

FILED
JAN - 7 1994
ORANGE SUPERIOR

STATE OF VERMONT
ORANGE COUNTY, SS

NICOLE GRAY and JAN GRAY,)
individually and as personal) ORANGE SUPERIOR COURT
representative of JOSHUA GRAY) DOCKET NO. S27-91 OeC
)
vs)
)
GIFFORD MEMORIAL HOSPITAL, INC. and)
BRENT BURGEE, M.D.)

OPINION AND ORDER

on

DEFENDANT GIFFORD'S MOTION IN LIMINE
TO EXCLUDE EXPERT TESTIMONY AS TO THE VALUE OF LOSS OF
COMPANIONSHIP DAMAGES

On December 27, 1993, the above entitled action came on for hearing before the undersigned on a Motion in Limine filed by Defendant Gifford Memorial Hospital, Inc. Attorney Gareth H. Caldbeck, Esq. represented the Plaintiff; Attorney Ritchie E. Berger, Esq. represented Defendant Gifford Memorial Hospital, Inc., and Attorney David L. Clearly, Esq. represented Defendant Brent Burgee, M.D. Based on the arguments and memoranda submitted, the court issues the following opinion and order.

OPINION

This action is a wrongful death case filed pursuant to 14 V.S.A. Sec 1491 and 1492. Plaintiffs' claim is that the negligence of the Defendants caused the still birth of Joshua Gray. In a previous ruling in the case, the court granted the Defendants' motion in limine to preclude the Plaintiffs from introducing evidence of hedonic damages for Joshua Gray's loss of enjoyment of living on the grounds that 14 V.S.A. 1492(b) establishes a basis for recovery

for losses suffered by the next of kin of the decedent, and not for losses sustained by the decedent himself. As a result, Plaintiffs are precluded from introducing the testimony of economist Stan V. Smith as to hedonic damages or the value of the stillborn child's loss of enjoyment of his own life. Stan V. Smith had valued such loss of enjoyment of life at \$3,380,528 using a methodology he has developed to value projected losses on a year by year basis. This methodology is based on statistics about amounts society is willing to spend to save lives. These statistics come from individual, industry, and government agency sources. The methodology assigns a value per year to an average person's life, and reduces each yearly value to present value.

Now, Defendant Gifford, joined by Defendant Burgee, seeks to preclude the Plaintiff from introducing the testimony of Stan V. Smith that the value to the survivors of the loss of companionship of the stillborn baby is \$3,183,645. Mr. Smith admittedly uses precisely the same methodology for reaching his opinion of this value as he used to value hedonic damages, except that the amount is less because the calculation ends with the projected death date of the older child in the family, rather than with the projected death date of Joshua Gray had he been born alive and lived. Mr. Smith links the concept of value to the decedent with the concept of value to the survivors by the simple statement that close family members place at least as much value on a relationship with the decedent as unrelated unknown persons do. (See page 4 of Exhibit C to Defendant Gifford's Motion in Limine.)

Defendants argue that the evidence should be excluded because it is speculative and not relevant under V.R.E. 402. Plaintiffs argue that Mr. Smith, as an economist, has scientifically based knowledge about the value of Joshua Gray's life that will assist the jury as the trier of fact in its task, and that the evidence is therefore admissible under V.R.E. 702. Defendants

counter with the argument that such testimony is simply hedonic damage evidence by another name, and it will not assist the trier of fact in valuing loss of companionship, which is not susceptible to scientific valuation and is uniquely within the province of the jury.

The language of 14 V.S.A. Sec. 1492(b) defines the scope of recoverable damages as "the loss of love and companionship of the child and for destruction of the parent-child relationship in such amount as under all the circumstances of the case, may be just." The statutory language makes clear that the damages are those suffered by the relatives as a result of the loss of the relationship. Its tone also indicates the subjective character of such damages: it links the concept of personal relationships with the standard of such damages as "may be just" under all the circumstances. It also assumes the amount of damages will vary depending on the particular nature of the relationship, as damages are to be awarded in relation to "all the circumstances."

The court agrees with the Defendants that any attempt to quantify loss to family members from a stillborn birth by measuring the value of the stillborn child's life to himself on the basis of societal statistics on the cost of risk avoidance, as Mr. Smith proposes to do, is both irrelevant and speculative. The legislature assigned to the trier of fact the job of placing a value on the emptiness and anguish in a family member's life due to the loss of a relationship. An economic value that society might put on a decedent's life, treating him as an average statistical person, is something quite different, and bears no relationship to any measures his family members might use in determining the extent of their own loss.

Furthermore, the inquiry is a purely subjective one, based on an evaluation of the physical, emotional and psychological relationship between

parents and a child. Clymer v. Webster, 156 Vt. 614 (1991). Jurors are specially suited for such evaluations, since each has an equally valid fund of experience on which to draw in evaluating psychological relationships between parents and children. For an economist to suggest that there is a special way to make such evaluations, and further that it involves measuring the economic value of a person's life to himself, statistically derived, misses the mark widely. Such testimony is so far off the point that it amounts to speculation and is irrelevant.

This is the position that has been adopted by other courts which have considered whether to admit this type of testimony as evidence in wrongful death actions. Bramlette v. Hyundai Motor Company, 1992 U.S. Dist. Lexis 13080 (E.D. Ill 1992); Southlake Limousine and Coach, Inc. v. Brock, 578 N.E. 2d 677 (Ind.App.1991); and Fetzer v. Wood, 569 N.E.2d 1237 (Ill App.Ct.1991). Plaintiff is unable to produce any case in which courts have allowed expert testimony of the type proffered here to be admitted to prove damages for loss of a relationship in a wrongful death action. Vermont case law clearly focusses on the personal nature of the lost relationship. Hart v. Union Mutual, 153 Vt. 152 (1989).

Plaintiffs advance the argument that the evidence should be admitted under V.R.E. 702 on the grounds that Stan V. Smith is an expert with scientific knowledge that will assist the trier of fact, in this case the jury, in making its decision. In support of this position Plaintiffs point to Mr. Smith's solid credentials as an economist. They further state that the testimony will assist the jury in its deliberations by introducing some proposed framework for measurement, and even if the jury decides to reject Mr. Smith's approach, it will still have received assistance through hearing his testimony. Plaintiffs point to the strong support for the helpfulness of Mr. Smith's testimony

expressed in the court's opinion in Sherrod v. Barry, 827 F. 2d 195 (7th Cir. 1987).

There are several important distinctions to be made here. First, Sherrod was not a case brought under a wrongful death statute but a Sec. 1983 action, in which there are principles involved that are different from those in a wrongful death claim. Bramlette, supra, at 16-17. Second, the court in Sherrod specifically permitted hedonic damage evidence, whereas hedonic damages have already been disallowed in this action and the question is whether Mr. Smith's testimony will be relevant to the jury in valuing loss of a psychological relationship. Third, evidence is admissible under Rule 702 only if the court concludes that the proposed expert has scientific or other specialized knowledge that will assist the trier of fact in its determination. The court concludes that while Mr. Smith has credentials indicating specialized knowledge, the particular knowledge he proposes to offer the jury here will not assist the trier of fact because the determination is one which a jury is uniquely suited to make. Finally, any reliance on Rule 702 is unavailing if the evidence offered is determined by the court not to be relevant under the fundamental requirement of relevance set forth in V.R.E. 402. As described above, the court concludes that the proffered testimony does not meet the basic test of relevancy because the measurement Mr. Smith uses is so unrelated to the problem of valuing a lost relationship as to be meaningless. Relevant evidence includes testimony of the survivors themselves about their actual relationship with the decedent, not the testimony of an economist about how much society is willing to pay to save the life of a nameless person with decedent's statistical data from foreseeable risks.

ORDER

For the foregoing reasons, the court concludes that Vermont's wrongful death statute precludes introduction of expert testimony that places value on a lost relationship by a methodology that measures the societal cost of risk avoidance to the decedent himself, and then attributes that value to the surviving family members with only minor adjustments. The motion in limine to preclude the introduction of such evidence is GRANTED.

Dated at Chelsea, Vermont this 7th day of January, 1994.

Mary Miles Teachout
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Superior Judge