SHALOME C. RABURNEL JOHNSON: And JOE L. JOHNSON, her husband Plaintiffs, vs. GEORGE REDD, GEORGE REDD (as employee, servant and/or representative of RED & TAN); RED & TAN, NJ TRANSIT CORP., RED & TAN (as employee, servant and/or representative of NJ TRANSIT CORP.), COACH USA, RED & TAN (as employee, servant and/or Representative of STAGECOACH GROUP COMPANY), IDS PROPERTY CASUALTY INSURANCE COMPANY, et als Defendants.	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY: LAW DIVISION DOCKET NO. HUD-L-855-11 **CIVIL ACTION** **OPINION**

DATE OF HEARING: October 24, 2013

DATE OF OPINION: November 12, 2013

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SARKISIAN, J.S.C.

SUMMARY OF ACTION

This is Defendants' motion in limine to bar the testimony of plaintiff's economist Dr. Stanley V. Smith, Ph.D. insofar as he opines to plaintiff's hedonic damages. This written opinion supplements the Court's decision during the trial of this matter which granted Defendant's motion on October 24, 2013.[1]

Notably, there is no binding New Jersey authority on point on this matter except the unreported decision of the Appellate Division in the case of Sheck v. Dalcorso, 2005 N.J. Super. Unpub. LEXIS 178 (App.Div. Dec. 29, 2005).

In Scheck, in a per curiam opinion, the Appellate Division reversed the trial court's decision which granted Defendant's motion for an involuntary dismissal based upon the lower court's finding of insufficient evidence of defendant's liability in this automobile accident case. The trial court had also precluded the testimony of the same economist, Dr. Smith, on hedonic damages. The Appellate Court noted that the trial court, who presides over the new trial, should conduct a Rule 104 hearing to determine whether an expert may testify as to the value of hedonic damages, which the trial court had not done. This Court noted that the Appellate Division's decision observed that while this issue has not previously been addressed in a published decision in in this state, it has been addressed elsewhere, both by state and federal courts, some permitting it, but the majority not, and has also been the subject of multiple law review articles. Scheck, supra, 2005 N.J. Super. Unpub. LEXIS 178 at *12.

The Court focused in preparation for the hearing which took place on day 4 of this seven (7) day trial by reviewing the sections of Dr. Smith's report devoted to his

[1] Dr. Smith was permitted to testify as to plaintiff's lost wages and household expenses but a jury verdict of no cause was reached as to all claims on October 31, 2013.

opinion as to hedonic damages and the cases and law review articles referenced in the 2005 Sheck case and after the Sheck case. Interestingly enough, this Court ascertained at the commencement of the hearing that a decision on a R. 104 hearing never took place in the Sheck case, as it settled after the remand and Dr. Smith indicated he was not aware of any subsequent case in New Jersey in which a R. 104 hearing had been conducted on this issue.

Plaintiff's attorney also provided to the Court, a day before the hearing, a copy of Dr. Smith's book which he co-authored with Michael L. Brookshire, Ph.D. entitled "Economic/Hedonic Damages—The Practice Book for Plaintiff and Defense Attorneys" (7th Printing March 2011).

In his report, Dr. Smith referenced three (3) studies upon which he relied, other than his own research and writings, in reaching his opinion-- Journal of Forensic Economics, Vol. 3, No. 3, Fall 1999, by T.R. Miller; "The Value of Life: Estimates with Risks by Occupation and Industry," Economic Inquiry, Vol. 42, No. 1, May 2003, by Professor W.K. Viscusi; and "The Value of Saving a Life: Evidence from the Labor Market," by Richard Thaler and Sherwin Rosen, published in Household Production and Consumption in 1975.

The underlying studies which construct economic models upon which estimates are presented as to the value of life are based upon studies of two (2) general groups; (1) Consumer behavior and purchases of safety devices, such as the analysis of smoke detectors and the lifesaving reduction associated with them; and (2) wage risk premiums to workers, such as the analysis of differential rates of pay for dangerous occupations with a high risk of death on the job.

A third group of studies consists of cost-benefit analyses of governmental regulations, such as the analysis of lifesaving resulting from the installation of smoke stack scrubbers at high-sulphur, coal-burning power plants.

Dr. Smith uses what is called the “willingness to pay” (“WTP”) approach in calculating hedonic damages. The Court found the explanation of the WTP approach in a 2004 Brooklyn Law review article to be informative:

> The WTP approach measures the value of a human life by examining "what we pay to prevent the loss of life, or what we pay for life-saving measures." This approach considers three models to quantify the value of life for the jury: (1) consumer willingness to purchase safety devices; (2) worker willingness to accept higher compensation for a greater risk of death; and (3) the government's willingness to impose safety regulations on private industry and the cost of such regulation. Each of these models attempts to quantify how much a person would be willing to pay to avoid death . . .
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> The first model evaluates consumer behavior. This model attempts to determine the additional price a person is willing to pay for a safer product or a safety device, such as an airbag or smoke detector, and the reduction of the risk of death resulting from such purchases. It then uses this information to estimate a monetary value people place on life. Basically, this method calculates the value of life by multiplying the probability of saving a single life by the cost of the safety device. For instance, assume that an optional driver's side airbag costs $500.00 and that this airbag reduces the chance of death in an accident from six in 10,000 down to two in 10,000. Reducing the chance of dying by four in 10,000, or one chance in 2,500, at a cost of $500 suggests, according to this theory, that the consumers place a value of $1,250,000 (2,500 x $500) on their lives. Another way of looking at this figure is that consumers have spent $1,250,000 on 2,500 devices that, probability shows, are likely to save a single statistical life.
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> The second model, sometimes referred to as the "individual avoidance" approach, is based on the theory that workers will demand higher wages in jobs with a greater risk of death. This estimate "would be exclusively linked to earnings potential in wages, salary, and other direct forms of compensation." For example, consider a 25-year old college graduate earning $40,000 a year who works as a salesperson - an occupation with a negligible work-related risk of death. Suppose that he is now offered a different job, with a one in 10,000 annual risk of death, so that if 10,000 people work at this job for a year, then it is probable that a work-related accident will claim the life of one. If the individual is willing to accept a job with a one in 10,000 chance of death for an additional $5,000 in salary, then it would stand to reason, according to this theory, that he or she would accept certain death for 10,000 times this amount, or $50,000,000 dollars. Under the individual avoidance approach, this dollar amount is the value the college student places on his life.

> The third model is based on the cost-benefit analysis conducted by government agencies in deciding whether to adopt a safety regulation. In the early 1980s, President Ronald Reagan issued an executive order requiring federal agencies to do cost-benefit studies to justify their regulations. As a result, agencies such as the Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency began using a dollar value of human lives saved to support their regulations. According to Dr. Smith, most of these government studies "show a willingness to implement legislation at a cost of approximately two million dollars ($2,000,000) per life saved; very little legislation beyond three million ($3,000,000)."
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> After determining the total value of life, experts who subscribe to the WTP approach subject this amount to a "loss of the pleasure of life" (LPL) scale to determine hedonic damages. Under the LPL scale, an injury resulting in missed work and disruption of family life for a few days is rated "minimal" with a one to seventeen percent loss of the pleasure of life. On the far end of the scale, a person who is bedridden and requires daily nursing care has suffered a "catastrophic" loss eliminating eighty-three to one hundred percent of the pleasure of life. Thus, a mental health professional would rate "an individual's degree of diminution of life that has been experienced from the date of injury to the date of the evaluation and then estimates the degree of diminution of life over the individual's remaining life span." An expert can then apply the percentage, which may vary over the course of a person's lifetime, to the total dollar value of life to determine hedonic damages.

Victor E. Schwartz & Carry Silverman, Hedonic Damages: The Rapidly Bubbling Calderon, 69 Brooklyn L. Rev. 1037, 1061-64 (2004).

While the third model was not identified in his report as disregarded by Dr. Smith, he did testify at the 104 hearing that he only considered the first two (2) general groups in reaching his opinion of plaintiff's hedonic damages. At the hearing, Dr. Smith confirmed that the first model evaluates consumer behavior relative to the additional price a consumer is willing to pay for a safer product, but he acknowledged that the consumer-purchase studies upon which he relies do not take into account factors other than safety and that there are "thousands" of other factors why a consumer may buy a product which has a safety feature.

With respect to the second and final model Dr. Smith relied upon, he acknowledged that wage-risk premium studies do not take into account non-monetary

incentives such as talent requirements, hours, and a particular passion one may have for a certain type of work.

Based upon the average of the economic studies cited above, Dr. Smith estimates the average value of the generic life to be approximately $4.4 million in the year 2012 dollars with a life expectancy of 82.4 years.

Based upon a telephonic interview with the plaintiff that was performed by a staffer of Dr. Smith, which was reduced to working notes, a two page document marked as an exhibit at the hearing, plaintiff responded to the staffer's questions on how the accident impacted on her life under the following four (4) categories: Practical; Social; Occupational and Emotional. Then, in a final question, the claimant is asked to "assume" that prior to the accident her quality of life was 100% and to estimate the percentage of her quality of life as a result of the accident. Plaintiff's response was that "she believes her quality of life is now twenty percent (20%) of what it was before the accident." In other words, the plaintiff believed she suffered an eighty percent (80%) reduction of her quality of life as a result of the accident.

Dr. Smith then takes the generic value of life and applies them to a set of tables in his report. In doing so, Dr. Smith's estimate of plaintiff's loss of the value of life are calculated from the date of the accident, February 17, 2009, through an assumed trial/settlement date of August 1, 2013, and from that date thereafter based upon her life expectancy.

In these tables, Dr. Smith provides his "Higher Impairment Rating" related to plaintiff's estimate of her percentage loss of life value as a result of the accident of an

eighty percent (80%) impairment in the amount of $3,684,167, and, for pedagogical comparison, provides the mathematical computation of a Lower Impairment Rating based upon a forty percent (40%) impairment in the amount of $1,842,101. Dr. Smith emphasized that he does not give an opinion on what he believes the jury should find as to value but rather provides a comparison of a higher and lower rating to advise the jury how the value translates in dollars.

The Appellate Division, in State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000) explained that when a court is to admit a scientific method not previously approved by the Appellate Division or Supreme Court, it must meet the standard articulated in Frye v. United States, 293 F. 1013 (D.C. Cir.1923). Although Frye has been replaced in the federal court system in favor of the more lenient standards of Federal Rule of Evidence as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), in New Jersey, with the exception of toxic tort litigation, Frye remains the standard. The Frye test asks whether the scientific test is generally accepted in the relevant scientific community. That acceptance may be demonstrated as follows:

> A proponent of a newly-devised scientific technology can prove its general acceptance in three ways:
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> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;
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> (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; **and**
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> (3) by judicial opinions that indicate the expert's premises have gained general acceptance.
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> The burden to "clearly establish" each of these methods is on the proponent of the evidence.

State v. Doriguzzi, 334 N.J. Super. 530, 539 (App. Div. 2000).

New Jersey Rule of Evidence 702 provides:

> If 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.

In short, subject to Rules of Evidence 104 and 403, there are three basic requirements for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art that such an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

Dehanes v. Rothman, 158 N.J. 90, 100 (N.J. 1999) (citing State v. Kelly, 97 N.J. 178, at 108 (N.J. 1984)).

When the qualifications of an expert or the admissibility of certain evidence is in question, the Judge will hold a Rule 104 hearing.[2] If the expert is found to be qualified and the evidence to be admissible, the judge will then consider whether such testimony and evidence risks (1) undue prejudice, confusion of issues, or misleading the jury or (2) undue delay, waste of time, or needless presentation of cumulative evidence. N.J.R.E. 403.

This Court is aware that hedonic damages are different than pain and suffering. Hedonic damages, although in a separate category of pain and suffering, are

[2] New Jersey Rules of Evidence 104 provides, in relevant part:

> **(a)** ***Questions of admissibility generally.*** -- When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

nevertheless non-economic damages. In Sheck, relying heavily on Eyoma v. Falco, 247 N.J. Super. 435 (App. Div. 1991), the Court described hedonic damages as follows:

> Hedonic damages are those damages which flow from physical impairments which limit plaintiff's capacity to share in the amenities of life. . . . In New Jersey, damages for loss of enjoyment of life are non-pecuniary damages. These damages are encompassed within an injured party's disability and impairment. Actual loss of enjoyment of life is not a function of pain and suffering. Rather, it is an element of the permanent injury plaintiff has suffered. [Further], we concluded in Eyoma that the concept of diminished loss of enjoyment of life [is] not a concept that is too esoteric for a jury to understand and evaluate.

Sheck, supra, 2005 N.J. Super. Unpub. Lexis 178 at *11-12.

In dicta, the New Jersey Supreme Court has plainly stated that expert testimony is NOT permitted where the expert seeks to quantify non-economic damages. Dehanes v. Rothman, 158 N.J. 90, 100 (N.J. 1999). In Dehanes, the issue before the Court was whether an attorney during summary may suggest to a jury an aggregate sum or "bottom-line" figure to award for a claim of unliquidated damages. Though this specific issue is not before this Court, the Supreme Court's explanation of permissible expert testimony in the field of damages is highly instructive. In Dehanes, the Supreme Court explained that experts may testify as to economic damages because such damages can, to some extent, be objectively quantified. On the other hand, damages relating to pain and suffering are beyond the realm of expert testimony. Specifically, the Court explained:

> Some losses in life cannot be measured in dollars and cents. No expert can properly aid a jury in determining what is just compensation for non-economic damages such as pain and suffering. What measure can there be of the suffering sustained by one who loses an arm or a leg in an accident? The value of pain and suffering is simply beyond the reach of science:
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> No market place exists at which such malaise is bought and sold . . . . It has never been suggested that a standard of value can be found and applied. The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.

> "[T]he nature of pain and suffering [thus] remains intrinsically and intractably subjective, and, necessarily, any equation between pain, suffering, impairment and the like and monetary compensation remains elusive and speculative."

Dehanes, 158 N.J. at 97 (internal citations omitted).

Although, as explained in Sheck and Eyoma, hedonic damages are different than damages for pain and suffering, both are non-economic damages. Importantly, the Supreme Court's decision in Dehanes was specific to noneconomic damages – not pain and suffering. This is evident because the Court specifically stated "No expert can properly aid a jury in determining what is just compensation for non-economic damages such as pain and suffering. Dehanes, 158 N.J. at 97.

As explained above, the WTP model is based on three distinct economic analyses. A recent decision by the First Circuit of the Federal Court casts doubt as to the reliability of each of these three models, two of which were relied upon by Dr. Smith.

In Smith v. Dorchester Real Estate, Inc., 2013 U.S. App. LEXIS 20785 (1st Cir. Mass. Oct. 15, 2013), plaintiff was a schizophrenic trash collector who was fraudulently induced into acting as a straw buyer for two overvalued residential properties in Massachusetts. Plaintiff sued various entities and individuals involved in the transactions, including the mortgage lenders, mortgage brokers, real estate brokers, and closing agents. A jury returned a verdict in favor of plaintiff of his claims of fraud and breach of fiduciary duty. Two defendants appealed, inter alia, the trial court's admission of Dr. Stanley Smith's testimony as to hedonic damages. Smith, 2013 U.S. App. LEXIS 29785 at *1.

The First Circuit noted that it was not clear whether Plaintiff was entitled to hedonic damages but assumed for purposes of the appeal that such damages were

compensable. Smith, supra, 2013 U.S. App. LEXIS 29785 at *22. Therefore, the issue before the Court was whether Dr. Smith's testimony as to hedonic damages is admissible under Federal Rule of Evidence 702.

The Court observed that "[t]he overwhelming majority of courts have concluded that [Dr. Smith's] willingness-to-pay methodology is either unreliable or not likely to assist the jury in valuing hedonic damages." Smith, supra, 2013 U.S. App. LEXIS 29785 at *22. The following are a list of cases that the First Circuit cited as examples of Dr. Smith's testimony being rejected:

> Allen v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 37815 (D. Md. Mar. 19, 2013); Richman v. Burgeson, 2008 U.S. Dist. LEXIS 48349 (N.D. Ill. June 24, 2008); Davis v. ROCOR Int'l, 226 F.Supp.2d 839, 842 (S.D. Miss. 2002); Saia v. Sears Roebuck & Co., 47 F.Supp.2d 141, 148-50 (D. Mass. 1999); Brereton v. United States, 973 F.Supp. 752, 758 (E.D. Mich. 1997); Kurncz v. Honda N. Am., Inc., 166 F.R.D. 386, 388-90 (W.D. Mich. 1996); Ayers v. Robinson, 887 F.Supp. 1049, 1059-64 (N.D. Ill. 1995); Sullivan v. U.S. Gypsum Co., 862 F. Supp. 317, 321 (D. Kan. 1994); Mercado v. Ahmed, 756 F.Supp. 1097, 1103 (N.D. Ill. 1991), aff'd, 974 F.2d 863, 868-71 (7th Cir. 1992); see also Dorn v. Burlington N. Santa Fe R.R. Co., 397 F.3d 1183, 1195 n.5 (9th Cir. 2005).

The First Circuit then addressed each of the three studies upon which Dr. Smith's WTP model is based.[3]

First, as to the consumer-purchases studies, the Court noted that consumer purchases are not an adequate reflection of consumers' valuation of life because the studies fail to take into account factors other than safety. Specifically, the Court noted:

> [S]pending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions 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.

[3] (1) Consumer willingness to purchase safety devices; (2) worker willingness to accept higher compensation for a greater risk of death; and (3) the government's willingness to impose safety regulations on private industry and the cost of such regulation.

Smith, at 24 (citing Mercado v. Ahmed, 974 F.2d 863, at 871 (7th Cir. Ill. 1992)).

Likewise, the First Circuit found Dr. Smith's reliance on wage-risk premiums (the second set of studies) to be unreliable. Specifically, the Court noted:

> [A]s for the wage-risk premiums that Dr. Smith purportedly took into account, to say that the salary paid to those who hold risky jobs tells us something significant about how much we value life ignores the fact that humans are moved by more than monetary incentives.

Smith, at 24-25.

Finally, the First Circuit found to be improper Dr. Smith's reliance on studies of Government Health and Safety Regulations (third set of studies). The Court explicitly doubted that government policies are dictated solely by valuations of life and, therefore, do not provide an accurate factual basis upon which Dr. Smith can rely. The court explained:

> Finally, the cost of government health and safety regulations per life saved "may suggest a collective policy judgment the government has made, or may represent a policy selected for reasons other than the cost-benefit analysis "hedonic analysis" implies, or even a mistaken policy.

Smith, at 25.

In short, the First Circuit concluded that "Dr. Smith's method for valuing life is based on assumptions that appear to controvert logic and good sense." Smith at 25; citing Wilt v. Buracker, 443 S.E.2d 196, at 205 (W. Va. 1993).

Additionally, other courts have found Dr. Smith's testimony to be unreliable on other grounds. In reaching his estimate of hedonic damages, Dr. Smith assumes a "percentage reduction" in the ability of the plaintiff to live a normal life. In the case at bar, Dr. Smith assumes an impairment rating by the jury of 40-80%. See Smith Report, p.8. This assumption is arbitrary and, therefore, unreliable.

In Saia v. Sears Roebuck & Co., the United States District Court for the District of Massachusetts rejected the testimony of Dr. Smith because his assumption of plaintiff's impairment was arbitrary. In Saia, Dr. Smith assumed "a rating by a psychiatrist or a psychologist or trier-of-fact of 10 percent (10%) to 20 percent (20%) reduction in the ability of [plaintiff] to lead a normal life." Saia v. Sears Roebuck & Co., Inc., 47 F.Supp.2d 141, at 146 (D. Mass. 1999).

The Court concluded that the ten to twenty percent range utilized in Dr. Smith's report was arbitrary. The Court explained:

> As Dr. Smith testified, the ten to twenty percent range [of impairment reduction], and the resulting calculations, were simply illustrative. There were only two ways, Dr. Smith testified, to establish an actual rate for the diminished value of life. This takes place at the third step of Dr. Smith's proposed methodology. First, a "specific psychosocial evaluation" could be done by a psychiatrist or psychologist, for example, and given to a jury. . . Second, . . . the jury itself could establish the dimunition figure.
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> Saia, 47 F.Supp. at 146.

Consequently, Dr. Smith's testimony did not meet the reliability requirements imposed by the Federal Rules of Evidence.

Other federal courts and the Appellate Court in California have also debunked the validity of the "willingness to pay" model used by Dr. Smith.

In Sullivan v. United States Gypsum Co., 862 F. Supp. 317, 321 (D. Kan. 1994), the Court commented on Dr. Smith's theory as follows:

> This court's concern is that the willingness-to-pay studies upon which Mr. Smith's calculations are based have no apparent relevance to the particular loss of enjoyment of life suffered by a plaintiff due to an injury or death. The studies relied on by Mr. Smith do not use methodology designed to calculate the loss of enjoyment of life, yet are nonetheless extrapolated by Mr. Smith into what he claims to be valid data for calculating damages for both Mr. and Mrs. Sullivan's loss of enjoyment of life. Mr. and Mrs. Sullivan suffered totally distinct and different damages (Mrs. Sullivan died, Mr. Sullivan faces living without the support and companionship of his wife), yet, under Mr. Smith's analysis their damages are identical, save only an adjustment for differing the expectancy. The court finds that the proffered testimony of Mr. Smith simply fails in any real terms

> to provide a measure of the loss and affection to [plaintiff] due to his wife's death. The court does not believe that the distinct and personal relationship that Mr. Sullivan enjoyed with his wife has commercial value which can be determined by a comparison to the alleged value that society places on the contributions of a statistically average person.

In Ayers v. Robinson, 887 F. Supp. 1049, 1061-1062 (N.D. Ill. 1995), the Federal District Court in Illinois observed:

> By definition the willingness-to-pay model estimates the value of a statistical life--a nameless, faceless member of society. This Court's trial jury will have a very different task: It must value the life of a specific individual (Plaintiff), the quality of whose life may have been substantially richer or poorer than the statistical mean. Applying Hedonic Damages' definition of the hedonic value of life to persons in radically different situations illustrates the point. Compare under that definition (1) a person who is sick with one who is healthy or (2) someone very old with someone very young. Or compare (3) a person with a loving family with one who has none, or (4) someone with many friends versus someone who has none. Try it with an arguably tougher class of criteria--say (5) wealth, (6) race, (7) intelligence, (8) education, (9) sex, (10) character, (11) reputation--and the complexities become plain. That process reveals a lack of fit because the willingness-to-pay data upon which Hedonic Damages relies goes to one thing (value of a statistical life) while the jury is called upon to determine a potentially very different figure (value of Plaintiff's life).

The Federal Court in Sullivan, supra, 862 F.Supp. at 321, also commented on the jury's capability of determining the plaintiff's losses based on their own experiences.

> Plaintiff seeks to present expert testimony on precise damage calculations for loss of enjoyment of life. The court finds that such damages are, by their very nature, not amenable to such analytical precision. The court does not believe that such testimony would be helpful to the jury. The court believes that a jury is capable of determining these losses from its own experiences and knowledge, and through testimony by [Plaintiff], and further concludes that the proffered testimony of Mr. Smith would improperly invade the province of the jury.

In Loth v. Truck-A-Way Corp., 60 Cal. App. 4th 757 (Cal. App. 2d Dist. 1998), the Appellate Court in California made similar findings.

> A plaintiff's loss of enjoyment of life is not "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. No amount of expert testimony on the value of life could possibly help a jury decide that difficult question. A life is not a stock, car, home, or other such item bought and sold in some marketplace.

> Smith's impersonal method of valuing life assumes that for the most part, all lives have the same basic value. That has democratic appeal, but Smith used no democratic processes in reaching that conclusion or selecting which benchmark figures to consider in setting the baseline figure. There is no statute Smith could have turned to for guidance. Our Legislature has not decreed that all injured plaintiffs of the same age and with the same degree of disability should recover the same hedonic damages; nor has it assigned set values in tort cases for the loss of an eye, ear, limb, or life. Moreover, our judicial law prohibits trial counsel from referring to the amounts of jury verdicts in other cases.

Id. at 767.

> The figures Smith included in his baseline calculation have nothing to do with this particular plaintiff's injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life. The studies Smith used may help explain how much consumers will pay for safer products, or how much society should pay for government-mandated safety programs, but they shed no light on how to value this particular plaintiff's pain and suffering following the automobile accident. It is speculative, at best, to say the amount society is willing to spend on seat belts or air bags has any relationship to the intrinsic value of a person's life or the value of an injured plaintiff's pain and suffering. By urging the jury to rely upon a baseline value supported by factors having nothing to do with this plaintiff's individual condition, Smith's testimony created the possibility of a runaway jury verdict.

Id. at 768.

Based upon the Court's review of Dr. Smith's report, his testimony at the 104 hearing, its review of published articles on the concept of hedonic damages and the decisions of other jurisdictions, this Court concludes that Dr. Smith should not be permitted to testify as to hedonic damages because it (1) is based on unreliable methods that underpin the theory which ascribes a monetary value to loss of enjoyment of life, (2) would be unhelpful and misleading to the jury, and (3) is overly prejudicial.

The underlying studies upon which Dr. Smith relies related to the willingness to pay approach are imprecise and unreliable statistical models.

In addition, Dr. Smith never makes a specific evaluation of this plaintiff's particular value of life. Rather, he assumes that her value of life is average, and projects her losses based on a value of generic life of $4.4 million. Moreover, the

protocol followed by Dr. Smith's staff in soliciting information from a claimant, such as the plaintiff herein and her opinion on the percentage loss in her quality of life as a result of the accident, is speculative and arbitrary.

Finally, this type of testimony runs afoul of Rule 403 because Dr. Smith's testimony could cause undue prejudice by artificially inflating, or deflating, the value of plaintiff's life. Dr. Smith's inability to precisely state what plaintiff's value of life is necessarily means the jury will have to guess as to whether plaintiff's value of life is more or less than "average," and the jury has no basis to know what constitutes "average."

The Court finds that loss of enjoyment of life damages are not amenable to the analytical precision which is the subject of Dr. Smith's opinion. The Civil Model Charge 8.11, which explains to the jury the concept of damages related to "Disability, Impairment, and Loss of Enjoyment of Life, Pain and Suffering, is more than sufficient to properly place this issue before a jury which can avail itself of its own experiences and knowledge.

The Court grants defendants' motion to bar Dr. Smith's testimony as to hedonic damages. The appropriate order accompanies this opinion.

SO ORDERED.

BARRY P. SARKISIAN, J.S.C.