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

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Legal Framework: Three Statutory Provisions

- **§ 11-109, Personal injury action.** Law itemized various types of economic damages, include past and future loss of earnings, but left noneconomic & other damages to case law. Law explicitly applies to WD as well as PI;
- **§ 3-904, Action for Wrongful Death.** Law does not restrict damages to pecuniary loss or benefit, and goes on to specify inclusion of (with slight differences as to the status of the decedent): mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable;
- No "**Survival Action**" as such is specified by statute, but this type of action is indirectly sanctioned by **§ 7-401(y**). It empowers the personal representative of the estate of the deceased to seek damages "…. for the protection or benefit of the estate, including the commencement of a personal action which the decedent might have commenced or prosecuted, except … [he] may not institute an action against a defendant for slander against the decedent during the lifetime of the decedent … [and] may recover the funeral expenses of the decedent up to the amount allowed [under the law]".

Loss of Earning Capacity in Personal Injury (PI) Actions

- In **PI actions**: "The loss of earnings in the past and such earnings or reductions in earning capacity which with reasonable probability may be expected in the future" [MPJI-Cv 10:2];

- **Reasonable probability** standard has been interpreted broadly:
  - A plaintiff was permitted to testify about her prior earnings even though she had not been employed for a number of years prior to her injury [Ihrie v. Anthony, 1954);
  - Loss of earning capacity was also extended to include lost future profits, even for firms that have yet to show a profit [Anderson v. Litzenberg ,1993, and re-affirmed in Lewin Realty v. Brooks, 2001];
  - Loss of earning capacity also applied to an infant who obviously had no work history. This med mal case involved a newborn delivery, resulting in severe permanent injuries over the child's entire lifetime [Muenstermann v. U.S., 1992, FTCA case]

Loss of Earnings in Wrongful Death (WD) and Survival Actions (1);

- In **WD actions**: Loss of earnings in amounts that might reasonably have expected to be received may be recoverable by decedent's beneficiaries. Children may recover for the "…loss of the comforts, education, and position in society which they would have enjoyed if their father had lived and retained his income…" [Balt. Transit. v. Castranda, 1950];
- Sometimes in WD cases, the court distinguishes the loss of earnings from the loss of support to dependents [Cincotta v. US, FTCA case, 1973]:
  - Spouses were awarded damages based on past and future earnings losses of the decedent less his personal consumption, including decedent's pension based on joint life expectancy;
  - Decedent's son was separately awarded past and future college expenses through age 21, the age of majority

Loss of Earnings in Wrongful Death (WD) and Survival Actions;

- In **Survival Actions**: Long precedent that such actions only cover pre-death harm. This includes "…the loss of earnings from the time of injury to the time of death" [Jones v. Flood, 1998];

- Whither lost accumulations to the decedent's estate? Waiting for Godot.

Work Life Expectancy (WLE): Accepted for Both PI and WD

- Case law has been quite explicit on WLE for PI actions:
  - PI juries have been instructed to consider the probable duration of lost earning capacity at least since 1955 [Adams v. Benson];
  - Courts have accepted future loss periods in PI cases based on "expected work life" [Anderson v. Litzenberg, 1993] and "projected … work-life" [Lewin Realty, supra];
- In a med mal PI case of misdiagnosed cancer [Monias v. Endal, 1993], court rejected defense's contention that future loss of wages be limited to the plaintiff's actual (shortened) life expectancy.
  - Instead, it ruled that losses be calculated to age 65, based on plaintiff's normal pre-injury life expectancy;
  - Court wouldn't address question of whether a prior PI judgment precludes a later WD action based on the same negligent conduct. However, it eliminated possible future problem of "double recovery", saying that defendant should not be required to make further compensation in a subsequent WD suit for any portion of previously paid wages.
- In WD action [Cincotta, supra], court referenced decedents' WLE in awarding damages for future earnings losses. It also required use of "joint life expectancy" to determine the period for surviving spouses to receive pension benefits, which were to begin at decedent's retirement age. Implicitly, if "joint life expectancy" (JLE) at time of death was shorter than the decedent's WLE, JLE would be applicable for the period of calculating future earnings loss.

Income Taxes: Ambiguity, but Different Guidance for PI v. WD Cases

- In seminal PI case [Lumber Terminals v. Nowakowski, 1977] court rejected defense's claim that plaintiff's loss was inappropriately based on gross income, saying that "…damages should be based upon the plaintiff's gross earnings or earning capacity …[despite] fact that the damages will be exempt from income tax."
- In later PI case [Denis v. Blanchfield, 1981], defense appealed malpractice verdict because the trial court refused to instruct the jury that no income tax will be owed on the award. Although this was a PI case, defense based its appeal on a WD action brought to the U.S. Supreme Court [Norfolk v. Liepelt, 1980] . Defense prevailed, with court saying:
  - "[Giving the instruction [i.e., that no income taxes would be applied to the award] can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.'"

Income Taxes: Ambiguity, but Different Guidance for PI v. WD Cases [cont.]

- In a 1973 WD action, US District Court for MD [Cincotta, supra, an FTCA case] wrote a more definitive opinion but with a caveat. It said "The applicable rule in Maryland … is that income taxes are not to be considered in any way, either to reduce or increase the award", and thus refused to deduct income taxes as defense requested. But:
  - In footnotes, the court did recognize prior federal case law from 1960 (McWeeney v. New York) in which a **"great earning power exception"** of high income might justify a reduction for income taxes, and which one judge on this court said **"under the appropriate circumstances such a rule could have application in Maryland"**;
  - However, while recognizing the possible applicability of this exception in principal, the FTCA court ruled that the plaintiff's incomes were "…not sufficiently high that a failure to deduct taxes will lead to an excessive award.
  - As of this 1973 case, no MD Court of Appeals had addressed the issue of a "great earning power exception" making income tax deduction acceptable. We are unaware of any subsequent ruling in MD on this issue.

Present Value: Guidance More Complex, Nuanced for PI, Clear for WD

- In a PI case, defense appealed, citing plaintiff's failure to reduce losses to present value [along with failure to inform jury about income taxes, already discussed in Lumber Terminals, supra]. Court rejected both arguments, saying about PV that "… testimony of present value is not *required* as a condition upon which an economist may project future wage loss."
- In PI cases, it is important to distinguish between the failure to reduce losses to present value (which is not a requirement of the plaintiff under Lumber Terminals, supra), and the refusal of a trial court to instruct juries about reduction of losses to present value upon request by one party (which is reversible error under Dennis v. Blanchfield, supra).
- Finally, in 2001, an appeals court gave a complex but nuanced decision that improved clarity on PI cases [Lewin Realty, supra]:
  - "…**in a simple and straightforward case**, in which … it is within the ordinary knowledge of laypeople to reduce an award of future lost earning capacity to present value, **the trial court must instruct the jury to reduce the award to present value when requested to do so**."
  - "By contrast, **when** the plaintiff is seeking damages for lost future earning capacity and … **the facts of the case are not so simple and straightforward** as to allow ordinary laypeople to reduce such an award to present value by use of their general knowledge of economic variables, **the defendant bears the burden of producing present valuation evidence**."

Present Value: Guidance More Complex, Nuanced for PI, Clear for WD [cont.]

- In WD cases, the principle of reducing an award to present value has been applied in some form by MD appeals courts for over 100 years [Consol. Gas Co. v. Smith,1909].
- First explicit rulings that present valuation is required in all WD cases came in 1954 [US v. Guyer, FTCA case], and in 1972 [Sun Cab Co. V. Walston, MD Appeals Court]:
  - In Guyer, court said: "Under the law of Maryland the measure of recovery for wrongful death … is the present value of the pecuniary benefit which the wife and children of the deceased might reasonably have expected to receive from him if he had not been killed.“
  - In Sun Cab, court reduced damages awarded to plaintiff because the trial judge did not instruct the jury to reduce the award to present value. Failure to provide that instruction was “reversible error”.

Collateral Source Rule: Similar for both PI and WD cases

- In 2001, a MD Appeals Court provided a “plenary explanation” of the Collateral Source Rule, quoting from a 1950 case (Plank v. Summers) that under state law:
  - "…[i]t is generally well settled … that the fact that the plaintiff may receive compensation from a collateral source (or free medical care) is no defense to an action for damages against the person causing the injury."
- In general, neither Social Security benefits in WD cases, nor disability or unemployment benefits in PI cases is allowed to lessen the damages recoverable by plaintiffs.
- A plaintiff can recover the value of medical care from employer even though latter has already paid for it though insurance. [Baltimore Transit Co. v. Harroll, 1958]
- Collateral Source Rule is also an evidentiary rule. Defendants are barred from introducing evidence that shows that the plaintiff has received collateral source benefits. This imposes certain limitations on questioning by defense [as shown in a FELA injury case, CSX Transportation v. Pitts, 2012]:
  - Defense was only allowed to inquire of plaintiff’s expert whether, had he used a different retirement age, age 60 (given that plaintiff was then 59 years), what would the economic loss be. The answer was “Zero”.
  - However, defense was precluded from asking whether "the overwhelming majority of people that retire in the railroad industry were, in fact, 60 years old", because this did not relate to the plaintiff individually. Defense’s appeal for inability to ask this question was rejected.

Loss of Household Services: Important Differences Between PI & WD

- Limited PI case law involving plaintiff's own loss in ability to perform household (HH) services.
- Regarding loss to children [Monias v. Endal, supra, PI med mal case resulting in shortened life expectancy or "lost years"], appeals court made distinction between PI and WD cases, noting similarity of loss of HH services to children and loss of parental consortium:
  - Court did not wish to expand loss-of-consortium type tort damages for a minor child whose parent is severely injured but not killed, explicitly deferring to legislature if it wished to do so.
  - Therefore it ruled that in PI cases, a "tort victim's **loss of earnings damages are based on pre-tort life expectancy**, but a **tort victim's loss-of-services damages are based on actual post-tort life expectancy** " (emphasis added)
- Unresolved issue: In desire to avoid double counting of losses between PI and WD for same tort, some losses may never be recovered, i.e., solatium claims of minor children survivors that were denied any claim during the injured parent's life.
  - The question posed in Maryland Tort Damages without a certain answer is this: "Can the personal representative of the estate recover damages for the inability of the deceased to engage in his or her normal activities from the time of injury to the time of death?"

Loss of Household Services: Important Differences Between PI & WD [cont.]

- In WD cases, rules involving loss of HH services from one spouse to another, as compared with loss of HH services to children, are much clearer and long established, including the need for experts to value those services [Sun Cab v. Walston, supra].
- Factors of proof suggested in MD Tort Damages & developed in part from American Jurisprudence, Proof of Facts include (assuming that husband's and wife's assigned roles can be reversed):
  - Age and life expectancy of wife and beneficiaries;
  - Condition and health of the parties involved;
  - Customary performance by wife of ordinary household duties;
  - Customary performance by wife of duties helpful to husband's occupation or profession;
  - Cost of substitute help employed after wife's death to perform those services that had been performed by the wife.
- Questions remain about preferability and acceptance of future loss periods based on Healthy Life Expectancy (HLE) and Full Function Healthy Life Expectancy (FFHLE) in lieu of Joint Life Expectancy.

Miscellaneous Topics

- **Personal Consumption:** In WD cases, lost earnings required to be reduced by decedent's "personal consumption" (Cincotta, supra), not lesser amount standard of "personal maintenance"
- **Pre-Judgment Interest:** Generally not recoverable in MD except in cases of where the plaintiff needed to borrow money resulting from the tort (Downs v. Reighard, 1972)
- **Hedonic damages and other intangible losses**:
  - Certain non-economic damages are routinely recoverable, especially loss of consortium or solatium involving the death of close family members; however
  - Hedonic damages (e.g., loss of enjoyment or value of life) are another matter. Such damages have never been successfully recovered in MD to the authors' knowledge.