I. INTRODUCTION

In aviation cases, much time, energy, focus and money are spent on assessing liability and developing and challenging expert testimony on liability issues. The parties typically engage in extensive discovery concerning the aircraft, its history and development, and alternative theories of accident causation. There also is concerted effort to minimize or eliminate any claim for punitive damages, where those claims are asserted. After preliminary
Too often in aviation cases, plaintiff’s assessment of damages involves a high level of speculation which not only can inflate compensatory damages, but which also can run afoul of standard evidentiary practice. Indeed, plaintiffs’ counsel frequently assert that allegedly “egregious” circumstances associated with aircraft accidents, and the concern of the flying public for aviation safety, warrant the award of heightened levels of compensatory damages, even in the absence of circumstances meeting the requirements for award of punitive damages.

Moreover, the introduction of faulty assumptions, or “myths,” in a forensic expert’s report or testimony also can skew a damages award upward. As discussed below, two categories of compensatory damages where speculation or faulty assumptions can creep in and go unchecked are in awards for pre-impact fear and post-impact pain and suffering, and in forensic economics used to determine the decedent’s “life worth.”

II. PRE-IMPACT FEAR AND POST-IMPACT PAIN AND SUFFERING

A. Pre-Impact Fear or Suffering

Simply put, pre-impact fear and suffering is a category of damages for fear or suffering allegedly sustained prior to the impact. This category also sometimes is referred to by many plaintiffs’ counsel as pre-impact terror or pre-impact pain and suffering. Historically, pre-impact damages were not recoverable due to their speculative nature. See, e.g., Dearborn Marine Serv., Inc. v. Armstrong, 499 F.2d 263, 288 (5th Cir. 1974) (finding evidence that decedent was alive after explosion and sought escape but that “[t]he immediacy of the occurrence and the absence of other evidence make too speculative the finding that [decedent]
survived for a matter of minutes and made his way to the forepeak.”) (boat explosion).

However, as damages for emotional pain became more acceptable, courts have generally, though not universally, allowed plaintiffs to recover pre-impact damages. See Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 317-18 (5th Cir. 1984) (applying Louisiana law to airplane crash; holding pre-impact terror recoverable where only indicia of fear based on simulation of crash); In re Jacoby Airplane Crash Litigation, 2006 U.S. Dist. LEXIS 87816, *21 (D. N.J. 2006) (finding New Jersey law would permit plaintiff to present a claim for pre-impact fright even if decedent did not suffer bodily harm prior to the impact); Platt v. McDonnell Douglas Corp., 554 F. Supp. 360, 363-64 (E.D. Mich. 1983) (holding that the Michigan Wrongful Death Act allows recovery for a deceased airline passenger's pre-impact fright and terror, because the MWDA allowance for pain and suffering in airplane accidents includes mental suffering, anxiety, suspense and fright in the form of pre-impact fright and shock); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 634 (Tex. 1986) (finding Texas law allows recovery for pre-impact terror).

Although most jurisdictions do recognize claims for pre-impact suffering or fear, there is concern about their speculative nature in awarding such damages. In Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976) (applying Florida law in airline crash), the court held that a Florida survival statute authorized pre-impact pain and suffering damages based upon the trial court’s finding that:

[I]t was ‘convinced that both of the deceased knew of the impending crash landing at sea, knew of the immediate dangers involved and are certain to have experienced the most excruciating type of pain and suffering (the knowledge that one is about to die, leaving three cherished children alone).’

Id. at 792.
However, it is the dissent by Justice Gee in *Solomon* that often is cited by some skeptical courts regarding speculation in awarding such damages:

The airplane crash and the [decedents’] resulting deaths were not the “but for” cause of whatever anxiety they may have suffered prior to their deaths. Their prior fears would not have been diminished had the plane leveled off at the last moment and avoided disaster altogether. This is because the [decedents’] anxiety for their own safety and their children’s future well being was caused by the anticipation of death, not by the actual crash that presumably killed them. *It is not enough that some impact accompany the mental suffering; the impact must cause the fears if they are to be compensable. Only then can courts measure mental duress by some means other than sheer speculation.*

*Id.* at 797.

Some jurisdictions require manifestation of bodily injury for recovery of pre-impact fear as a method of addressing the inherent speculation in awarding such damages. For example, under Illinois law, actionable mental anguish must be caused by bodily injury. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 507 F. Supp. 21, 23* (N.D. Ill. 1980) (finding pre-impact fright or terror to be non-actionable under Illinois law); *see also Fogarty v. Campbell 66 Express Inc.*, 640 F. Supp. 953, 957 (D. Kan. 1986) (finding Kansas law would refuse recovery for negligently induced, pre-impact emotional distress not itself resulting in physical injury from car accident); Restatement (Second) of Torts, § 436A (“If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.”).

The Warsaw and Montreal Conventions (“Conventions”) also do not permit recovery for solely emotional injuries. In *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552
(1991), the Supreme Court held that plaintiffs may not recover for pure emotional injuries under Article 17 of the Warsaw Convention. *Id.* (stating, “[w]e conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury”); see also *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927, at *13 (E.D.N.Y. May 8, 2007) (holding that plaintiff could not recover for emotional injuries caused by the delay of baggage); *Bobian v. CSA Czech Airlines*, 232 F. Supp. 2d 319 (D.N.J. 2002) (rejecting argument that post traumatic stress disorder (PTSD) or exposure to G-forces constituted a bodily injury under Convention).

What was left undecided after the decision in *Floyd* was whether recovery was permitted for claims involving emotional injury accompanied by physical injury. Generally, courts permit recovery for emotional injury under the Conventions if it was proximately caused by physical injury that occurred during the flight. See *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007) (finding bodily injury sufficiently alleged and ruling plaintiff may recover for emotional distress experienced during the flight that arose out of her injuries); see also John F. Easton, Jennifer E. Trock, Kent A. Radford, *Post Traumatic "Lesion Corporelle": A Continuum Of Bodily Injury Under The Warsaw Convention*, 68 J. Air L. & Com. 665, 697 (2003) (“... courts generally agree that emotional injury is compensable [under the Conventions] if it proximately flows from a physical injury.”) If, however, it can be shown that the mental injuries accompany, but are not proximately caused by, a bodily injury, then it is unlikely that the air carrier will be liable under the Conventions. *Ehrlich v. American Airlines*, 360 F.3d 366, 368 (2d Cir. 2004) (where plaintiffs suffered from a fear of flying and sleep deprivation after the accident, air carrier was not liable under Warsaw Convention on ground that mental injuries that accompany, but are not caused by, bodily injuries are not recoverable).
Most jurisdictions will allow some form of recovery for pre-impact fear or suffering, although some require the plaintiff to show that she suffered from a physical injury as well. If a plaintiff alleges pre-impact fear, terror or suffering, it must be determined what amount of proof must be shown within that jurisdiction.

B. Post-Impact Pain and Suffering

As the name suggests, post-impact pain and suffering refers to pain and suffering that occurs after the impact or injury. Courts allow recovery for post-impact pain and suffering where the victim is conscious after the injury-causing event. *See, e.g., Zicherman v. Korean Airlines Co.*, 43 F.3d 18, 23 (2d Cir. 1994) (allowing pain and suffering damages where circumstantial evidence suggested that injured party survived up to twelve minutes after impact). The key issue is that plaintiff must present evidence that the victim was conscious after the accident. *See Nichols v. Marshall*, 486 F.2d 791, 793 (10th Cir. 1973) (requiring pain and suffering to be “realized” by injured party before it is compensable). Such evidence might include accounts by eyewitnesses or health care personnel witnessing bodily movement or sounds from the plaintiff or decedent.

As with pre-impact pain and suffering, a plaintiff may try to rely on speculation rather than direct evidence to support this claim. In wrongful death cases, a plaintiff may not have direct evidence and, therefore, may need to rely on expert opinion that the victim likely remained conscious for a certain amount of time based on injuries suffered, toxicology (indicating some period of conscious survival before death), the manner in which the aircraft crashed, and the time it took for medical assistance to be administered.
If plaintiff claims post-impact pain and suffering, the focus should be on whether there is conclusive evidence of consciousness of the decedent. Even if the decedent exhibited vital signs, he nonetheless may have been unconscious for all or part of the time after impact. If so, the period of unconsciousness generally is not compensable for post-impact pain and suffering. See id.

C. Bifurcation of Pre- and Post-Impact Damages

In jurisdictions where pre-impact and post-impact claims are recognized, the plaintiff may request a separate damage award for each. In Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 106 (S.D.N.Y. 1983), the court found that New York law recognized a claim for pre-impact fear and rejected defendant’s argument that the pre-impact claims should be merged into the main action for wrongful death. The court denied summary judgment on the pre-impact claim on the ground that plaintiff indicated that he intended to produce the testimony of an eyewitness to the crash, NTSB public documents, and decedent’s “seat assignment in the aircraft.” Id. at 107. The court agreed that the evidence could support an inference that the decedent knew she was in immediate danger of injury when the aircraft turned nose-up and rolled over due to the loss of engine power. Id.

The court also held that in wrongful death actions, post-impact conscious pain and suffering is a separate and independent claim. Id. at 106 (stating that New York law provides for recovery on both claims and that plaintiff is entitled to an opportunity to establish his case as to each); see also In re Air Crash Disaster Near New Orleans, La., 789 F.2d 1092 (5th Cir. 1986), aff’d, 821 F.2d 1147 (5th Cir. 1987) (en banc) (upholding bifurcated verdict awarding separate damages for pre- and post-impact pain and suffering), reversed on other grounds, 883 F.2d 17, 17-18 (5th Cir. 1989) (limiting damage awards under Warsaw Convention).
The significance of having separate damage awards for pre-impact and post-impact suffering is twofold: (1) it can increase the amount of compensatory damages; and (2) by increasing compensatory damages, it can increase the amount of punitive damages, as a ratio to the compensatory damage award. Objectively, any alleged pain and suffering associated with the accident need not be broken up into two tort claims; it can be viewed as one event. The bifurcation of the tort claims, however, allows the plaintiff to interject speculation (often through its expert) and artificially inflate the amount of compensatory damages. It also permits the plaintiff to seek damages for pre-impact suffering when post-impact damages are not recoverable because the evidence shows that the decedent died upon impact.

As noted above, one reason plaintiffs may seek to inflate the amount of compensatory damages awarded through pre- and post-impact damages is to increase the amount of a potential punitive damages award. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the court held that any ratio between the compensatory verdict and the punitive verdict less than a single digit multiple is acceptable. Thus, the higher the compensatory damage award, the more punitive damages can be sought as a ratio to the compensatory verdict.  

This tactic could backfire, however, if the compensatory award is substantial. In that case, defense counsel could argue a qualification provided by the court in *State Farm* that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to

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4 A more comprehensive discussion of the law related to the permissible ratio of punitive damages awarded to compensatory damages will be presented at this conference by William L. Waudby in his presentation and paper entitled “Punitive Damages In Aviation Litigation: Availability, Constitutionality & The Future.”
compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at 425 (finding that significantly large punitive damage awards can violate due process); see also *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634, 171 L. Ed. 2d 570, 599 (2008) (finding punitive-to-compensatory ratio of 1:1 to yield maximum punitive damages in maritime case).

**D. Per Diem Compensation for Pain and Suffering**

Another method of inducing a jury to award a large amount for future pain and suffering that can involve speculation is the “per diem” or “formula” argument sometimes offered by plaintiff’s counsel in closing argument. *See* Kevin W. Murphy, *Closing Argument: Addressing Damages in Aviation Wrongful Death Cases*, 73 JOURNAL OF AIR LAW AND COMMERCE 3, 464 (2008); Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 TENN. L. REV. 1 (2003-2004) (“Use of per diem arguments has been a significant factor contributing to the increase in damages for pain and suffering in modern tort law.”). A per diem argument “is made when the plaintiff requests a lump sum amount for future pain and suffering damages,” then divides that amount by the number of time units, such as per day, expected in a plaintiff’s life resulting in a price of pain per unit. *Id.* For example, “is fifty cents an hour too high for what the victim suffered?”

Not all courts will entertain this kind of speculation. Many jurisdictions reject the use of a per diem argument on the grounds that it is speculative, it is not supported by the evidence, and/or it encroaches upon the role of the jury. *See, e.g.*, *Moorehead v. State Farm Fire & Cas. Co.*, 123 F.Supp.2d 1004, 1007 (W.D. Va. 2000) (rejecting counsel’s use of a per diem formula for emotional damages); *Botta v. Brunner*, 138 A.2d 713 (N.J. 1958) (refusing to permit use of the per diem formula because of its speculative nature and because it invaded jury’s role).
In *Caley v. Manicke*, 182 N.E.2d 206, 208 (Ill. 1962), the Illinois Supreme Court prohibited the use of a per diem argument because the jury would “be better able to determine reasonable compensation than it would if it were subjected to expressions of counsels’ partisan conscience and judgment on the matter.” *But see Allred v. Chittenden Pool Supply, Inc.*, 298 So.2d 361, 365 (Fla. 1974) (court thought introduction by plaintiff’s counsel of a formula for calculating damages for pain and suffering might be of use to a jury).

In aviation cases, one of the difficulties in mounting a defense to claims of pain and suffering is that the accidents frequently involve gruesome facts as to the manner of injuries and the erratic or harrowing performance of the aircraft before the crash. Also, to many jurors, the idea of an aircraft accident seems “scarier” than death or injury in other types of personal injury cases such as a car accident. Plaintiff attorneys are well aware of this phenomenon and often will seek to use the per diem approach to speculate as to a dollar amount for damages that will compensate the victim for what she may have experienced during those last minutes or seconds before or after the plane crashed. Given the potential for speculation, use of a per diem formula should be objected to on that ground, as well as the ground that it is not supported by the evidence. It also logically seeks to assume a duty that is well within the normal province of jurors to assess, as jurors are well-equipped to identify a dollar amount for pain and suffering without the use of speculative formulas.

III. FORENSIC ECONOMICS

Another area of compensatory damages where speculation and faulty assumptions can and often do creep in is plaintiff’s forensic economics expert’s report and testimony. Forensic economics has been defined as “the application of economic theories and methods to
matters of the court.” John E. Scarbrough, Ph.D., *Daubert Challenges to the “Forensic Economist,”* at 2 (unpublished paper, presented at 41st Annual SMU Air Law Symposium in February of 2007, on file with author). Forensic economics is used to assess a person’s earnings in his or her lifetime. The use of forensic economics in the courtroom, however, has been called into question because it can involve certain assumptions or “myths” that go unchallenged and can result in a skewed, i.e., inflated, result. *Id.* The myths perpetuate not because forensic economics is beyond the understanding of lawyers and judges, but often because they think they understand the theories sufficiently when in reality they only know a great deal about the “mythology of damages” and “courtroom economics.” *Id.*

A. The Top Ten Myths of Forensic Economics

Although there can be many myths or assumptions regarding the application of forensic economics, some of the most common are summarized below as the “Top Ten.”

1. **MYTH: Earnings increase at a constant rate.** This first myth involves a faulty approach followed in analysis presented by some forensic economists. The assumption is that everyone’s earnings grow at the same rate, independent of age and experience. In the real world, however, an employee’s experience matters. An employee with experience usually has a higher earning capacity than an employee with less or no experience. For example, an entry level employee in 2008 who receives a 3% raise in her second year will make more in 2009 than the entry level employee in 2009. If, however, you apply the myth that earnings increase at a

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constant rate, then experience is ignored and both employees earn the same in 2009. This is not how it works in the real world and not how it is applied in the field of general economics.

2. **MYTH:** Earnings rise at a constant rate relative to the discount rate.
Sometimes referred to as the “stepchild” to the myth of constant earnings rate, the discount rate, or net discount rate (discount rate net of earnings growth), is faulty for the same reason as the constant earnings myth. The net discount rate is used to estimate the present value of earnings but is based on the idea that earnings increase at a constant rate.

3. **MYTH:** Consumption is a percentage of the decedent’s earnings.
This myth assumes that only the individual who earns the income partakes in the consumption of the income, thereby ignoring the consumption of income by the spouse and any dependents. Also, if consumption is only subtracted from the decedent’s earnings income, then consumption would cease to be deducted once the individual retires.

4. **MYTH:** The value of fringe benefits is their cost to the employer. If the value of fringe benefits is calculated solely on the basis of what it cost the employer to provide, the value becomes overinflated. Certain benefits such as social security benefits are paid by both the employer and employee.

5. **MYTH:** The value of household services is the replacement cost of time spent. It is not only the time that the decedent spent on providing household services that should be considered, but the value of those services to the plaintiff. Also taken into account should be those services that others provided to the decedent that no longer have to be provided.
6. **MYTH:** Present value/discount rate is either historical or present Treasury Note rate. An investor would not rely on an historical average of short-term notes for long-term investing and neither should a forensic economist rely on a historical or present short term rate to measure a future stream of damages. Other interest rates such as a portfolio of U.S. Treasury securities or AAA-rated municipal bonds are better indicators.

7. **MYTH:** Inflation of medical-related goods and services in life care plans mirror historical medical inflation. If inflation is measured using changes in the medical components of the Consumer Price Index (CPI), question whether there is an upward bias of the medical CPI. Also find out what medical components are included in the calculation as some are unrelated to typical life care.

8. **MYTH:** Future inflation and future productivity mirror history. Inflation estimates that are based on historical averages are not appropriate indicators for projecting future inflation. Also, be wary of a method that relies on a simple average or one person’s opinion. Rather, determine the rate for long-term inflation provided by The Livingston Survey.6

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9. **MYTH:** Forensic economics is a field or branch of economics. The idea that forensic economics is only applied in a court of law, with its own set of methods, is inaccurate. There is no such thing as “courtroom economics.”

10. **MYTH:** The relevant scientific community is that of “forensic economics.” This myth is closely tied to myth #9. Just as there is no separate branch for “courtroom economics,” forensic economics, like any other “forensic” discipline, must adhere to the basic principles and methods of the discipline, here, economics. To the extent that it does not adhere to basic economics, it is faulty.

    Overall, the fundamental concern with perpetuating such myths is that basic economic theory too often is not being applied in the courtroom. Rather, a courtroom brand of “forensic economics” too often has been accepted and gone unchecked, resulting in speculation rather than economic theory being applied. How does a practitioner challenge such “courtroom economics”? As with any challenge to an expert’s credentials or applied reasoning, the proper procedure is to request a Daubert hearing.

**B. Daubert Challenges to “Courtroom Economics”**

1. **Standard**

    Most lawyers and judges are very familiar with the Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), which explained the standard for expert testimony proffered in federal courts (and now widely adopted by state courts as well). That standard is applied under Federal Rule of Evidence 702 pertaining to testimony by experts, which provides as follows:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In a *Daubert* challenge, the court assumes the role of “gatekeeper” to ensure that the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. The four factors courts consider are: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the general acceptance of the theory in the scientific community. *Daubert*, 509 U.S. at 593.

Other courts have developed tests to determine whether expert testimony should be admitted under *Daubert*. For example, in *Rink v. Cheminova, Inc.*, 400 F.3d 1286 (11th Cir. 2005), the Eleventh Circuit established a three-part test to determine whether expert testimony should be admitted under *Daubert*, requiring the following elements all to be established: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. 400 F.3d at 1291-92.

Moreover, even if a witness is qualified as an expert regarding a particular issue, the process used by the witness in forming his expert opinion must be sufficiently reliable under *Daubert* and its progeny. See, e.g., *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d
1333, 1342 (11th Cir. 2003) (stating that “one may be considered an expert but still offer unreliable testimony”). The “objective of Daubert’s gatekeeping requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert … employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152.

In the context of testimony by a highly qualified forensic economist, it still will be necessary to ensure that the expert’s testimony does not violate the principles discussed above so that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice” of an economist. Although the standards and factors considered in a Daubert hearing to scrutinize the admissibility of this testimony are well known, whether and when to request such a hearing can be a more complicated strategic question. Some thoughts on this strategic decisionmaking and timing follow.

2. Whether and When to Request a Daubert Hearing, and What to Challenge

A threshold issue for counsel commonly is whether and when to mount a Daubert challenge. One strategic option is to forego a Daubert challenge, and instead to rely upon aggressive cross examination of the plaintiff’s expert (paired frequently with presentation of your own defense economics expert). While the technical economics issues to be addressed in such a Daubert motion also can be raised on cross examination, there is a substantial practical trial risk that the jury will not be able to follow the nuances of the cross examination. Moreover, a very aggressive and extended cross examination on the “myths” discussed above, and possible presentation of an alternative defense economics expert to address the “myths,” also risks placing more emphasis on economic damages issues than you, as trial counsel, may desire for strategic
case presentation reasons. This is a decision that must be carefully weighed and decided by the trial team.

If the decision is made to pursue a Daubert motion where the forensic expert’s report and anticipated testimony rely upon certain common economic myths, then a hearing might be warranted following the expert’s deposition or issuance of the expert’s report. For example, if opposing counsel’s expert relies on historical data or averages to forecast inflation, it seems wise to request a Daubert hearing challenging whether the expert’s reliance on historical averages – something not generally used in mainstream economics for forecasting – renders her opinion inadmissible. To ensure the opportunity to have a comprehensive Daubert hearing before the Court that is not unduly pressured by normal pre-trial and trial dynamics and competing priorities, you should strongly consider filing your Daubert motion as soon as practical after issuance of the expert’s report (or delaying the filing until shortly after the expert’s deposition, if your jurisdiction permits expert depositions).

Another area in which forensic experts have offered questionable opinions, and where a Daubert hearing can be a useful tool, is if the forensic expert provides a dollar amount for hedonic damages, or damages for the “loss of enjoyment of life” in wrongful death cases. In Ayers v. Robinson, 877 F. Supp. 1049 (N.D. Ill. 1995), defense counsel sought to exclude the plaintiff’s expert’s opinion on hedonic damages. The court applied each Daubert factor and found that the variance in the results made it too imprecise and speculative, and held that the techniques used to evaluate a person’s life were not scientific. Id.

In some jurisdictions, a Daubert challenge may not be necessary if the court has ruled that hedonic damages are not recognized. In Brown v. Seebach, 763 F. Supp. 574, 583
(S.D. Fla. 1991), the District Court ruled that in a wrongful death case, there was no cause of action for hedonic damages in Florida. Likewise, in *Brereton v. United States*, 973 F. Supp. 752, 756 (E.D. Mich. 1997), the District Court held that hedonic damages were not recoverable in a wrongful death case. In cases where the injuries were not fatal, however, courts may permit such damages. *Id.* (finding that hedonic damages are applicable for living or permanently injured persons). If so, then a *Daubert* hearing may be useful to challenge the expert’s methods used at arriving at a dollar amount of loss.

Keep in mind that a claim for hedonic damages may also be another tactic for increasing the compensatory damage award. It should be questioned whether (1) hedonic damages are permitted in the jurisdiction; and (2) if so, whether it is appropriate to assert them as a separate damages category independent from claims of pain and suffering.

3. Practical Tips

If a *Daubert* hearing is warranted, some basic areas that also are ripe for inquiry are the forensic expert’s calculations for earnings and what journals he relied upon.

a) Earnings Calculations

The earnings calculation is important in determining compensatory damages since a person’s “life worth” often boils down to how much she earns. As explained above, it is a common assumption made by many forensic economists that everyone’s earnings grow at the same rate, independent of age and experience. As we know, in the real world, an employee’s age and experience matters. Therefore, what method should be used to calculate an individual’s earnings?
The generally accepted method for projecting an individual’s future earnings is the “human capital earnings function.” See Scarborough, *Daubert Challenges to the “Forensic Economist,”* at 18. The human capital earnings function assumes that an individual’s earnings generally rise at a declining rate as he or she ages and gains experience. *Id.* It takes into account an individual’s age, education, experience, occupation and job tenure. For example, an individual first obtains an education and then begins her employment with little experience. She gains working experience and knowledge during the early years of employment. Those gains start to diminish as she continues to work because there is less experience and knowledge to be gained, resulting in a declining return. Thus, the height of one’s earnings may come somewhat earlier in the working life of an individual and flatten out, or even decline, in later years.

Therefore, a forensic economist who assumes that earnings increase at a constant rate ignores the reality of the human capital earnings function, and ignores the data relied upon by economists in the field.

b) Journals Relied Upon

Another practical tip that can be used to cross-examine opposing counsel’s forensic expert, either during a *Daubert* hearing or during trial, is to inquire about what journals he relied upon. If the answer is the *Journal of Forensic Economics* or the *Journal of Legal Economics*, find out whether those journals are accepted in the general field of economics, and whether the author of a specific article or publication is an economist. If the journal or article relied upon was written by someone who calculates damages for the purpose of providing testimony in personal injury cases, rather than an economist, for example, then the forensic expert’s report is ripe for a *Daubert* challenge.
If the defense has retained a rebuttal economic expert, it would be prudent to understand what journals, texts, or periodicals she relies upon. For example, the JOURNAL OF LABOR ECONOMICS is generally thought to be one of the most important labor economics journals. See Scarborough, supra, at 25.

IV. CONCLUSION

It is not unusual for defense counsel to spend much of their resources and pre-trial focus on the liability portion of the case and not enough on the damages portion. Compensatory damages often are considered late in the litigation and too often, speculation or incorrect assumptions made by plaintiff’s forensic expert are accepted by counsel and the courts without rigorous challenge. It is important to question the methods used and the assumptions made so that speculation is not permitted to inflate compensatory damages. Of course, be sure to check the law of the jurisdiction to determine what categories of damages are recognized. For those types of damages that are recoverable, closely scrutinize opposing counsel’s forensic expert report for any assumptions or myths, and explore these myths and assumptions in detail at the expert’s deposition or on the stand at a hearing or at trial. If the report and testimony are not in keeping with basic economic principles, then move aggressively to exclude the offending testimony.