

COLUMBIA LAW REVIEW

SIDEBAR

VOL. 109

APRIL 20, 2009

PAGES 21–30

DESCRIBING THE EFFECT OF ADAPTATION ON SETTLEMENT

*John Bronsteen**

*Christopher Buccafusco***

*Jonathan Masur****

Response to: Peter H. Huang, Emotional Adaptation and Lawsuit Settlements, 108 Colum. L. Rev. Sidebar 50 (2008); Rick Swedloff, Accounting for Happiness in Civil Settlements, 108 Colum. L. Rev. Sidebar 39 (2008).

We would like to thank Rick Swedloff and Peter Huang for taking the time to comment on our Essay, and it is a pleasure to engage in a dialogue with them about hedonic adaptation. In every instance, however, their critiques miss the mark. Swedloff and Huang have mischaracterized many of our key arguments, and the remainder of the significant points made in their responses were anticipated and answered in our Essay.

Let us begin with a one-paragraph summary of our Essay to clarify what we have claimed. Civil procedure scholars have spent decades analyzing the circumstances under which lawsuits settle. We argue that the settlement models created by those scholars have omitted a relevant factor: plaintiffs' psychological adaptation to their ailments. Because people adapt to certain injuries—i.e., their happiness or subjective well-being increases with time, even if the injury is permanent—the sum they will accept in settlement should decrease as time passes, all else being equal. That is the sum and substance of our claim.

It is worth taking a moment to note what we do not claim. First, we of course do not claim that adaptation is the only thing that affects settlement or even that people with adaptable injuries will settle earlier than those without them. Indeed, our Essay's contribution is to identify one new factor that should be added to the sophisticated, multi-factor

* Assistant Professor, Loyola University Chicago School of Law.

** Visiting Assistant Professor, University of Illinois College of Law.

*** Assistant Professor, University of Chicago Law School.

analysis of settlement behavior that exists within the literature. Other factors can and do cut in the other direction, as we discuss at length in the Essay. But all else being equal, adaptation will make the plaintiffs who experience it more likely to settle than they would have been if they had not adapted at all. Second, we need not and do not assert that people adapt entirely to their injuries. Rather, we identify a class of injuries that admit of adaptation, then point to substantial empirical evidence that people adapt partly to those injuries—i.e., that their level of happiness increases as time passes after the injury, even though it may never rebound fully to its pre-injury level. Our claim is only that, other things being equal, people will be less happy immediately after their injury (and therefore less willing to settle, all else equal) than later, due to adaptation. That people do not adapt fully to reach pre-injury levels (a point we acknowledge repeatedly) does not undercut this central claim.¹ Third, we draw no normative conclusions whatsoever: Our Essay describes a phenomenon and predicts behavior, nothing more.

These three claims that we do not make are precisely the three claims to which Huang objects. The first paragraph of his response outlines his three points as follows: “First, people care about more than happiness” and their settlement decisions may accordingly be affected by such other factors; “[s]econd, adaptation can be slow and remain incomplete after many years”; and “[t]hird, fostering emotional adaptation by lengthy tort litigation raises ethical and normative questions.”² We agree with all of those points. The third one goes beyond the scope of our Essay, and the first two are points that we make at length in the Essay.

None of this would be a problem if it were not for the fact that Huang characterizes his arguments as criticisms of what we have written. The second sentence of his response is: “This Response demonstrates that [the Essay] is a facile application of hedonic adaptation with the following three points”³—i.e., the three points that contradict nothing we wrote.

Rick Swedloff makes the same three categories of substantive points as Huang, although Swedloff’s rendering acknowledges in several instances our anticipation of his objections. First, Swedloff notes that the empirical evidence shows only that certain injuries admit of adaptation and that people adapt only partly, not fully, to even those injuries.⁴

1. The logic of the Essay shows that any nonzero amount of adaptation should have the claimed effect, with the effect increasing as adaptation increases. The evidence supports the view that people adapt far more than an amount just above zero, but either way, characterizing the amount as small, as Huang does, Peter H. Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 *Colum. L. Rev. Sidebar* 50, 53 (2008), http://columbialawreview.org/assets/sidebar/volume/108/50_Huang.pdf, does not contradict our claim that it exists and is relevant to settlement.

2. *Id.* at 50.

3. *Id.*

4. Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 *Colum. L. Rev. Sidebar* 39, 40–44 (2008),

Second, Swedloff discusses the factors other than adaptation that affect the litigation process and may interact with adaptation during that process.⁵ And third, Swedloff considers the normative implications of adaptation in the settlement process.⁶ Once again, these points are all consistent with our claims in the Essay.

The following sections address the points raised by Huang and Swedloff in more detail.

I. HUANG'S RESPONSE

A. *Factors Other than Adaptation Can Influence Settlement*

Huang's first criticism of our Essay is that factors other than happiness go into the decision to settle a lawsuit.⁷ We acknowledged this point in the Essay, with italics in the original: "We mean only to say that *all things being equal*, delay will drive settlement through hedonic adaptation."⁸ In fact, we spent much of the Essay describing such other factors.⁹ As we have made clear from the outset, there are many things that a plaintiff might care about during litigation; one of those things is her view of what constitutes fair and appropriate compensation, and that view is likely to be affected, at least in some cases, by adaptation to her injuries. That she might also care about other things, and that her opinion about fairness might also involve other considerations, is not in dispute.

For this reason, Huang is wrong to conclude that if some factor caused faster litigation to promote settlement, then that fact would contradict our conclusion. Our claim is not absolute but relative. We do not argue that cases settle more if litigation moves slowly, but rather that whatever combination of factors determines the likelihood of settlement, adaptation is one factor in the mix that increases its likelihood. As we emphasized in the Essay: "We wish to stress that we make no claims on the ultimate frequency of settlement in protracted or expeditious cases (or the relative rates of settlement in each case)."¹⁰

One of Huang's main examples of a factor other than adaptation that can influence settlement—i.e., acrimony—is a factor we discuss,

http://columbialawreview.org/assets/sidebar/volume/108/39_Swedloff.pdf.

5. *Id.* at 44–46.

6. *Id.* at 46–48.

7. See Huang, *supra* note 1, at 51 ("Naturally, individuals desire happiness; but most people, especially litigation parties, care about emotions other than happiness and care about things other than emotions.").

8. John Bronsteen, Christopher Buccafusco & Jonathan Masur, Hedonic Adaptation and the Settlement of Civil Lawsuits, 108 *Colum. L. Rev.* 1516, 1543 (2008).

9. See, e.g., *id.* at 1519–26, 1536–48.

10. *Id.* at 1543. It is worth noting that when we say that we make no claim regarding "the relative rates of settlement in each case" we are referring to the overall rate of settlement in expeditious cases versus the rate of settlement in protracted cases. *Id.* Our claim is precisely about the relative rates of settlement of adaptable versus nonadaptable cases in expeditious cases, and the same relative rate in protracted cases.

saying the same thing about it that he does. Huang writes that “tort lawsuits can become unpleasant, with each side determined to emotionally harass the other. Parties can end up in a vicious cycle of aggressive litigation behavior: Litigation causes negative affect, leading to more aggressive litigation behavior that causes further negative affect, and so forth.”¹¹ We similarly write that “delays and time lags in litigation are often caused by hard bargaining and acrimony between the parties. As much as the adaptation that follows from delay might increase the rate of settlement, the rancor that accompanies it might act in the opposite direction.”¹²

Huang goes too far, however, when he contends that “[t]ort victims motivated by . . . emotions [such as ‘blameworthiness, efficiency, equity, fairness, justice, morality, and responsibility’] will continue litigation even if they experience complete hedonic adaptation,”¹³ and that “for these other motivations, hedonic adaptation is generally irrelevant.”¹⁴ On the contrary, litigants motivated by “equity, fairness, justice, [and] morality” may well adjust their opinions of the fair outcome of the litigation as they discover that the injuries’ effects on their well-being are not as durable as they had supposed. Part of our core argument, after all, is that litigants consider “values like fairness when deciding whether to accept a settlement offer”¹⁵ such that “[i]f a plaintiff’s perception of what would constitute fair compensation were to decrease as time passed, then that passage of time would accordingly increase the likelihood of settlement.”¹⁶ We repeat here the caveat we offered in the Essay:

To be sure, many factors could influence a plaintiff’s demand, and her current experience of the injury is only one of them. But holding constant all such other factors, one would expect a plaintiff to be more willing to settle if, over time, she came to view a smaller amount as representing a fair payment for her injury.¹⁷

B. *How Much Do People Adapt?*

Huang’s argument about the nature of hedonic adaptation also does not undercut our thesis. Some of his points simply report psychological findings that we agree with and acknowledge repeatedly in our Essay, e.g., “adaptation . . . will not be immediate,”¹⁸ and

11. Huang, *supra* note 1, at 51.

12. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1543.

13. Huang, *supra* note 1, at 51.

14. *Id.* at 52.

15. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1523.

16. *Id.* at 1526.

17. *Id.*

18. Huang, *supra* note 1, at 54. Compare, e.g., Bronsteen, Buccafusco & Masur, *supra* note 8, at 1529 & n.71 (discussing two-year course of adaptation in Oswald and Powdthavee study).

“adaptation . . . can remain incomplete.”¹⁹ Other points he makes in this section are both irrelevant to our claims and, we believe, mistaken. For example, Huang argues that forecasting errors are normatively valuable because if people foresaw their own adaptation, “they would neither do anything desirable nor avoid doing anything undesirable because nothing would have much impact on their long-run happiness.”²⁰ We take no position on any normative claim, but it is worth noting that accurate forecasting would not necessarily detour people from pursuits Huang considers desirable, for reasons Huang himself stresses: People would care about the unhappiness they experience before adaptation, and they might also value things other than their own happiness.

Huang’s only point that would, if true, undermine our Essay’s claim is also the least sustainable part of his response. Without discussion, Huang quotes a short commentary by Daniel Kahneman to suggest that Kahneman has renounced the idea of hedonic adaptation.²¹ We reproduce here Huang’s entire block quotation from Kahneman:

Ten years ago the generally accepted position was that there is considerable hedonic adaptation to life conditions. . . . Evidence that people adapt—though not completely—to becoming paraplegic or winning the lottery supported the idea of a “hedonic treadmill” [I]t is rare for a hypothesis to be so thoroughly falsified. . . . [A]lthough I still find the idea of an aspiration treadmill attractive, I had to give it up. . . . We have been wrong and now we know it. I suppose this means that there is a science of well-being, even if we are not doing it very well.²²

The ellipses would make it seem as though the “hypothesis” that has been “so thoroughly falsified” is the notion that “there is considerable hedonic adaptation to life conditions.” To the contrary, Kahneman’s unaltered comments reveal that he said nothing of the sort. Instead, the falsified hypothesis to which

19. Huang, *supra* note 1, at 53. Compare, e.g., Bronsteen, Buccafusco & Masur, *supra* note 8, at 1529 & n.71 (explaining that Oswald and Powdthavee study shows partial but “incomplete” adaptation).

20. Huang, *supra* note 1, at 55.

21. See *id.* at 53 (quoting Daniel Kahneman, *The Sad Tale of the Aspiration Treadmill*, Edge World Question Center (2008), at http://www.edge.org/q2008/q08_17.html#kahneman (on file with the *Columbia Law Review*)). Though Huang does not discuss this passage, the fact that he locates it in a section titled “Second Thoughts about Hedonic Adaptation,” *id.* at 52, is indicative of his view. See also Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness* 28–30 (Mar. 3, 2009) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=1354234> (quoting same excerpt for proposition that “Daniel Kahneman recently publicly changed his views about hedonic adaptation”).

22. Huang, *supra* note 1, at 53 (quoting Daniel Kahneman, *The Sad Tale of the Aspiration Treadmill*, Edge World Question Center (2008), at http://www.edge.org/q2008/q08_17.html#kahneman (on file with the *Columbia Law Review*)).

Kahneman refers to his own theory of the aspiration treadmill,²³ which was created to “offer[] an appealing solution to the puzzles of adaptation.”²⁴ Kahneman nowhere indicates that adaptation itself is in doubt, and indeed in other work he makes clear the continuing strength of the findings in favor of adaptation. For example, in the research article that forms the basis for Kahneman’s public comments that Huang quoted, Kahneman notes that while “initial findings yield little support for the aspiration treadmill,” “adaptation occurs even when well-being is measured with the gold standard of the Experience Sampling Method.”²⁵

C. Normative Issues

As for Huang’s section on normative considerations, he describes accurately the intended scope of our piece in this statement: “If there is hedonic adaptation because of litigation delay, at least five complex ethical questions follow—none of which the Essay fully addresses.”²⁶ Nonetheless, Huang expresses this point as a criticism: His use of the word “fully” gives the impression that we touched upon these issues but did not understand or address their full depth. Nothing could be further from the truth. Every one of our claims is purely descriptive; we treat these normative questions as beyond the scope of our argument and orthogonal to the descriptive claims we make.²⁷

23. Kahneman’s aspiration treadmill theory was designed to explain perceived discrepancies between individuals’ moment-by-moment assessments of happiness and their overall levels of satisfaction with their lives—discrepancies that Kahneman later found did not exist, at least in the form that he originally believed. See generally Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, *J. Econ. Persp.*, Winter 2006, at 3. The important point is that the falsification of the aspiration treadmill theory does not cast doubt on hedonic adaptation; if anything, it reinforces it. See *infra* note 25 and accompanying text.

24. Daniel Kahneman, *The Sad Tale of the Aspiration Treadmill*, *Edge World Question Center* (2008), at http://www.edge.org/q2008/q08_17.html#kahneman (on file with the *Columbia Law Review*).

25. Kahneman & Krueger, *supra* note 23, at 16, 18; see also Alan B. Krueger, Daniel Kahneman, David Schkade, Norbert Schwarz & Arthur A. Stone, *National Time Accounting: The Currency of Life*, in *Measuring the Subjective Well-Being of Nations: National Accounts of Time Use and Well-Being* 9 (Alan B. Krueger ed., forthcoming), available at <http://www.nber.org/books/krue08-1> (on file with the *Columbia Law Review*).

We also note that the “AREA” model of adaptation does not contradict our argument. Huang writes: “If this model is correct, the march of time is not why a tort victim will adapt hedonically to an injury. Instead, this model suggests tort victims will adapt emotionally to injuries after they explain and understand how and why they were injured.” Huang, *supra* note 1, at 53–54. We never argued that the passage of time itself was the causal factor behind adaptation, only that it was a necessary predicate to adaptation. See Bronsteen, Buccafusco & Masur, *supra* note 8, at 1525 (“Due to such adaptation, a plaintiff’s assessment of how severely she has been harmed will often change over time.”); *id.* at 1534 (“Adaptation, as noted above, takes time . . .”). Huang’s reasons for adaptation would coincide with the passage of time, rendering all of our claims unaffected.

26. Huang, *supra* note 1, at 55.

27. E.g., Bronsteen, Buccafusco & Masur, *supra* note 8, at 1518 (“[W]e propose that,

II. SWEDLOFF'S RESPONSE

Swedloff's points fit into the same categories as do Huang's, although they are organized slightly differently. We follow Swedloff's organization in addressing his arguments.

A. *How Much People Adapt and How Adaptation Interacts with Other Factors in Litigation*

The main section of Swedloff's response discusses our descriptive claim.²⁸ Swedloff makes five main points: (i) certain injuries may be unadaptable;²⁹ (ii) even for adaptable injuries, the adaptation is typically incomplete;³⁰ (iii) preferences rather than happiness level may drive settlement negotiations;³¹ (iv) measurements of happiness may be unreliable;³² and (v) elements of the litigation process might hinder adaptation or limit its effects on settlement.³³

We gave a full response to all of these points in the Essay, but we will briefly restate our explanations here. Regarding the first point, Swedloff himself points out that we acknowledged that adaptation does not occur in all cases. In fact, it is central to our thesis that (as Swedloff puts it) "some number of plaintiffs may not adapt to injury and, for those plaintiffs, adaptation may be irrelevant to settlement."³⁴ As we equivalently wrote, adaptation makes settlement more likely in lawsuits arising from "the class of injuries that involve ongoing disabilities or losses of function, but not continuous pain—in other words, those to which humans are capable of adapting hedonically."³⁵

As to his second point, Swedloff notes—as do we—that the longitudinal study by Oswald and Powdthavee finds about fifty percent adaptation to moderate disability and thirty percent adaptation to severe disability.³⁶ We describe those results in the Essay as supplying "substantial evidence that hedonic adaptation to disability is significant (if incomplete)."³⁷ Swedloff implies that this characterization goes too

by allowing plaintiffs time to adapt to their injuries, such delays may result in an increase in settlements that avoid some of the costs of trial. Accordingly, we suggest that current accountings of drawn out litigation processes have overstated the net costs attributable to extended procedure."); id. at 1539 ("[W]e mean only to argue that the current cost-benefit accounting of the civil trial process is incorrect, and biased toward overestimation of litigation costs.").

28. Swedloff, *supra* note 4, at 40–46.

29. Id. at 40–41.

30. Id. at 41–42.

31. Id. at 42–43.

32. Id. at 43–44.

33. Id. at 44–46.

34. Id. at 41.

35. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1536; see also id. at 1530–31.

36. Compare Swedloff, *supra* note 4, at 42, with Bronsteen, Buccafusco & Masur, *supra* note 8, at 1529.

37. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1529.

far³⁸ (or, as Huang puts it, “[w]hile reasonable people can quibble over whether fifty percent adaptation is more like a glass being half full or half empty, thirty percent adaptation is indisputably akin to a glass being seventy percent empty”³⁹). Of course, these issues of characterization are entirely irrelevant to our claim that adaptation will affect settlement. Whether one chooses to label the effect large or small, the only relevant point is that the more people adapt, the greater the effect on settlement will be. The study by Lucas that Swedloff cites would undercut our claim only if it were interpreted to show zero adaptation,⁴⁰ but as Swedloff acknowledges, even Lucas found a reduction in psychological distress over time. The lone subset of the lone study that arrives at contradictory results, Lucas’s life-satisfaction numbers, does not refute the mountain of evidence we survey supporting hedonic adaptation.⁴¹

Swedloff’s third point notes the study in which colostomy patients reported placing a high value on living without a colostomy, notwithstanding adaptation to colostomies.⁴² We address this point in the Essay, saying the same thing about it that Swedloff does, namely that it is “evidence for the limitations of subjective well-being as a measure of welfare.”⁴³ Swedloff does not address our point that even the results of this same colostomy study suggest that a focusing illusion, rather than a different way of valuing human life, is at work.⁴⁴ In any event, as with the Lucas study, isolated counterexamples do not invalidate the evidence for adaptation. To deny our claim that adaptation exists and affects settlement would be to disregard the weight of the evidence, to put the point conservatively.

Swedloff’s fourth point is that measurements of happiness may be subject to errors of self-reporting.⁴⁵ There is no doubt that a particular individual might unknowingly skew her self-report because she found a dime just before taking the survey,⁴⁶ but such noise should be washed out by a survey’s large sample size.⁴⁷ Moreover, even if self-reports were

38. See Swedloff, *supra* note 4, at 42.

39. Huang, *supra* note 1, at 53.

40. See Swedloff, *supra* note 4, at 41–42 (citing Richard E. Lucas, Long-Term Disability Is Associated with Lasting Changes in Subjective Well-Being: Evidence from Two Nationally Representative Studies, 92 *J. Personality & Soc. Psychol.* 717, 726 (2007)).

41. See Bronsteen, Buccafusco & Masur, *supra* note 8, at 1527–31. In addition, it is worth noting that the studies by Oswald and Powdthavee and Lucas aggregate across all disabilities, only distinguishing those that are moderate from those that are severe. As other research on adaptation to disability suggests, however, adaptation is a complex phenomenon that is likely to affect various disabilities in different ways. Thus, these studies may fail to distinguish between adaptable and unadaptable injuries, a key aspect of our theory.

42. Swedloff, *supra* note 4, at 42–43 (citing, *inter alia*, Dylan M. Smith et al., Misremembering Colostomies? Former Patients Give Lower Utility Ratings than Do Current Patients, 25 *Health Psychol.* 688, 691 (2006)).

43. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1535 n.104.

44. *Id.*

45. Swedloff, *supra* note 4, at 43–44.

46. *Id.* at 43.

47. This would only introduce problems of systematic bias if we thought that many

unreliable for measuring happiness on an absolute scale, they would still provide the relative information necessary to measure adaptation. Our Essay does not rely on the credibility of all subjective well-being research, but only on two of its most robust findings: adaptation and affective forecasting. Once again, the weight of the evidence supports our claims.

Finally, Swedloff suggests that elements of the litigation process might hinder adaptation or limit its effects on settlement.⁴⁸ We address these points in our section on “Principal Objections,”⁴⁹ which Swedloff generally acknowledges. As we explain in that section, the effect of adaptation of course decreases as the plaintiff’s lawyer’s control over decisions about settlement increases,⁵⁰ and the same is true regarding issues of insurance.⁵¹ But as we go on to say, the idea that the lawyer exerts full control “is a caricature of the attorney-client relationship; more likely, each party will have some say over the most important litigation choices, particularly the question of when and whether to settle.”⁵² Swedloff notes in addition that adaptation is unimportant if state damage caps limit pain and suffering awards to below the amount that even an adapted plaintiff would view as fair or adequate. This is a good point (and perhaps the only one we do not address in the Essay), and we appreciate Swedloff’s having raised it. Just as with the role of insurers, we expect that the vast majority of cases will be unaffected by this limitation.

In sum, the Essay anticipated Swedloff’s objections and explained why the idea we contribute is of value notwithstanding those caveats.

B. *Normative Issues*

Regarding Swedloff’s section on normative implications, we merely reiterate that our Essay has nothing to say on that score. When Swedloff says we argue “that immediately after the injury, the plaintiff incorrectly predicts the duration of her pain and suffering and therefore demands *too high* a settlement amount,” he attributes to us a normative claim we

people found dimes before filling out well-being surveys, a possibility we consider unlikely. Moreover, there is no reason to believe that people experience predominantly happy sensations before taking surveys; a survey-taker seems equally likely to have just been kicked in the shins. And the idea that happiness self-reports involve only random noise is inconsistent with the fact that those reports generate such replicable and statistically significant findings in so many areas. See Shane Frederick & George Loewenstein, Hedonic Adaptation, *in* Well-Being: The Foundations of Hedonic Psychology 302, 311–14 (Daniel Kahneman et al. eds., 1999) (reviewing research on hedonic adaptation).

48. Swedloff, *supra* note 4, at 44–46.

49. Bronsteen, Buccafusco & Masur, *supra* note 8, at 1542–48.

50. *Id.* at 1542 (“Certainly if the plaintiff exerts no control over a lawsuit, her adaptation is irrelevant.”).

51. *Id.* at 1542 n.132 (“Similarly, if the plaintiff has already recovered from her insurer, and the insurance company is the true plaintiff at suit, the plaintiff’s adaptation will not affect the lawsuit.” (citation omitted)).

52. *Id.* at 1542–43.

do not make.⁵³ We believe that people with adaptable injuries will tend to settle earlier than they would have settled absent adaptation. We leave others to decide whether this phenomenon is good or bad.

Preferred Citation: John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Describing the Effect of Adaptation on Settlement*, 109 COLUM. L. REV. SIDEBAR 21 (2009), http://www.columbialawreview.org/Sidebar/volume/109/21_Bronsteen.pdf.

53. Swedloff, *supra* note 4, at 47 (emphasis added). “Too high” is Swedloff’s phrase. We wrote: “[T]he amount of money that the plaintiff believes will fairly compensate her for her injury—the amount that will “make her whole” in the typical parlance of tort damages—will decrease.” Bronsteen, Buccafusco & Masur, *supra* note 8, at 1538. We ascribed no normative judgment whatsoever to this phenomenon.