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The Price of Life: A Prediction of South Carolina's Approach to Expert Testimony on Hedonic Damages Using the Willingness-to-Pay Method

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THE PRICE OF LIFE: A PREDICTION OF SOUTH CAROLINA'S APPROACH TO EXPERT TESTIMONY ON HEDONIC DAMAGES USING THE WILLINGNESS-TO-PAY METHOD

I. INTRODUCTION

Courts disagree on the extent of relief required to compensate an injured plaintiff.[1] One such disagreement involves damages for the lost enjoyment of life,[2] known as hedonic damages. Some courts hold that an injured plaintiff is not entitled to recover for the lost enjoyment of life;[3] others view hedonic damages as an integral part of making an injured plaintiff whole and grant compensation for the reduction in the plaintiff's ability to enjoy life.[4] In those jurisdictions that recognize hedonic damages, only a minority allow expert

1. *See generally* Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1042–43 (2004) (explaining the disagreement between courts as to whether to award a certain type of damages).
2. *See id.* at 1038, 1042–43.
3. *See id.* at 1043.
4. *See id.* at 1042.

testimony to establish the value of the plaintiff's lost enjoyment of life.[5] South Carolina recognizes a right to hedonic damages as a compensable portion of an injured plaintiff's intangible loss[6] but has not addressed the admissibility of an economist's expert testimony on the value of a plaintiff's hedonic damages.

This Note examines whether expert testimony using the willingness-to-pay method to develop a monetary value for the lost enjoyment of life would be admissible in South Carolina. Part II provides an overview of hedonic damages by examining their origin, their treatment compared with other forms of recovery, and some criticisms of this form of damages. Part III examines the methods used to value hedonic damages and the jurisdictional disagreement as to whether to allow expert testimony using the willingness-to-pay method. Part IV argues that South Carolina courts would find expert testimony on hedonic damages inadmissible under South Carolina Rules of Evidence 702 and 403. Part V offers some concluding remarks.

A majority of courts find that expert testimony on hedonic damages is inadmissible.[7] South Carolina would likely adopt this majority position based on three principal grounds. First, such expert testimony fails to assist the trier of fact because the economic models that measure lost enjoyment of life only capture the value placed on the life of a statistically average person, and use sources too attenuated to capture a specific individual's value of enjoying life.[8] Second, South Carolina courts insist that intangible loss, by its very nature, is not quantifiable in a precise sense.[9] Because of this lack of precise measure, most jurisdictions, including South Carolina, do not require that damages for intangible losses be discounted to present value.[10] For similar reasons, per diem arguments are only allowed if clearly labeled as an argument and not as evidence.[11] Finally, unfair prejudice substantially outweighs any probative value of expert testimony in violation of Federal Rule of Evidence 403[12] and its South Carolina counterpart.[13]

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5. *See id.* at 1043.

6. *See* Boan v. Blackwell, 343 S.C. 498, 502, 541 S.E.2d 242, 245 (2001).

7. *See* Schwartz & Silverman, *supra* note 1, at 1043.

8. *See, e.g.*, Ayers v. Robinson, 887 F. Supp. 1049, 1061 (N.D. Ill. 1995) (describing how the willingness-to-pay model experts employ "estimates the value of a statistical life," rather than a specific individual).

9. *See, e.g.*, Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) ("Pain and suffering have no market price.").

10. *See* Rhodan v. United States, 754 F. Supp. 76, 78–79 (D.S.C. 1991) (citing Phillips v. United States, 575 F. Supp. 1309, 1314–15 (D.S.C. 1983)).

11. *See Edwards*, 244 S.C. at 281, 136 S.E.2d at 711.

12. *See Ayers*, 887 F. Supp. at 1062.

13. S.C. R. EVID. 403.

II. ORIGINS OF HEDONIC DAMAGES

Where a plaintiff suffers physical injury, tort damages aim to compensate for all injuries the defendant's wrongdoing proximately caused.[14] Traditionally, these injuries are divided into tangible and intangible components.[15] The tangible component consists of losses such as medical expenses and lost wages that employment earnings records and hospital bills confirm.[16] The intangible component of damages lacks the clarity that the sources used to confirm the tangible component provide.[17] Courts group the many components of intangible losses into two categories: (1) "pain and suffering," representing the "physiological experience resulting from bodily harm," and (2) "mental or emotional distress, which is the psychological response to an injury or threatened injury."[18] Courts disagree as to whether to categorize hedonic damages as a subcomponent of pain and suffering or as its own form of intangible loss, and whether to include the damages as part of the jury charge or in a special interrogatory.[19]

Though the term "hedonic damages" was not used until the 1980s,[20] courts have long considered damages for the loss of enjoyment of life to be an element of damages.[21] The term "hedonic" derives from the Greek word "hēdon(ē)" meaning "pleasure" or "pleasurable."[22] *Sherrod v. Berry*[23] is the first case to use the term "hedonic damages."[24] In *Sherrod*, a federal district court allowed an economist to testify regarding the value of a deceased plaintiff's enjoyment of life using complex economic models for the express purpose of helping the jury resolve the problem of valuing human life.[25] The expert defined the "hedonic value of life" as "the larger value of life, the life at the pleasure of society . . . the value including economic, including moral, including philosophical, including

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14. *See* 22 AM. JUR. 2D *Damages* § 122 (2003) (citing King v. Cooney-Eckstein Co., 63 So. 659, 661 (Fla. 1913)).

15. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 613 (4th ed. 2011).

16. *See id.*

17. *See id.*

18. *See id.* at 613–14.

19. *See* Schwartz & Silverman, *supra* note 1, at 1042–43.

20. *See id.* at 1041.

21. *See, e.g.*, Bassett v. Milwaukee N. Ry. Co., 170 N.W. 944, 946–47 (Wis. 1919) (quoting Benson v. Superior Mfg. Co., 132 N.W. 633, 637 (Wis. 1911)) (recognizing that the jury could consider "diminished capacity for enjoying life" in determining damages to injured plaintiff).

22. Schwartz & Silverman, *supra* note 1, at 1041.

23. 629 F. Supp. 159 (N.D. Ill. 1985), *rev'd en banc*, 856 F.2d 802 (7th Cir. 1988).

24. Schwartz & Silverman, *supra* note 1, at 1041; *see also Sherrod*, 629 F. Supp. at 163 (providing the first use of the term in this lawsuit).

25. *See Sherrod*, 629 F. Supp. at 162. Interestingly, the hedonic damages in this case represented a form of recovery from a wrongful death claim. *See id.* at 160. Of the states that recognize hedonic damages, many jurisdictions do not allow for the recovery of hedonic damages in a wrongful death suit. *See* Schwartz & Silverman, *supra* note 1, at 1042.

all the value with which you might hold life . . . ."[26] Other courts have since adopted the phrase and found that hedonic damages compensate a plaintiff's lost ability to "derive pleasure from the normal activities of daily life, or . . . to pursue his talents, recreational interests, hobbies, or avocations."[27] Although the Seventh Circuit reversed *Sherrod* on appeal without considering the expert testimony issue,[28] *Sherrod* laid the foundation for the debate surrounding the expert testimony of economists on the lost enjoyment of life.[29]

Jurisdictions that recognize hedonic damages disagree over the classification of such damages.[30] Some jurisdictions view hedonic losses merely as one of a variety of factors for the jury to consider when awarding damages for pain and suffering.[31] Other jurisdictions, including South Carolina, instruct the jury that hedonic damages is its own separate award of intangible loss.[32]

III. VALUING HEDONIC DAMAGES

Placing a value on intangible damages is a difficult and imprecise task.[33] Courts grapple with two possible methods to assist a jury in placing a value on an injured plaintiff's lost enjoyment of life.[34] The first possibility gives the jury complete latitude to determine the value of the plaintiff's lost enjoyment of life, guided by its own experience and testimony from the victim, the victim's family and friends, and expert psychologists.[35] This method of valuing hedonic loss is allowed as a matter of course in every jurisdiction that allows hedonic damages.[36] In addition to this type of evidence, the second method allows an economist to provide context for the calculation of damages by synthesizing various labor, consumer, and government studies concerning the economic value

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26. *Sherrod*, 629 F. Supp. at 163.

27. Boan v. Blackwell, 343 S.C. 498, 502, 541 S.E.2d 242, 244 (2001).

28. *See* Sherrod v. Berry, 856 F.2d 802, 807 (7th Cir. 1988).

29. *See Sherrod*, 629 F. Supp. at 164.

30. *See* Schwartz & Silverman, *supra* note 1, at 1042–43.

31. *See, e.g.*, Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990) (upholding jury instructions indicating that a loss of enjoyment of life is "an element of *disability*, *pain*, *and suffering*").

32. *See, e.g.*, Romero v. Byers, 872 P.2d 840, 846 (N.M. 1994); *Boan*, 343 S.C. at 502–03, 541 S.E.2d at 245 ("[A] separate charge on hedonic damages will minimize the risk that a jury will under- or over-compensate an injured person for her noneconomic losses. . . . In situations where the differences may be difficult to discern, defendants may request the submission of a separate interrogatory.").

33. *See generally* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 544 (2005) (discussing the difficulty of placing a value on a life).

34. *Compare* Smith v. Kmart Corp., 177 F.3d 19, 31 (1st Cir. 1999) (allowing the jury to place a value on the loss of opportunity to enjoy life after hearing testimony), *with* Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426, 433, 438 (Ohio Ct. App. 1998) (including an economist's expert testimony in evidence).

35. *See, e.g.*, *Smith*, 177 F.3d at 31 (allowing the jury to assess testimony).

36. *See* Jay M. Zitter, Annotation, *Excessiveness or Adequacy of Damages Awarded for Injuries to Nerves or Nervous System*, 51 A.L.R.5TH 467, 519 (1997).

of human life.[37] This method is considerably more controversial and has been admitted on relatively few occasions.[38]

A. The Accepted Methods

Where a plaintiff is injured, the jury is tasked with valuing all forms of intangible loss that the plaintiff can prove.[39] The jury's personal experiences along with other testimony that establishes the extent of the plaintiff's lost enjoyment of life, including testimony from the injured plaintiff herself as to the extent of her own lost enjoyment of life guides their determination.[40] In *Smith v. Kmart Corp.*,[41] the First Circuit upheld a $500,000 award for intangible losses, including lost enjoyment of life,[42] where a plaintiff was injured as a result of a falling cooler in a Kmart store.[43] The plaintiff testified that the accident impaired her ability to engage in many of the pleasurable pursuits of life, including traveling with her husband, performing household chores, and engaging in social activities such as dancing and taking aerobics.[44] In addition to the personal testimony of a plaintiff, individuals close to a plaintiff with knowledge of her activities before and after an injury may also testify to provide context for a plaintiff's lost enjoyment of life.[45] In *Smith*, the plaintiff's husband bolstered the jury's damage valuation by testifying that the plaintiff's social relationships and the couple's marital relationship suffered as a result of the accident.[46]

Courts also allow some type of expert testimony to aid the jury's determination of the lost enjoyment of life.[47] Medical experts may testify as to the extent of a plaintiff's physical injuries and the impact of those injuries on a plaintiff's normal life.[48] Additionally, a psychologist may testify to illustrate the

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37. *See, e.g.*, *Lewis*, 714 N.E.2d at 429–30, 436 (finding no abuse of discretion in admitting an economist's calculations where he compared his own figure with those established by OSHA and the Nuclear Regulatory Commission).

38. *See, e.g.*, *id.* at 438 (calling testimony based on the willingness-to-pay method "shaky but admissible" and stating that other cases support excluding such testimony (internal quotation marks omitted)).

39. *See* Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (quoting Harper v. Bolton, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962)).

40. *See, e.g.*, *Smith*, 177 F.3d at 23, 31 (illustrating testimony a jury might hear and providing that it was for the jury to weigh).

41. 177 F.3d 19.

42. *Id.* at 32.

43. *See id.* at 22.

44. *See id.* at 31.

45. *See, e.g.*, *id.* at 23–24 (presenting testimony from neighbors about plaintiff's changed behavior after an injury).

46. *See id.* at 23.

47. *See, e.g.*, Sumner v. United States, 794 F. Supp. 1358, 1364, 1369 (M.D. Tenn. 1992) (awarding damages for loss of enjoyment of life after experts testified at trial).

48. *See, e.g.*, *id.* at 1364 (expert testified on medical expenses).

extent of the plaintiff's psychological injuries resulting from an accident.[49] For example, in *Horton v. Channing*,[50] a Florida state court admitted a psychologist's testimony about the extent of psychological trauma a family suffered for several years following an accident.[51]

These forms of admissible testimony support a value of the lost enjoyment of life by providing the jury with context for the quality of the plaintiff's life and the extent it is impacted by an injury where the witness has firsthand knowledge of the plaintiff's injury.[52] The testimony of the plaintiff, the plaintiff's family, and a psychologist stops short of offering an opinion as to the monetary value the jury should assign to the lost enjoyment of life. Where such determinations are reserved for the jury, courts are willing to allow plaintiffs to offer considerable evidence supporting the impact of an injury on the enjoyment of life.[53]

B. Expert Testimony Based on the Willingness-to-Pay Method

Courts are less willing to admit testimony where an expert, without firsthand knowledge of a plaintiff's life or injury, uses generic statistical data to offer the jury a concrete, specific value for the lost enjoyment of life.[54] In *Sherrod*, the first case to address this conflict, the court allowed an economist to present forensic evidence establishing the value individuals place on the enjoyment of life.[55] Although the case was subsequently overturned on grounds other than the admissibility of the expert,[56] the impact of the decision continues to resonate.[57]

Though the details of the statistical approach vary, all of them can be traced back to economist Stanley Smith, who adopted a "willingness-to-pay" approach.[58] Smith, a University of Chicago-trained economist,[59] is considered a

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49. *See* Horton v. Channing, 698 So. 2d 865, 868 (Fla. Dist. Ct. App. 1997) (quoting Angrand v. Key, 657 So. 2d 1146, 1148–49 (Fla. 1995)).

50. 698 So. 2d 865.

51. *See id.* at 868.

52. *See id.* (quoting *Angrand*, 657 So. 2d at 1148–49).

53. *See, e.g.*, Smith v. Kmart Corp., 177 F.3d 19, 23–24 (1st Cir. 1999) (allowing multiple witnesses to testify).

54. *See, e.g.*, Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 711 (1964) (stating that while evidence helps to establish the amount of damages to award, only the jury can "place a monetary value thereon").

55. Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985), *rev'd en banc*, 856 F.2d 802 (7th Cir. 1988). Interestingly, the United States District Court for the Northern District of Illinois would later reconsider the issue and hold that expert economic testimony was not admissible to establish the value of hedonic damages. *See* Mercado v. Ahmed, 756 F. Supp. 1097, 1103 (N.D. Ill. 1991).

56. *See* Sherrod v. Berry, 856 F.2d 803, 807 (7th Cir. 1988).

57. *See, e.g.*, Banks v. Sunrise Hosp., 102 P.3d 52, 62 (Nev. 2004) (citations omitted) (explaining the split in the courts as to whether to allow economists to testify and deciding to adopt the approach that they are allowed to do so); Schwartz & Silverman, *supra* note 1, at 1041 (giving credit to the economist in the case for coining the term "hedonic damages").

58. *See* Schwartz & Silverman, *supra* note 1, at 1061.

59. Mercado v. Ahmed, 974 F.2d 863, 868 (7th Cir. 1992).

leading authority on using economic theory to value the lost enjoyment of life.[60] Simply put, the willingness-to-pay method derives a value of human life by first determining the statistical yearly net hedonic value of life, representing the value the average individual places on the enjoyment of life.[61] Second, a psychologist derives the individual plaintiff's "lost pleasure of life," representing the extent the plaintiff's life is impaired from the injury.[62] The net hedonic value of life is then multiplied by the plaintiff's lost pleasure of life to determine a yearly value for the individual plaintiff's hedonic loss.[63] Finally, the plaintiff's yearly net hedonic loss is multiplied by the plaintiff's life expectancy to determine a lump sum owed to the plaintiff to compensate for the lost enjoyment of life, which is then discounted to present value.[64] The method is explained in more detail below.

The statistical yearly net hedonic value of life is first derived by determining the value of life as a whole through willingness-to-pay studies.[65] These studies determine the value of life by measuring how much an individual is "willing to pay" to reduce her risk of injury or how much an individual would accept to increase her risk of injury.[66] Smith and other expert economists value life through three categories: consumer-market studies, labor studies, and cost–benefit studies from regulatory agencies.[67]

Consumer-market studies value human life by observing how much an individual is willing to spend on safety devices, such as smoke detectors or airbags, and dividing that spending by the amount those devices reduce an individual's probability of dying.[68] For example, assume that a consumer's decision to buy airbags in a car reduces her probability of death from two in 10,000 to one in 10,000—a difference of one in 10,000. If a particular consumer spent $500 to have airbags installed in her car, Smith would argue that she places a value on her life of $5,000,000.[69]

Labor-market-willingness-to-pay studies provide the value a worker places on her life as evidenced by the additional compensation she will demand to take

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60. *See, e.g.*, Schwartz & Silverman, *supra* note 1, at 1061 (referring to Smith as an expert "who literally wrote the book on hedonic damages").

61. *See* Edward P. Berla et al., *Hedonic Damages and Personal Injury: A Conceptual Approach*, J. FORENSIC ECON., Dec. 1989, at 4–5.

62. *See id.* at 1, 5.

63. *See id.* at 5.

64. *See id.* Many jurisdictions use treasury tables as a guide for life expectancy. *See id.* South Carolina uses a different table, enacted by statute, to determine life expectancy in litigation. S.C. CODE ANN. § 19-1-150 (1976).

65. *See id.* at 4.

66. *See* Dennis C. Taylor, Note, *Your Money or Your Life?: Thinking About the Use of Willingness-to-Pay Studies to Calculate Hedonic Damages*, 51 WASH. & LEE L. REV. 1519, 1521 (1994).

67. *See id.* at 1524.

68. *See* Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 102–03 (1990).

69. *$500 ÷ (1/10,000) = $5,000,000.*

on riskier work, which is an extension of Adam Smith's discussion in *The Wealth of Nations*.[70] This information enables economists to calculate the value of life by taking the additional amount an individual demands to take on riskier employment and dividing the additional compensation by the increased probability of dying.[71] For example, assume that a window washer demands $500 in additional compensation to move from washing windows on the first floor to washing windows on the twentieth floor of a skyscraper. Assuming that the additional nineteen-story suspension increases the window washer's probability of death from one in 10,000 to two in 10,000, economists assert that the window washer values her life at $5 million.[72]

Cost–benefit studies conducted by government agencies and used to value regulations provide a third type of data for valuing human life.[73] The range of numbers that government agencies use is hardly consistent, ranging from a value of life by the Consumer Product Safety Commission at a mere $70,000 up to $132 million by the Food and Drug Administration.[74]

The willingness-to-pay method aggregates the observations of all three kinds of studies to arrive at the value of life for a "statistically average person."[75] This amount is used to calculate the net hedonic value of life by taking the value of a statistically average life and subtracting out all "non-hedonic" value of life, including the value of lost earnings, fringe benefits, and household services.[76] The economist breaks this net hedonic value of life into a yearly amount by dividing the net hedonic value by the remaining life expectancy of an average person.[77] Consider the following example:

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70. *See* McClurg, *supra* note 68, at 102 (citing Richard Thaler & Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, *in* HOUSEHOLD PRODUCTION AND CONSUMPTION 265, 266 (Nestor E. Terleckyj ed., 1976)); *see also* 1 ADAM SMITH, THE WEALTH OF NATIONS 88–107 (Ernest Rhys ed., J.M. Dent & Sons Ltd. 1933) (1976) (for this discussion).

71. *See id.*

72. This computation functions in the same manner as the air bag example above. *$500 ÷ (1/10,000) = $5,000,000.*

73. *See* McClurg, *supra* note 68, at 106 & n.214 (citing Clayton P. Gillette & Thomas D. Hopkins, Federal Agency Valuations of Human Life: A Report to the Administrative Conference of the United States 2 (Dec. 7, 1988) (unpublished report) (on file with the University of Dayton Roesch Library)).

74. *See id.* (citing Gillette & Hopkins, *supra* note 73, at 2).

75. *See* Berla et al., *supra* note 61, at 5.

76. *See id.*

77. *See id.* The Seventh Circuit stated, "The statistically average person is 31 years old with a 45 year additional life expectancy." Mercado v. Ahmed, 974 F.2d 863, 869 (7th Cir. 1992). In the interest of simple math, the following in-text example adopts a fifty-year remaining life expectancy.

$5,000,000	Value of life of a statistically average person (determined through consumer-market studies, labor studies, and government cost–benefit studies)
Minus $2,000,000	Value of average lost earnings, fringe benefits, and household services
Equals $3,000,000	Net hedonic value of life
Divided by 50	Remaining life expectancy of average person
Equals $60,000	**Yearly net hedonic value of life**

Once the economist determines a yearly net hedonic value of life, the calculation then yields to the expertise of a psychologist.[78] In the second phase of the willingness-to-pay model, the yearly net hedonic value of life is multiplied by the plaintiff's lost pleasure of life.[79] The psychologist evaluates the mental health impacts of the plaintiff's injury on the Lost Pleasure of Life Scale (LPL Scale), ranging from zero to 100 as the plaintiff's injury becomes more severe.[80] The LPL Scale measures the percentage of a plaintiff's lost pleasure of life in multiple areas including everything from the ability to feed oneself, to interacting with loved ones, to the lost ability to derive pleasure from a choice of occupation.[81] These measures vary depending on the injury and may not remain constant over the plaintiff's life; therefore, psychologists are instructed to take this variance into account.[82] For instance, a psychologist may testify that the plaintiff's lost pleasure of life will be extreme for three years following the accident and then will decline to a minimal level for the rest of the plaintiff's life.[83] In that case, the LPL Scale measure would be highest in the first three years and then would fall to some lower measure as defined by the psychologist.[84] Assuming for simplicity, however, that a psychologist determined that the plaintiff lost thirty percent of her enjoyment of life as a result of the injury the defendant caused, this component of the willingness-to-pay model would be calculated as follows:

$60,000	Yearly net hedonic value of life of statistically average person
Times 30%	Plaintiff's lost pleasure of life
Equals $18,000	**Plaintiff's yearly net hedonic value of life**

The remaining life expectancy of the plaintiff—the third component of the willingness-to-pay model—is multiplied by the plaintiff's yearly net hedonic

78. *See* Berla et al., *supra* note 61, at 5.
79. *See id.*
80. *See id.* at 2–4 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 11, 18–19 (3rd ed. 1987)).
81. *See id.* at 2.
82. *See id.* at 3–4.
83. *See id.* at 4.
84. *See id.*

value of life to arrive at the plaintiff's individual hedonic value of life.[85] Assuming that the hypothetical plaintiff above has a remaining life expectancy of twenty years, the economist would discount the $18,000 yearly net hedonic value of life (over the remaining twenty-year life expectancy) to its present value to arrive at a final number to present to the jury as representing the plaintiff's lost pleasure of life.[86]

C. Other Jurisdictions' Treatment of the Willingness-to-Pay Method

1. Majority Rule: Testimony Based on the Willingness-to-Pay Method Inadmissible

A majority of courts hold that expert testimony using the willingness-to-pay method is inadmissible under Federal Rules of Evidence 702 and 403 based on several principal objections.[87] First, the willingness-to-pay method values the "hypothetical person," rather than the individual plaintiff in the suit, making such testimony irrelevant and thus inadmissible under Rule 702.[88] Whether the plaintiff is a thirty-two-year-old billionaire triathlete or a ninety-five-year-old nursing-home patient that can barely get out of bed, the value of the lost enjoyment of life is presumed to be the same.[89]

Second, the willingness-to-pay method rests on faulty assumptions.[90] Consumer willingness-to-pay studies fail to consider that some individuals are more willing or able to spend money on safety than others.[91] The method also ignores human susceptibility to marketing and pressures to be a "cautious" person.[92] Similarly, labor studies rest on the questionable assumption that an individual's choice of employment is entirely motivated by monetary incentive and that humans accurately perceive risk.[93]

Third, the willingness-to-pay method has not gained fundamental acceptance in the economics community.[94] In *Ayers v. Robinson*,[95] the United States District Court for the Northern District of Illinois took particular exception to the assertion that the willingness-to-pay method as applied to hedonic loss was

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85. *See id.* at 5.
86. *See id.*
87. *See id.* Most states have adopted some version of the Federal Rules of Evidence. *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T1 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) (listing states that have adopted the Federal Rules of Evidence). Each rule is explored in detail below.
88. *See* Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 92 (Colo. App. 1997).
89. *See id.*
90. *See* Mercado v. Ahmed, 974 F.2d 863, 870–71 (7th Cir. 1992).
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. 887 F. Supp. 1049 (N.D. Ill. 1995).

entrenched in the economics community, finding that the expert's tracing his valuation of human life back to Adam Smith's *The Wealth of Nations*, "coats [the] novel use of a quite recent economic theory with a vintage veneer that it does not deserve."[96] Additionally, the Seventh Circuit found it "irrefutable" that there was "no expert consensus supporting [the expert's] methodology."[97]

Fourth, the value of a human life resulting from these studies is so widely varied that the valuations cannot be considered reliable under Rule 702.[98] Finally, courts fear that expert testimony on hedonic damages usurps the power of a jury; thus, the unfair prejudice to the defendant outweighs the probative value of testimony using the willingness-to-pay method, in violation of Rule 403.[99] Because loss of enjoyment of life is inherently subjective, the jury is in the best position to make an individualized determination as to the value of a particular plaintiff's enjoyment of life.[100] For example, the Supreme Court of Hawaii affirmed a trial court's decision not to allow expert testimony on hedonic damages finding that an economist could not assist the jury because "an economist is no more expert at valuing the pleasure of life than the average juror."[101]

2. *Minority Rule: Testimony Based on the Willingness-to-Pay Method Admissible*

Jurisdictions that allow expert testimony using the willingness-to-pay method to value hedonic damages pursuant to Federal Rules of Evidence 702 and 403[102] generally find the testimony admissible for three reasons. First, the willingness-to-pay method is the subject of substantial peer review in the economics community.[103] Second, the willingness-to-pay method is admissible because economists have expertise to assist the jury in determining the "monetary value of intangibles."[104] Third, parties defending against the willingness-to-pay method are free to offer their own experts to make the jury

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96. *Id.* at 1063.

97. *See Mercado*, 974 F.2d at 871. Interestingly, Stanley Smith was the expert offered in this case. *See id.* at 868; *see also supra* notes 58–60 and accompanying text (discussing Stanley Smith).

98. *See* Schwartz & Silverman, *supra* note 1, at 1067 (quoting *Ayers*, 887 F. Supp. at 1061 n.4).

99. *See id.*

100. *See* Montalvo v. Lapez, 884 P.2d 345, 366 (Haw. 1994) (quoting Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992)).

101. *Id.*

102. *See, e.g.*, Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426, 433, 438 (Ohio Ct. App. 1998) (finding the testimony based on the willingness-to-pay method "shaky but admissible" under Federal Rule of Evidence 702). *See generally* FED. R. EVID. 403 (allowing a court to "exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"); FED. R. EVID. 702 (requirements regarding expert testimony).

103. *See Lewis*, 714 N.E.2d at 436.

104. *See* Banks v. Sunrise Hosp., 102 P.3d 52, 63 (Nev. 2004).

aware of the flaws of the willingness-to-pay method.[105] These decisions, however, are in the decided minority.[106]

IV. EXPERT TESTIMONY USING THE WILLINGNESS-TO-PAY METHOD IN SOUTH CAROLINA

The courts of South Carolina have not yet had the occasion to decide whether expert economic testimony on hedonic damages is admissible. While many states determine the admissibility of expert testimony under the federal standard outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[107] the South Carolina Supreme Court declined to adopt *Daubert* in *State v. Council*[108] and, instead, opted to evaluate expert testimony under the interpretation of the South Carolina Rules of Evidence (SCRE).[109] Under this approach, a court first evaluates the expert's testimony under SCRE 702 and may only admit the expert's testimony if: (1) the evidence "will assist the trier of fact," (2) the expert is qualified by "knowledge, skill, experience, training, or education," and (3) the science underlying the expert's testimony is reliable.[110] If testimony is admissible under SCRE 702, a court then looks to SCRE 403 to determine if the probative value of the expert's evidence is substantially outweighed by any potential prejudice.[111]

A. Admissibility Under South Carolina Rule of Evidence 702

1. Assists the Trier of Fact

Under SCRE 702, expert testimony assists the trier of fact when the offering party can show that the "subject matter [of the expert's testimony] is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury."[112] The jury's ultimate role in any case is to be the finder of fact;[113] it

105. *See id.*

106. *See* Schwartz & Silverman, *supra* note 1, at 1043.

107. 509 U.S. 579 (1993).

108. 335 S.C. 1, 515 S.E.2d 508 (1999).

109. *See id.* at 20, 515 S.E.2d at 518; *see also* HUBBARD & FELIX, *supra* note 15, at 197 n.111 (citing *Council*, 335 S.C. at 20, 515 S.E.2d at 518; Kari Thorsvold, Note, *Guarding the Gate to Expert Testimony*, Kumho Tire Co. v. Carmichael *and* State v. Council, 51 S.C. L. REV. 965, 978–79 (2000)) (explaining that the two tests are "functionally very similar").

110. *See Council*, 335 S.C. at 20 & n.15, 515 S.E.2d at 518 & n.15 (quoting S.C. R. EVID. 702).

111. *See id.* (citing S.C. R. EVID. 403, 702).

112. Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

113. *See* Day v. Kilgore, 314 S.C. 365, 368, 444 S.E.2d 515, 517 (1994) (citing Morrison v. State, 845 S.W.2d 882, 885 (Tex. Crim. App. 1992)).

must assess the credibility of witnesses[114] and apply the law as provided by the trial judge to determine the extent of any relief due to an injured plaintiff.[115]

Expert testimony clearly assists the jury where it explains a complex issue not understood by the average juror and is based on concrete and reliable information.[116] For example, litigants routinely call economists as experts to assist the trier of fact in a wrongful death case to provide the jury with a present value of the decedent's lost income.[117] Such calculations require considerable economic expertise far beyond the average juror's abilities.[118] Thus, where an economist offers such expert testimony on lost income, it assists the trier of fact by minimizing unnecessary speculation that the jury is not qualified to make.[119] However, where the expert testifies as to the amount of intangible loss required to compensate an injured plaintiff, reliable data are simply not present because such damages are not readily observable, as compared to earning capacity.[120] Therefore, South Carolina courts limit an attorney's ability to present a per diem value for intangible loss[121] and do not discount intangible loss to present value,[122] in both instances finding intangible loss too speculative to arrive at any value apart from the jury's discretion.[123] Similarly, South Carolina courts would likely not allow expert testimony based on the willingness-to-pay method under SCRE 702.

Courts allow experts to testify regarding intangible loss in certain limited circumstances.[124] Medical experts, for example, may testify as to the extent of the physical injury sustained by an injured plaintiff in order to aid the jury in valuing pain and suffering.[125] Similarly, mental health experts may assist the jury in understanding the extent of psychological damage suffered by an injured plaintiff to value pain and suffering and lost enjoyment of life.[126] Expert testimony in these instances is, however, limited to understanding the *extent* of

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114. *See* State v. Aleksey, 343 S.C. 20, 29, 538 S.E.2d 248, 252–53 (2000).

115. *See* Harper v. Bolton, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962).

116. *See Watson*, 389 S.C. at 445–46, 669 S.E.2d at 175.

117. *See, e.g.*, Jackson v. Price, 288 S.C. 377, 379–80, 342 S.E.2d 628, 630 (Ct. App. 1986) ("An economist, qualified as an expert witness in calculating financial losses in wrongful death cases, testified for [the plaintiff].").

118. *See* 22 AM. JUR. 2D, *supra* note 14, § 769 (citing Hughes v. Pender, 391 A.2d 259, 262 (D.C. 1978)).

119. *See id.* (citing *Hughes*, 391 A.2d at 263).

120. *See* HUBBARD & FELIX, *supra* note 15, at 613.

121. *See, e.g.*, Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 711 (1964) (stating that counsel should refrain from giving a per diem value because "only the jury [can] place a monetary value thereon").

122. *See* Rhodan v. United States, 754 F. Supp. 76, 78–79 (D.S.C. 1991) (citing Phillips v. United States, 575 F. Supp. 1309, 1314–1315 (D.S.C. 1983)).

123. *See id.* at 78 & n.10; *Edwards*, 244 S.C. at 281, 136 S.E.2d at 711.

124. *See, e.g.*, Sweeney v. Car/Puter Int'l Corp., 521 F. Supp. 276, 283–84 (D.S.C. 1981) (allowing doctors to testify about plaintiff's "emotional scars" and psychological impairment from a boating accident).

125. *See* Scott v. Porter, 340 S.C. 158, 171, 530 S.E.2d 389, 395 (Ct. App. 2000).

126. *See Sweeney*, 521 F. Supp. at 283–84, 289.

the intangible harm caused by the injury and does not extend to the economic value of the harm.[127]

South Carolina cases emphasize that an award for hedonic damages requires *jurors* to award "money for injuries which are not readily reducible to specific amounts."[128] Although South Carolina courts have offered no further insight into hedonic damages, courts yield to the jury in valuing similar intangible loss.[129] In *Smalls v. South Carolina Department of Education*,[130] a pick-up truck struck and killed an eight-year-old girl as she crossed the street to board the school bus.[131] The jury awarded damages of $310,000, an amount which exceeded the child's medical bills by more than $250,000 and included compensation for pain and suffering.[132] In upholding the jury's value of damages, the court noted that "[t]he jury's determination of damages . . . is entitled to substantial deference."[133] Therefore, a jury's determination as to hedonic damages would likely be afforded the same deference.

Additionally, South Carolina's restriction on the use of the per diem method of valuing pain and suffering indicates that courts would find that an economist's testimony on hedonic damages would not assist the trier of fact.[134] The per diem method of valuing pain and suffering is calculated by defining the amount of a plaintiff's pain and suffering for a specified time period and multiplying it by the amount of time the plaintiff will suffer.[135] South Carolina allows attorneys to argue that the jury should adopt such a method for valuing a plaintiff's pain and suffering provided that the attorney makes clear that the determination of the value rests entirely with the jury.[136] In *Edwards v. Lawton*,[137] the South Carolina Supreme Court held that the plaintiff's attorney could argue the per diem method to value pain and suffering because the attorney emphasized that "only the jury could place a monetary value" on pain and suffering.[138] The court concluded, "[D]amages for pain and suffering are unliquidated and indeterminate in

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127. *See id.* at 284.

128. Boan v. Blackwell, 343 S.C. 498, 502, 541 S.E.2d 242, 245 (2001) ("[A] separate charge on hedonic damages will minimize the risk that a jury will under- or over-compensate an injured person for her noneconomic losses. . . . In situations where the differences may be difficult to discern, defendants may request the submission of a separate interrogatory.").

129. *See, e.g.*, Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000) (stating that a "jury's determination of damages" in a survival action are "entitled to substantial deference").

130. 339 S.C. 208, 528 S.E.2d 682.

131. *See id.* at 214, 528 S.E.2d at 685.

132. *See id.* at 215, 528 S.E.2d at 685.

133. *Id.* at 215, 528 S.E.2d at 686.

134. *See* Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 711 (1964).

135. *See* 22 AM. JUR. 2D, *supra* note 14, § 222 (citing Giant Food Inc. v. Satterfield, 603 A.2d 877, 878–79 (Md. Ct. Spec. App. 1992); Graeff v. Baptist Temple, 576 S.W.2d 291, 302 (Mo. 1978); Combined Ins. Co. of Am. v. Sinclair, 584 P.2d 1034, 1050 (Wyo. 1978)).

136. *See Edwards*, 244 S.C. at 281, 136 S.E.2d at 711.

137. 244 S.C. 276, 136 S.E.2d 708.

138. *See id.* at 281, 136 S.E.2d at 711.

character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial [j]udge."[139] Since the courts of South Carolina do not allow a plaintiff's attorney to suggest a value for pain and suffering, it is unlikely that a court would be willing to admit an economist's testimony to value hedonic damages.[140]

Furthermore, South Carolina courts do not permit the discounting of intangible damages to present value.[141] Expert testimony in reliance on the willingness-to-pay method necessarily requires discounting to present value in contravention of this principle.[142] Once the expert has arrived at the plaintiff's yearly hedonic damages, the expert then discounts the plaintiff's hedonic loss to present value.[143] Therefore, courts would find that such testimony does not assist the trier of fact.

Expert testimony that places a mathematically ascertainable value on hedonic damages stands in stark contrast to South Carolina courts' repeated insistence that intangible damages, both hedonic damages[144] and damages for pain and suffering,[145] have no value apart from the jury's subjective determination. Therefore, South Carolina courts are unlikely to find that an economist's expert testimony assists the trier of fact in its determination of hedonic damages.

2. *Expert Qualification*

The party offering expert testimony meets the expert qualification requirement under SCRE 702[146] if the expert has knowledge or skill in a profession or science which makes her more "qualified than the jury to form an opinion on the particular subject of [the expert's] testimony."[147] Any defects in an expert's education and experience "go to the weight [of the expert's testimony] rather than the admissibility" of such testimony.[148]

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139. *Id.* at 281, 136 S.E.2d at 710 (citing Wright v. Gilbert, 227 S.C. 334, 338, 88 S.E.2d 72, 75 (1955)).

140. The Illinois Appellate Court embraced a similar argument to find an economist's expert testimony on hedonic damages inadmissible. *See* Fetzer v. Wood, 569 N.E.2d 1237, 1244–47 (Ill. App. Ct. 1991) (citations omitted).

141. *See* Rhodan v. United States, 754 F. Supp. 76, 78–79 (D.S.C. 1991) (citing Phillips v. United States, 575 F. Supp. 1309, 1314–15 (D.S.C. 1983)).

142. *See* Berla et al, *supra* note 61, at 5.

143. *See id.*

144. *See* Boan v. Blackwell, 343 S.C. 498, 502, 541 S.E.2d 242, 245 (2001).

145. *See* Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (quoting Harper v. Bolton, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962)).

146. *See* S.C. R. EVID. 702.

147. Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011) (quoting Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997)) (citing S.C. R. EVID. 702).

148. *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (citing Lee v. Suess, 318 S.C. 283, 286, 457 S.E.2d 344, 346 (1995)).

A trained economist likely possesses the necessary qualifications to make the complex calculations and adjustments the willingness-to-pay model requires to estimate hedonic damages.[149] However, assuming that the court finds that the testimony is not helpful to the jury, then the expert's qualification, no matter how impressive, is irrelevant.[150] As noted above, South Carolina courts defer to the jury's discretion to value a plaintiff's noneconomic damages.[151] Thus, a South Carolina court may find that the economist lacks any specialized knowledge to be better informed than the jury regarding the appropriate value of a plaintiff's hedonic loss.[152]

However, this requirement under SCRE 702 poses the smallest threat to the admissibility of economic testimony on hedonic damages because, while many courts hold that expert testimony on hedonic damages is inadmissible, the objections to the testimony typically go to the utilized methodology rather than the expert's qualifications.[153] Therefore, while a court may take exception to an economist's qualifications to value hedonic loss above the jury, the testimony will likely be inadmissible on other grounds.

3. Reliability

The final hurdle for admissibility of expert testimony under SCRE 702 is that the science underlying the expert's testimony must be reliable under the

149. For example, Stanley Smith, the economist credited with developing the method to place a value on hedonic damages, is regularly called to testify as an expert. *See, e.g.*, Sherrod v. Berry, 629 F. Supp. 159, 162 (N.D. Ill. 1985), *rev'd en banc*, 856 F.2d 802 (7th Cir. 1988) (Smith testified as an expert.); Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 574 (Ct. App. 1998) (same); K.M Leasing, Inc. v. Butler, 749 So. 2d 310, 319 (Miss. Ct. App. 1999) (same); Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 741 (Neb. 1995) (same). Smith has made substantial contributions to the economic study of hedonic loss. *See generally* Berla et al., *supra* note 61 (article describing how to calculate hedonic damages co-authored by Smith).

150. *See supra* Part IV.A.1. In the landmark *Daubert* case, in footnote two, the court outlined the impressive credentials of the experts at issue. Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579, 583 n. 2 (1993). On remand to the Ninth Circuit, the court said of the expert qualification requirement that "something doesn't become 'scientific knowledge' just because it is uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were 'derived by scientific method' be deemed conclusive, else the Supreme Court's opinion could have ended with footnote two. . . . [T]herefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to 'scientific knowledge,' constitutes 'good science,' and was 'derived by the scientific method.'" Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315–16 (9th Cir. 1995).

151. *See* Harper v. Bolton, 239 S.C. 541, 547–48, 124 S.E.2d 54, 57 (1962) (citing Wright v. Gilbert, 227 S.C. 334, 338, 38 S.E.2d 72, 75 (1955)).

152. *See, e.g.*, Montalvo v. Lapez, 884 P.2d 345, 366 (Haw. 1994) (finding that an expert economist is "no more expert at valuing the pleasure of life than the average juror").

153. *See, e.g.*, Ayers v. Robinson, 887 F. Supp. 1049, 1063 (N.D. Ill. 1995) (criticizing the expert's methodology).

standard the South Carolina Supreme Court adopted in *State v. Council*.[154] The court evaluates the reliability of expert testimony using the following factors:

> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.[155]

An examination of each factor of the reliability inquiry reveals that a South Carolina court would likely find expert economic testimony on hedonic damages inadmissible on the grounds of unreliability.

a. Publications and Peer Review of Willingness-to-Pay Method

Using economic models to value human life has been a matter of considerable controversy in the economics community for a number of years, starting with Adam Smith's *The Wealth of Nations*, first published in 1776.[156] In this foundational economic work, Smith suggested that coal miners would demand higher wages for taking on increased risks associated with employment.[157] T.C. Shelling transformed Smith's work into a method of valuing life in an article published in 1960, suggesting that Smith's wage–risk model could be used to provide a cost–benefit analysis for government regulations.[158] Since Schelling's work, considerable economic literature has explored the use of occupational and safety decisions to value human life.[159]

Although the measurement of the value of human life through willingness-to-pay studies is the subject of considerable discussion in the economics community, economists do not agree on the accuracy of these studies to value human life.[160] For example, economist Glenn Blomquist called into question the use of valuing human life through labor studies on foregone earnings, arguing:

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154. 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

155. *Id.* at 19, 515 S.E.2d at 517 (citing State v. Ford, 301 S.C. 485, 488–89, 392 S.E.2d 781, 783 (1990)).

156. *See* 1 SMITH, *supra* note 70, at 88–107.

157. *See Ayers*, 887 F. Supp. at 1063 (citing 1 SMITH, *supra* note 70, at 93). The court mentions, however, that Smith was quick to point out that humans were poor at appreciating the true risk of an activity. *See id.* at 1062 (citing 1 SMITH, *supra* note 70, at 96–99).

158. *See id.* at 1063 (citing T.C. Shelling, The Life You Save May Be Your Own, *in* PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127 (Samuel B. Chase, Jr. ed., 1968)).

159. *See, e.g.*, Bryan C. Conley, *The Value of Human Life in the Demand for Safety*, 66 AM. ECON. REV. 45, 45–46 (1976) (undermining Schelling's study by suggesting that above a relatively low income level, persons valued their life at amounts greater than discounted earnings and discounted consumption); *see also* Glenn Blomquist, *Value of Life Saving: Implications of Consumption Activity*, 87 J. POL. ECON. 540, 542–46 (1979) (developing an empirical model for valuing human life on the basis of seat belt use).

160. *See, e.g.*, Blomquist, *supra* note 159, at 540 (calling the method "unsatisfactory").

> Despite its numerical manageability, [valuing life on the basis of] foregone earnings is unsatisfactory because there is little theoretical basis for its use. Foregone earnings neglect the value of nonmarket activity as well as the surplus value of living and unreasonably imply that the value of life saving for self-sufficient persons, housewives, and retirees is zero.[161]

Even economic works that analyze the willingness-to-pay approach as potentially valuable to government regulators recognize that the value to society of a statistically average life is dramatically lower than the value of the life of an identifiable person, further undermining the reliability of such measures.[162] In addition, economics literature recognizes that humans are exceedingly poor at appreciating risk, which is an important assumption in willingness-to-pay models.[163]

Courts and economists alike recognize the weaknesses in the willingness-to-pay method, thus undermining the cornerstone of economic expert testimony on an injured plaintiff's hedonic damages.[164] Therefore, an inquiry into the peer review and publications of the method used by experts to value hedonic damages weighs against its reliability.

b. Prior Application of the Willingness-to-Pay Method

Jurisdictions disagree whether expert testimony using the willingness-to-pay method is admissible to establish a plaintiff's lost enjoyment of life.[165] A majority of courts find expert testimony using the willingness-to-pay method inadmissible.[166] Those states that find such testimony inadmissible have two principal objections to the willingness-to-pay method. First, the willingness-to-pay method only values the life of the statistically average person and thus fails to take into account things that make the plaintiff's loss of enjoyment unique.[167] The goal of awarding damages to compensate an injured plaintiff is not to award damages for the loss to a hypothetical person.[168] In fact, the South Carolina Supreme Court recently noted that the "primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the

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161. *Id.*

162. *See, e.g.*, John W. Pratt & Richard J. Zeckhauser, *Willingness to Pay and the Distribution of Risk and Wealth*, 104 J. POL. ECON. 747, 747–48, 759–60 (1996) (quoting Schelling, *supra* note 158, at 129).

163. *See id.* at 748.

164. *See supra* notes 87–101, 160–63 and accompanying text.

165. *See supra* Part III.C.

166. *See* Schwartz & Silverman, *supra* note 1, at 1064 (quoting Kurncz v. Honda N. Am., Inc., 166 F.R.D. 386, 388 (W.D. Mich. 1996)).

167. *See* Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 92 (Colo. App. 1997).

168. *See* Schwartz & Silverman, *supra* note 1, at 1066.

hands of others."[169] The willingness-to-pay method falls short of this stated goal, however, because the value of life that an economist uses to determine hedonic damages is the same regardless of the personal characteristics of the plaintiff.[170]

The Colorado Court of Appeals found it inconceivable that an economist could opine on the value of a plaintiff's lost enjoyment of life without ever speaking to the injured plaintiff or determining what circumstances made their lives enjoyable.[171] Similarly, the California Court of Appeals, in finding expert testimony inadmissible, noted that the value of life relied on as the baseline for valuing hedonic damages has "nothing to do with this particular plaintiff's injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life."[172]

Second, even accepting that willingness-to-pay studies accurately capture a value on the whole human life, the majority of courts find that it cannot be extrapolated to accurately reflect the value of the *enjoyment* of life.[173] As explored earlier, willingness-to-pay studies value the amount that an individual would pay to avoid death.[174] Even assuming that the value of life may be reasonable, courts still reject the method on the grounds that it is unreliable because "it has nothing to do with defining the particular value of the loss of *enjoyment of life*."[175]

A small minority of courts find an economist's expert testimony on the value of hedonic damages admissible.[176] In several such situations, the cases lack precedential value.[177] Of those remaining, the courts of Ohio and Nevada offer

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169. *See* Willis v. Wu, 362 S.C. 146, 159, 607 S.E.2d 63, 69 (2004) (quoting Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984)).

170. *See* Schwartz & Silverman, *supra* note 1 at 1066–67.

171. *See Scharrel*, 949 P.2d at 92.

172. Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 578 (Cal. Ct. App. 1998).

173. *See, e.g.*, Montalvo v. Lapez, 884 P.2d 345, 366 (Haw. 1994) (stressing that the expert may not be able to help a jury value enjoyment of life); Wilt v. Buracker, 443 S.E.2d 196, 204 (W. Va. 1993) (expressing concern over the willingness-to-pay studies not actually calculating the loss of enjoyment of life).

174. *See supra* Part III.B.

175. *Wilt*, 443 S.E.2d at 205.

176. *See, e.g.*, Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985) (United States District Court for the Northern District of Illinois allowed expert testimony), *rev'd en banc*, 856 F.2d 802 (7th Cir. 1988); K.M. Leasing, Inc. v. Butler, 749 So. 2d 310, 324 (Miss. Ct. App. 1999) (Mississippi Court of Appeals allowed expert testimony); Hunt v. K-Mart Corp., 981 P.2d 275, 278–79 (Mont. 1999) (Montana Supreme Court allowed expert testimony); Banks v. Sunrise Hosp., 102 P.3d 52, 63 (Nev. 2004) (Nevada Supreme Court allowed expert testimony); Sena v. N.M. State Police, 892 P.2d 604, 610–11 (N.M. Ct. App. 1995) (New Mexico Court of Appeals allowed expert testimony); Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426, 438 (Ohio Ct. App. 1998) (Ohio Court of Appeals allowed expert testimony).

177. *See, e.g.*, *Sherrod*, 856 F.2d at 807 (reversing the lower court's decision, which admitted expert testimony); *K.M. Leasing, Inc.*, 749 So. 2d at 320, *superseded by statute*, 2003 Miss. Laws 1289 (codified as amended at MISS. CODE. ANN. § 11-1-69 (Supp. 2012)) (later law supersedes the case); *Hunt*, 981 P.2d at 279 (testimony admitted because of defendant's failure to object).

the most thorough arguments for admitting expert testimony to value hedonic damages.[178]

In *Banks v. Sunrise Hospital*,[179] the Nevada Supreme Court admitted expert testimony to value hedonic damages on the grounds that the economist had specialized knowledge to determine "the monetary value of intangibles."[180] Furthermore, the court emphasized the defendant's freedom to offer its own expert testimony to refute the methodology or the expert's value on hedonic damages.[181] The court found that the expert's specialized knowledge combined with the defendant's ability to highlight the weaknesses of the expert's testimony made any probative value of the expert's testimony sufficient to outweigh any potential prejudice and admitted the testimony.[182]

Similarly, in *Lewis v. Alfa Laval Separation, Inc.*,[183] the Ohio Court of Appeals found expert testimony on hedonic damages was "shaky but admissible."[184] In that case, the court found that the numerous publications in the economics community on the value of life supported the scientific validity of the method.[185] After highlighting the arguments against allowing such testimony, the court found that "[a]lthough [it] might have chosen to exclude [the expert's testimony]," the court could not say that the decision to admit the testimony was an abuse of discretion.[186]

Prior application of the willingness-to-pay method to value hedonic damages reveals that most courts regard such testimony to be inadmissible.[187] While some courts allow testimony using the willingness-to-pay method, these decisions are thinly reasoned in comparison to those not admitting testimony.[188] In addition, a decided majority of courts do not allow testimony,[189] with no federal court above the district level admitting testimony. Therefore, prior application of the willingness-to-pay method to hedonic damages weighs against admitting expert testimony.

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178. *See Banks*, 102 P.3d at 61–64 (citations omitted); *Lewis*, 714 N.E.2d at 433–38 (citations omitted).

179. 102 P.3d 52.

180. *See id.* at 63.

181. *See id.*

182. *See id.*

183. 714 N.E.2d 426.

184. *Id.* at 438 (internal quotation marks omitted).

185. *See id.* at 436.

186. *See id.*

187. *See* Schwartz & Silverman, *supra* note 1, at 1064–65 (quoting Kurncz v. Honda N. Am., Inc., 166 F.R.D. 386, 388 (W.D. Mich. 1996); Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992)).

188. *Compare* Ayers v. Robinson, 887 F. Supp. 1049, 1059–64 (N.D. Ill. 1995) (citations omitted) (detailing thoroughly the reasons for the inadmissibility of the testimony), *with* Banks v. Sunrise Hosp., 102 P.3d 52, 61–64 (Nev. 2004) (citations omitted) (discussing briefly the testimony's admissibility).

189. *See* Schwartz & Silverman, *supra* note 1, at 1043.

c. Quality Control

South Carolina courts look to the validity and accuracy of the evidence to determine whether the evidence meets the quality control requirements for reliability under SCRE 702.[190] The wide range of estimates valuing human life suggests that any quality control economic experts employ is insufficient to render such evidence reliable under SCRE 702.[191] Estimates of the value of life range immensely.[192] In *Ayers v. Robinson*,[193] the court noted that one group of economists valued life based on the willingness-to-pay method between $500,000 and $9 million.[194] Government estimates present an even more stark contrast.[195] At one extreme, the value of life the Consumer Products Safety Commission estimated is $70,000, contrasted with the upper extreme of $132 million by the Food and Drug Administration.[196] Courts and commentators suggest that the government's numbers are more likely the result of the political pressures of election cycles and legislative concerns than a carefully scrutinized and reliable estimate of the value of human life.[197]

Like the outside political concerns affecting government estimates of the value of life, labor, and consumer willingness-to-pay studies reflect at least a skewed value of life.[198] Regarding labor studies, courts suggest that an individual's employment decision is motivated by far more than money.[199] For example, a police officer clearly considers more than money when deciding to enter into that line of work, because otherwise very few people would be willing to take on the dangerous job of patrolling crime-ridden areas.[200] Labor-market-willingness-to-pay studies also make the arguably false assumption that individuals have complete freedom of choice when deciding to pursue an occupation.[201] Many individuals are likely motivated at least as much by a sense

190. *See, e.g.*, State v. Jones, 343 S.C. 562, 574, 541 S.E.2d 813, 819 (2001) (finding evidence was not reliable where there was not sufficient quality control to ensure the "validity, accuracy, and repeatability" of the process (internal quotation marks omitted)); State v. Council, 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999) (finding that evidence met the quality control requirement when a lab "validated the process and determined [the] rate of error").

191. *See* Schwartz & Silverman, *supra* note 1, at 1067 (quoting *Ayers*, 887 F. Supp. at 1061 n.4).

192. *See id.* (quoting *Ayers*, 887 F. Supp. at 1061 n.4).

193. 887 F. Supp. 1049.

194. *See id.* at 1063.

195. *See* Schwartz & Silverman, *supra* note 1, at 1067 (quoting *Ayers*, 887 F. Supp. at 1061 n.4).

196. *See id.* (quoting *Ayers*, 887 F. Supp. at 1061 n.4).

197. *See, e.g.*, Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992) (court suggesting political concerns affect value of life estimates); Schwartz & Silverman, *supra* note 1, at 1067 (commentators suggesting the same).

198. *See Mercado*, 974 F.2d at 871.

199. *See id.*

200. *See id.*

201. *See* Kurncz v. Honda N. Am., Inc., 166 F.R.D. 386, 389 (W.D. Mich. 1996).

of civic duty or a need to provide for their families as they are by an appreciation of risk and reward.[202]

In addition, using a consumer's decision to buy a safety device as a benchmark to value human life has considerable shortcomings in terms of reliability.[203] First, an individual may simply lack the financial resources to spend on the safety device.[204] Second, beyond safety concerns, the consumer's decision to buy a safety device is also affected by marketing and government safety regulations.[205] Third, since consumers view spending on safety devices as a way to reduce risk, the decision to purchase an airbag or a smoke detector is just as much a measure of whether or not a person is cautious as it is a value of life.[206] Finally, given the considerable evidence to the contrary, willingness-to-pay studies focused on consumer decisions make a considerable error in assuming that consumers accurately perceive risk.[207] Without a true appreciation of risk, it is erroneous to argue that a consumer is making a statement about the value of life when spending money on safety devices.[208]

Therefore, given the considerable discrepancy of the estimates of human life and the questionable assumptions made to reach them, a South Carolina court would likely find that willingness-to-pay models do not meet the threshold of quality control to be considered reliable evidence under SCRE 702.

d. Consistency with Recognized Scientific Laws and Procedures

Since adopting the reliability standards under SCRE 702 in *State v. Council*,[209] South Carolina courts have offered only a limited interpretation of the final factor for reliability.[210] In *State v. Jones*,[211] the State attempted to use "barefoot sole impression" evidence to link a defendant with a bloodstained footprint left in the home of a murder victim.[212] The court held that the evidence was inadmissible in part because the evidence was not "consistent with *recognized* scientific laws and proceedings."[213] The court emphasized that the evidence failed with respect to this requirement because the scientific

202. *See id.*

203. *See Mercado*, 974 F.2d at 871.

204. *See* Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 92 (Colo. App. 1997).

205. *See Mercado*, 974 F.2d at 871.

206. *See id.*

207. *See* Anderson v. Neb. Dep't of Soc. Servs., 538 N.W.2d 732, 742 (Neb. 1995).

208. *See Mercado*, 974 F.2d at 871.

209. *See* 335 S.C. 1, 20, 515 S.E.2d 508, 517 (1999) (citing State v. Ford, 301 S.C. 485, 488–89, 392 S.E.2d 781, 783 (1990)).

210. *See, e.g.*, State v. Jones, 343 S.C. 562, 541 S.E.2d 813, 818–19 (2001) (citing *Council*, 335 S.C. at 20, 515 S.E.2d at 518; State v. Jones, 273 S.C. 723, 730–31, 249 S.E.2d 120, 124 (1979)) (providing a brief explanation as to whether the evidence was consistent with recognized scientific laws).

211. 343 S.C. 562, 541 S.E.2d 813.

212. *See id.* at 571–72, 541 S.E.2d at 818.

213. *See id.* at 573, 541 S.E.2d at 819.

community substantially discredited the barefoot sole impression evidence.[214] On retrial in *State v. Jones*,[215] the court again held that the barefoot sole impression evidence was inconsistent with recognized scientific laws and proceedings because the evidence was not applicable to the general population.[216] Whether the test is the level of "recognition" by the scientific community or the general applicability to the population, expert testimony valuing a plaintiff's hedonic damages using the willingness-to-pay method is not "consistent with recognized scientific laws and proceedings."

First, just as the science underlying barefoot sole impressions was discredited in the scientific community, willingness-to-pay studies have faced considerable criticism from economists and courts alike, making the study far from a "recognized" science.[217] Second, although the willingness-to-pay method is theoretically applicable to everyone, the method is not generally applicable because it makes no adjustments for the particularized circumstances that make an individual plaintiff's life enjoyable.[218] A consistent measure is not necessarily generally applicable. After all, courts could place a consistent value on all injured plaintiffs' lost income, but no one would argue that such consistency is a reliable way to measure lost wages. Therefore, an examination of the willingness-to-pay method for consistency with recognized scientific laws and procedures weighs against admitting expert testimony valuing hedonic damages.

B. Admissibility Under South Carolina Rule of Evidence 403

Assuming that a court admits expert testimony under SCRE 702, the court may still exclude the evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[219] If the trial judge finds that the probative value of the evidence outweighs any prejudice, the jury may then afford the expert testimony the weight it deems appropriate.[220] Even assuming that a South Carolina court found expert economic testimony valuing hedonic damages admissible under SCRE 702, the court would not be able to determine whether the evidence's minimal probative value outweighs its prejudicial effect.

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214. *See id.*

215. 383 S.C. 535, 681 S.E.2d 580 (2009).

216. *See id.* at 557, 681 S.E.2d at 591–92.

217. *See supra* Part IV.A.3.a.

218. *See, e.g.*, Wilt v. Buracker, 443 S.E.2d 196, 204–05 (W. Va. 1993) (explaining the method using 10,000 generic window washers).

219. S.C. R. EVID. 403.

220. *See* State v. Council, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999) (citing S.C. R. EVID. 403).

Those advocating for the use of expert testimony to value hedonic damages highlight that the probative value of the testimony is the guidance it provides to make jury verdicts more consistent and fair to injured plaintiffs.[221] While some consistency to the valuation of intangible losses may be desirable, the very suggestion that there is a way to measure the lost enjoyment of life is prejudicial.[222]

As one court noted, even if the party opposing testimony can effectively call into question the expert's valuation and the trial judge makes clear that the jury can afford the expert's testimony as little weight as it deems appropriate, there remains a concern that jurors will be misled and will "latch onto the first expert figure lobbed their way."[223] While courts might not find the jury's reliance on a figure provided by an expert prejudicial in all circumstances, the valuation of hedonic damages is likely to cause substantial prejudice in some cases.

First, an expert placing a definitive value on the enjoyment of life would prejudice the jury because courts rely on the expertise of the jury to value intangible losses.[224] In *Boan v. Blackwell*,[225] the court stated that hedonic damages "are not readily reducible to specific amounts" and left it to the jury to place a value on the lost enjoyment of life.[226] Furthermore, aside from hedonic damages, courts have concluded that similar intangible losses are not capable of any precise valuation and must be determined by the jury.[227]

Second, the method for valuing intangible losses likely prejudices the jury because South Carolina does not allow courts to reduce intangible damages to present value.[228] As explained previously, the final step of valuing hedonic damages requires the economist to discount the plaintiff's yearly lost enjoyment of life to present value.[229] In *Rhodan v. United States*,[230] the court refused to reduce a jury award for pain and suffering by discounting the award to present value.[231] The district court emphasized that "[t]here are numerous South Carolina cases which espouse the theory that damages for pain and suffering have no market price and cannot be determined with exactitude."[232] Thus, courts

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221. *See* Taylor, *supra* note 66, at 1521–22.

222. *See* Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (quoting Harper v. Bolton, 239 S.C. 541, 547–48, 124 S.E.2d 54, 57 (1962)).

223. *See* Kurncz v. Honda N. Am., Inc., 166 F.R.D. 386, 390 (W.D. Mich. 1996).

224. *See Harper*, 239 S.C. at 547–48, 124 S.E.2d at 57 (citing Wright v. Gilbert, 227 S.C. 334, 338, 88 S.E.2d 72, 75 (1955)).

225. 343 S.C. 498, 541 S.E.2d 242 (2001).

226. *Id.* at 502, 541 S.E.2d at 245.

227. *See Harper*, 239 S.C. at 547–48, 124 S.E.2d at 57 (citing *Wright*, 227 S.C. at 338, 88 S.E.2d at 75).

228. *See* Rhodan v. United States, 754 F. Supp. 76, 78–79 (D.S.C. 1991) (citing Phillips v. United States, 575 F. Supp. 1309, 1314–15 (D.S.C. 1983)).

229. *See* Berla et al., *supra* note 61, at 5.

230. 754 F. Supp. 76.

231. *See id.* at 78–79 (citing *Phillips*, 575 F. Supp. at 1314–15).

232. *Id.* at 77–78.

would not likely find that the limited probative value of expert testimony on hedonic damages outweighs the considerable risk of prejudice.

V. CONCLUSION

South Carolina recognizes hedonic damages to compensate an injured victim for the intangible enjoyment of life that she can no longer experience as a result of some wrongful act by a defendant.[233] It is impossible to imagine a scenario where an individual consciously considers the question "how much would I have to give you to take away your ability to enjoy your favorite hobby?" It is even more far-fetched to assume that the individual would then give an honest answer. Assuming that one could answer the question, there may be no amount of money that one would accept to have the fun stripped from her life. Given the inexact nature of these losses, there is a reasonable desire to introduce some form of consistency to the valuation of hedonic loss.[234] The willingness-to-pay method is a valiant attempt at valuing the intangible; however, it falls too short of certain to make its way in front of a jury.[235]

If the courts of South Carolina face the issue, they, too, will likely find that expert testimony on hedonic losses using the willingness-to-pay method is inadmissible under SCRE 702 and 403. South Carolina courts have repeatedly emphasized the importance of leaving intangible losses to the jury.[236] Furthermore, the willingness-to-pay method falls short of reliable in numerous ways.[237] First, the method provides only the hedonic value of the life of a statistically average person, effectively failing to assist the jury in determining how much to value the individual plaintiff's lost enjoyment of life.[238] Second, willingness-to-pay studies that value the entirety of life arguably offer little help to assist in determining the value of the *enjoyment* of life.[239] Third, the inclusion of certain factors such as consumer spending and labor markets do not directly capture the value an individual places on enjoying her life.[240] Finally, discounting intangible losses to present value, as required by the willingness-to-

233. *See* Boan v. Blackwell, 343 S.C. 498, 502, 541 S.E.2d 242, 245 (2001).

234. *See, e.g.*, Berla et al., *supra* note 61, at 1 (aiming to develop a system to aid in "the greater predictability of fair jury awards").

235. *See, e.g.*, Mercado v. Ahmed, 974 F.2d 863, 870–71 (7th Cir. 1992) (describing how it falls short).

236. *See, e.g.*, Harper v. Bolton, 239 S.C. 541, 547–48, 124 S.E.2d 54, 57 (1962) (citing Wright v. Gilbert, 227 S.C. 334, 338, 88 S.E.2d 72, 75) (stressing the importance).

237. *See supra* Part IV.A.3.

238. *See, e.g.*, Ayers v. Robinson, 887 F. Supp. 1049, 1052–53 (N.D. Ill. 1995) (basing calculations on a "statistically average person").

239. *See* Wilt v. Buracker, 443 S.E.2d 196, 205 (W. Va. 1993).

240. *See, e.g.*, *Mercado*, 974 F.2d at 871.

pay method, stands in direct contradiction to a decision by a federal district court in South Carolina.[241]

The shortcomings are too numerous for an expert to represent to a jury a specific value of human life. Until the development of a more reliable method, courts will have to leave valuation of the bits of life with no objective measurement to the jury, guided by their own experience and expertise. Whether this results in overcompensation or undercompensation is impossible to know, but for now, courts are decidedly in favor of leaving the hedonic value of life to the jury as the true expert "enjoyers" of life. South Carolina courts should follow suit.

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241. *See* Rhodan v. United States 754 F. Supp. 76, 78–79 (D.S.C. 1991) (citing Phillips v. United States, 575 F. Supp. 1309, 1314–15 (D.S.C. 1983)).