

Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of Florida

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I. Introduction

This paper shows the practicing forensic economist how to perform economic damage calculations in death and injury cases in the state courts of Florida. References will be made to the appropriate statutes, case law, jury verdict forms and jury instructions, where applicable, throughout this paper. Section II deals with discounting methods and present value and Sections III and IV discuss the basis for making calculations in death and injury cases, respectively. Section V discusses the unique case of how economic calculations are made in medical malpractice arbitration cases (death and injury). Hedonic damages and *Frye* issues are dealt with in Section VI, while Section VII addresses practice issues in Florida. Concluding remarks are presented in Section VIII. The appendix contains sample verdict forms for death and injury cases in Florida together with relevant sections of the jury instructions.

The foundation for the calculation of economic damage laws in Florida begins with the primary distinction between death and injury cases. Death cases are specifically governed by statute, whereas injury cases are derived from common law. The Florida Wrongful Death Act spells out each type of recoverable economic and noneconomic damage. An injured claimant, on the other hand, looks solely to existing judicial procedures that have developed over the years to calculate recoverable economic and noneconomic damages.

II. Discounting Methods and Present Value

In Florida, there is no particular discounting method required, as long as it is a recognized method, *Delta Air Lines v. Ageloff* (1989). In this case, the court declined to adopt any of three methods of discounting future losses to present value. The result is that in Florida the practicing forensic economist can use any of the three recognized methods: nominal, real (below market) or offset. (See *Plazza v. Patio Concrete, Inc.*, 1990, for affirmation of the offset method.) As the court noted somewhat tongue in cheek in *Delta Air Lines*, "...we decline to adopt a particular method...if economists are unable to agree on the subject, we doubt that this Court has the expertise to select one method over another."

III. Economic Damages in Death Cases

Economic damages in wrongful death cases in Florida are governed by the Florida Wrongful Death Act, Florida Statutes, Chapter 768.16-768.27. The five

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basic elements of economic loss are loss of net accumulations, medical expenses and funeral expenses to the decedent's estate, and loss of services and support to the decedent's survivors.

Medical and funeral expenses are effectively plug-in items from the perspective of the forensic economist and merely need documentary proof and a calculator for verification. The loss of net accumulations (to the estate) and the loss of support (to the survivors) are based on the decedent's prospective future income stream. Loss of services to the survivors is not based on the prospective income stream, but on the value of non-market services that the decedent provided to the survivors.

In determining economic damages in Florida in wrongful death cases, *Marianna v. May* (1922), *Smith v. Lassing* (1966) and *Seaboard Coast Line Railroad Corporation v. Robinson* (1972) indicate that the decedent's age, probable life expectancy, health, business capacity, present and future prospects of business success at the time of death, earnings, past earnings, business, education, habits of industry, experience, energy, morals, means, adaptability, skill, and thriftiness, are all relevant factors in determining economic damages. In *Bould v. Touchette* (1977), the court ruled that the recovery of economic damages in a death case does not have to be "measured to mathematical certainty."

A. Net Accumulations

Net accumulations is defined in the Florida Wrongful Death Act as "the part of the decedents expected net business or salary income, including pension benefits, the decedent probably would have retained as *savings* and left as part of his estate if he had lived his normal life expectancy." The act further defines net business or salary income as "the part of the decedent's probable gross income *after taxes*, excluding income from investments continuing beyond death, which remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind." [emphasis added]

Delta Air Lines defines net accumulations as representing, "...what the decedent's estate would have been worth at death. This sum is reduced to present value so that it can be reinvested by the survivors, with the intention that when the estimated natural death of the decedent occurs the estate will equal what it would have been worth had he not died." Similarly, in *Smith*, net accumulations is defined as how much the decedent "would have accumulated in her estate via her skill and efforts...in the period from the date of her accidental death to the date of her expected normal death, reducing the result to its present money value." In *Wilcox v. Leverock* (1989) the court defined net accumulations in the following statement: "Monies which would have accumulated as a result of skill or efforts of the decedent are irretrievably lost upon death and are properly recoverable by the estate."

Synergy Gas Corporation v. Johnson (1993) held that for there to be an award for loss of net accumulations there must be evidence of (1) the decedent's propensity to save in the past, and (2) whether there were any historical savings for the decedent. (see also *Ellis v. Golcanda Corp.*, 1977) However, it is

not clear whether this notion would apply to the death of a third-year medical student who would not satisfy either of the two conditions in *Synergy Gas Corporation*, but who indeed would expect to have a significant loss of net accumulations to his estate with a normal work and life expectancy.

The cases of *Delta Air Lines* and *Wilcox* both highlight the concept that income from investments continuing beyond death should not be included in any calculation of lost net accumulations. In *Wilcox* the court specifically excluded trust income from the calculation of lost net accumulations. In *Delta Air Lines* the court states “income from investments in which the decedent had an interest at his death is passive income which continues to accrue regardless of his skills or efforts. The untimely death deprives neither the decedent’s estate nor his survivors of the income from these investments.”

B. Support

According to the Florida Wrongful Death Act, support “includes contributions in kind as well as money.” Both lost net accumulations and support are derived from “expected net business or salary income.” Support, by interpolation, is the decedent’s probable gross income less the decedent’s taxes, personal expenses, and net accumulations to the estate. It is worth noting that nowhere in the wrongful death statute, case law, or Florida Standard Jury Verdict Form or Jury Instructions does the concept of earning capacity/ability enter into the economic damages equation in Florida in a death scenario. The legal definition explicitly states that taxes are deducted as well as the decedent’s personal expenses (consumption). Nowhere does it say that personal expenses (consumption) of the decedent should be based on a poverty or maintenance level of consumption as is the case in some other states. So, the basis for personal expenses (consumption) is the actual personal consumption of the decedent in Florida.

By definition under Section 768.18, Survivors means “the decedent’s spouse, children, parents, and when partly or wholly dependent for support (or services), any blood relatives and adoptive brothers and sisters.” In order to claim loss of support (and services) the decedent’s spouse, children and parents need only prove a history of such. (The act was modified in 1990 to allow such an economic claim for children without any requirement of either dependency or minority). Other blood relatives must prove not only a history of support (and services) but actual dependence, such as one who looks to another for aid or support. (See *Guillen v. Kitching*, 1978.)

C. Services

Services are defined in the Florida Wrongful Death Act as “tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.” [emphasis added] In the case of *Etheridge v. Piper Aircraft* (1977) the court stated “it is not necessary to hire

others as replacements for decedent in order to recover damages in a wrongful death action for loss of decedent's services." (See also *Smith v. Whidden*, 1956, and *Smyer v. Gaines*, 1976.)

Significantly, the definition of services indicates that which is *usually* of a household nature. This does not preclude services other than of a household nature. In the cases of *Lithgow v. Hamilton* (1966) and *Atlantic Coast Line Railroad Company v. Braz* (1967) the courts indicated that a survivor was entitled to the consideration of the value of future services of a business (not household) nature that a decedent had provided gratis to the survivor's business while alive.

IV. Economic Damages in Injury Cases

Injury cases in Florida state courts are not adjudicated under a particular statute as is the case in death cases, but by common law. One current jury verdict form asks the jury the following question: "What is the amount of any damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, and medical expenses to be incurred in the future?" (See Appendix) The words ability and capacity are effectively interchangeable in Florida courts.

A. Earning Capacity

The forensic economist in injury cases in Florida must look to case law as a guide for the economic damage calculations. In *Atlantic Coast Line Railroad Company v. Ganey* (1961), the court stated: "in determining loss of earning capacity, [the] jury may consider, along with [the] mortality table, the injured person's age, health, habits, occupation, surroundings and earnings, both before and after injury, and all of these items are appropriate, though less than all may suffice."

In *Atlantic Coast Line Railroad Company v. Ganey* (1967), the District Court of Appeal of Florida declared that the measure of future loss to be compensated is the loss of capacity to earn, rather than actual loss of earnings. The concept that actual prior earnings of an injured party is only one of many factors relevant in a claim for loss of earning ability/capacity in the future is further exemplified in *Florida Greyhound Lines v. Jones* (1952). Here the court allowed a claim for the diminished future earning capacity of a housewife where there was no evidence of actual past earnings, because at some future time she may need to earn money and may not be able to work because of the injury sustained. Similarly, in *McElhaney v. Uebrich* (1997), the court supported a claim for loss of earning capacity for a plaintiff, despite the fact that she had worked unpaid for her husband's business, based upon her education and skills and what she could have earned in the open market. (See also *Mullis v. City of Miami*, 1952)

In Florida courts, earning capacity does appear to have limitations, in the sense that adjustments should be made to fit an individual case. In *Loftin v. Wilson* (1953) the court stated "...no individual has a practical capacity for

working each week during the remainder of his life..." and in *Atlantic Coast Line Railroad Company v. Ganey* the court stated "...the value of future earning power depends on probabilities and cannot often be reduced to certainty."

Also, earning capacity must not be speculative. In *Gonzalez v. Price* (2001), the appellate court deemed a claim for loss of earning capacity of a professional singer and dancer to the effect that an accident had diminished "her chance to become a star on Broadway or in the movies" to be "extraordinarily speculative." (See *W.R. Grace & Company-Conn v. Owens Corning Fiberglass*, 1995, and *Marianna*, 1922, for similar language in a death scenario.)

In *Allstate Ins. Co. v. Shilling* (1979) the court held that for there to be a claim for loss of earning capacity, the impairment to earning capacity must be shown with "reasonable certainty" and there must be evidence which will permit the jury to arrive at a pecuniary value for the loss. In this particular case, the evidence was that the plaintiff had to change her work habits following the injury. *Hubbs v. McDonald* (1987) took *Allstate Ins. Co. v. Shilling* forward one more step by indicating that over and above reasonable certainty there must also be a "monetary standard" against which a jury can measure any future loss of earning capacity. In this case the plaintiff was earning less after her injury than prior to her injury, which satisfied the monetary standard by which the jury could award damages. This does not mean, however, that just because a person is earning more after an injury than prior thereto that such person has not suffered a loss of earning capacity.

In *Long v. Publix Super Markets, Inc.* (1984), the court held "[the] fact that plaintiff at the time of trial is earning as much or more than she did prior to the injury does not preclude her from asking the jury to consider loss of future earning capacity. Such circumstances may make her burden of persuasion more difficult, but they do not defeat her opportunity to try." In this particular case the plaintiff was able to claim a loss of earning capacity due to a documented permanent disability and less efficiency following the injury. In a similar vein, in *Cox v. Shelley Tractor and Equipment, Inc.* (1986) the jury awarded damages for loss of earning capacity even though the plaintiff's earnings at the time of trial were more than prior to the accident, because he now needed to hire helpers to complete his work in a timely manner, which he did not need to do prior to his injury.

B. Future Medical Expenses

In *Loftin* (1953), economic damages for future medical expenses were held recoverable "only as to those reasonably certain to be incurred." In *Garriga v. Guerra* (2000), the court noted that an award for future medical expenses must be based on "competent evidence that plaintiff would reasonably incur medical expenses in the future." See also *Nuta v. Genders* (1993) which discusses the necessary evidence as to the amount of future medical expenses that needs to be presented. As a result, in personal injury cases in Florida it is very common for the forensic economist to price out the future medical expenses for an injured individual using a life care plan provided by a qualified rehabilitation expert or M.D. *Auto-Owners Insurance Company v. Tompkins* (1995) indicates

that a permanent injury is not an absolute prerequisite for claiming future medical expense damages. (See also *Metrolimo, Inc. v. Lamm*, 1995)

In *Ramey v. Winn Dixie Montgomery, Inc.* (1998), the lack of past medical treatment of an injured party with permanent injuries due to a lack of insurance and funds did not preclude a claim for future medical expenses. Finally, on this topic, in *DeAlmeida v. Graham* (1987), the amount of an injured party's past medical expenses did not furnish the jury a sufficient reasonable basis to compute an amount for the future medical needs of the injured party. As noted above, the forensic economist must determine such economic losses based upon competent evidence that rises to the level of a reasonable degree of economic probability.

C. Services

Loss of services is also recoverable in injury cases, whether the lost services claimed are of a household or business nature. In *White Construction Company, Inc. v. Dupont* (1983), the court indicated the conditions that needed to be met on this issue, specifically "the reasonable value of such services or to show that it was necessary to hire someone else to perform such services."

In *Miami Transit Co. v. Scott* (1952), the court indicated that a husband had lost the services of a wife as a housekeeper/housewife and as a mother to their children because the husband had to hire a housekeeper due to his wife's injuries being of a permanent nature. In *Rumsey v. Manning* (1976), the court allowed a spouse to recover the value of business services that an injured spouse had provided to their joint beekeeping business without compensation. In this particular case the claims for loss of earnings and for loss of earning capacity had both been dropped, which was very significant to the court because it wanted to avoid any double recovery of economic damages. In *White Construction Company, Inc.*, the court indicated that "the potential danger of a double recovery is always lurking in such situations."

The Florida Supreme Court in *United States v. Dempsey* (1994) held that parents could recover for the loss of services that a child would have rendered to them but for the child's significant injury only if they can establish that the child had extraordinary income-producing abilities prior to injury. This ordinarily is highly unlikely.

V. Arbitration

Medical malpractice cases in Florida involving death or injury where both parties agree to arbitrate are sent to arbitration. The non-economic damages are capped and the economic claim is for "net economic damages" which are defined as including, *but not limited to*, past and future medical expenses and 80% of wage loss and loss of earning capacity, offset by any collateral source payments. [emphasis added] It is most interesting that the economic damage calculation in this statute is 80% of wage loss and loss of earning capacity whether it is a death or injury claim. (See *St. Mary's Hospital, Inc. v. Phillipe*, 2000.) The Florida Legislature in its legislative findings and intent indicated

that “the recovery of 100% of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.” The phrase *but not limited to* appears to open the door to include services, fringe benefits, pension benefits, and any other economic damages applicable. Finally, whereas in death cases under the Florida Wrongful Death Act the concept of earning capacity/ability is explicitly not considered, in this arbitration statute the concept applies in death as well as in injury cases. The arbitration statutes controlled recovery in such cases, not the Wrongful Death Statute. The case of *University of Miami v. Echarte* (1993) highlights the general history and debate surrounding this act.

The Florida Legislature enacted new legislation in 2003 that will impact the medical malpractice economic damages for arbitration in death cases to the extent that the Florida Wrongful Death Act now controls the awardable economic damages. This has effectively done away with part of the holding in *St. Mary's Hospital, Inc.* pertaining to economic damages in death cases. The effective date of this new legislation was September 15, 2003.

VI. Hedonic Damages and *Frye*

To date, hedonic damages have not been admitted into any courts in Florida. In *Russell v. Trento* (1984) the Third District Court of Appeal of Florida ruled that the value of human life is not an element of the damages under the Florida Wrongful Death Act which benefits the survivors. In *Brown v. Seebach* (1991) the court noted that hedonic damages attempt to compensate the survivors of the decedent for “lost pleasures,” but that such damages are not a part of the Florida Wrongful Death Act. The court further said “The court is of the opinion that there is no cause of action for hedonic damages in Florida. The court must follow the guidelines in the Florida Wrongful Death Act and Florida case law until such time as the [Florida] Supreme Court or the Florida Legislature decides differently.” Survivors are entitled only to those noneconomic damages specifically spelled out in the Florida Wrongful Death Act.

In Florida, the state’s equivalent of *Daubert* at the federal level is *Frye*. In the original *Frye* case the court stated “the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.” [emphasis added] *Frye* provides a mechanism for evidentiary hearings on the admissibility of expert testimony. In a very recent case, *Stewart v. Youngblood* (2003), a Florida court again rejected the introduction of hedonic testimony from a forensic economist working for the plaintiff as to the monetary value of the enjoyment of life after a *Frye* hearing. The court found the proposed testimony inadmissible as “unscientific ...abstract ...arbitrary...” and “...totally irrelevant because it is based on subjectivity.”

VII. Some Practice Issues

During the discovery process leading up to trial in Florida, the forensic economist expert witness (whether working for the plaintiff or defense) is sub-

ject to deposition on his opinions in the case in question if he is a listed expert on that case. These opinions usually take the form of a written report outlining the economic damages and showing how the damages were calculated. This economic report is usually available to the opposing side prior to the economist's deposition by a number of methods, namely, (1) a request for production, (2) by subpoena *duces tecum* to bring the report to the deposition, (3) by informal agreement with opposing counsel, or (4) a court issued pretrial order requiring the exchange of expert reports by a certain date. Expert opinions, as opposed to a report, may be obtained through interrogatories. When working for the plaintiff, it is very unusual for the forensic economist to not have had a deposition taken before trial. There is no "trial by ambush" in Florida! When working for the defense, it is often the case for the economist not to be listed as an expert witness and thus be used as a consultant only. For the defense in a consultant capacity, the economist helps the defense attorney criticize the assumptions, data sources, etc. used by the plaintiff's economist. Customarily, unless there are very large differences in economic opinions between the economists for the plaintiff and defense, this is the situation. In this author's experience, defense attorneys are, more often than not, loathe having economic opinions from a defense economist at trial which establish a baseline or minimum amount for the economic damages in a particular case.

VIII. Summary and Conclusions

This article hopefully gives the practicing forensic economist an insight into how economic damages are calculated in Florida in injury and death cases in state court. At the time of writing, the Florida Legislature had met for its annual Spring legislative session. One of the main topics on this year's legislative agenda was the placing of statutory caps on non-economic damages in lawsuits involving alleged medical malpractice (other than in cases in which one or both of the parties agree to arbitrate which has its own built-in caps on the non-economic damages). The Florida Legislature, after being called back into its third Special Legislative Session, did place non-economic caps on cases involving alleged medical malpractice. This is likely to be challenged in the court system. However, at least in the short run, it does not appear that there will be any significant changes in the way that economic damages are currently defined in Florida, except under arbitration. To the extent that more caps on non-economic damages are introduced in the future, it will mean that the economic damage part of the claim will become increasingly more important.

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APPENDIX

I. Jury Verdict Forms (Injury and Death)

These forms are reproduced from the Florida Standard Jury Instructions in Civil Cases publication from the Florida Bar.

VERDICT FORMS FOR PERSONAL INJURY:

(#1)

What is the amount of any damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, and medical expenses to be incurred in the future, and [list any other economic damage]?

What is the total amount of damages sustained by [name spouse] in loss of [his wife's] [her husband's] services?

OR

(#2)

What is the amount of any damages sustained by [name claimant] in the past, for medical expenses?

for lost earnings or earning ability?

What is the present money value of any damages to be sustained by [name claimant] in the future?

for medical expenses?

for lost earning ability?

What is the amount of any damages sustained by [name spouse] in loss of [his wife's] [her husband's] services in the past? in the future, reduced to present value?

VERDICT FORMS FOR WRONGFUL DEATH:

(#1)

What is the total amount of any damages lost by the estate for the amount of any medical or funeral expenses and loss of net accumulations?

What is the amount of any damages sustained by [name of surviving spouse/name of surviving child] for loss of decedent's support and services?

OR

(#2)

What is the amount of any earnings lost by the estate from the date of injury to the date of death?

What is the amount of any net accumulations lost by the estate?

What is the amount of any medical or funeral expenses resulting from the [decedent's] injury and death charged to the estate?

What is the amount of any loss by [name surviving spouse/surviving child] of the decedent's support and services, from the date of injury to the present?

What is the amount of any loss by [name surviving spouse/surviving child] of decedent's support and services in the future?

Jury verdict forms and instructions for the new medical malpractice legislation passed in the Summer of 2003 are currently not available for publication. However, language in the Florida Statutes concerning this new legislation appears to indicate

that juries will be asked to come up with an amount of economic damages unreduced to present value dollars and the number of years into the future over which those damages will be awarded. Presumably the court will then take the jury's figures and come up with a present value figure.

II. Jury Instructions (Injury and Death)

REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for (future economic damage) should be reduced to its present money value. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) for these losses as they are actually experienced in future years.

MORTALITY TABLES

- a. Claimant permanently injured
If the greater weight of the evidence shows that (claimant) has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long (claimant) may be expected to live. Such tables are not binding on you but may be considered together with other evidence in the case bearing on (claimant's) health, age and physical condition, before and after the injury, in determining the probable length of his life.
- b. Personal representative claiming damages for loss to a survivor
In determining the duration of any future loss sustained by (a survivor) by reason of death of (decedent), you may consider the joint life expectancy of each survivor and the decedent. The joint life expectancy is that period of time when both the decedent and a survivor would have remained alive. The mortality tables received in evidence may be considered, together with the other evidence in the case, in determining how long each may have been expected to live.

The admissibility of expert testimony is controlled by the Florida Evidence Code. Pursuant to Fla. Stat. 90.702 (2001), expert testimony will be admissible if:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.