

Update to Assessing Economic Damages in Personal Injury and Wrongful Death Litigation in Florida

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Abstract

Current changes in personal injury and wrongful death litigation in the state of Florida.

I. Introduction

This paper is an addendum to my 2002 article (Williams, 2002) in the *Journal of Forensic Economics* which 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, and jury verdict forms, where applicable, throughout this paper. Sections II and III discuss the basis for making calculations in death and injury cases, respectively. Section IV discusses how economic calculations are made in medical malpractice arbitration cases (death and injury). *Daubert* issues are dealt with in Section V, while the appendix contains updated sample verdict forms for death and injury cases in Florida.

II. Economic Damages in Death Cases

As was discussed in my prior paper, the Florida Wrongful Death Act, Chapter 768 of the Florida Statutes, details the five elements of economic damages that can be awarded. Net accumulations, the economic damage related to savings and net worth, is an element of economic damage available to the estate of the decedent. If the decedent is under age 25 and has *no* survivors (wife, children) there is *no* legal claim for net accumulations allowed. A claim for net accumulations is allowed if the decedent is under age 25 with survivors, or age 25 and over with or without survivors. However, in *Synergy Gas Corp. v. Johnson* (1993), the court determined that to succeed on a claim for net accumulations, there must be evidence of historical savings and the decedent's propensity to save in the past.

The following scenario was posed in my previous article: where does this leave a young decedent who is a medical student age 25 or older with probable debt (i.e. no savings due to the length of his or her graduate studies), in regard to a net accumulation claim to his or her estate? By strictly following *Synergy*

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and only looking historically at savings there would be no net accumulations claim allowed. However, *Citrus County v. McQuillin* (2003) may provide an alternate answer. This case involved the death of a 28-year-old mother and wife who was working, but had dropped out of high school in the 11th grade and was living paycheck-to-paycheck and had no record of past savings. In *Citrus* (at 1-3), the court rejected awarding net accumulations reasoning, “no evidence was presented that [the] decedent had any propensity to save *in future*, or ability to do so.” (emphasis added). The *Citrus* case may have opened the door to a net accumulations claim where there is a reasonable expectation of a future expected income stream which leads to a *future* ability to save over a decedent’s worklife and life expectancies using appropriate savings rates and occupational/industry earning data. Whereas *Synergy* appears to look only backwards, the *Citrus* may look forward.

III. Economic Damages in Injury Cases

In *Miami-Dade County v. Cardoso* (2007), the court reversed a modest claim of \$10,000 by a flower vendor for future loss of earning capacity. The court reasoned that because the plaintiff’s testimony regarding his earnings as a flower vendor was contradictory and unsubstantiated, no evidence was presented that his capacity to earn was diminished. At the time of trial, plaintiff was earning substantially more as a truck driver than he earned as a flower vendor. The court opined that the loss of *capacity* to work as a flower vendor is far different than the loss of the *desire* to work as a flower vendor. The court noted that the plaintiff clearly had the capacity to sell flowers, but simply chose not to.

In *Truelove v. Blount* (2007), the lower court awarded \$220,000 in future damages, combining the amount of future medicals and lost future earning ability (capacity). On appeal the court ruled that although future medicals “might” and “could” be needed, the evidence failed to rise to the level of reasonable certainty. The court also determined that with regard to loss of future earning capacity that there was no basis or supporting evidence on which the jury could assess or realistically calculate future earning capacity damages that were reasonably certain to occur in the future. The court concluded that the economic damage award was left to conjecture and too speculative to uphold the lower court’s decision.

In *Moreno v. Diaz* (2007), the court determined that the amount awarded at trial for future medical expenses did *not* bear a reasonable relationship to the future medical expense damages provided at trial to the jury. The court ruled that the evidence presented at trial was insufficient to support the jury’s award.

In *Owen v. Morrisey* (2001) the court concluded that although the case law permits an award of future economic damages without a finding of permanent injury, a permanent injury is a *significant factor* in establishing a reasonable certainty of the future economic damages.

IV. Medical Malpractice Arbitration

In *Estrada v. Mercy Hospital, Inc.* (2013), the court held that damages for a patient’s loss of earning capacity should have been based on the patient’s

prospective earnings for the balance of the patient's life at the time of injury, undiminished by any shortening of that life expectancy as a result of the injury. A subsequent wrongful death action is barred when the personal injury litigation results in a judgment favorable to the injured person. See *Variety Children's Hospital. v. Perkins* (1983).

V. *Daubert*

In 2013, the Florida Legislature amended section 90.702 of the Florida Evidence Code "to adopt the standards for expert testimony in the courts of this state as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) and as reaffirmed and refined by both *General Electric Co. v. Joiner* (1997) and *Kumho Tire Co., v. Carmichael* (1999)." See Ch. 2013-107, § 1 Laws of Florida (2013). In doing so, the Florida Legislature expressed its intent to prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou* (2007). On July 1, 2013, these revisions to section 90.702 went into effect, changing Florida from a *Frye* state to a *Daubert* state.

Florida's new expert evidence standard mirrors Federal Rule of Evidence 702 and requires a court to consider three enumerated requirements when determining whether evidence is admissible at trial. Specifically, Florida courts must now determine whether: (1) the expert's testimony is based upon sufficient facts or data; (2) the expert's testimony is the product of reliable principles and methods; and (3) the expert applied the foregoing principles and methods reliably to the specific facts of the case. In addition, a court must now interpret and apply these three requirements in accordance with the four-part *Daubert* test, which aids in analyzing whether the principles and methods used by the expert are reliable. See *Kumho*.

The Florida legislature has also broadened the reach of Florida's expert evidence standard by explicitly subjecting pure opinion testimony to the analysis. It also applies regardless of whether the technique is new-and-novel or tried-and-true. All expert's opinions and methodologies are analyzed under this new standard. Further, relying upon *Daubert* and its progeny, the new standard "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and other specialized knowledge," which includes "engineers and other experts who are not scientists." See *Kumho* (at 147-153). This includes forensic economists, where there have not been many *Daubert* challenges to date.

However, on September 1, 2016, the Florida Supreme Court began to hear oral arguments as to whether to override the Florida Legislature regarding *Daubert* and return Florida back to the *Frye* standard.

VI. Conclusion

This addendum article on the calculation of economic damages in Florida in injury and death cases should be read in conjunction with my original 2002 article.

References

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Case Law

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 Synergy Gas Corporation v. Johnson, 627 So.2d 539-541 (1993)
 Truelove v. Blount, 954 So.2d 1284 (2007)
 Variety Children's Hosp. v. Perkins, 445 So.2d 1010 (1983)

Appendix

Jury Verdict Forms (Injury and Death)

These forms are reproduced from the Florida Supreme Court. It is worth pointing out that earning capacity on the standard personal injury verdict form only applies to the future, not to the past.

Verdict Form for a Florida Personal Injury Case

What is the total amount of (claimant's) damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses incurred in the future, and (list other economic damages)?\$ _____

What is the total amount of damage sustained by (spouse) in loss of [his wife's] [her husband's] Services?\$ _____

Verdict Form for a Florida Wrongful Death Case

Damages of the Estate

What is the total amount of any damages lost by the estate for [any earnings of the decedent lost from the date of injury to the death not including any

amount of support lost by a survivor in that period] [,] [the amount of any medical or funeral expenses resulting from (decedent's) injury and death charged to the estate or paid by someone other than a survivor] [,] [and] [loss of net accumulations] [,] [(list other damages sustained by estate)]? \$ _____

Damages of (surviving spouse)

What is the amount of any damages sustained by (surviving spouse) for the [loss of the (decedent's) support] [and] [services [, and] [medical or funeral expenses] resulting from (decedent's) injury and death paid by (surviving spouse)? \$ _____

Damages of (surviving child)

What is the total amount of damages sustained by (surviving child) for the [loss of the (decedent's) support] [and] [services] [, and] [medical or funeral expenses resulting from (decedent's) death paid by (surviving child)]? \$ _____