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The Official Newsletter of the State Bar of Michigan Negligence Law Section
David R. Getto, Chair

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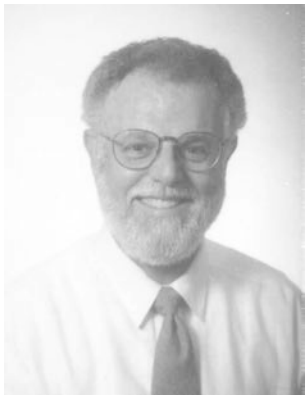
FROM THE CHAIR



David R. Getto

Recently, the publisher of the *Kalamazoo Gazette*, George Arwady, published an editorial entitled "Don't Let Your Babies Grow Up To Be Lawyers." The editorial is a vicious and unjustified attack on our noble profession as well as our legal system. Interestingly, Mr. Arwady acknowledges a strongly held 20 year bias against lawyers and also self-servingly laments the unfairness of settling so-called meritless claims filed against his newspaper. One could, of course, merely dismiss Mr. Arwady's remarks as a combination of bias and ignorance liberally sprinkled with a dollop of "poor me." On the other hand, one can derive from his remarks some important things to bear in mind about our legal system that Mr. Arwady and those of this ilk do not appreciate or understand.

As I see it, attorneys, particularly trial attorneys, seem incredibly ignorant about how to defend our legal system. Permit me to offer a few suggestions. First, our legal system is designed to resolve disputes. It is a dispute resolution system. Justice is the ideal of the system, something to which the system aspires, but like perfection, cannot realistically be achieved at all times. Second, the chief characteristic of our legal system is its **overall fairness** in resolving disputes in a civil and non-violent fashion. One cannot evaluate the fairness of the system by simply asking one side whether he or she liked the outcome. Yet many critics of our legal system, such as Mr. Arwady, rely exactly on such anecdotal information when calling for system "reform." Third, let us examine the features of our legal system that make it the best system ever devised for fair dispute resolution:

- **Open and ready access.** This encourages individuals, organizations and corporations to resolve their differences in a civil, non-violent way.
- **A settled system of rules all parties must follow, thereby placing everyone on a level playing field.** This includes an "umpire" (the judge) who makes sure the rules are followed. Nowhere else in society do we have this except, interestingly, in organized sports and gaming. We don't have such settled rules in politics or business.
- **A built in set of checks and balances.** As long as you follow the rules, you will get your day in court. Attempted abuses are automatically countered by the opposite party and consequences visited on the offending party by a ruling of the court in short order.
- **Jury trial.** This device affords to a party the opportunity to make a case or defense directly to the citizens of our community who by group decision, bring to bear on the dispute their collective experiences, common sense and understanding of community mores. This is the only form of "direct democracy" left in our government. Citizens are directly participating in a governmental decision that will formally resolve the dispute, letting the chips fall where they may.

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Introduction

By Chad A. Brown, Editor

"How good is man's life, the mere living!
how fit to employ
All the heart and the soul and the
senses forever in joy!"
—Robert Browning (1812-1889)

As negligence attorneys, we associate dollar values with imprecise losses each and every day. A fractured femur has an uncertain value, but add a surgery and a couple of pins and screws, and that injury is easily worth several times more than the initial uncertain value. With all of this speculation, one would wonder how any claim is ever proven with any degree of certainty, but somehow they are.

While the law tells us that a broken bone has value as a loss to the victim, this proposition becomes a bit hazier when we look generally at a human life and the simple joy associated with living. How do we put a dollar value on something so inherently unquantifiable as a human life? Even more so, how do we prove that value?

Black's Law Dictionary defines hedonic damages as, "damages awarded in some jurisdictions for the loss of enjoyment of life, or for the value of life itself, as measured separately from the economic productive value that an injured or deceased person would have had." With such a nebulous concept, the practical difficulties associated with removing these damages from the realm of speculation are obvious.

At the forefront of this debate is Dr. Stan V. Smith, a forensic economist who has authored numerous works on the subject and has testified in many state and federal courts throughout the nation. While it's hard to imagine an argument that would denigrate the value of human life to a nullity, the methodologies for determining such a value also leave a great deal of wiggle room and bestow upon juries a tremendous amount of discretion.

In this month's Point/Counterpoint, our distinguished authors explore not only the theoretical propriety of hedonic damages, but also the strengths and weaknesses of the current methods of valuation. While this issue is certain to remain a point of contention in the courtroom, I hope that this forum spurs productive contemplation, in both practical and theoretical respects, on this heated subject.

Point

By Timothy P. Smith, Smith & Johnson, P.C.

Hedonic Damages and MCL 600.2955

Timothy P. Smith

Every day in courts throughout the State, experts are offered by counsel to express opinions on various aspects of cases. Not many experts have stirred the breadth and intensity of debate as those economists who are offered to testify regarding hedonic damages, also known as the loss of enjoyment of life. The economist at the center of this hedonic debate is Stan Smith, a forensic economist from Chicago, Illinois. Mr. Smith is a nationally recognized economist whose expert economic testimony on the issue of the value of life in the United States has been admitted into evidence in over 125 State and Federal Court cases. He has been admitted by no less than 13 Circuit Courts in the State of Michigan. He has been published in numerous peer reviewed journals on the topic of hedonic damages and is the author of 37 published articles regarding hedonic damages and other damage issues which have appeared in the Journal of Forensic Economics, the ABA Journal and the Federation of Insurance and Corporate Counsel Quarterly, amongst other periodicals. He authored a text book with Economist Michael Brookshire entitled "Economic Hedonic Damages" which is used in a number of college courses in forensic economics throughout this country. He also authored the 1988 Supplement to Volume 13 Am. Jur. *Proof of Facts* 2d on Hedonic Damages.

Smith's methodology has been accepted not only in the above mentioned peer viewed literature, but also in widely accepted text books in the field of economics such as *Economics* by David C. Collander, which is an introduction to economics textbook and the third most widely used textbook in college economics courses nationwide. The standard advanced textbook in labor economics, the *Economics of Work and Pay* by Hammermesh and Rees, also discusses with approval the methodology of Dr. Smith for valuing a life.

Further, and probably most significant, Smith's methodology, which involves a "willingness to pay" model, is endorsed by the U.S. Government as the standard and recommended approach for use by all U.S. Agencies in the valuing of life for policy purposes as mandated in President Clinton's Executive

Order No. 12866 and by the Office of Management and Budget. Prior Presidents and subsequent Presidents have signed similar orders mandating this methodology for valuing life for policy purposes.

The first court to adopt the methodology of Smith was the Northern District of Illinois in *Sherrod v Berry*, later affirmed by the 7th Circuit in 1987. The entire panel of 11 judges of the 7th Circuit not only recognized the expertise of Smith, but stated,

> "The testimony of expert Economist Stan Smith was invaluable to the court, enabling it to perform its function of determining the most accurate and probable estimate of the damages recoverable for the hedonic value of (decedents life)."

In Michigan, MCLA 600.2955 creates a statutory version of the multi-factor test discussed by the U.S. Supreme Court in *Daubert v Merrell Dow Pharmaceuticals. Inc.* and the "General Acceptance" test of *Davis - Frye*. This statute creates not only a general "reliability" requirement for cases involving personal injury but expands the list of factor enumerated in *Daubert* to a total of seven. While all of the factors should be considered, none are determinative and not all need be satisfied. MCLA 600.2955 states:

> "In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the Court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the Court shall examine the opinion and the basis for the opinion which basis include the facts, technique, methodology, and reasoning relied on by the expert and shall consider all the following factors:
>
> a. Whether the opinion and its basis have been subjected to scientific testing and replication;
>
> b. Whether the opinion and its basis have been subjected *to peer* review publication;
>
> c. The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards;
>
> d. The known or potential error rate of the opinion and its basis;
>
> e. The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision "relevant expert community" means individuals who are knowledgeable in the field of study and are gamefully employed, applying that knowledge on the free market;
>
> f. Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered; and
>
> g. Whether the opinion or methodology is relied upon by experts outside of the context of the litigation.

Looking specifically to the requirements of MCL 600.2955, the first question for a reviewing court would be "whether the opinion and its basis have been subjected to scientific testing or application."

As stated earlier, Dr. Smith's methodology is endorsed by the US Government as the standard and recommended approach for use by all US agencies regarding life for policy purposes as mandated in President Clinton's Executive Order # 12866. Further, the Regulatory Policy Guidelines of the Office of Management and Budget for the United States of America approves of and embraces the use of willingness to pay estimates as a widely accepted way to monetize explicit reductions and fatality risks as part of its budget approach.

Additionally, numerous economists throughout the nation have affirmed that the loss of enjoyment of life can be calculated with a reasonable degree of professional certainty.

Dr. Gary R. Albrecht, a Professor at Wake Forest University has testified as follows in support of Smith's methodology:

> "There is a consensus, although not unanimity, in the field of forensic economics that we can derive values for statistically average lives based on the scientific studies of the value of life reflected in "willingness to pay" literature. Like many other economists, I believe loss of enjoyment of life damages in personal injury cases and wrongful death cases, including valuation of loss of society and companionship, can be calculated with a reasonable degree of economic certainty."

Lastly, the textbook "*Economic/Hedonic Damages*," co-authored by Stan Smith is required reading in many college courses throughout the country in the study of economics. A number of the more reputable colleges including Penn State, Notre Dame and University of Wisconsin utilize Smith's textbook as part of their curriculum. Of course Smith utilized the book in his own course during his tenure as a professor at DePaul University.

The next point of inquiry for the reviewing court would be "whether the opinion and its basis have been subjected to peer review publication." As stated earlier, Dr. Smith's methodology has been published with approval in peer reviewed journals throughout the country including the *Journal of Economics, Journal of Political Economy, American Eco-*

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nomic Review, The Quarterly Review of Economics and Business, Journal of Political Economy and many others. Further, the *Journal of Forensic Economics* has published Dr. Smith and this methodology and discusses a known or potential rate of error for that methodology. They found that Dr. Smith's methodology is well within the acceptable standard in the field of economics generally using a 95% confidence rate for the statistical testing and acceptance of his results. Even more compelling is the fact that Kenneth Arrow, a Nobel Laureate in economics, discusses and approves of this very method for use in valuing life in an article entitled "Invaluable Goods" which was published in the *Journal of Economic Literature* in 1997.

'Essentially, they are arguing that the methodology is not "precise" enough. But they are missing the boat in that regard.'

Robert D. Bean, Ph.D., Professor of Economics with the Department of Accounting, Finance and Economics at the University of Wisconsin has testified in support of Smith's methodology and its acceptance in peer reviewed publications.

> "I have calculated the loss of enjoyment of life in personal injury cases based on peer reviewed studies and the academic/economic literature on 'willingness to pay' to save statistical lives. These studies are based on what people are willing to pay to reduce the risk of death, and what workers are willing to accept as payment for accepting such risk on the job. This methodology has been widely accepted and published in the peer reviewed economic literature for several decades and economic journals of the highest quality."

The third question for the court under MCLA 600.2955 will be "the degree to which the opinion and its basis are generally accepted within the relevant expert community." Many economists throughout the country are on record affirming that the loss of enjoyment of life can be calculated with a reasonable degree of professional certainty. These economists include John D. Ward, Ph.D., the chairman of the Department of Economics at the University of Missouri—Kansas City and former editor to the *National Journal of Forensic Economics*, Luvonia J. Casperson, Ph.D., the chair to the Department of Economics and Finance at Louisiana State University, Everett Dillman, Ph.D., one of the vice presidents of the National Association of Forensic Economics, as well as Stephen T. Riley, Ph.D., former professor at Rochester Institute of Technology, amongst others.

Robert D. Bean, Ph.D. has testified regarding "general acceptance," stating:

> "Disagreements among economists in the forensic field in this area regarding these calculations do not materially differ from the many disagreements that exist over methodologies and other areas of economic testimony such as valuing businesses, calculating work life for injured workers, estimating discount rates for present value purposes, etc., where diversity of expert economic opinion has long been accepted in Court's of law."

Steven T. Riley, Ph.D., former Professor in Economics and Professor of Finance with the graduate school of business at the Rochester Institute of Technology has testified to the methodology's acceptance within the relevant expert community.

> "When an individual is injured or dies an economic loss is incurred both by that individual and those close to the individual. All economists would agree that the enjoyment of life has 'economic value.' Like many economists working in the field of economic forecasting, I believe that the loss of enjoyment of life of an injured person or the loss of society and companionship of the survivors can be calculated with a reasonable degree of economic certainty. There is a large body of peer reviewed research and literature that has developed in this area of economics. The underlying research, the theoretical basis of the research and the practical application of the research is widely accepted in the field of forensic economics."

The widespread support from economists combined with the support of numerous peer reviewed articles as well as the fact that numerous college courses teach this theory utilizing the textbook of Dr. Smith, is ample support within the relevant expert community as to Dr. Smith's opinions and its basis.

The last two areas of inquiry for the court would be "whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to each type of opinion being proffered 'and' whether the opinion or methodology is relied upon by experts outside of the context of litigation."

There is no question that the opinion is reliable. It is taught as an accepted methodology in colleges throughout the country. Hedonic calculations are generally accepted in the field of

forensic economics and have been deemed reliable in previously cited peer reviewed journals. Further, experts outside the context of litigation are relying upon this methodology including our own government where the Office of Management and Budget has mandated the use of this methodology.

Defense attorneys and detractors to Stan Smith and his methodology claim that the analysis deals with a statistical life and not the particular plaintiff. Essentially, they are arguing that the methodology is not "precise" enough. But they are missing the boat in that regard. As testified to by Steven T. Riley, Ph.D.:

> "Economics is often thought of as a science because part of what economists do is mathematical calculations. This view, however, misses the fundamental nature of economics. Economic calculations cannot be science in the sense of unchallengeable knowledge. Mathematics, chemistry, physics, engineering and the like are less subject to the vagaries of human behavior. The results of experiments in those areas can be replicated. The same is not true for economics. Economic knowledge is the study of human behavior relating to production, calculation, distribution, and consumption of wealth. Wealth being used in the broadest possible sense. Economics offers a systematic view of the world based on observations and assessments of human behavior. A fundamental window to view that behavior is the market. Just as with estimating future discount rates, valuing businesses, determining lost earnings and lost earnings capacity and numerous other calculations, hedonic calculations look to the future. Hedonic calculations are certainly part of the accepted system of economic knowledge and such calculations help economists, citizens, jurors and attorneys understand how people value their lives and the lives of others."

From a case law perspective, the two cases that proponents of hedonic damages should be prepared to deal with would be out of Michigan's Federal Courts in the Eastern and Western District. Keep in mind Federal Holdings are not controlling with regard to State Courts, but certainly are persuasive authority. That being the case, our State Court Judges are and have been free to disregard the two holdings discussed below.

The first case is *Kurncz v Honda North America, Inc.*, a (1996) case from Michigan's Western District which was decided by Judge Enslen. A Northern Michigan circuit judge who recently qualified Stan Smith to testify regarding hedonic damages after a *Daubert* hearing stated in his holding that "Enslen's opinion has been criticized by others in the field as being non-meritorious and misinformed." Although a complete discussion of the *Kurncz* case is beyond the scope of this article, the information discussed above can be used and has been used quite effectively to discount the *Kurncz* opinion as being "nonmeritorious" and "misinformed." Many state court judges here in Michigan since the *Kurncz* opinion in 1996 have admitted this methodology and qualified Stan Smith as an expert.

Brereton v USA, a (1997) case from Michigan's Eastern District is much easier to distinguish. In *Brereton*, the government challenged Smith's methodology both as to its reliability and usefulness pursuant to *Daubert*. At the time of the hearing, Plaintiff had not responded to the motion and was directed to do so by the Court in a supplemental brief.

Specifically, the Court directed both parties to consider the *Kurncz* case and the findings of Judge Enslen. Unfortunately, Plaintiff failed to discuss *Kurncz* in their supplemental brief and addressed *Daubert* only to suggest that expert testimony should not be barred prior to its presentation to the Court at the time of trial. The Court described Plaintiffs presentation as "inadequate" and "completely unpersuasive."

It would seem from a very plain reading of the case that hedonic damages as a methodology was not properly briefed or presented by Plaintiff. Accordingly, it would be unfair for a state court judge to take this holding from the Eastern District of Michigan as a basis for exclusion of hedonic damages as a methodology in that particular county. Further, the damages available to an estate under the Wrongful Death Act are different than the loss of enjoyment of life damages available to an individual who has suffered personal injury, but lives beyond the accident.

The battle over hedonic damages will continue to be fought at the state court level here in Michigan. Circuit by circuit, it is up to those attorneys offering this methodology to present the complete case supporting the use of hedonic damages. These attorneys must not only present the history of hedonic damages as a viable and recognized area of economics, but also introduce the court to all of the evidentiary support for the methodology developed by Stan Smith. The support for the methodology is irrefutable and a thorough presentation and discussion of the materials referenced in this article should provide enough factual support for a successful *Daubert* hearing.

Timothy P. Smith *is an attorney with Smith & Johnson, P.C., in Traverse City, Michigan, where he handles primarily personal injury and wrongful death cases. He currently sits on the Executive Board for the Michigan Trial Lawyers Association where he is a sustaining member as well as frequent moderator and lecturer in the field of litigation strategies and techniques. He is one of the few lawyers in Michigan who has successfully admitted hedonic damages in our state's circuit courts.*

Counterpoint

By Hal 0. Carroll, Vandeveer Garzia, P.C.

Value of a Life
"Hedonic" Damages or Houdini Damages?

Hal O. Carroll

The philosophy of vagueness

Defining the issue is always important, but especially so here. Several terms float around, all of them lacking in any precise definition. There are "hedonic damages," and "hedonic" suggests that the question is loss of enjoyment of life. There is "value of a life," which suggests that every human life has a monetary "value" distinct from pain and suffering and even from "hedonic" damages. Next we have the twins, "willingness to pay," and "payment to avoid," both offered as a scientific method for determining "hedonic" damages or perhaps for determining "value of a life." It all tends to be vague, and one suspects the vagueness itself is seen as a virtue by the proponents.

Do we not all, as individuals, value human life? Of course we do. More important, the proponents ask, surely we "as a society" value life? Note the addition of yet another vague term. The term "society" is used to justify a subtle shift, so that the goal of the tort system is not to compensate actual people for actual losses, but to express some overarching "societal" value of human life in general. Thus the focus of damages shifts subtly from the actual plaintiff or decedent, the real person who has a name and whose name appears in the caption, to a hypothetical, homogenized human being.

But all of these phrases have a certain undeniable attraction. After all, who among us will deny that human life is valuable. Mine is to me, and yours to you. Wouldn't it be churlish of me to say that mine has value but yours, or the plaintiff's or the decedent's does not? Even the most callous defense lawyer would never embrace such a position.

Well, then, the argument goes, we all agree that life has value, so the only thing we have to do is figure out how to express that value in dollars. After all, if a business is being sold, we have methods of arriving at a value. Net asset value is one technique, capitalization of the stream of future income is another. Neither is precise, but both are helpful. Doesn't human life deserve the same sort of scientific-economic analysis?

It all sounds so plausible. Yet there are insurmountable problems with it. The problems are so severe that the courts that have dealt with it in reported decision are virtually universal in rejecting it, whatever label is put on it. Is it just that courts are heartless and unfeeling, or perhaps just mired in outworn, mechanistic measures of damages?

The theories in practice

No. There are sound reasons why the theory – or theories (the vagueness means it is not always clear if there is one theory or two)—have so often been rejected.

Irrespective of the labels, there seem to be two different branches, which can be expressed as questions:

1. Are hedonic damages (in this context often called "value of a life") a distinct, and separately compensible, item of damage.
2. If not, are hedonic damages (often called here, "loss of enjoyment" of life) a useful measure of damages, *i.e.*, does it describe evidence that a jury can consider in assessing other damages, such as pain and suffering?

The underlying concept—the methodology

The methodology is what dresses these vague philosophies in scientific garb. It is most often associated with Stan Smith, who has built a career around presenting it and having it rejected by courts. The methodology has three branches: (1) willingness to pay, (2) risk premium, and (3) federal cost-benefit analysis of federal programs.

Willingness to pay

The willingness to pay method considers "the amount society [sic] is willing to pay per capita on protective devices such as seat belts, smoke detectors, etc." From this, Smith says, we can infer the value that "society" places on an average human life.

Risk premium

The risk premium method is complementary to the willingness to pay model. It looks at how much additional pay a worker will demand for working on a job that has relatively grater risk of injury or death. This also, says Smith, supports an inference as to the value that society places on human life.

Cost-benefit analysis

This method looks at the cost-benefit analyses that underlie various "federally mandated safety projects." Since any cost-benefit analysis must assign a value to preserving life, it provides the basis for the argument that the federal government itself has arrived at a judgment as to how much life is worth. Why the federal government should be seen as authoritative on this subject is never actually explained, but just assumed.

Value of a life as a compensible loss in Michigan

In Michigan, it is easy to describe the status of the value of a life theory as a type of damage in a wrongful death action: it is not allowed and cannot be. At common law there was no action for wrongful death, so both the right to sue and the damages that can be received, are defined purely by statute. The variations among the various states in wrongful death actions form a dizzying array in all aspects of the cause of action, of which more in a moment.

For Michigan, though, the statute is clear, and the statute is the only source for a definition of damages, since there was no common law right of recovery for wrongful death. The compensible losses include "reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of injury and death; and damages for the loss of support and the loss of the society and companionship of the deceased." MCL 600.2922(6).

Thus, in Michigan, the short answer to a claim for damages based on the "value of the life" that was lost is: the statute doesn't allow it. The definition of the damages has varied somewhat over the life of the wrongful death act (it was amended in 1873, 1939, 1961, 1965, 1971 and 1985) but over more than a century and a half the courts have never allowed recovery based on the value of a life. The measure of **economic** loss has always been tied to the lost support that would have been provided by the decedent if untimely death had not intervened.

Value of a life as a compensible loss in other states

So in Michigan there cannot be damages for the destruction of the "value of a life." What about other states? There are other states with statutes that have different definitions of compensible losses where the value of a life could conceivably be a measure of damages. In those states, the issue then would translate to the second question: is the evidence that the methodology offers admissible?

States that would be candidates for allowing damages for the loss of the value of the decedent's life might include those that treat the estate of the decedent itself as a beneficiary. Michigan does not, except as a residual recipient of the damages attributable to pain and suffering. But even the states that make the estate the beneficiary of the action have not embraced the value of the lost life as an item of damage. These include Connecticut, District of Columbia, Florida, Hawaii, New Hampshire and Washington. The only state to expressly consider it as an item of damage is Hawaii, which has rejected it. The other states seem not to have been visited by Stan Smith, but their discussions of wrongful death damages generally are always expressed in traditional economic terms, measured by the loss of income (see above footnotes).

It is significant that this result applies even in states in which the courts actually use the term "value of a life." For example, the courts in Delaware speak of the "value of the decedent's life," but only the value **to each claimant**. Delaware's statute, like Michigan's, defines damages in terms of "[d]eprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries that would have resulted from the continued life of the deceased." Thus, Stan Smith's theory has been rejected.

In Georgia the statute itself speaks of the value of a life. The act defines damages to include "the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived." Even here, the measure of the "value" is relentlessly economic. Wrongful death damages include "lost potential lifetime earnings." This is broader than Michigan's loss of support measure, but it still is nowhere near a societal value of an average life.

Value of a life—survivor's loss in death cases

The value of a life theory also falls short as proof of the loss to a survivor. For example, in a case in Indiana, Stan Smith offered his theory as a measure of the survivor's loss, even where it is not compensible to the deceased. The court rejected it. Smith testified as to value of a life based on "how much society is willing to pay to reduce the risk of people dying by accident." He testified that the "value of an average life ranges from $1.5 million to $8.5 million." He then subtracted lost earnings and household services, came up with $2.3 million, and divided by life expectancy to get $60,000 per year. Smith admitted he could not value the actual loss of affection and love to the decedent's spouse. The court stated that "[t]he parties to this action understood that, under Indiana's wrongful death statute, damages could not be assessed for the lost pleasures of life to the decedent." The court concluded that "it is simply not clear that this testimony could have been helpful to the jury."

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Hedonic damages as proof of damages in personal injury cases

If "value of a life" fails as a separate compensible damage in death cases, maybe it has some evidentiary value in helping the jury arrive at an amount for damages that are recoverable. It has been observed that the theory (here, it is called "hedonic damages") is oxymoronic when applied to a decedent. "Unless we are to equate loss of life's pleasures with loss of life itself, we must view it as something that is compensible only for a living plaintiff who has suffered that loss." Therefore, its "relevancy [is] so attenuated as to be impermissibly speculative."

Daubert *has proved to be the rock on which the theory floated by Stan Smith has foundered.*

If the theory is to have any validity, it can only be in the context of personal injury cases, especially those with permanent injuries.

Yet a review of the reported cases on hedonic damages or value of a life in the fifty states discloses a consistent pattern of rejection. In personal injury cases, the cases fall into two categories. In some states, loss of enjoyment is treated as a separate element of damage. The states that have adopted this view include: Arizona, Florida, Hawaii, Louisiana, and Mississippi.

In other states, loss of enjoyment is considered to be an inherent aspect of pain and suffering. The states that follow this view include: California, Colorado, Delaware, Georgia, Kansas, Kentucky, and Michigan.

Here the question is whether Stan Smith's methodology has evidentiary value rather than as a separate item of damage. This is where the proponent invokes MCL 600.2955. It is worth observing briefly that MCL 600.2955, which enshrined the *Daubert* criteria in Michigan, was intended to limit evidence, not expand it. The proponent's reliance on this statute is therefore at odds with the statutory purpose.

In any event, *Daubert* has proved to be the rock on which the theory floated by Stan Smith has foundered. The analysis of the Indiana court has been repeated many times over. For example, in Illinois, the court said: "There is no basic agreement among economists as to what elements ought to go into the life valuation." The court noted that the bottom line of most studies is an extremely broad range between less than $100,000 and more than $12,000,000. The high end is 120 times as much as the low end. "[T]he consensus is that of persons who are no more expert than are the jurors on the value of the lost pleasure of life." Stan Smith and his "studies" are not expert.

Louisiana agrees. "[E]conomic theories which attempt to extrapolate the 'value' of human life from various studies of wages, costs, etc., have no place in the calculation of general damages."

Kansas agrees that it is not scientifically valid and would not assist the trier of fact.

In Tennessee, the court conducted a survey of various other decisions, and concluded, with some asperity, that "[s]peculative assumptions remain speculation." The court also criticized the theory for predicating an award for a particular person on some generic person, saying that a "generic view" of anonymous lives "seems a rather callous and unhelpful perspective." So much for "societal value." The court also noted that the potential rate of error is too high, with its range from below $100,000 to $12,000,000. "A spread of this magnitude not only admits the possibility of error, it casts serious doubt on the validity and usefulness of the exercise." The court also noted that the "willingness to accept" risk for higher pay model assumes full information, and free and knowing choice, and criticized the "willingness to pay" model on the same basis. Finally, the opinion did conclude with some good news, if only for Mr. Smith and his compatriots. It predicted that "[t]here will be other cases as it appears that this type of testimony is the fashionable trend among claimants' attorneys."

Hawaii rejected the evidence and also pointed out that loss of enjoyment is an inherent part of the traditional pain and suffering basis of compensation. The court said that "indisputably, hedonic damages are recoverable." They include pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other nonpecuniary loss or claims. Nevertheless, the evidence was inadmissible because it "would have been irrelevant, would not have assisted the jury, and would not have added to the common understanding of the jury . . ."

The same result has obtained and the same reasoning has been applied in case after case. To repeat the reasoning in detail would be repetitive. Nebraska held that the testimony was not scientific and would not assist the trier of fact. Other states that reject Smith's theories include New Mexico, Kansas and Massachusetts. The Massachusetts court noted that after *Daubert*, "quite a number of federal decisions have rejected such expert testimony, in particular Dr. Smith's testimony."

Counterpoint

Proponent's view

Proponent says that the "entire panel" of the 7th circuit enthusiastically approved Smith's testimony, and quoted language to that effect. Actually, the language appears in a footnote to an opinion by a three judge panel. That opinion was vacated and a new opinion issued. Moreover, the action was a federal civil rights action, not a personal injury or death action. Civil rights actions necessarily involve different policy considerations.

Proponent also says that "Dr. Smith's methodology is endorsed by the US Government . . . for policy purposes." "Endorsed" is too strong a word, and in any event the courts have consistently recognized that government agency policy does not translate to tort measures of damages.

Proponent says that the witnesses who propound the theory testify that the values of a life "can be calculated with a reasonable degree of professional certainty." It depends on what one means by certainty. If, in a condemnation action, an expert testified that the property that was taken was worth between $100,000 and $12,000,000 (120 times as much) it would be met with scorn. Arriving at a single figure, whether by the statistical method of mean, mode or median, would not obscure the fact that the underlying data made the result meaningless.

Proponent says that Dr. Smith says his result has a "95% confidence rate," which means that he is 95% certain that the value of a human life is $12,000,000, or maybe 120th of that, or maybe somewhere in between.

Finally, proponent concedes that two federal courts in Michigan have not smiled upon the theory, but notes hopefully that this is not binding on state courts. That is true, and it is also true that Michigan's state courts have not ruled on the issue. In death cases, the answer, as noted at the beginning, is that there can be no damages for value of a life under Michigan's wrongful death act. In personal injury cases, it is idle to hope that Michigan's courts would stand alone and reject the rule applied in all the other federal and state courts under *Daubert* principles and allow the evidence.

Why bad things happen to bad theories

The only sense in which Dr. Smith's theories have been successful is for Dr. Smith himself, along with his co-theorists. He seems to travel from place to place, put in his evidence, have it rejected, and then move on. The reasons for the consistent failure of his theories range from the practical to the philosophical. On the practical level, the fact that the range of values he arrives at is so broad, with the top end being 120 times the low end, is a telling and almost tangible proof of the inherent unsoundness of the methodology. Even without delving into the details of the methodology, the result itself casts doubt on the theory. The theory is so weak as to border on self-caricature.

More fundamentally, the theory misunderstands the purpose of the tort compensation system. The key term here is compensation. The tort system exists to provide real compensation to real people for real losses. Government programs exist for different purposes. In allocating government resources, it is appropriate to use cost-benefit analyses, but the purpose is only to allocate resources, not to set any absolute or objective value on human life, or on the ability to enjoy life's pleasures. Everyone who deals with the tort system, whichever counsel table they sit at, is painfully aware of the inadequacy of the system in any real humanitarian sense. Dollars are a poor compensation for the loss of a loved one.

But adding a speculative and even more unreal theory to the mix does nothing to improve the quality of the system or the results it produces. The unreality of the "value of a life" theory can be illustrated by converting it to simple question to ask of any bereaved spouse or parent: how much money would you take in exchange for the deceased if you were offered an exchange? The question is not only crude and offensive, but meaningless. Assigning a "value" to a deceased person based on some ill defined "societal" measure is equally crude, equally offensive and equally meaningless.

Hal O. Carroll *specializes in appellate practice and in insurance and indemnity issues at Vandeveer Garzia. He also edits the Michigan Defense Quarterly.*

IN MEMORIAM
William J. Weinstein

Bill Weinstein, who was chairperson of the Negligence Law Section in 1961-62, died on June 22, 2002, at the age of 84. The Negligence Law Council was honored to have him, and his wife, Rose, as guests at the past-presidents dinner at the Detroit Golf Club on May 10, 2002. Bill was born in Detroit and graduated from Northern High School in 1934. He received his law degree from Wayne State University in 1940. He also served in the U.S. Marine Corps during World War II, and was awarded two purple hearts and a bronze star for his service. Before his retirement, Bill was a senior partner and trial attorney in the Southfield law firm of Weinstein, Kroll & Gordon. He will be greatly missed by all of those from our section who knew him.

Annual Past Chairpersons' Dinner

Detroit Golf Club
May 10, 2002

Richard Kaufman & Joe Lujan

Mike Stacy & Hon. Michael Talbot

David Getto & Bob Siemion

Judge Talbot, Judy Susskind,
Judge Ed Thomas, & Jan Brandon

Judy Susskind & Judge Talbot

Tim Knecht & David Getto

From the Capitol Steps

By William B. Wortz

Election 2002—A Time of Change

William B. Wortz

The 2002 election is a crossroads of sorts for Michigan. The coming together of term limits, reapportionment of the House and Senate districts, and an open Governor's race for the first time in twenty years makes for the potential of great change. For organizations like the negligence section of the State Bar, this election will set the players who will take us through the next decade. Below is the early line on how the races are shaping up:

GOVERNOR: Much attention has been focused on the Democratic primary where Attorney General Jennifer Granholm, former Governor James Blanchard and Congressman David Bonior are battling for their party's nomination. Currently Granholm and Blanchard are running neck and neck with Bonior, unable so far, to find traction with statewide Democrats. The Democratic Primary looks to be a race that will come down to the wire. On the Republican side, Lt. Governor Dick Posthumus has a commanding lead over his two rivals in the Republican Primary to succeed Governor Engler. Lacking a major shift in voter preference, Posthumus should be the nominee in November.

OUTCOME: Early polling puts Lt. Governor Posthumus behind any one of the three Democratic candidates in a head-to-head comparison. Posthumus will likely close the gap as the campaign develops, but continues to struggle with what pollsters are calling the "Engler Fatigue" factor. The Democratic Primary is truly too close to call and at this stage hard to predict. One thing is clear however, the more the Democrats spend in the primary beating up on each other, the better chance Posthumus has of keeping Republicans in the Governor's mansion.

MICHIGAN SENATE: The combination of term limits and reapportionment has made the 38 Senate elections more interesting, and in some cases, vital for control of the upper chamber. With 27 vacancies and substantial changes in district lines in as many as 20 Senate seats, the long-standing Republican majority could be at risk. Most political observers predict that the current 23-15 Republican majority could fall by two or three seats. This brings their control to a razor thin margin and easily puts the Democrats within striking distance of achieving control of the Senate, which they have not enjoyed since 1983.

OUTCOME: The Republicans are ready for this fight and have raised big bucks and have a strong field of candidates. It is likely, barring a majority landslide at the top of the ticket that the Republicans will hold on to their majority status in the Senate, albeit with a slightly smaller head count. Here are the races to watch as we head into November, which could decide control of the Senate:

District 19 Rep. Mickey Mortimer (R-Horton) vs. Rep. Mark Schauer (D-Battle Creek)

District 20 Former Rep. Ed LaForge (D-Kalamazoo) vs. winner of the Republican Primary between Rep. Jerry Vander Roost (R-Galesburg) and Rep. Tom George (R-Kalamazoo)

District 29 Rep. Steve Pestka (D-Grand Rapids) vs. Republican Kentwood Mayor Bill Hardiman

District 31 Rep. Mike Green (R-Mayville) vs. Congressman Jim Barcia (D-Bay City)

District 36 Rep. Andy Neumann (D-Alpena) vs. Rep. Tony Stamas (R-Midland)

MICHIGAN HOUSE OF REPRESENTATIVES: Reapportionment, term limits and the chance to seek higher office have put 53 open seats up for grabs in the 110 member House. For the second time in four years, over one half of the members of the House will be new to the chamber. As the Republicans fight to retain control of the Governor's Office and the Senate, it appears that Republican majority in the House may actually increase. Speaker Rick Johnson has been focused on maintaining a Republican majority and as a result has recruited a number of strong candidates and raised a sizable war chest. Currently the Republicans hold a 58-52 seat majority. After the reapportioning of all 110 districts, the Republicans should win 60 to 63 seats on baseline Republican voter strength.

OUTCOME: The Republicans seem poised to keep control of the House, marking the first time since the 1950s that they have maintained a majority in the lower chamber for three consecutive elections. The size of the majority caucus may vary from a low of 59 to a high of 63 based in some measure on voter turnout and how well the top of the ticket performs in November. Below are a few seats to watch that could make a difference in the balance of power in the House:

District 17 Dan Paletko (D-Dearborn Heights) vs. winner of the Republican Primary between Miles Handy (R-Redford) and Kathleen Husk (R-Redford)

District 32 Dan Acciavatti (R-Chesterfield) vs. John Hertel (D-Lenox)

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LEGISLATIVE UPDATE

By Richard P. Duranczyk and Steven A. Hicks

Richard P. Duranczyk

As spring has drawn into summer, the state legislature has remained in session, due largely to the budget crisis. In fact, the legislature plans to return from its current recess to resume session on August 13th. While the budget has been at the forefront of most discussions, there have been some developments concerning negligence law that are worth reporting. The following is a summary of those developments, which may ultimately have a bearing on negligence law practice in Michigan.

Bills to Restore Loss of Opportunity to Survive Introduced in Both Houses

HB 5934, sponsored by Rep. Andrew Raczkowski (R-Farmington Hills), and SB 1249, sponsored by Sen. Don Koivisto (D-Ironwood), provide for the restoration of loss of opportunity to survive claims in medical malpractice cases. In 1990, the Michigan Supreme Court in *Falcon v Memorial Hospital* held that a person's lost opportunity to survive a potentially fatal disease was a compensable injury if the failure to diagnose or treat violated established medical standards of care. Simply put, the lost opportunity to survive doctrine recognizes that all life has value and that negligence which reduces a person's expected life span and leads to premature death diminishes the value of that person's life. In 1994, the legislature restricted the doctrine when it enacted a broader bill restricting patients' rights in medical malpractice cases. Recently, in *Wickens v Oakwood Health Care System*, the Supreme Court ruled that a plaintiff may not bring a loss of opportunity to survive claim if he or she is still living. HB 5934/SB 1249 would reverse the Supreme Court's ruling in *Wickens* and the changes made by the Legislature in 1994 and return the law to its pre-tort reform state under *Falcon v Memorial Hospital.*

No-Fault Automobile Insurance Bills Introduced in Legislature

HB 5218/5219, sponsored by Rep. Bruce Patterson (R- Canton), provides for an increase in the minimum allowable coverages for residual bodily injury from 20,000 per person/$40,000 per occurrence to $75,000 per person/$150,000 per occurrence.

HB 5951, sponsored by Rep. Mark Shulman (R-West Bloomfield), would require consumers be informed as to whether a no-fault carrier offers uninsured and underinsured motorists' coverage. The bill is currently before the House Committee on Insurance and Financial Services. A hearing was held on the bill but no vote has been taken and it is still in committee.

Senate Bill Would Limit Liability of Security Guards

SB 380, sponsored by Rep. William Bullard (R-Highland), would limit the liability of security guards working at shopping centers,

Steven A. Hicks

entertainment forums, and casinos. The Negligence Law Section opposed the bill because it would expand immunity into the private sector. Timothy Knecht, who is currently vice-chairperson of the Negligence Law Council, testified against the bill in a hearing before the Senate Committee on the Judiciary. Notwithstanding our opposition, the bill was reported out of committee and it was soon passed in the Senate. The bill is currently pending before the House Committee on Commerce. A hearing was held on the bill in committee but no vote has been taken. Todd Tennis testified against the bill on behalf of the Negligence Law Section at that hearing.

Medical Malpractice Bills Would Further Limit Liability of Health Care Professionals

A package of bills sponsored by Sen. Mike Goschka (R-Brant) would further limit the liability of health care professionals in medical malpractice cases. SB 1243 would amend the requirements for qualifying an expert witness in a medical malpractice case. SB 1244 would limit the liability of emergency room physicians in certain limited circumstances. SB 1245 would require a plaintiff to file a sworn statement of facts, which sets forth not only the facts constituting fraudulent concealment but also the evidence, which proves those facts independent of the Plaintiff's statements and beliefs, in order to extend the statute of limitations for fraudulent concealment. SB 1246 would allow the defendant in a medical malpractice case to sign the affidavit of meritorious defense. SB 1247 would exempt medical malpractice cases which allege fraudulent concealment from the two year statute of limitations but require instead that the plaintiff must file the cause of action within 6 months of the date of discovery, and in any case, no later than 6 years from the date of negligence.

SB 184, sponsored by Sen. Joseph Schwarz (R-Battle Creek), adds physician assistants to the list of health care professionals who are protected from liability under the good samaritan statute. It has passed in both Houses and is awaiting the Governor's signature.

House Bill Would Require Affidavits of Merit Be Signed By Licensed Michigan Physician

HB 5787, introduced by Rep. Barbara Vander Veen (R-Allendale) would require that affidavits of merit be signed by a physician licensed in the State of Michigan who practices in the same field as the defendant in the medical malpractice case. It is currently before the House Committee on Civil Law and the Judiciary. No hearings have been held.

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Legislative Report
Continued from page 12

House Bill Would Cap Non-Economic Damages in All Personal Injury and Wrongful Death Cases

HB 6139, which was introduced by Rep. Robert Gosselin (R-Troy) would impose a cap on non-economic damages in all personal injury and wrongful death cases.

House Bill Would Provide Death Exception To Cap On Non-Economic Damages in Medical Malpractice Cases

HB 5684, introduced by Rep. David Woodward (D-Royal Oak), would amend the cap on non-economic damages in medical malpractice so that it would no longer apply to wrongful death cases.

Appeal Bond Capped at $25 Million

HB 5151, sponsored by Andrew Richner (R-Grosse Pointe Park), caps appeal bond which must be filed at $25 million, indexed every 5 years. The Negligence Law Section supported the bill. It passed both Houses and was signed into law by the Governor, as 2002 PA 265, effective January 1, 2003.

Richard P. Duranczyk *is Legislative Counsel for the Michigan Trial Lawyers Association in Lansing.*

Steven A. Hicks *is an attorney with Knaggs, Harter, Brake & Schneider, P.C., in Lansing.*

From the Capitol Steps
Continued from page 11

District 37	Former Mayor Aldo Vagnozzi (D-Farmington Hills) vs. winner of the Republican Primary between John Akouri (R-Farmington Hills), Valerie Knol, (R-Farmington) and Terry Sever (R-Farmington Hills)
District 62	Mike Nofs (R-Marshall) vs. Ted Dearing (D-Battle Creek)
District 91	Country Commissioner Nancy Frye (D-Holton) vs. winner of the Republican Primary between David Farhat (R-Muskegon) and Kennet Walcott (R-Muskegon)

The 2002 election will bring another wave of change to the Capitol. With 80 of 148 legislative seats open this year, a new governor and administration, we can expect many new twists and turns in the political debate in Lansing.

Bill Wortz *is a lobbyist with Public Affairs Consultants, Inc., in Lansing. He serves the Negligence Law Section as part of its lobbying team in Lansing. Bill is a graduate of Michigan State University, with a B.S. in Russian Literature and Labor Relations. Upon graduation from college, Bill immediately began working for the Michigan House of Representatives as the chief of staff to Representative Mick Middaugh (R-Paw Paw), chair of the House Conservation, Environment and Great Lakes Committee. In his nearly four years there he was responsible for the day-to-day workings of the legislative office including constituent relations, publications, and management of the Representative's entire legislative agenda. Bill has extensive experience with many political and ballot proposal campaigns. In particular, he served as a spokesman for Proposal A, which was successful in delivering a property tax cut to Michigan's citizens. In addition, he has written numerous articles for trade magazines, and his editorials have been published in many newspapers statewide. He joined PAA in January of 1996, having spent the last four years as Director of Public Policy for the Michigan Association of REALTORS, where he was responsible for the success of the REALTORS legislative agenda and their PAC fund raising efforts.*

From the Chair
Continued from page 1

Finally, we should point out to those that attack the legal system that it is a social institution not a scientific laboratory. As such, it is subject to all of the foibles of human nature but certainly no more so than other institutions of government or business. In our legal system decisions must be made whether we have all the information or not and irrespective of the inherent uncertainties of life. Resolution is the aim so people can get on with their lives. It is no different in other human endeavors, whether one is running a business, planning a community or fighting a war.

I urge you to listen carefully to those who make broad generalized attacks against our legal system. Take note of the examples they cite, all of which are highly atypical and not representative of the whole. Recognize that people like Mr. Arwady complain about the system not because it is broken and needs fixing, but rather because it is working all too well. The Arwadys of this world are not interested in resolving disputes on a level playing field unless, of course, they are allowed to start with a 20 point lead.

It has been my privilege to serve as your Chairperson this year. Tim Knecht will be taking over the presidency soon. I wish him well and pledge to him and the Council my continued support and assistance.

David R. Getto, Chairperson

Recent Developments in Negligence Law

Michigan Supreme Court

Claims for negligence and intentional torts were viable against bail bondsmen for arresting the wrong person; a facially valid out-of-state warrant did not provide a shield for liability.

Bright v Littlefield, 465 Mich. 770 (2002). Plaintiff's claims for negligence and intentional torts should not have been summarily dismissed because it was undisputed that plaintiff had not committed a felony; therefore, defendant bail bond company did not have authority to arrest him. It was confirmed that the actual person who should have been arrested was plaintiff's brother, who was arrested in another state on a drug charge there and then fled. The court concluded that the plain language of MCL § 764.16(b) provided authority for a private person to arrest another if the other had committed a felony. The statute did not grant arrest authority where the other had not committed a felony, even though the private person had probable cause to believe that the other had committed a felony. Thus, subsection (b) did not shield the party making the "arrest" from liability. The facially valid out-of-state warrant did not, under these facts, provide authority to arrest plaintiff. Summary disposition for defendants was reversed and the case was remanded.

Insufficient medical malpractice Notice of Intent did not toll the statute of limitations, and objections to the Notice of Intent did not have to be made prior to the filing of the complaint.

Roberts v Mecosta County Gen. Hosp., 466 Mich. 57 (2002). The statute of limitations in a medical malpractice action is not tolled unless the notice of intent is in full compliance with § 2912b, and the Court of Appeals erred in concluding that defendants waived their ability to challenge the sufficiency of the notices by not objecting before the complaint was filed. Section 2912b did not require a defendant to object to deficiencies in a notice of intent before a complaint was filed. The burden of complying with the notice of intent requirements was on plaintiff. Further, tolling of the statute of limitations under § 5856(d) was available only when a plaintiff had met all the requirements of § 2912b. Absent an express waiver, a defendant could only waive objections to plaintiff's fulfillment of the requirements of § 5856(d) by failing to invoke the statute of limitations after the suit was filed or failing to object to the adequacy of the notice of intent after plaintiff asserted tolling in response to a statute of limitations defense. The matter was reversed and remanded to the Court of Appeals for a determination of whether the trial court erred in finding that plaintiff's notices of intent did not comply with § 2912b.

In a slip and fall claim, there was no special aspect to a slanted roof with ice that would have allowed the owner to be liable to an invitee under a premises liability theory of recovery; danger was open and obvious.

Perkoviq v. Delcor Homes-Lake Shore Pointe, LTD., 466 Mich. 11 (2002). The court held that the evidence on the motion for summary disposition did not provide a basis for establishing plaintiff's claim that defendant, as owner of the property, was liable on a premises liability theory for injuries sustained when plaintiff slipped and fell from a slanted roof that was covered with ice. Therefore, the judgment of the Court of Appeals was reversed and the trial court's judgment for defendant was reinstated. Plaintiff was an invitee as an employee of a subcontractor on the project, and he was injured when he slipped and fell on ice or frost that had formed on the roof of a partially constructed house that he was preparing to paint. The court held there was no question that the condition of the roof was open and obvious, and plaintiff presented no evidence that the condition of the roof was unreasonably dangerous. The court concluded that the Court of Appeals seemed to have confused general contractor liability with the liability of a possessor of premises. Defendant's additional duties as general contractor did not alter its duties as owner.

Wrongful death saving statute applies to medical malpractice actions brought under the six-month discovery rule.

Miller v. Mercy Memorial Hosp. Corp., Supreme Court No. 118701, 2002 Mich. LEXIS 1050 (June 4, 2002). Reversing the judgments of the trial court and Court of Appeals in plaintiff's wrongful death action based on medical malpractice, the court held that plaintiff's claims were not barred by the statute of limitations. The court overruled *Poffenbarger v. Kaplan, 224 Mich. App. 1 (1997)* to the extent that it held that MCL § 600.5852 did not incorporate the six-month discovery rule. The court concluded that the six-month discovery rule was a "period of limitation" within the meaning of the saving statute. The plain language of § 5838a(2) provided two distinct periods of limitation: two years after the accrual of the cause of action, and six months after the existence of the claim was or should have been discovered. Section 5852 refers to "the" period of limitation. The provision does not limit or qualify which period of limitation applies, the two-year period of limitation in § 5805(5), or the six-month discovery period in § 5838a(2). As a savings statute, § 5852 applies to whatever period of limitation is or may be applicable in a given case. Section 5852 is a savings statute, not a statute of limitations.

Insurer was required to defend insured because the claim arose from professional services rendered, and it was irrelevant whether the claim sounded in negligence or medical malpractice.

Stover v Garfield, Supreme Court No. 120165, 2002 Mich. LEXIS 1196 (June 25, 2002). In an order, in lieu of granting leave to appeal, the court reversed the September 14, 2001 published opinion of the Court of Appeals (*Stover v Garfield, 247 Mich. App. 456 (2001)*) and remanded for consideration of issues raised by the garnishee defendant-appellant, which were not addressed by the original decision. As indicated in parts II and III of the dissent at the Court of Appeals, the insured's acts or omissions causing the death of plaintiff's decedent were in the course of delivering professional services. It was unneces-

sary to determine the question of whether the theories pleaded in the underlying complaint sounded in medical malpractice or some other cause of action. Regardless of the theory of liability, garnishee defendant had a duty to defend unless a policy exclusion applied.

Michigan Court of Appeals

Icy steps were open and obvious, and there were no special aspects that created a uniquely high likelihood of harm so as to remove the condition from the open and obvious danger doctrine.

Corey v. Davenport College of Business, Court of Appeals No. 206185, 2002 Mich. App. LEXIS 638 (April 26, 2002). On remand, in light of *Lugo v Ameritech Corp., Inc., 464 Mich. 512 (2001),* the court vacated its previous opinion and affirmed the trial court's grant of summary disposition in favor of defendant on plaintiff's premises liability claim. Plaintiff slipped and fell on snowy and icy steps located outside of one of defendant's dormitories. The court held that the slippery steps were not only an open and obvious condition, but there were also no "special aspects" of the steps to create a "uniquely high likelihood of harm or severity of harm" if the risk was not avoided or that would serve to remove the condition from the open and obvious danger doctrine. The steps were not very high, and there was an alternate route readily available to plaintiff. The court further held that its decision was not changed by the Michigan Supreme Court's decision in *Quinlivan v Great Atlantic & Pacific Tea Co., Inc., 395 Mich. 244 (1975).*

Nawrocki *and* Hanson *are to only be applied prospectively.*

Sekulov v City of Warren, Court of Appeals No. 228159, 2002 Mich. App. LEXIS 707 (May 14, 2002). Concluding that *Nawrocki v Macomb Co. Rd. Comm., 463 Mich. 143 (2000)* and *Hanson v Mecosta Co. Bd. of Co. Rd. Comm'rs., 465 Mich. 492 (2002)* should have prospective application only, the court held that plaintiff sufficiently pled a cause of action in avoidance of governmental immunity against the defendant-county. Plaintiff's decedent was struck and killed in 1987 as he crossed at a designated crosswalk while traversing a county road. The crosswalk was within the traveled portion of the highway, i.e., the roadbed. Plaintiff alleged that the county breached its duty to design roadways, crosswalks, and pedestrian traffic lights in a reasonably safe manner. Given that plaintiff was not automatically barred by governmental immunity simply because the accident occurred in the crosswalk, the court concluded that the allegations in the complaint and accompanying affidavits satisfied the pre-*Nawrocki* and pre-*Hanson* requirements for a valid cause of action. Summary disposition in favor of the county was reversed, summary disposition for the defendant-city was affirmed, and the case was remanded.

In a medical malpractice action, timely filing of a nonconforming affidavit of merit warranted dismissal without prejudice, but the court declined to decide whether the timely filing of the defective affidavit tolled the statute of limitations.

Kirkaldy v Rim, Court of Appeals No. 225735, 2002 Mich. App. LEXIS 792 (June 4, 2002). Deciding an issue of first impression, the court held the trial court properly determined that the correct sanction for plaintiffs' timely filed, nonconforming affidavit of merit was dismissal *without prejudice*. In order to qualify as an expert witness, plaintiffs' expert needed to be a board-certified neurologist because the defendant-doctors were both board-certified neurologists. However, plaintiffs' expert was a board-certified neurosurgeon. The court concluded that the purpose of the statute, to prevent frivolous medical malpractice actions, was fulfilled here where plaintiffs filed an affidavit in which a medical professional clearly supported plaintiffs' claims the defendants' actions amounted to malpractice. Although the expert may not have been technically qualified to testify, he had adequate knowledge, skill, and experience regarding the treatment of neurological conditions such that his proffered testimony would eliminate the possibility plaintiffs' claim was frivolous. The court specifically declined to decide whether the timely filing of the defective affidavit tolled the statute of limitations.

The court was bound by* Sekulov *to only apply* Nawrocki *prospectively, but it criticized the* Sekulov *opinion and recommended further review of the issue.

Adams v. Department of Transp., Court of Appeals No. 230268, 2002 Mich. App. LEXIS 815 (June 7, 2002). Reversing summary disposition for defendant because it was bound by the decision in *Sekulov v City of Warren, Court of Appeals No. 228159, 2002 Mich. App. LEXIS 707 (May 14, 2002),* which held that *Nawrocki v Macomb Co. Rd. Comm., 463 Mich. 143 (2000)* only had prospective application, the court expressed disagreement with *Sekulov* and recommended this case be submitted to a special conflict panel to resolve whether *Nawrocki* should have retroactive application. The court asserted that *Nawrocki* clarified the meaning of the highway exception to governmental immunity, rather than clearly establishing a new legal principle, and thus agreed with the dissent in *Sekulov* that *Nawrocki* applies retroactively. Applying *Nawrocki* retroactively, defendant was appropriately granted summary disposition on plaintiff's claims, based on failure to erect temporary portable stop signs or take other safety measures at the intersection where a power outage had disabled the traffic signal.

Statutory damages cap on the liability of motor vehicle lessors was constitutional.

Phillips v. Mirac, Inc., Court of Appeals No. 227257, 2002 Mich. App. LEXIS 814 (June 7, 2002). Deciding an issue of first impression, the court found that the $20,000 damages cap in MCL § 257.401(3), which limited a plaintiff's recovery in an action against a lessor of a motor vehicle, absent negligence by the lessor, when bodily injury or death occurred from an acci-

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dent involving a motor vehicle leased for 30 days or less, did not violate a party's right to a jury trial, to equal protection, or to due process of law under the Michigan Constitution. The case arose from an automobile accident in which plaintiff's decedent, a passenger in a vehicle driven by Reed, the person who rented the vehicle from defendant for less than 30 days, was killed. Plaintiff did not allege defendant was negligent in leasing the vehicle to Reed, whom the jury found negligent. The jury returned a verdict in favor of plaintiff. Reed was uncollectible, and plaintiff sought damages of $250,000 from defendant, who agreed to pay damages in the amount of the statutory cap. Because the trial court found the statute to have been unconstitutional, the court reversed and remanded.

Medical malpractice suit against hospital required affidavit of merit from physician who was board certified in the same specialty as the offending physicians, who were the basis of the claim against the hospital under a theory of vicarious liability.

Nippa v. Botsford Gen. Hosp., Court of Appeals No. 229113, 2002 Mich. App. LEXIS 898 (June 21, 2002). Although "party" is a legal term of art, the court rejected plaintiff's argument that the expert who provided her affidavit of merit was not required to be board-certified in infectious disease because the hospital, the only named defendant, was not so certified, although two of the allegedly negligent treating physicians were so certified. The court concluded that plaintiff was alleging liability by the hospital under a theory of vicarious liability, and acceptance of plaintiff's argument would "effectively repeal" MCL § 600.2169 by allowing plaintiffs to avoid the statute's requirements by declining to name individual physicians as defendants. Therefore, the court rejected plaintiff's claim that "party," as used in § 2169, should be interpreted to refer only to named parties of record. The trial court's order of involuntary dismissal was affirmed.

Pursuant to the totality of the circumstances, plaintiff's conduct and actions effectively waived the permissive right to a civil jury trial, despite a properly filed demand for a jury trial.

Marshall Lasser, PC v George, Court of Appeals No. 226920, 2002 Mich. App. LEXIS 971. Consistent with the relevant court rules, the subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a totality of the circumstances test. The trial court did not err in denying plaintiff's motion for reconsideration after a bench trial on the issue of damages, notwithstanding the fact he had filed a jury demand and did not explicitly withdraw the demand. After a default judgment was entered on the issue of liability, the parties fully and actively participated in the bench trial on the issue of damages. The trial ranged over a period of 16 months and was addressed in 5 separate hearings. Both parties were given notice the trial court would be deciding the damages issue and both parties were present and represented by counsel. There was no indication in the record either party ever objected to the bench trial, and no indication either party proceeded under protest. The court concluded both parties' acquiescence to the bench trial evidenced an agreement to waive the secured right to a jury trial. Affirmed.

The previous case summaries have been provided to the Negligence Law Section courtesy of the State Bar of Michigan e-Journal. Visit the State Bar's website, *www.michbar.org* to subscribe to the e-Journal or if you have questions, please email *mpickett@mail.michbar.org*

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