the sound discretion of the jury.118 In summary, there are solid arguments that can be made for and against hedonic damages in a personal injury case. Although a court may find the expert testimony helpful to a jury and may aid in

For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decision made by profit-seeking manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, spending on safety items reflects a consumer’s willingness to pay to reduce risk, perhaps more a measure of how cautious a person is than how much he or she values life. Few of us, when confronted with the threat, ‘Your money or your life!’ would, like Jack Benny, pause and respond, ‘I’m thinking, I’m thinking.’ Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an air bag is not immediately obvious.

Id. at 871. The court then concluded that “Smith was no more expert in valuing life than the average person.” Id.

117. Id. In Craft v. Matlack, Inc., No. CIV.A.91-2465, 1992 WL 124406 (E.D. La. May 26, 1992), the court barred the plaintiff’s economist, Melville Z. Wolfson, from testifying, holding that hedonic damages are “within the province of the jury,” and “[t]he basis of the economist’s testimony on this issue is speculative and does not relate in any specific scientific way to this plaintiff.” Id. at *1.

Also in Augustin v. Hyatt Regency of New Orleans, No. CIV.A.91-0670, 1992 WL 21823 (E.D. La. Jan. 29, 1992), the same court excluded the testimony of the same economist. The plaintiff wanted to introduce hedonic damages after he was injured in an accident at the Hyatt Regency Hotel “when a waiter dropped a tray that struck his ankle.” Id. at *1. The Augustin court held that the testimony was excluded under Rule 403 of the Federal Rules of Evidence in that “the probative value of Melville Wolfson quantifying loss of enjoyment of life is substantially outweighed by the dangers of Rule 403.” Id.

Last, in Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284 (La. Ct. App. 1992), the Court of Appeals of Louisiana excluded the testimony of Dr. Luvonia J. Casperson as to hedonic damages. Id. at 285. The court held that the testimony “would imply certainty in an area where none exists and . . . would improperly invade the province of the jury.” Id. at 286.

giving consistency to verdicts, in the end the court should find that, as Professor Stanley Smith admits, the "economists can present a probable range for the value of life, but only the jury can decide where on that range any given individual falls."\textsuperscript{119}

\textbf{B. Wrongful Death Actions}

The wrongful death action is a creature of statute whose origins are patterned after an English statute known as Lord Campbell's Act.\textsuperscript{120} The aim of wrongful death statutes was not to benefit the personal character or "enjoyment of life" which the decedent lost, or to compensate for the injury suffered by the decedent, but to compensate the beneficiaries of the decedent for \textit{their} losses.\textsuperscript{121}

Yet, as the law evolved, the wrongful death statute and its aims for compensation have taken on new perspectives. In wrongful death actions, an argument for the introduction of expert testimony on hedonic damages may be more clearly defined in that the state statute either provides for hedonic damages or it does not.

Section 55-7-6 of the West Virginia Code specifies the allowable damages for wrongful death, of which loss of enjoyment of life is not specifically included.\textsuperscript{122} Under the statute, damages are allowed for sorrow, mental anguish, loss of income, loss of services, expenses for care, and reasonable funeral expenses. Of particular importance to the hedonic argument is the provision which states that allowable damages "may not be limited to" the damages specified in the statute.

\begin{itemize}
  \item \textsuperscript{119} Smith, \textit{supra} note 27, at 72.
  \item \textsuperscript{120} Walker \textit{v.} Walker, 350 S.E.2d 547, 549 (W. Va. 1986).
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} The West Virginia Code provides:

  The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.

  \textit{W. VA. CODE} § 55-7-6(c)(1) (Supp. 1992).
\end{itemize}
In *Roberts v. Stevens Clinic Hospital, Inc.*, a wrongful death action was brought in West Virginia against the defendant hospital and the treating doctor on behalf of a two and one-half year old child who died of a non-consensual biopsy. Plaintiff’s counsel, in his closing argument, made a number of analogies that could lead a juror only to believe that the juror’s job was to evaluate the decedent child’s life in terms of money. The West Virginia court held that the jury made an award which was excessive and that damages for loss of life was not a permissible award in wrongful death actions. “Our wrongful death statute . . . specifically sets forth in subsections (c)(1) and (2) the losses for which damages can be recovered. Obviously, if the measure of damages were the value of a human life then, arguably, no jury verdict could be excessive.”

In a more recent case, the argument against hedonic damages in wrongful death actions was made in that the aim of a damage award is supposed to be compensatory in nature for the benefit of the beneficiaries. Thus, an award for hedonic loss would overcompensate plaintiffs (beneficiaries of the decedent), making it an award for the loss suffered by the decedent, rather than a loss to the beneficiaries. “Our statute . . . allows an action for wrongful death based upon the loss sustained by the beneficiaries of the recovery, rather than on the injury suffered by the deceased or his estate.”

123. 345 S.E.2d 791 (W. Va. 1986).
124. *Id.* at 794-95.
125. *Id.* at 799. The plaintiff’s counsel in his closing argument compared the value of the decedent’s child’s life to a race horse, to the price the military pays for aircraft and to the space program. As an example, plaintiff’s counsel argued “[a]nd what about our space program? I’m proud of our country. 225,000,000 people, but when we made the decision to go into space, a decision was made that not one single life would be sacrificed as a guinea pig. The decision was made that we would bring our astronauts back. And billions have been spent for all of the safety devices to insure that they come back.” *Id.*
126. *Id.* at 799-800.
127. Walker v. Walker, 350 S.E.2d 547, 549 (W. Va. 1986); see also Singleton v. Suhr, No. 55367, 1989 WL 54383, at *2 (Ohio Ct. App. May 18, 1989) (interpreting the Ohio wrongful death statute, the Ohio appellate court held that expert testimony on hedonic damages was impermissible because “the loss of enjoyment of life is a loss suffered by the decedent and is an inappropriate element of damages in a wrongful death action which is brought for the exclusive benefit of certain surviving relatives for the damages they have suffered”).
Yet, more recently, the Supreme Court of Appeals of West Virginia revisited the issue of permissible closing arguments in a wrongful death action in *Pasquale v. Ohio Power Co.*128 In *Pasquale*, the defense made a motion for mistrial based on alleged improper remarks of plaintiff's counsel during closing argument.129 In the motion for mistrial, defense counsel argued that plaintiff's counsel asked the jury to award damages to the beneficiaries of the estate based on the value of the decedent's life; an argument claimed as an improper measure of damages under the West Virginia Wrongful Death Statute.130 The defense contended that the plaintiff's counsel's arguments were similar to the impermissible closing arguments made in *Roberts*.

The Supreme Court of Appeals of West Virginia, in *Pasquale*, held that the value of a decedent's life is a permissible argument in a wrongful death action.132 Stating that the "value of the decedent's life" is somewhat a misnomer, the court held that "[t]here is no question that West Virginia Code [section] 55-7-6, allows a jury to consider the economic, social, and emotional losses sustained by the decedent's beneficiaries resulting from his wrongful death."133 Specifically, the court held "[t]o this extent, the jury is in effect setting a value on the decedent's life insofar as it relates to his or her beneficiaries."134 Accordingly, the court has signaled that in a wrongful death action, the value of the decedent's life is a permissible argument, and simple lost wage, pecuniary arguments are not the only monetary way in which beneficiaries can recover in a wrongful death action.135

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129. *Id.* at 753.
130. *Id.*
131. *See supra* note 125.
133. *Id.* at 753.
134. *Id.*
135. Although this may appear to open the door to an argument that hedonic damages are allowed in wrongful death cases, the *Pasquale* court did not go that far. The *Pasquale* opinion still reads that the focus of wrongful death damages rests on how the loss, "relates to his or her beneficiaries." *Id.* Expert testimony on hedonic damages would, on the other hand, focus on how the damage affected the decedent—that is how the decedent lost his or her enjoyment of life. This is impermissible. Since 1914, the West Virginia courts have allowed counsel to argue to the jury that they are allowed to consider "the decedent's age, earning capacity, experience and habits." But again, it is permissible only to focus on the
The *Pasquale* court also held that it is impermissible for plaintiff's counsel to argue to the jury that the decedent's life was worth a specific dollar amount when compared to other objects. The court cited the examples of *Jackson v. Cockill* and *Roberts* when in closing argument plaintiff's counsel compared the decedents' life to the money paid for a racehorse, the salary of a baseball player, or space program. The court held that "[t]his rule is simply an extension of the general damages rule that forbids plaintiff's counsel from making monetary comparisons that are not in evidence in order to inform the jury of an overall dollar amount it should return." The court next distinguished *Pasquale* from *Roberts* by noticing two substantial differences. First, in *Pasquale*, the plaintiff presented evidence of actual damages in addition to the funeral and related expenses by having an expert testify about the loss of income suffered by the decedent’s wife and children by using the decedent’s work-life expectancy.

The second distinguishing factor between *Roberts* and *Pasquale* was that in *Roberts*, the plaintiff's closing argument emphasized damages, asking the jury to consider the value of the decedent's life compared to objects with specific and substantial dollar values. In *Pasquale*, plaintiff's counsel's closing arguments asked for a value of the decedent's life compared to ephemeral, nonspecific objects.

decedent's life as it may affect his probable earnings, and it is still impermissible to focus on the hedonic aspect of the decedent. See *Yeater v. Jennings Oil Co.*, 84 S.E.2d 904, 905 (W. Va. 1914); *Bond v. City of Huntington*, 276 S.E.2d 539, syl. pt. 1 (W. Va. 1981).

138. *Pasquale*, 418 S.E.2d at 754. The court’s ruling may signal that in closing argument, if hedonic evidence is allowed to be established by expert testimony, and such testimony is in evidence, plaintiff’s counsel may be allowed to make specific reference to that figure in their closing argument, that is to a specific monetary figure.
139. *Id*. In fact, the jury awarded the exact amount estimated by the plaintiff’s expert.
140. *Id*.
141. *Id*. In *Pasquale*, the court cited statements of the plaintiff's counsel during closing arguments:

In addition to economic loss, the plaintiff and family are entitled to, she and the children are entitled to compensation for the loss of society and companionship caused by the tragic death of their father and her husband, Michael Pasquale.

How can these be measured? How much is a father worth? How much is a husband worth? How much is a loving father and a loving husband worth?
The court also noted that in *Pasquale* defense counsel did not object during the closing, but waited until closing argument was finished to ask for a mistrial. Apparently, the court found this of great weight. The court stated that a motion for a mistrial is a drastic remedy, and a decision within the trial court's discretion, and because defendant's counsel did not make a timely objection, the trial court's denial of the mistrial motion was sustained.\(^{142}\)

The court added that the defendants did not offer any instruction to inform the jury that the plaintiff's damages could not be measured by the value of a life, "i.e., that a human life is [not] worth a given amount of money."\(^{143}\) Accordingly, the court held that the value of the decedent's life, as it affects the beneficiaries, is a permissible element of a wrongful death action while the hedonic value of a decedent's life is not admissible evidence.\(^{144}\)

To date, only a few states have allowed hedonic damages to be awarded under their wrongful death statute.\(^{145}\) A provision of the Nevada Wrongful Death Statute allows for recovery of "damages for pain, suffering or disfigurement of the decedent."\(^{146}\) In reviewing the Nevada Wrongful Death Statute, the Nevada federal district court, held that hedonic damages can be recovered when it was "consciously experienced before death."\(^{147}\) In *Sterner v. Wesley College, Inc.*,\(^{148}\) a

\(^{142}\) *Pasquale*, 418 S.E.2d at 755-56. This ruling is apparently inconsistent with the court's previous ruling in *Roberts*. See *Roberts*, 345 S.E.2d at 799 n.5.

\(^{143}\) *Id.* at 756. This ruling may impliedly assert that hedonic damages cannot be introduced in wrongful death actions.

\(^{144}\) Although not yet asserted in a case, this may open the door to an expert attempting to quantify the hedonic aspect of the beneficiaries' loss.

\(^{145}\) *Sanderson v. Steve Snyder Enters.*, 491 A.2d 389, 397 n.12 (Conn. 1985) (damages under CONN. GEN. STAT. § 52-555 (Supp. 1988) include "compensation for the destruction of [a decedent's] capacity to carry on and enjoy life's activities in a way she would have done had she lived."); see also *Johnson v. Inland Steel Co.*, 140 F.R.D. 367 (N.D. Ill. 1992) (holding that hedonic damages are appropriate matters for inclusion in a wrongful death suit under the Indiana Wrongful Death Statute). *Id.* at 372 (emphasis in original).


\(^{147}\) *Id.* at 873. The court did not address whether expert testimony would be allowed.

student died in a dormitory fire. The United States District Court for the District of Delaware, in interpreting the Delaware wrongful death statute, held that the hedonic value of the decedent's life could only be expressed in terms of the decedent's pain and suffering before death. 149 A similar decision was made by a federal district court in New Jersey in Clement v. Consolidated Rail Corp. 150 There, the court interpreted New Jersey's Wrongful Death Statute and Survival Statute and held that hedonic damages are not available under the Wrongful Death Statute, but are recoverable under the Survival Statute for the decedent's pain and suffering before death. 151

For the most part, unless a wrongful death statute can be read expansively to include hedonic damages, they are usually not permitted as an element of damages in a wrongful death case. 152 It has been

149. Id. at 273. In Sturner, the court reserved its decision with regard to expert testimony on hedonic damages, reasoning that the Delaware statute, the hedonic damage of the decedent's life, regardless of pain and suffering "is inadmissible under Delaware's wrongful death statute, as either a distinct basis for recovery or as a purported measure of the parent's mental anguish." Id. at 274.


151. Id. at 156; see also Eyoma v. Falco, 589 A.2d 653 (N.J. Super. A.D. 1991).

long held that the wrongful death action is to compensate the beneficiaries for their loss, and not for hedonic losses or the lost enjoyment of life of the decedent. With the Pasquale case, the West Virginia court has expanded permissible arguments in wrongful death cases, but has continued to focus the allowable recovery on the losses of the beneficiaries as opposed to the losses of the decedent. 153

Accordingly, the best argument for hedonic damages under the West Virginia wrongful death statute would be to convince the trial court to read the statute expansively in that the recoverable damages are "not limited to" those specified in the statute and may include hedonic damages. However, this appears to be a pretty tough sell in light of Roberts and Pasquale. Even if hedonic damages were accepted as allowable in a wrongful death action, there still lies the basic proof and evidentiary standards presented in a personal injury action to be confronted before such testimony will be admitted.

V. CONCLUSION

Hedonic damages is a new emerging theory being asserted by injured plaintiffs. The concept of hedonic damages itself is not objectional. In general terms, hedonic damages is the qualification of the loss of enjoyment of life. As the Supreme Court of Appeals of West Virginia held in Flannery, it is a separate element of damages which a jury may award.

153. Some commentators have specifically disagreed with the majority of states' wrongful death statutes which simply award damages based on a person's monetary standing in life. That is, a wrongful death action for a doctor would be worth much more than a wrongful death action of a person who is unemployed simply because the majority of wrongful death statutes compensate the beneficiaries by a pure pecuniary or wage standard of the decedent. By allowing loss of the value of life to be awarded to the beneficiaries, it is argued that hedonic damages bring a more equal award to wrongful death damages. See, e.g., Andrews J. McClurg, It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 NOTRE DAME L. REV. 57 (1990).
The most controversial aspect of hedonic damages is expert testimony mathematically quantifying the monetary value of the hedonic aspect of life. The aim of expert testimony is to aid the jurors in their deliberations and to give them the best information to render an objective opinion. Yet, before such testimony can be admitted at trial, some serious questions have to be fully addressed. Can the value of life actually be measured? Are the expert's opinions based on solid economic principles? Should we allow evidence as to the value of enjoyment of life to be presented to the jury or should we rely solely on the jury's collective wisdom to make this difficult determination?\textsuperscript{154}

Expert testimony on hedonic damages is receiving mixed reviews throughout the country. For the most part, it has been rejected under evidentiary rule 702 as being speculative or invading the jury's province in that hedonic damages are for the trier of fact to assess a value to life. Yet, as indicated in \textit{Mercado v. Ahmed}, the best method to have expert testimony admitted on hedonic damages is to prove the reliability and validity of the economic principles and the theories underlying the economic valuation of the loss of enjoyment of life.

If and until the reliability and validity of an expert's opinion on hedonic damages can be thoroughly established, the best way to introduce hedonic damages to the jury is for the attorney to know his client, know their losses, and persuasively, passionately, and eloquently argue the hedonic loss to the jury. However, understanding that courts are more willing to allow expert testimony to "aid" the jury's understanding under the liberal rules for the admissibility of expert opinion, quantitative figures of hedonic damages may be on the horizon.

\textsuperscript{154} Additionally, an argument can be made that if an expert is allowed to quantify the value of life and place a monetary figure on hedonic damages, why prohibit expert quantification other general unliquidated damages, such as pain and suffering? If an expert can value life based on the government standards of risk, why prohibit an expert from attaching a figure to pain and suffering based on research studies of hospital stays, pain medication, annual sales of pharmaceutical companies for aspirin, pain management surveys, and physical therapists data. Surely, it must be easier to quantify pain as a monetary figure because almost everyone has experienced pain, compared to no one being able to fix a monetary figure to their life. The expert could then average out his figures, and testify to an individual's pain tolerance based on an injury.
Yet, the underlying concern throughout these arguments is the recurring question, can anyone really value life? Philosophers, theologians, and scientists have pondered the question and are mystified as to the answer. In the end, the true value of life may not rest on statistics or mathematics, but the value of life, the hedonic value of life, may be a decision which ultimately rests in the jury's deliberative wisdom.