Time Holes in Made Whole

Michael J. O'Hara, J.D., Ph.D.
Professor Emeritus
College of Business Administration
University of Nebraska at Omaha
mohara@unomaha.edu

Abstract

Ben Franklin observed: "Time is money." Like all aphorisms, however, its kernel of truth is less than the whole truth. Sometimes time is not money; and thus not damages. As with all aspects of damages, the legal contours of the recoverable loss that as a matter of law makes the plaintiff whole has holes. One motivation for courts of law to welcome expert witnesses on the question of damages is that time can be money. Calculating just how much time is just how much money is but one expertise that is likely to assist the trier of fact.

Introduction

A listserv exchange between long-time forensic damages experts (especially Bill Landsea of Florida and Jim Rodgers of Pennsylvania) triggered this manuscript. One of the ways that time is not money was revealed in a case for which Dr. Landsea[1] was calculating damages. In consultation with his engaging litigator, Bill endeavored to calculate the dollar value of that hole in making whole. Bill posted to the listserv his first endeavor and solicited comments. Rather quickly, Dr. Rodgers chimed in with some citations including one that gave a set of court decisions agreeing with Bill approach to calculating damages.[2] However, each of those six jurisdictions deviated from their common law stance of time is not money in that context because the six courts were interpreting a to-be-liberally-construed statutory cause of action (i.e., consumer protection). Alas, for Bill's engaging litigator, that plaintiff was seeking redress for a traditional common law cause of action distinct from the statutory cause of action in each of the six cited cases.

All of which got me thinking: "When is time not money?"

Beyond the Scope of This Work

Let's start by saying what is beyond the scope of this manuscript.

Varying greatly in complexity and completeness, there are a host of well-regarded formulas for calculating how much a dollar today is worth more than a dollar tomorrow as well as calculation of how much a dollar today is worth less than a dollar yesterday. The time value of money can be computed with simple interest or with compound interest (i.e., interest earned on prior period's earned interest).

---

[1] Dr. Landsea has under final review a *Practice Note* about his endeavor to be published in a forthcoming issue of the double blind referred journal *The Earnings Analyst* (https://www.theearningsanalyst.com/). *TEA* is jointly published by the American Rehabilitation Economics Association (www.a-r-e-a.org) and the Collegium of Pecuniary Damage Experts (www.CPDE.info).

[2] See, *In Re: General Motors LLC Ignition Switch Litigation*, 2018 U.S. Dist. LEXIS 155576 (S.D.N.Y. 9-12-2018) which listed Colorado, New York, Ohio, Oklahoma, Utah, and Virginia as each interpreting its consumer protection act as deviating from that State's traditional common law confinement of damages to lost income or lost earnings ability. Their common law traditionally excluded recovery for lost "free" time or "personal" time (e.g., driving self to physical therapy related to the injury). These courts took note of their State's statutes authorizing recovery of actual damages instead of merely damages as well as providing expanded recovery for noneconomic (read: non-pecuniary) damages.

The two formulas are:

SIMPLE INTEREST	**COMPOUND INTEREST**
FV = PV (i) n + PV	FV = PV (1 + i)^n

where
FV = future value
PV = present value
i = interest rate, and
n = number of time periods.[3]

For example, if PV = 1, i = 0.10, and n = 3, then

FV = 1 (o.10) 3 + 1 = 1.30	FV = 1 (1.10) (1.10) (1.10) = 1.331

Do note, if there are enough commas to the right of the dollar sign, then 3.1% can be real money.

There is a vast literature and array of formulas on when to and how to move away from a single lump sum future payment and into multiple payments of equal or varying sizes; as well as when to and how to move away from simple interest and into compound interest using a single interest rate or a variety of rates; as well as when to and how to move from n time periods of equal duration and into time periods of equal or varying durations and/or equal or varying frequencies.

For the purpose of this manuscript, we need say no more than a dollar today is worth more than a dollar tomorrow; and a dollar yesterday is worth more than a dollar today. The focus of this manuscript will be on whether that dollar is owed. Those formulas are not within the scope of this work.

Knowing how to tailor a formula to fit a case is an expertise that assists the trier of fact. For the expert witness, the task is to correctly select from within that vast literature and array of formulas the correct formula so as to align with the legal contours of recoverable damages. This manuscript is about those legal contours and is not about those formulas.

---

[3] NOTE: The ^n in the above compound equation is an alternative method of indicating an exponent. The traditional method is a superscripted number instead of a leading carrot.

An exponent indicates that the value to which the exponent is attached is to be multiplied by itself as frequently as the numerical value of the exponent. For example, when here where n=3 and i = 0.10, then (1 + i)^3 = (1 + 0.10) (1 + 0.10) (1 + 0.10); so that (1 + i)^n = 1.331 (assuming the reader is to ignore significant digits).

Instead of a carrot (i.e., ^) to indicate the next item is an exponent, an exponent often is represented by a superscript. For example, in this formula instead of (1 + i)^n it would be written as $(1 + i)^n$. But, especially in complex formulas with layers of exponents the increasingly smaller fonts of multiple superscripts can become unreadable.

So, for the math queasy among us, fear not. Beyond the two above, nary a mathematical equation will grace these pages. Instead, you will be greeted by the legal formulations so familiar to you.

Holes in the Whole

The legal contours of damages, from the perspective of the plaintiff, always have failed to truly make the injured party whole. Also, from the perspective of the defendant, the legal contours of damages always have included more than merely the whole; a negative hole, if you will. Not as a full inventory, but merely as some examples, let's note the following holes in the whole.

While The Law asserts that by compensatory damages the plaintiff shall be made whole, in fact, plaintiffs do not obtain full recovery of losses associated with suffering the wrong doer's act: be that wrongful act a tort, a breach of contract, a breach of other legal right, etc. FIRST, to be recoverable damages must be pecuniary[4] (a.k.a., economic damages or monetary damages) in nature as well as inclined to serve efficiency[5] as The Law sees efficiency. SECOND, an aspect of the many so called "tort reform" statutes is constraining the finder of fact's discretion via (undisclosed to the jury but known to the judge) pre-set dollar caps on maximum defendant liability; especially pain and suffering. THIRD, the legal contours of contract damages exclude consequential damages, even if the parties' explicit oral agreement is superseded by written fine print terms in a nearly unconscionable replacement form contract. FOURTH, unquestionable infringement of one's constitutional rights to receive due process of law from all governmental actors has been set aside by the constitutional gloss of qualified immunity. FIFTH (and far from being the smallest of the holes), the routine plaintiff when successful in proving the defendant's act was unlawful as well as successful in proving the defendant's wrongful act was the proximate cause of the plaintiff's losses, the plaintiff does not recover the substantial (i.e., routinely ranging between one-fourth and one-third of the recovery) litigation costs of so proving.[5] There are many more holes, but these few ought suffice to prove the point that the plaintiff is made less than whole due to holes in the legal contours of damages.

Defendants tend not to complain about holes in the plaintiff's recovery. Instead, defendants tend to focus on the defendant's perception of the plaintiff's double or excessive recovery at the defendant's expense: a negative "hole" if you will. FIRST, the collateral source rule bars the defendant from claiming as an offset against the plaintiff's losses payments made by third parties to the plaintiff that prevented the plaintiff from personally experiencing the loss;

---

4 O'Hara, Michael. 2010, "Pecuniary Damages", https://www.theearningsanalyst.com/product/tea11-3/.

5 O'Hara, Michael. 2014, "Learned Hand's False Sense of Efficiency" https://www.theearningsanalyst.com/product/tea14-5/.

5 The USA does so as a deliberate policy rejecting the UK's default policy of the litigation winner is paid by the loser the winner's actual litigation expenses. The USA does this to avoid the real world consequence of the poor not being economically able to sue the rich. In some contexts USA legislatures have either authorized judicial ordering of cost or the legislature itself commands the ordering of costs by a specific type of winner.

especially so if the plaintiff's own precautionary action (e.g., buy insurance) triggered the third party's payment. SECOND, in many, but far from all, legal contexts the plaintiff does not experience traditional tax liabilities for their recovery. Accordingly, so called "tort reform" often targets non-taxation of damage awards without simultaneously targeting non-recovery of litigation expenses. But also note, when the plaintiff's recovery is subject to taxation, often the consequence is a new hole because of the peculiar context of taxation of a damage award can result in a tax bill that consumes the entire damage award (e.g., what would otherwise have been multiple years of income individually taxed, a damage award can arrive for inclusion in a single tax year's income). As is so often true when confronting competing policy choices, some commentators perceive non-taxation as an explicit offset to non-recovery of litigation expenses whereas proponents of "tort reform" seek termination of a subsidy for the plaintiff's bar. THIRD, once in receipt of a recovery of an award of damages, the plaintiff is free to expend those monies in the pattern of the plaintiff's own choosing and is under no obligation to buy those goods (e.g., a new handicap equipped van every five years) or those services (e.g., weekly lawn mowing) assumed by the expert in calculating damages to assist the trier of fact. Instead, the plaintiff might choose to squander the money in Vegas or, perhaps, pay the plaintiff's litigator's bill. FOURTH, plaintiffs have a duty to mitigate. Plaintiffs may not sit idly by as damages aggregate. Instead, plaintiffs must take reasonable steps to constrain the aggregation of losses experienced. Failure to mitigate damages will bar the plaintiff's recovery of those avoidable damages; and, sometimes, recovery of all damages.

Suffice it to say, to make whole is a legal fiction instead of an accurate description of the task sought to be completed by The Law. Now let us turn to specific holes that are created when time is not money.

An Arrow and an Exchange

What is time? What is money? How is it they equate?

Time is an arrow, to The Law. In stark contrast, physics entertains a multiverse as well as entertains time running forwards, backwards, and permitting non-contiguous time jumps within each of those alternative universes as well as between those alternative universes. But, to The Law time has a unidirectional motion from past to present, to future and doing so solely within The Law's bailiwick. That is time is like an arrow in flight.

This is not to say that The Law is without flexibility regarding time. Routinely, The Law requires its agents to entertain alternative realities (e.g., realities that would exist "but for" the defendant's wrongful act) and alternative timelines (e.g., wrongful termination of employment losses including periods of presumed reasonable mitigation efforts). Expert witnesses routinely assist the trier of fact with these tasks. The Law requires the trier of fact both to jump about along the arrow of time as well as to consider alternative arrows of "but for" worlds.

The Law equates time with money as well as money with time upon the predicate that replacement expenditures can offset wrongfully induced losses.

To economics, money serves three functions: medium of exchange, unit of account, and store of value. As a medium of exchange money allows those participating in a transaction to translate the quantities and qualities of their respective desires embedded in their respective assets into a shared language of dollars. That exchange is not in isolation. That exchange is a precursor to each party's subsequent array of exchanges that more accurately correspond to that party's current and future desires. Money's unit of account function allows further translation by providing an independent and unitary metric for the joint attributes of quantity and quality. Then, the temporal dimension of desire is captured by money when money serves as a store of value. The Law leans on all three functions of money when The Law equates time and money. The role of a damage expert witness is to testify regarding the time value of money as it relates to all three functions as well as tallying the recoverable losses according to the contours of recoverable damages that The Law ascribes to the defendant's wrongful act.[6]

Sometimes the Past Does Not Exist

Dr. Landsea had before him a standard personal injury tort case.

Assume, on day 1 the plaintiff is injured; but the trial is at some distant date. Starting on day 1 and continuing through the period of time known as pre-trial assume the plaintiff suffers the loss of ability to perform a variety of household services. For the sake of simplicity, assume the array of household services (e.g., wash dishes, mow lawn, etc.) that can not be performed is a constant array throughout the pre-trial period and the post-trial period. Additionally for the sake of simplicity assume during the pre-trial time period that a constant fraction of that array of household services are replaced with market purchases (e.g., buy lawn service but not buy maid service). Finally, assume, those two constant fractions continue unchanged in the post-trial period until the plaintiff's end of life expectancy. What compensation makes the plaintiff whole?

Routinely, The Law permits recovery of damages for all post-trial loss of household services while The Law simultaneously only allows from recovery pre-trial loss of household services that were purchased from the market. That is, recovery is denied for household services gifted or done by a family member expecting recompense if and only if within the damage award; as well as denied for foregone services. Most anything can be purchased from the market. Some things can not be purchased from the market (e.g., life itself[7]). Routinely, the courts welcome damage experts for tallying (according the legal contours) the inventory of market purchases as well as calculating the time value of money associated with those purchases, which together provide the calculation of damages that, as a matter of law, make the plaintiff whole.

---

[6] Some expert witnesses (i.e., witnesses permitted to testify as to opinion instead of required to limit testimony to facts) testify as to causation. Usually causation experts are from the "hard sciences". But, occasionally a "soft science" (read: very limited, if any, ability to conduct experiments with the attribute of being replicable) expert will be permitted to opine as to causation. No expert is permitted to testify as to the ultimate question before the court; expert testimony must be limited to the elements of a cause of action.

[7] More on that topic later in the section "Hedonic Damages: Both Yes and No.

When addressing a tally of a plaintiff's past damages there is material distinction between historical household services that are:

[a] replaced via market purchase (either by the plaintiff or by a collateral source);
[b] replaced but payment by plaintiff conditional on inclusion in the damage award;
[c] gifted replacement; and
[d] foregone replacement.

These distinctions between [a] buy, [b] conditional, [c] gift, and [d] foregone do not exist in the tally of future damages since all future household services (for which the plaintiff lost the ability to perform due to wrongful action of the defendant) are assumed to be purchased from the market.

Generically, the common law tallies as a compensable loss only past out-of-pocket expenses; thereby excluding from recovery [b] conditional performance; [c] gifted time received; and [d] foregone services. Interestingly, out-of-pocket expenses are recoverable even if the pocket was not the plaintiff's. The collateral source rule will bar defendant's gain (via reducing the awarded damages) from the expenditures of third parties (e.g., AFLAC duck). Non-insurance cash expenditures (e.g., family member gives the gift of market purchased maid service instead of gives the gift of time doing the maid service personally) are similarly protected from defendant off-set via the collateral source rule.

Note how in the context of a family member gifting time to perform services The Law doubly treats time as not money. Both the past is ignored and simultaneously the gift of time is ignored. The policy motivations for these two are distinct. The motivation for ignoring the past is that (paradoxically relative to the presumed future purchases) the quantity and quality of replacement services are not sufficiently definite to avoid testimony being speculative. However, that assertion of speculative is more appropriate for foregone and some conditional performances than it is for gifted time since for gifted time both the quantity of time and tasks performed are known. The second motivation for ignoring the gift of time instead of the gift of cash is a boundary condition on the collateral source rule that eleemosynary transactions are not to be equated with market transactions. This second motivation arguably captures conditional pay performances. But note, in a classic example of a legal exception has an exception, if an eleemosynary entity (i.e., not a family member) were to itself engage in sufficient similar transactions (e.g., fraction of service providers are not volunteers and a fraction of [e.g., means tested] recipients pay for services rendered) to quantify the cash value of its eleemosynary time donations, then a market value would be established and welcomed in court as proof of the quantum of dollar loss.[8]

With respect to foregone past services, it is unclear why future voluntary forbearance is materially distinct so as to justify the recovery of the future value and the barring recovery of the past value. Why post-trial does the plaintiff have the freedom to choose but no such freedom is recognized pre-trial? Is it an aspect of mitigation policy? However, to the extent that those

[8] A complex legal question would be whether the eleemosynary entity would have standing for a subrogation claim against the plaintiff's recovery.

foregone past services proximately alter the array of needed future services, that increment of future increase attributable to delay would be recoverable. A seemingly odd deviation from mitigation policy. For example, pre-trial deferral of roof maintenance because tortfeasor's wrongful act removed both the plaintiff's ability to do the repair personally as well as the financial ability to purchase repair from the market, then what would have been preventable structure damage would be recoverable post-trial expanded maintenance services post-trial. Otherwise, the past is water under the bridge.

Plumb Out of Time

Time can be of the essence in special legal circumstances (e.g., speak now or forever hold your peace). When time is of the essence money is less likely to be equal to time. Sometimes the processes in play are so time sensitive that action "now" yields radically different outcomes than any future cash value can purchase from the market. The equitable remedies, most notably injunction, seek to address this concern.

An example can come from an environmental suit seeking to prevent species extinction. Cash lacks the ability to buy rekindling of an extinct species thus money can not equal time.[9] Similarly, in construction contexts the sequencing of tasks also can be intensely time sensitive. Recall how, in the context of a construction contract, how small delays in complaining about what would have been a material breach are so swiftly transformed into waiver. Construction contract time that is reasonable is vastly less that The Law uses for ordinary contract.

A But for World

In *Monty Python and the Holy Grail* an elderly man during the Black Plague famously called out "I'm not dead yet!".[10] In The Law's but for world for the wrongfully dead sometimes damages are calculated as if the deceased is assumed to be alive.

Dead, but alive: how so?

For example, what would have been earned but for the defendant's wrongful act terminating the plaintiff's life prior to the end of the plaintiff's work life expectancy given the plaintiff's earnings record and earning capability? Those earnings losses would be a pecuniary (a.k.a., economic loss that is legally recognized versus "mere economic loss" that is not recoverable). The but for world also permits a damage award for non-economic damages; for example, loss of consortium. The so called "tort reform" statutes often arbitrarily cap the maximum dollar value of non-economic damages on the policy argument that without the market purchases as the unit of account juries are too often and too easily swayed by passion rather than reason when seeking to use dollars to equate with time lost with a loved one.[11] An extension

---

9 Absent *Jurassic Park* technologies. But, do recall, that those *Jurassic Park* technologies were fundamentally flawed because the rekindling was not, in fact, of the extinct species but instead a creation of a new hybrid with alternative reproduction capabilities.

10 https://www.youtube.com/watch?v=Jdf5EXo6I68

11 Fully intending the pun: "How dear thy heart?".

routinely, but not uniformly adopted by the States, added on to that but for world of dead but alive is a marriage existing at the time of death will be neither assumed subsequently dissolved nor assumed subsequently replaced by another marriage until the end of the deceased plaintiff's life expectancy. This bar on introduction of change in marital status exists even though clear statistics exist to support far from speculative forecasts on such change of marital status.

When you are numbered among the living dead, what household services might you have provide in that but for world (deduction is done for the personal consumption that being dead would have avoided)? Of course, the traditional household services that have market counterparts (e.g., lawn service; maid service) will be tallied among the special (a.k.a., economic) damages. Some new services might be necessitated by the wrongful act (e.g., wheelchair accessible van replacing a pre-injury sedan) or might be necessitated by the change of circumstances induced by the financial magnitude of the damage award itself.[12] When it comes to creativity, it is hard to top the creative damage claim of defensive sleeping. To wit: defensive sleeping cloaks a routine non-market transaction with the patina of a market transaction. Loss of a sleeping partner (now deceased but living in the but for world) provides security services "comparable" to the types of security services that might be purchased from the market. But, is not defensive sleeping "free" time akin to the non-recoverable "free" time spent driving to a physical therapy appointment necessitated by the wrongful act?

Another version of dead but alive comes before the courts when the deceased is a child. Of course, a Lake Woebegone future awaited the child.[13] The gross estimate of damages proximately caused by the defendant's wrongful act spring from Lake Woebegone. What of the net? That is net of expenses that would have been borne by the parents in creating that above average child. Woe be unto he who dares to seek to persuade the trier of fact of the economic truth that, to the parents (versus society), the discounted present value of a living child is negative, so that death is a positive economic market event visited upon the parents. Yes, the defendant may seek the off-set for the death avoiding time and cash that would have lavished on the deceased child but for the untimely death imposed on the child. While legally admissible, such evidence only is introduced by an inexperienced and foolish defense litigator.

Sometimes The Law gets quite precise and formulates a bright line rule for the trier of fact to apply so as to define the contours of recoverable loss.

An example of legal precision is the (*pardon my French*) the "Oh Shit!" Rule. If following the moment of defendant's wrong act which triggered the plaintiff's death the deceased lives long enough to be-able-to utter those fateful words (need not say them, need only have the consciousness and the time to do so), then the plaintiff has the time and the consciousness to experience pain and suffering for which the jury may award non-economic damages measured in dollars. Minute measures of time can be material.

---

12 Mitenko, Graham and Michael J. O'Hara. 2012. "Financial Management Fees in Damage Claims." *The Earnings Analyst*, 12:41-62. https://www.theearningsanalyst.com/product/tea12-3/

13 "Well, that's the news from Lake Wobegon, where all the women are strong, all the men are good looking, and all the children are above average." https://en.wikipedia.org/wiki/Lake_Wobegon

Hedonics: Both Yes and No

The legal jargon "hedonic damages" comes in two different flavors: one universally welcomed by the courts and the other nearly uniformly rejected by the courts. The first dictionary definition of "hedonic" is "1: of, relating to, or characterized by pleasure".[14]

In real estate damages, hedonic damages are a routine component of recoverable damages. Hedonic damage in the context of real estate damage is a discrete metric of location specific characteristics that help give truth to the valuation adage "Location, location, location." For example, does the property in question have a good view that market buyers routinely prize and for which market buyers willingly pay a premium? Note how this is akin to, but receives materially different legal treatment from, contractual consequential damages. Real estate hedonic damages are recovery of the loss of an attribute of the property that might or might not be external to the property itself. Obviously, beautiful trees on your own property, if wrongfully destroyed, could support recovery of hedonic real estate damages. However, attributes external to your property also may support recovery of hedonic real estate damages. But, the damage must be wrongful to support recovery. Extern attributes (e.g., an unobstructed view of a distant lake) often would not support the distant but viewing land owner's having standing to sue an interposed real property owner from lawfully obscuring that view (e.g., planting trees). Such lawful uses of their own land, as discrete from otherwise wrongful action will not support a suit. But, because the market pairs the property with that attribute (even if an externality) so tightly The Law recognizes loss when there is wrongful severance of the attribute. In stark contrast, to achieve such an externality pairing in the context of contracts requires an express agreement to so pair.

Another version of judicially welcomed hedonic damages comes from employment law. Unlawful discrimination comes in two types: disparate treatment and disparate impact. Disparate treatment exists when on individual is proven to have intentionally discriminated against another individual. Disparate impact exists when statistics prove that an employer's pattern or practice generates a disproportionate adverse consequence for members of a protected class (i.e., [routinely limited to the classes of] race, color, sex, religion, physical handicap) that is not justified by a legitimate business purpose (e.g., safety). Hedonic damages may be part of the proof of disparate impact. For example, if an employer's compensation structure contains a material component of tip income; and if the employer knows customers have demonstrated hedonic preference that generates material variations in compensation across protected classes, then that proof of hedonic damages can support a claim for disparate impact.

In stark contrast to real estate hedonic damages and in stark contrast to disparate impact hedonic damagers, in the context of wrongful death litigation hedonic damages are roundly rejected by the courts. In the context of wrongful death litigation hedonic damages are proffered as the dollar value of the loss of life itself. Most courts reject an expert's claim of expertise on the question of the value of the loss of life itself; a claim of expertise that is superior to the ken of the Reasonable Person serving a juror. Thus, courts deny admission of expert testimony on the

[14] https://www.merriam-webster.com/dictionary/hedonic

topic of hedonic damages on the grounds that an expert can not assist the trier of fact because this species of loss is well within the ken of the Reasonable Person. Additionally, some courts require such hedonic damages to be encapsulated with the catch-all category of "pain and suffering" (which, as you recall the so called "tort reform" advocates have arbitrarily capped).

Clearly, a death imposed wrongfully has cost the plaintiff time of life. But, the dollar value of that lost time, in the eyes of The Law, is prescribed an implied value that is *de minimis* beyond the earnings lost.

There are economic experts who turn to statistical measures in an effort to quantify the dollar value of the loss of life itself. The resort to such statistics is both to establish a basis for expertise as well as to generate a dollar value of the loss. One metric is VSL (value of statistical life) and another metric is QALY (quality adjusted life year). VSL is an inherently dollar denominated metric and QALY can be, but more often keys on quality metrics instead of dollars but does so in a larger formula that includes dollars. QALY is used as the metric of hedonic damages less frequently than VSL is used.

Using VSL to measure hedonic damage twists the stated purpose of VSL. Government regulators and mass market merchants engaged in benefit to cost calculations that seek a metric of the dollar value of a life lost *in some sense*. This is not a market transaction. Instead, VSL's dollar value is an imputed value predicated upon a presumptively fully informed rational decision maker trading risk of loss for a price (e.g., buy a home fire detector). Do note, the dollar value generated by VSL will vary by the statistically assumed at risk population (FAA used upper middle class customers while the Ford selling the Pinto used lower middle class) and that population's aggregated earnings. Rich people are worth more than poor people, but that is hardly life itself. Hedonic damages twists that isolated risk trade into a purported universal revealed preference for death avoidance; and, then equates the price of death avoidance in that narrow context to be a proxy for the dollar value of life itself. Quite a leap.

QALY comes from health systems that necessarily are implicitly rationing access to health care technologies. QALY leans on delayed mortality and medical metrics of improved quality across all modalities of care, and then rations care access towards the greatest QALY. Note that in QALY rich people have the same value as poor people, unlike VSL. Price of care is one variable in the QALY formula. Thus, the QALY formula can be reconfigured so that dollars are the final output by holding constant the metric of delayed mortality as well as holding constant the metric of quality of life. In QALY the dollar value is the cost of care experienced by the provider of care as distinct from the price paid by the recipient of care: often because, in a nationalized health care system, the provider of care does not charge a market price to the recipient of care. Thus, QALY is a dollar value not entertained by the recipient and yet this dollar value is being used to estimate the recipient's value of life itself.

So, in wrongful death suits (a statutorily created legal cause of action not found in the common law) loss of life itself is not recoverable and not a subject for expert testimony. What of other contexts of life itself?

Now, if in a wrongful death action life lost has a legally recognized value lost that necessarily is *de minimis*, then must a gain of life also be positively *de minimis* and thus inherently not wrongful? That is, if a plaintiff has imposed upon the plaintiff life (i.e., time) the plaintiff expressly sought to avoid, then can that imposition of that time be wrongful? If it is life itself, then less so.

If a now-parent was actively seeking to avoid pregnancy (e.g., had a known genetic defect with known high frequency of transmission to offspring), and due to medical gross negligence a pregnancy results, can the parent *qua* plaintiff sue for that child's wrongful life? Do recall from above, that the net present value of a living child is economically negative for the parent (if one ignores non-cash, non-market transactions measured in utils). An entirely different question is whether the child has standing to sue for life itself imposed against the parent's express desires. Perhaps a jurisdiction's law will so strongly presume life's preference for life that prior to life, objectively, life irrebuttably is desired. But, the parent *qua* patient may recover for that economic loss imposed on the parent. Do we now include the dollar value of the parent's time in rearing that Lake Woebegone child?

Consider a different context. What if life itself is imposed on the plaintiff by the defendant's unauthorized defeat of the plaintiff's rational suicide? Make it easy and assume a jurisdiction with legalized physician assisted suicide, and further assume all prerequisites required by the jurisdiction have been satisfied so that the plaintiff has the right to engage in rational suicide. Now, assume an unauthorized interloper bent on denial of this personal sovereignty. Does the unwilling living plaintiff have a zero loss since the implied dollar value of life itself is positive but *de minimis*; accordingly forced life is a gain? Would the forced-to-live plaintiff have duty to mitigate against lost earnings so that failure to mitigate off-sets any plaintiff claimed damages? What is the negative of hedonic damages?

Again, "I'm not dead yet." comes into play. If the plaintiff has suffered a personal injury, yet still lives, but with a proximately caused shortened life expectancy, then is it double counting for the plaintiff to both recover for earnings that will be lost during the period of truncation as well as to recover for the value of life itself? Does my time have any legally recognized dollar value beyond market transactions completed or which might have been completed?

Is there any type of expert that can assist the trier of fact on these questions?

Lastly, can only humans lose time? What of my pet? If I'm within the confines of San Francisco, then I do not own my pet as my personal property chattel, but instead I am custodian with a bailee's duties owed by me to my pet. And, as that bailee I have next-best-friend standing to sue in the name of my pet. This legal rubric requires of me far more than mere anti-cruelty duties.

One component of my hedonic loss might be my suffering the tortious taking of my prior ability[15] to pet my pet. May I, as custodian, recover as next-best-friend for my wrongfully

[15] To the subjective or objective satisfaction of my pet?

deceased pet's loss of time with me? May I, as personal representative of my pet's estate, recover for my pet's pain and suffering if my pet could have satisfied the
"Oh shit!" Rule?

Whose time is it anyway?
Is the theft of time a wrong without a remedy?