

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

Joseph Irving Rosenberg and Thomas C. Borzilleri*

Abstract

This article is one in the *Journal of Forensic Economics* series providing experts with information about how to prepare and testify about economic damages in personal injury and wrongful death cases in the state of Maryland.¹ Topics covered include a review of the Maryland state court system, rules regarding expert testimony, and wrongful death and personal injury economic damages calculations. An Appendix contains the relevant statutes.

I. Introduction

In this article, we provide practicing economic damages experts with a guide to preparing economic damage appraisals in personal injury and wrongful death cases that are consistent with Maryland statutes and case law. References to appropriate statutes and case law are made throughout the article. Section II describes the legal framework, including an overview of the state court system and relevant statutes. Section III describes general considerations involving expert testimony, depositions, and admissibility of evidence. Section IV covers the most pertinent elements of damages that practitioners need to know, including (A) Loss of Earnings and Earning Capacity; (B) Discounting to Present Value; (C) Life Expectancy and Worklife Expectancy; (D) Income Taxes; (E) Personal Consumption Deduction; (F) Household Services; (G) Collateral Source Rule; (H) Prejudgment Interest; (I) Hedonic Damages; (J) Loss of Fringe Benefits; and (K) Manner of Payment of Damages. Section V is a summary of this article.

*Joseph I. Rosenberg, LLC, Kensington, MD, and Thomas C. Borzilleri, Economic Consultant, Bethesda, MD.

¹A description of this series appeared in Robert A. Male and James D. Rodgers, "Introduction," *Journal of Forensic Economics*, Vol. 15, No. 3, Fall, 2002, pp. 317-18. Prospective authors of a paper for the series should consult that introduction and contact Male and Rodgers for information about the sequence of steps in the development and submission process, and also about papers already being developed or reviewed.

II. Legal Framework

A. Overview of State Court System

Maryland's court system has two levels of trial courts and two levels of exclusively appellate courts. The District Courts, with 34 locations in 12 districts, try cases of lesser claim amount and small criminal penalty. Juries are not used. Each case is heard and decided by a judge only. In civil cases, the District Court has exclusive jurisdiction in claims for \$5,000 or less, and concurrent jurisdiction with the circuit courts in claims for amounts above \$5,000 but less than \$30,000. Larger claim such as injury and death cases, serious criminal charges, juvenile cases, family matters, such as divorce, and appeals from the District Courts are tried in the Circuit Courts, which are located in each Maryland county and in Baltimore City. At the appellate level, the Court of Special Appeals considers any reviewable matter from the Circuit Courts. The Maryland Court of Appeals is the highest court in the state, and it hears cases almost exclusively by *certiorari* in which each side presents oral arguments.

B. Statutes

Three applicable statutes provide the high-level legal framework for personal injury and wrongful death. Under the Maryland Code Ann., these are:

Courts and Judicial Proceedings, Title 11-Judgments, Subtitle 1 – Judgments – Miscellaneous, § 11-109. Economic damages for personal injury or wrongful death;

Courts and Judicial Proceedings, Title 3 - Courts of General Jurisdiction - Jurisdiction/Special Causes of Action, Subtitle 9 - Wrongful Death, § 3-904 - Wrongful Death Action;

Estates and Trusts Title 7 - Administration of The Estate, Subtitle 4 - Powers of Personal Representative, § 7-401 - General powers, subsection (y) Prosecute or defend litigation

These statutes are in the Appendix.

III. General Considerations

A. Expert Testimony

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony.

Specifically, Rule 5-703 “Bases of an Expert’s Opinion Testimony” says:

(1) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

(2) If Facts or Data Inadmissible. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury over objection only if the court finds on the record that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

(3) Instruction to Jury. If facts or data not admissible in evidence are disclosed to the jury under this Rule, the court, upon request, shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert’s opinion or inference.

(4) Right to Challenge Expert. This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert’s opinion or inference. (Westlaw, Maryland Code and Court Rules)

B. Depositions

Depositions are routine. Note that under Maryland rules, in addition to paying for testimony time, the party calling the deposition is responsible for paying preparation time and for expenses reasonably incurred by the expert in travel to and from the deposition. Maryland Code and Court Rules, Rule 2-402 (g)(3) 10 days’ notice must be given.

C. Admissibility

In August 2020, Maryland replaced its long-standing Frye-Reed test for admissibility with an expanded set of “Daubert factors” to interpret Maryland Rule 5-702. The list of 10 “Daubert factors” now include:

- (1) whether a theory or technique can be (and has been) tested;
- (2) whether a theory or technique has been subjected to peer review and publication;
- (3) whether a particular scientific technique has a known or potential rate of error;
- (4) the existence and maintenance of standards and controls;
- (5) whether a theory is generally accepted;
- (6) whether experts are proposing to testify about matters growing naturally and directly of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

- (7) whether the expert has unjustly extrapolated from an accepted premise to an unfounded conclusion;
- (8) whether the expert has adequately accounted for obvious alternative explanations;
- (9) whether the expert is being as careful as he [or she] would be in his [or her] regular work outside his [or her] paid litigation consulting; and
- (10) whether the field or expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. (*Rochkind v. Stevenson*, 2020)

IV. Elements of Damages

A. Loss of Earnings and Earning Capacity

In the various statutes pertaining to personal injury and wrongful death, reference is made only to past and future loss of earnings and not to loss of earning capacity. Nonetheless, Maryland has recognized loss of “earning capacity” as well as loss of earnings, as both have been long and well supported by Maryland case law. In a seminal case (*Adams v. Benson*, 1955), an appeals court laid a solid foundation for recovering these losses. The court ruled that:

...if the jury believed that plaintiff's hand was permanently injured as a result of the negligence of defendants, she was entitled to recover damages for (1) resulting loss of time and loss of earnings, (2) loss or diminution of earning capacity sustained by being temporarily deprived of her capacity to perform her ordinary labor, and (3) loss of future earnings, if shown with reasonable certainty and not merely speculative in character. The jury were [sic] entitled to consider plaintiff's earning capacity before the injury, the probable duration of such capacity, and how far the injury would probably disable her from engaging in those occupations for which she would have been qualified in the absence of the injury. (*Adams v. Benson*, p. 271)

The same court also stated that documentation of actual earnings is merely some evidence of earning capacity and is not required:

In many cases evidence of salary, wages or other income derived from personal services, earned by a plaintiff before and after sustaining an injury, is available for the purpose of comparison in proof of diminished earning power; but such a comparison is not essential to proof of diminished earning power, but all relevant facts must be considered. (*Adams v. Benson*, pp. 272-273)

No subsequent case law has overturned *Adams*. Reliance on vocational expert opinion to establish earning capacity in the absence of financial documentation is commonplace in Maryland.

Compensation for lost earning capacity also has been awarded in a personal injury case of an infant who obviously had no work history. (*Muenstermann v. United States*, 1992)

Loss of earnings capacity was mentioned again, explicitly, and also extended to include lost future profits, even for firms that have yet to show a profit. (*Anderson v. Litzenberg*, 1997, p. 152, and p. 161, respectively. The Anderson court's general principal of accepting "...impairment of earning capacity without establishing a prior track record of earnings" was reaffirmed by the *Lewin* court. (*Lewin Realty v. Brooks*, 2001, p. 468) The *Anderson* court did not explicitly mention firm size as a criterion for not having to show a profit, but simply stated that a plaintiff can "...recover for impairment of earning capacity without establishing a prior track record of earnings," in this case applied to a self-employed plaintiff with a small home remodeling firm in its early growth stage. (*Anderson v. Litzenberg* p. 161) The *Lewin* court cited and affirmed the *Anderson* court's application of loss of earning capacity with no prior earnings track record but applied this logic to an individual rather than to a firm, i.e., to a minor child whose future earning capacity was impaired due to lead paint poisoning.

Given the increase in "gig workers" and 1099 workers on contract, the issue of measuring loss of earning capacity for self-employed workers is likely to become an increasingly contentious issue in the future.

B. Discounting to Present Value

There is no statutory discount rate in Maryland. Case law has not indicated any specific preferences regarding discounting to present value, other than it being required. According to *Maryland Tort Damages*, "In considering present value, the damages must be discounted to an amount which, when invested at the prevailing rates would produce an aggregate amount equal to the pecuniary loss." (2015, p.179) However, the term "prevailing rates" does not appear in either of the two cases referenced following this quote in *Maryland Tort Damages* (*Baltimore Transit Co. v. State*, 1950; and *Sun Cab Co. v. Walton*, 1972). In fact, Maryland pattern jury instructions only provide general guidance on how to apply interest rates when discounting to present value: "In other words, the total anticipated future loss must be reduced to an amount, which if prudently invested at a particular rate of interest over the applicable number of years, will return an amount equal to the total anticipated future loss." (MPJI-Cv 10:5, 2019)

Thus, Maryland case law has provided no explicit preferences for one discount method over another, e.g., for discounting with current market yields or with historical average yields. It also had provided no preferences for instrument type (e.g., U.S. Treasuries vs. municipal bonds) or preferences for any other specific discounting matters such as the range of bond maturities that would be acceptable.

The issue of discounting to present value has requirements for calculating damage awards that differ between personal injury and wrongful death cases. In the personal injury case of *Lumber Terminals v. Nowakowski*, 1983, the defendant appealed on several grounds, including that the plaintiff failed to reduce losses to "present value." (*Lumber Terminals v. Nowakowski*, p. 89) The Appeals Court rejected defense's argument about present value, saying that:

... testimony of present value is not required as a condition upon which an economist may project future wage loss. The distinction made between wrongful death and personal injury cases (requiring an instruction in the former but not the latter, ...[based on] Walston, supra, 267 Md. At 571) can not be logically based upon the restricted damages allowed in wrongful death cases and has no sound basis in principle. (*Lumber Terminals v. Nowakowski*, 1983, p. 91)

For personal injury cases, it is important to distinguish the failure to reduce losses to present value (which is *not a requirement* of the plaintiff under *Lumber Terminals*) from the refusal of 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*, 1981). The issues of whether and how juries in personal injury cases need to be informed about present value, and which side bears the burden of proof to introduce present value, were addressed more recently and definitively in *Lewin Realty v. Brooks*, 2001. In this lead paint premises liability case, defendant appealed the trial court's allowance of testimony by the plaintiff's vocational expert on the grounds that it did not require him to reduce his loss of earning capacity to present value, and that his testimony was "speculative," "without foundation," and lacking in "competent evidence to support such a damages award." The Special Appeals Court noted that the defendant did not appear to have asked the trial court to instruct the jury on present value, and the plaintiff asserted that the defense bore the burden of introducing present valuation evidence. Citing several precedents which appeared to be somewhat in conflict among themselves, the *Lewin* Special Appeals Court tried to reconcile these rulings on when juries need to be instructed on present value and who had the burden of proof, based on the complexity of the case:

...in a simple and straightforward case, in which the trial court ascertains that 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, in the trial court's assessment, 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. [emphasis added] (*Lewin Realty v. Brooks*, 2001, p. 477)

The Court of Special Appeals decision in *Lewin* was later upheld by an Appeals Court. (*Brooks v. Lewin Realty*, 2003)²

²*Brooks v. Lewin Realty*, 2003 was the Appeals Court that upheld the Special Appeals Court verdict in *Lewin Realty v. Brooks*, 2001. As with *Dennis v. Blanchfield*, and other many other cases, the parties' names on the case are reverse ordered, hence the Appeals Court decision is listed with Brooks name first.

In practice, most personal injury cases involving lost future earning capacity are not that simple, and in any event it may be preferable for plaintiff's counsel to introduce present value based on evidence, rather than leave this concept to be defined by the defense. It is therefore both common, and advisable, for plaintiff's counsel to introduce present value calculations in personal injury cases. For defense, it is advisable to make sure that future earning capacity is appropriately reduced to present value, given as mentioned above, that a trial court's refusal upon request to instruct juries about reduction of losses to present value is reversible error. (*Dennis v. Blanchfield*, 1981)

Compared with personal injury, present valuation requirements in wrongful death cases have been clear and stable for quite some time. In a wrongful death case, a court of special appeals explained that:

... the principle (of reducing an award to present value) seems to have crept into the law by common acceptance, for the Court of Appeals has never had occasion to rule squarely upon it. The earliest indication of its consideration is found in *Consol. Gas Co. v. Smith* (1909), where the Court used the present value rule to test the prejudicial effect of evidence... (*Sun Cab Co. v. Walston*, 1972, p. 124)

Although for many years the requirement for present valuation of future losses has been unchallenged in wrongful death cases, it may not have been until 1954 that the first explicit reference was made to it as a requirement in a federal case but based on Maryland law as provided for in the Federal Tort Claims Act. (*United States v. Guyer*, 1954)³

C. Life Expectancy and Worklife Expectancy

The earliest reference to life expectancy in a wrongful death case was in *Baltimore & R. Turnpike Road v. State* (1889), also referenced as *President, Etc. of the Baltimore & R. Turnpike Road v. State, To Use of Grimes et al.*, Dec. 18, 1889. The appeals court affirmed the lower court's jury instruction that "... damages should estimate the reasonable probabilities of the life of the deceased..[and regarding the widow]...it was understood by the jury as meaning the probable duration of the joint lives of herself and her husband." (*Baltimore & R. Turnpike Road v. State*, 1889, p. 884)

Regarding personal injury cases, at least as far back as 1955, Maryland courts have ruled that juries "... were entitled to consider... the probable duration of such [earning] capacity." (*Adams v. Benson*, 1955, p. 271) In more recent rulings, terms accepted by the courts over which loss of future earning capacity should be calculated have included "expected work life" and

³In *United States v. Guyer*, a suit under the Federal Tort Claims Act for wrongful deaths that occurred in Maryland. The following quote is from *United State. v. Guyer*, cited in *Sun Cab v. Walston*, p. 128: "Under the law of Maryland the measure of recovery for wrongful death in a case such as this 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."

“projected ... work-life...” (*Anderson v. Litzenberg*, 1993, p. 158, and *Lewin Realty v. Brooks*, 2001, p. 470, respectively)

There are no statutory life expectancy tables required in Maryland applicable either to wrongful death or personal injury cases. In wrongful death actions when a widow or widower is a survivor, joint life expectancy tables should be used. This requirement was established by the *Cincotta* court, which said that “With regard to widows, the factors of joint life expectancy must be considered together with the occupation of the deceased and the comfort and support he provided his family at the time of his death.” (*Cincotta v. United States*, 1973, p. 407), the court also referencing other prior cases on this point: *Jennings v. United States*, 1959; *Baltimore Transit v. State, ex rel., Castranda*, 1950; *Baltimore & O. R.R. v. State ex rel. Kelly*, 1866). Hence, losses of care are calculated using joint life expectancy.

A later court addressed the issue of probable life expectancy. (*Pierce v. Johns-Manville Sales*, 1983) While earnings losses are calculated on pre-injury life expectancy, medical expenses are calculated on the probable life expectancy of the injured person who requires future medical services. The court said that “Probability exists when there is more evidence in favor of a proposition than against it (a greater than 50% chance that a future consequence will occur)”, and so required that future medical expenses or items in a life care plan must be more likely than not, i.e., probable not merely possible. (*Pierce v. Johns-Manville Sales*, 1983, p. 666)

Perhaps the most interesting case involving a variety of worklife expectancy and household services issues (the latter addressed in a separate section of this paper) is the medical malpractice case of *Monias v. Endal*, 1993. Plaintiff Endal sued Dr. Monias for negligence in failing to diagnose and treat a breast cancer, alleging that had such diagnosis and treatment occurred in a timely manner, Endal would have had an 85-90% chance of being cured instead of only 20%. The court rejected defense’s contention that future loss of wages be limited to the plaintiff’s actual (shortened) life expectancy, instead ruling that it be based on plaintiff’s normal life expectancy: “If the injury shortens plaintiff’s life expectancy, the weight of American authority nevertheless computes future earning loss on the basis of the life expectancy plaintiff would have had without the injury.” (*Monias v. Endal*, 1993, p. 281)

The appeals court held that future losses should apply to age 65, when it assumed that the plaintiff would have retired, pre-injury. However, for loss of household services, it rejected plaintiff’s argument that her pre-injury life expectancy also should apply. Instead, it agreed with a prior appeals court ruling that “as a general rule, a plaintiff cannot recover damages for the ‘lost years’ of shortened life expectancy caused by a defendant’s negligence.” (*Monias v. Endal*, 1993, p. 283, also citing *Rhone v. Fisher*, 1961)

The *Monias* court thus made the distinction in shortened life cases that it should not treat loss-of-services damages the same as loss of earnings damages. It explained its reasons for this distinction explicitly, as follows:

In the instant case the “post premature death” loss-of-earnings damages were to compensate Ms. Endal for money that she will not receive

because of her untimely death. The “post premature death” loss-of-services damage were to compensate for services Ms. Endal will not be able to perform for her family because of her untimely death. Obviously, Ms. Endal will have no need for her own services following her premature death; these loss-of-services damages were to compensate Ms. Endal’s family. Damages for loss of services to family members, if recoverable at all, are properly pursued in a wrongful death action. We find no justification for a further extension of Rhone, and we hold that a tort victim in a personal injury suit is not entitled to loss-of-services damages for the period of the “lost years” of shortened life expectancy. (*Monias v. Endal*, 1993, pp. 284-285)

Hence, to summarize the requirements established in *Monias* of an injury that causes an expectation of pre-mature death, two distinct time phases apply: personal injury and wrongful death. In the personal injury phase, the court said that earnings losses must be based on pre-injury life expectancy, implicitly meaning pre-injury worklife expectancy. For loss-of-services, however, only the wrongful death phase applies, with the period of loss only beginning with the pre-mature death date resulting from the injury.

D. Income Taxes

In both personal injury and wrongful death cases, taxes are not considered. Losses are calculated on gross earnings. In the seminal personal injury case of *Lumber Terminals v. Nowakowski*, 1977, defense appealed the gross earnings award on several grounds. Among these were that plaintiff’s expert improperly calculated the loss on the “. . . basis of gross rather than net wages to the date of trial despite the fact that appropriate tax deductions to net wages were easily discernible.” (*Lumber Terminals v. Nowakowski*, 1977, p. 96) The appellate court rejected this contention as applied to either past or future losses, saying that:

... the award of damages should be based upon the plaintiff’s gross earnings or earning capacity and should not be reduced because of any income tax savings which may result to the plaintiff from the fact that the damages will be exempt from income tax. (*Lumber Terminals v. Nowakowski*, 1977, p. 97)

The court’s position on income taxes was reaffirmed by a Court of Special Appeals of Maryland. “This problem has been fairly addressed by the Maryland Court of Appeals and is not, at this time, the accepted law of this State.” (*Great Coastal Express, Inc. v. Darlin Schrufer et al.*, 1977, p. 721) Thus, the court concluded that in determining damages the question of federal and state income taxes shall not be considered.

In another Maryland case of note concerning taxes, a personal injury defendant Dennis, appealed a malpractice verdict involving an erroneous diagnosis because the trial court refused to instruct the jury that: “Any damages awarded to plaintiff are not income to [plaintiff] within the meaning of federal and state income tax laws, and no income tax will be

owed or paid thereon.” (*Dennis v. Blanchfield*, 1981, p. 334) Instead, the Maryland Special Appeals Court quoted from a related United States Appeals Court decision:

To put the matter simply, giving the instruction [no income taxes being 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. (*Burlington Northern, Inc. v. Boxberger*, 1975, cited in *Dennis v. Blanchfield*, 1981, p. 336)

While this instruction must be given if requested, it does not obviate the conclusion that in Maryland, the measure of losses is pre-tax gross earnings.

E. Personal Consumption Deduction

In Maryland wrongful death cases, a deduction for the decedent’s personal consumption is required. The concept of personal consumption as a deduction from lost earnings was first applied as a reduction for “living expenses” based on a court’s discretion in *United States v. Guyer* (1954):

Mrs. Guyer testified that they had six or seven hundred dollars a month to live on; and it was on this testimony that the trial judge arrived at the \$7,500 per year. Of course, the deceased’s living expenses were a substantial part of the living expenses of the family of which he was a part; and, all things considered, we think that \$5,000 per year would more nearly approximate the pecuniary loss which his wife and children could reasonably be held to have sustained as a result of his death. Accepting this as a basis, the award should be one-third less, or \$87,500 instead of \$131,250. (*United States v. Guyer*, 1954, p. 268)

Although the “living expenses” concept was cited in several later cases, the term “personal use and consumption” first appears to have been mentioned in *Cincotta v. United States*, 1973. This was a federal court case in which the decision followed Maryland law under the Federal Tort Claims Act, FTCA.⁴ In this case, the lost earnings resulting from wrongful deaths of two pilots were required to be reduced by each decedent’s personal consumption:

The Government correctly argued that in computing the survivors’ pecuniary loss, that amount which the decedent dedicated to his personal use and consumption must be deducted from his yearly income, for such is the law in Maryland (*United States v. Guyer, supra*, at 268 of 218 F.2d; *Plant v. Simmons Co., supra*, at 738-739 of 321 F. Supp.

⁴Under FTCA, U.S. district courts have exclusive jurisdiction for cases of “. . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, . . . [but with money damages applied] in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)

(D.Md.1970); *Jennings v. United States*, *supra*, at 531-532 of 178 F. Supp.), cited in *Cincotta v. United States*, 1973, p. 408.

As with *United States v. Guyer*, there was no evidence introduced concerning the income each party had dedicated to personal use and consumption. Therefore, the court again applied its own discretion and assigned personal consumption expenses, allowing for 35% deduction for both pilots, and a reduced 25% deduction during the period when one of the pilot's sons was expected to remain in college and for which he was granted a separate award for his educational expenses. (*Cincotta v. United States*, 1973, p. 409)

In summary, economists reduce lost earnings for personal consumption as required, and if absent, the court may step in as in *Guyer* to provide its own percentage reductions.

F. Household Services

Loss of household services in personal injury and wrongful death cases have been recognized in various ways for different types of familial relationships. It also is a type of loss for which there are important differences between injury and death cases.

Courts have recognized the rights of parents to recover the loss of services of a child from negligent injuring in at least two cases over 50 years ago. (*Hudson v. Hudson*, 1961, and *Maxworthy v. Horn Electric Serv. Inc.*, 1972) In neither of these two cases is a description given as to the specific nature of the lost services that would have been provided by the injured children, although in the latter case, \$30,000 was awarded to the husband for recovery of the loss of services of his four-year-old daughter. (*Maxworthy v. Horn Electric Serv.*, 1972, p. 452) The implication is that such losses are closer to consortium and/or solarium rather than what is typically thought of as household service, e.g., cooking, cleaning, yardwork, etc. Despite the recognition of lost services from injured minor children, Maryland courts have not resolved whether the expected services from a negligently injured adult child also is compensable to the parents (*Maryland Tort Damages*, 2006, p. 14), unlike in wrongful death cases.

Monias v. Endal, 1993, held that (1) an injured plaintiff cannot recover loss of household services based on pre-injury life expectancy and (2) the loss of household services provided by parents to children differs between personal injury and death cases. In addition to clarifying that an injured plaintiff cannot recover loss of household services based on pre-injury life expectancy, this case also clarified that the loss of household services by parents to children differ between personal injury and wrongful death cases:

We also note that the award in the instant case for "loss of household services to children" is similar to a child's claim for "loss of parental consortium." [While some jurisdictions take this position] Maryland, however, has not recognized such a claim for children except in the context of a wrongful death action. We are not persuaded that this Court should further expand tort damages to include such loss-of-

consortium type damages for a minor child whose parent is severely injured but not killed. . . . [Thus,] [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]. (*Monias v. Endal*, pp. 285-286)

As compared with loss of household services both to and from children, the loss of household services from one spouse to another, and the need for expert opinion to value those services, have been much clearer and long established. In *Sun Cab v. Walston*, 1972, an appellate court recognized the pecuniary loss to a widower for the value of services performed as a wife and mother, and explained the need for relying on expert opinion to value those services, referencing a 1939 decision:

. . . that the value of housekeeping services performed by the deceased wife and mother was a proper element of damages...[adding]... It cannot be said that jurors residing [in place A] possessed of any such common knowledge of those factors in [place B]... as to enable them without the aid of some testimony to fix their value. (*Industrial Service Co. v. State, Use of Bryant*, 1939, cited in *Sun Cab Co. v. Walston*, 1972, p.142)

In 2019 the Court of Special Appeals of Maryland held that services were recoverable as a pecuniary loss but that a three-part test must be met: 1) evidence must identify specific services that have a market value; 2) there must be evidence that the beneficiary could have reasonably expected to receive such services; and 3) there must be “some” evidence concerning the duration over which services would have been provided. The Court rejected a claim for the service of a deceased minor child over the joint life expectancy of mother and child, in particular citing the question of expected duration. (*Choudhry v. Fowlkes*, 2019)

Some economic damages experts use the *American Time Use Survey* (ATUS) data directly as provided by the Bureau of Labor Statistics (<https://www.bls.gov/tus/>). Others, including the authors of this report, have used for many years a conveniently compiled set of ATUS data from the “Dollar Value of a Day” (*Expectancy Data*, a yearly publication). At trial, however, testimony often must be elicited from beneficiaries to meet that three-part test outlined above. Anecdotally, it appears that “Dollar Value of a Day” is used more frequently than ATUS directly.

One last household services issue, whether parents of a deceased child were restricted to pecuniary loss sustained during the child’s minority, was resolved by an appellate court in *Barrett v. Charlson*, 1973. This case involved the wrongful death of a 20-year-old daughter (when the age of majority was 21) and underscores the difficulty in separating loss of household services from loss of solatium when dealing with children.

Writing its decision in 1973, the court noted that in 1969 the wrongful death statute was amended to change from strict application of the “pecuniary loss” or “pecuniary benefit” to one that included elements of “solatium.” Based on this

change, the trial court ruled in favor of the parents. But the parents appealed anyway, alleging that the damage award was inadequate because it only compensated for “pain and suffering” for the one year remaining until their daughter would have reached the age of majority. The appeals court agreed with the parents based on the principal of not limiting the award to their daughter’s period of minority, rather than the amount of the award itself. (*Barrett v. Charlson*, 1973, p. 97).

G. Collateral Source Rule

In general, neither social security benefits in wrongful death cases, nor disability or unemployment benefits as provided by statute in personal injury cases is allowed to lessen the damages recoverable by plaintiffs. The Collateral Source Rule involves benefits of any kind (income, health care, or other benefits) received by a plaintiff from a source independent of the parties to the case that compensate for his or her injuries suffered, and do not diminish the damages otherwise recoverable by the plaintiff. No appellate decision has explicitly addressed insurance benefits under the Affordable Care Act.

It does not appear that there has been any Maryland appeals court ruling in a wrongful death case that explicitly addresses whether the loss of social security benefit allows for any offset by the surviving spouse’s benefit. According to *Maryland Tort Damages*, in reference to 84 A.L.R. 2D 764, “Those few jurisdictions which have addressed the issue have held that the amount of a recovery in a wrongful death action shall not be reduced by any amount received by the plaintiffs as Social Security benefits.” (*Maryland Tort Damages*, 2015, p. 181)⁵

In Maryland, a more general point was made by an Appeals Court in 2001, saying it provided a “plenary explanation” of the Collateral Source Rule in a 1954 case, in turn quoting from a 1950 case: “. . . [i]t is generally well settled [under Maryland law] 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.” (*Plank v. Summers*, 1954, p. 561, quoting *Sainsbury v. Pennsylvania Greyhound Lines*, 1950, also cited in *Kremen v. Maryland Auto Insurance Fund*, 2001).

A plaintiff can recover the value of medical care and treatment from an employer even though the latter has already paid for it through insurance or otherwise. (*Baltimore Transit Co. v. Harroll*, 1958) As explained in pattern jury instructions,

In arriving at the amount of damages to be awarded for past and future medical expenses and past loss of earnings, you may not reduce the amount of your award because you believe or infer that the plaintiff has received or will receive reimbursement for, or payment of proven

⁵Upon review of 84 A.L.R. 2D 764, “Damages for wrongful death of husband or father as affected by receipt of social security benefits,” 12 state cases were cited but Maryland was not among them.

medical expenses or lost earnings from persons or entities other than the defendant, such as, for example, sick leave paid by the plaintiff's employer, or medical expenses paid by the plaintiff's health insurance. (MPJI-Cv 10:8, cited in *Maryland Tort Damages*, 2015, p. 33).

Awards in medical malpractice cases are limited to the total amount of past medical expenses paid by or on behalf of the plaintiff, or past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person is obligated to pay. (Maryland Courts and Judicial Proceedings, Section 3-2A-9(d), cited in *Maryland Tort Damages*, 2015, p. 33). To avoid a jury from considering write-offs by health care providers which are collateral source payments, it was ruled that such payments must be presented to the court post-verdict rather than presented at trial. (*Lockshin v. Semsker*, 2010)

Another Collateral Source Rule limitation on questioning by defense came in a nuanced example in *CSX Transportation v. Pitts* (2012), an injury case under FELA involving the retirement age of a railroad worker. In this case, a main reason why defense appealed the trial court decision was its denial to question plaintiff's economic expert about the average retirement age of railroad workers. The trial court's discretion was upheld based on the Collateral Source Rule. (*CSX v. Pitts*, 2012, pp. 470-471) The appeals court explained its rationale by quoting from an earlier case with a similar issue:

[E]vidence of future retirement or pension benefits is not admissible on the issue of when an employee, but for the accident, would have been expected to stop working. The probative value is too attenuated to offset the potential misuse that the jury could make of the evidence. Evidence bearing on the expected work-life of the employee is not a cognizable exception to the collateral source rule. (*Norfolk S. Ry. Corp. v. Tiller*, 2008, cited in *CSX v. Pitts*, 2012, p. 470).

One debate involving the collateral source rule occurs when a retiree selects a joint-survivor benefit in the retirement program. Although defense may claim that this is an offset, plaintiff will argue that this is a collateral source, since the amount of retirement income received by the survivor's spouse is less than if the plaintiff had chosen a single life annuity. We are unaware of any case law that supports the inclusion of this benefit as an offset to any loss to the estate.

H. Prejudgment Interest

In Maryland tort cases, pre-judgment interest generally is not recoverable in a claim for damages. (*Polgase v. Greyhound Lines*, 1975) Prejudgment interest has been awarded for money borrowed resulting from specific torts, e.g., due to property damage (*Noyes Air Conditioning Contractors v. Wilson Towers Ltd Partnership*, 1998) or for the purchase of additional land necessitated by negligent misrepresentation (*Pine Street Trading Corp. v. Farrell Lines, Inc.*, 1976) (cited in *Maryland Tort Damages*, 2015, p. 40). Some economists adjust past losses using the consumer price index to return to the party the purchasing power lost. We are not aware of any case that has addressed this issue.

I. Hedonic Damages

The issue of allowing recovery for hedonic damages, narrowly defined to mean loss of enjoyment in life, has been a source of controversy in many states. To the best of our knowledge, hedonic damages have never been awarded in a Maryland case.

J. Loss of Fringe Benefits

Loss of fringe benefits have been recognized as part of lost earnings for many years. After citing similar rulings in other states, a Maryland appeals court said in 1954 that “where hospital and medical services are furnished gratuitously to the injured party, he can recover the value of those services from the tortfeasor.” (*Plank v. Summers*, 1954, p. 562)

In *Cincotta*, the appellate court applied this straightforward rule to a pension based on the joint life expectancy of decedent and surviving spouse:

At age 65, had Mr. Turner remained with MMC, with no further increases in salary, he would have qualified for a yearly pension of \$13,800. This figure, minus the husband’s personal consumption, will be used as representative of the widow’s pecuniary loss over the remainder of the joint life expectancy after the husband would have reached retirement age. (*Cincotta v. United States*, 1973, p. 410)

In general, pensions, retirement plans, social security payments, and other benefits of employment have been considered appropriate elements for inclusion in calculating pecuniary loss.

K. Manner of Payment of Damages

Following a jury verdict, the court rejected defense’s request to discharge its obligation via an annuity purchased from another company that would cover both medical expenses and future loss of earnings. Citing another case, the court said that “relying on one company...to last that long may actually place more risk on the plaintiffs than having them diversify an investment portfolio with public and private bonds and securities and certificates of deposits.” (*Kent Village Associates, et al., v. Kimberly Smith, et al.*, 1995, p. 526, citing *Muenstermann v. United States*, 1992) Here again, even though the case was under federal jurisdiction, money damages were based on Maryland state law as provided for under the FTCA, as explained above).

V. Summary

In this article, we have provided practicing economic damages experts with a guide to preparing economic damage appraisals in personal injury and wrongful death cases that are consistent with Maryland statutes and case law. For critical topics such as loss of earnings/earning capacity, present value, and income taxes, Maryland courts have established principals that provide clear

guidance to economic damages experts and attorneys, that we have attempted to succinctly cover here, and the Appendix contains the relevant statutes. Other topics, such as life expectancy and worklife expectancy, discounting to present value, household services, and collateral source rules, while clear in most ways, have more nuances in how the law has been applied under less common circumstances.

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Appendix: Statutes (West's Annotated Code of Maryland)

§ 11-109. Economic damages for personal injury or wrongful death
West's Annotated Code of Maryland, Courts and Judicial Proceedings,
Current through legislation effective July 1, 2020

Title 11. Judgments (Refs & Annos)

Subtitle 1. Judgments-Miscellaneous (Refs & Annos)

§ 11-109. Economic damages for personal injury or wrongful death

Economic damages defined

- (a) (1) In this section, "economic damages" means loss of earnings and medical expenses.
- (2) "Economic damages" does not include punitive damages.

Itemization of award

(b) As part of the verdict in any action for damages for personal injury in which the cause of action arises on or after July 1, 1986 or for wrongful death in which the cause of action arises on or after October 1, 1994, the trier of fact shall itemize the award to reflect the monetary amount intended for:

- (1) Past medical expenses;
- (2) Future medical expenses;
- (3) Past loss of earnings;
- (4) Future loss of earnings;
- (5) Noneconomic damages; and
- (6) Other damages.

Payment of future economic damages

(c) (1) The court or the health claims arbitration panel may order that all or part of the future economic damages portion of the award be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the plaintiff, funded in full by the defendant or the defendant's insurer and equal when paid to the amount of the future economic damages award.

(2) In the event that the court or panel shall order that the award for future economic damages be paid in a form other than a lump sum, the court or panel shall order that the defendant or the defendant's insurer provide adequate security for the payment of all future economic damages.

(3) The court or panel may appoint a conservator under this subsection for the plaintiff, upon such terms as the court or panel may impose, who shall have the full and final authority to resolve any dispute between the plaintiff and the defendant or the defendant's insurer regarding the need or cost of expenses for the plaintiff's medical, surgical, custodial, or other care or treatment.

Death of plaintiff prior to final payment of award

(d) If the plaintiff under this section dies before the final periodic payment of an award is made, the unpaid balance of the award for future loss of earnings shall revert to the estate of the plaintiff and the unpaid balance of the award for future medical expenses shall revert to the defendant or to the defendant's insurer if the insurer provided the funds for the future damages award.

§ 3-904. Wrongful death action

West's Annotated Code of Maryland Courts and Judicial Proceedings, Effective: October 1, 2012; Current through legislation effective July 1, 2020

Title 3, Courts of General Jurisdiction-Jurisdiction/special Causes of Action (Refs & Annos)

Subtitle 9. Wrongful Death (Refs & Annos) § 3-904. Wrongful death action

Actions for benefit of spouse, parent, and child of deceased person

(a) (1) Except as provided in paragraphs (2) and (3) of this subsection, an action under this subtitle shall be for the benefit of the wife, husband, parent, and child of the deceased person.

(2) A parent may not be a beneficiary in a wrongful death action for the death of a child of the parent if:

(i) 1. The parent is convicted under §§ 3-303 through 3-308, § 3-323, § 3-601, or § 3-602 of the Criminal Law Article; or

2. The parent committed an act prohibited under §§ 3-303 through 3-308, § 3-323, § 3-601, or § 3-602 of the Criminal Law Article;

(ii) The other parent of the child is the victim of the crime or act described under item (i) of this paragraph; and

(iii) The other parent of the child is a child of the parent.

(3) (i) An action under this subtitle for the wrongful death of a child caused by the parent of the child allowed under the provisions of § 5-806 of this article may not be for the benefit of that parent of the deceased child.

(ii) An action under this subtitle for the wrongful death of a parent caused by a child of the parent allowed under the provisions of § 5-806 of this article may not be for the benefit of that child of the deceased parent.

Actions for benefit of persons related by blood or marriage

(b) If there are no persons who qualify under subsection (a) of this section, an action shall be for the benefit of any person related to the deceased person by blood or marriage who was substantially dependent upon the deceased.

Damages awarded in proportion to resulting injury

- (c) (1) In an action under this subtitle, damages may be awarded to the beneficiaries proportioned to the injury resulting from the wrongful death.
 (2) Subject to § 11-108(d)(2) of this article, the amount recovered shall be divided among the beneficiaries in shares directed by the verdict.

Death of spouse, minor child, parent of minor child, or unmarried children

(d) The damages awarded under subsection (c) of this section are not limited or restricted by the “pecuniary loss” or “pecuniary benefit” rule but may include damages for 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 for the death of:

- (1) A spouse;
- (2) A minor child;
- (3) A parent of a minor child; or
- (4) An unmarried child who is not a minor child if:
 - (i) The child is 21 years old or younger; or
 - (ii) A parent contributed 50 percent or more of the child’s support within the 12-month period immediately before the date of death of the child.

Death of child or parent of child who is not a minor

(e) For the death of a child, who is not described under subsection (d) of this section, or a parent of a child, who is not a minor child, the damages awarded under subsection (c) of this section are not limited or restricted by the “pecuniary loss” or “pecuniary benefit” rule but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, attention, advice, counsel, training, education, or guidance where applicable.

One action for death of person

- (f) Only one action under this subtitle lies in respect to the death of a person.

Limitations

- (g) (1) Except as provided in paragraph (2) or (3) of this subsection, an action under this subtitle shall be filed within three years after the death of the injured person.
 (2) (i) In this paragraph, “occupational disease” means a disease caused by exposure to any toxic substance in the person’s workplace and contracted by a person in the course of the person’s employment.

(ii) If an occupational disease was a cause of a person's death, an action shall be filed:

1. Within 10 years of the time of death; or
2. Within 3 years of the date when the cause of death was discovered, whichever is the shorter.

(3) (i) This paragraph applies only to a wrongful death cause of action arising from conduct that would constitute a criminal homicide under State or federal law.

(ii) If knowledge of a cause of action or the identity of a person whose wrongful act contributed to a homicide is kept from a party by the conduct of an adverse party or an accessory or accomplice of an adverse party:

1. The cause of action shall be deemed to accrue at the time the party discovered or should have discovered by the exercise of ordinary diligence the homicide and the identity of the person who contributed to the homicide;
2. A presumption shall exist that the party should have discovered by the exercise of ordinary diligence the identity of the person who contributed to the homicide after:

A. A charging document is filed against the person alleged to have participated in the homicide; and

B. The charging document is unsealed and available to the public; and

3. An action under this subtitle shall be filed within 3 years after the date that the cause of action accrues.

Persons with unmarried parents

(h) For the purposes of this section, a person born to parents who have not participated in a marriage ceremony with each other is considered to be the child of the mother. The person is considered to be the child of the father only if the father:

(1) Has been judicially determined to be the father in a proceeding brought under § 5-1010 of the Family Law Article or § 1-208 of the Estates and Trusts Article; or

(2) Prior to the death of the child:

(i) Has acknowledged himself, in writing, to be the father;

(ii) Has openly and notoriously recognized the person to be his child; or

(iii) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

§ 7-401. Powers and authority of personal representative; Prosecute or defend litigation (y)(1) (authority for survival action)

West's Annotated Code of Maryland Estates and Trusts, Effective: October 1, 2019, Current through legislation effective July 1, 2020

Title 7. Administration of the Estate (Refs & Annos)

Subtitle 4. Powers of Personal Representative (Refs & Annos)

§ 7-401. Powers and authority of personal representative

Prosecute or defend litigation

(y)(1) A personal representative may prosecute, defend, or submit to arbitration actions, claims, or proceedings in any appropriate jurisdiction for the protection or benefit of the estate, including the commencement of a personal action which the decedent might have commenced or prosecuted, except that:

(i) A personal representative may not institute an action against a defendant for slander against the decedent during the lifetime of the decedent.

(ii) In an action instituted by the personal representative against a tortfeasor for a wrong which resulted in the death of the decedent, the personal representative may recover the funeral expenses of the decedent up to the amount allowed under § 8-106(c) of this article in addition to other damages recoverable in the action.

(2) A personal representative may request criminal injuries compensation, restitution, or any other financial property interest for a decedent who was a victim of a crime.