

## 12 THE LAW AND PUBLIC POLICY

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## 12.1 Introduction

In the preceding chapters, a step-by-step presentation has been made regarding the work of forensic economists in wrongful death and personal injury cases. In this chapter, we turn to a jurisdiction-by-jurisdiction examination of major legal guidelines and parameters affecting economic loss analyses and the testimony of the economic expert, most specifically in wrongful death cases. Then, our own opinions are offered on appropriate public policy relative to many of these legal parameters. These opinions and recommendations are, admittedly, from the perspective of economists who estimate damages in a litigation setting.

## 12.2 The Law and Wrongful Death

### A. Background

Recovery of damages in death actions is necessarily concerned with statutorily-created causes of action. At common law, such recoveries were prevented by any of three distinct and basic rules. The first rule was that if a tortfeasor died after causing injury, the victim's claim died as well. This rule may have been grounded on the somewhat "criminal" nature of the action and the resulting unwillingness to punish the successors by a criminal action.<sup>1</sup> Similarly, under the second rule, the victim's death also ended the action, it having been "drowned" in the larger matter of the (criminal) offense against the Crown.<sup>2</sup> As a result of these two rules, the subsequent death of either the tortfeasor or his victim prevented any compensation for the victim's losses, whether medical expenses, loss of income, or pain and suffering.

Not only was the victim's claim ended by the death of either the tortfeasor or his victim, but also the victim's dependents had no claim of their own for the losses caused by the wrongful death. This third common law rule, generally dated from *Baker v. Bolton*,<sup>3</sup> stated that the death of a human being was not an actionable injury in a civil court. Therefore, if a person died as a result of the tortious conduct of another, there would be recovery neither for the victim's losses before his death nor for the survivors' losses caused by the death.

In response to the harshness of the common law rules, most modern statutes have created two separate causes of action for wrongful death. The first cause of action, called the survival action, usually provides for a continuation of whatever action the victim would have had if he and/or the tortfeasor had lived. In the case of a tort victim who dies as a result of his injuries, the survival statute would allow the continuation of the decedent's personal injury action in the name of a specified party, generally the decedent's personal representative.

In addition, most jurisdictions also provide for an independent cause of action intended to compensate for the wrongful death itself. This second type of statute, generally called a Death Act or a Wrongful Death Act, measures recovery based

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<sup>1</sup> See Dobbs, D., *HANDBOOK ON THE LAW OF REMEDIES* (1973) for a consideration of the origins of the common law rules.

<sup>2</sup> *Higgins v. Butcher*, 89, 80 Eng. Rep. 61 (K.B. 1607).

<sup>3</sup> 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808).



on the loss to either the decedent's estate or his survivors. The single exception is the Alabama statute, which has been interpreted as allowing only punitive damages.<sup>4</sup>

The existence of two separate causes of action for wrongful death creates a problem of overlapping damages for certain elements of economic loss. For example, compensation for the decedent's lost earning capacity would theoretically be recovered both under a survival statute (since it could have been recovered for the decedent's full work-life expectancy in a personal injury action if the decedent had lived) and under a Wrongful Death Act (either as a loss to the decedent's estate or as a loss of support to his survivors). In order to prevent a double recovery by the plaintiffs, most jurisdictions have taken any of several approaches as to which statute applies to a particular element of damages. In the majority of jurisdictions, recovery under the survival statute is limited to the period between injury and death, and includes elements such as loss of wages and medical expenses incurred during that period.<sup>5</sup> Future damages, such as loss of support and services, may then be recovered under the Wrongful Death Act. In this view, one action "begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."<sup>6</sup> In the minority of jurisdictions which permit recovery of future damages in a survival action, windfall recoveries may be prevented by limiting the recovery for loss of income in the survival action to net accumulations, i.e., the amount that the decedent would have earned and saved during his lifetime,<sup>7</sup> or by specifically reducing the recovery in the survival action by the amount recovered under the Wrongful Death Act.

Since the action under the Wrongful Death Act is a statutorily-created cause of action involving future damages, special considerations and variations among the jurisdictions become critical. While Wrongful Death Acts are almost universally intended to compensate the survivors, the jurisdictions are inconsistent, not only in the elements of damage recoverable under the statutes, but also the calculation of damages and the basic policy underlying the statutes themselves.

### B. *Measure of Damages*

Table I, and the accompanying citations and commentary in Appendix I, begins with a jurisdiction-by-jurisdiction survey of the measure of damages provided for by Wrongful Death Acts and court decisions. (Table II and commentary in Appendix II survey hedonic damages by jurisdiction, citing court decisions, with discussion in section 12.4.) It is shown that a few states adopt a "loss to the estate" (Column 1A of Table I) measure of damages. The decedent's estate recovers for

<sup>4</sup> See *Lowe v. General Motors Corp.*, 642 F.2d 1373 (5th Cir. 1980).

<sup>5</sup> See, e.g., Colo. Rev. Stat. § 13-20-101 (1973); Fla. Stat. Ann. § 768.21 (West Supp. 1983); *Ellis v. Brown*, 77 So.2d 845 (Fla. 1955); *Doggett v. Boiler Eng'g & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970); *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 380 N.E.2d 583 (1974); Ind. Code Ann. 34-1-1-1 (West 1973); *Flowers v. Marshall*, 208 Kan. 900, 494 P.2d 1184 (1972); *Roundtree v. Technical Welding & Fabrication Co.*, 364 So.2d 1325 (La. Ct. App. 1978); Or. Rev. Stat. § 30.075 (1979); *Allen v. Burdette*, 139 Ohio St. 208, 39 N.E.2d 153 (1942); R.I. Gen. Laws § 10-7-5 (1970); *Fries v. Stieben*, 455 F.Supp. 1204 (D.S.D. 1978); *Prunty v. Schwantes*, 40 Wis. 2d 418, 162 N.W.2d 34 (1968).

<sup>6</sup> *St. Louis I.M. & S.Ry. v. Craft*, 237 U.S. 648, 658 (1915).

<sup>7</sup> *Runyon v. Dist. of Columbia*, 463 F.2d 1319 (D.C. Cir. 1972); Hawaii Rev. Stat. § 663-8.



the decedent's loss of earning capacity as if he had lived out his normal lifespan, as well as reasonable medical expenses before death.

The majority of state Wrongful Death Acts, as well as federal statutes such as the Federal Employers' Liability Act (FELA), have rejected the "loss to the estate" measure of damages. Instead, these jurisdictions measure damages in terms of economic loss to the survivors (See Column 1B). For example, instead of measuring lost income in terms of the decedent's "lost earning capacity," these states measure the survivors' "loss of support," "loss of the decedent's services," and by another rule, "loss of inheritance." In most "loss to the survivors" jurisdictions, the award is also distributed to the statutory beneficiaries, either directly or by some method "proportionate to the loss suffered by each."<sup>8</sup> Even this rule is not universal, however. A few "loss to the survivors" jurisdictions, while measuring damages as the loss to particular beneficiaries, distribute the award by some means other than a simple distribution proportionate to each survivor's loss. Some states have distribution statutes which specify a particular distribution formula for the lump sum award;<sup>9</sup> others distribute the award according to the intestate succession laws.<sup>10</sup> Indiana appears to have gone further and distributes the wrongful death recovery in the same manner as other personal property of the decedent, i.e., according to the decedent's will.<sup>11</sup> While such distribution statutes appear to contradict the purpose of a "loss to the survivors" measure of damages (since an heir who is unable to show actual loss could conceivably recover), care must be taken to avoid confusing the method of calculating damages with the method provided for the eventual distribution of the award. This is particularly important since there is authority limiting recovery to those beneficiaries who actually suffered loss, even though there are other legal heirs under the intestate succession law.<sup>12</sup>

Seven states have been placed in the "other" category. In these jurisdictions, the distinctions between loss to the estate and loss to survivors are unclear or contradictory, or other special situations exist. The commentaries on Appendix I citations in this "other" category attempt to provide brief coverage of state guidelines which do not fit neatly into the first two categories.

### C. Wage Growth and Discounting

A major parameter affecting the work of a forensic economist may involve the "Teeter-Totter" issues of wage growth versus discount rates (see Chapter 3). Does the expert have the discretion to select wage growth and interest (discount) rates, or is this discretion somehow limited?

<sup>8</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-612 (1982); D.C. CODE ANN. § 16-2701 (West 1981); FLA. STAT. ANN. § 768.21 (West Supp. 1983); KAN. STAT. ANN. § 60-1905 (1976); MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (1980); MINN. STAT. ANN. § 573.02 (West Supp. 1983); OKLA. STAT. ANN. TIT. 12 § 1053 (West Supp. 1982).

<sup>9</sup> See, e.g., ME. REV. STAT. ANN. TIT. 18A § 2-804 (Supp. 1982); MISS. CODE ANN. § 11-7-13 (Supp. 1982); N.M. STAT. ANN. § 41-2-3 (1978); VT. STAT. ANN. TIT. 14 § 1492 (1974).

<sup>10</sup> See, e.g., N.C. GEN. STAT. § 28A-18-2 (Supp. 1981); PA. STAT. ANN. TIT. 42 § 8301 (purdon 1982); S.C. CODE ANN. § 15-51-40 (Law. Co-op. 1977).

<sup>11</sup> IND. CODE ANN. § 34-1-1-2 (West 1973); *Northern Ind. Power Co. v. West*, 218 Ind. 321, 32 N.E.2d 713 (1938).

<sup>12</sup> See, *Manning v. Copelli*, 270 Pa. Super. 207, 411 A.2d 252 (1979).



Table I includes a jurisdiction-by-jurisdiction survey on this question, with three categories. Accompanying citations are provided in Appendix I, with brief explanations and comments as necessary.

The large majority of states allow the economic expert to use his or her discretion in selecting wage growth and discount rates (Column 2A). In a few states where relevant citations could not be found on this issue, it might logically be assumed that an economic expert would also exercise such discretion. Only the state of Alaska restricts a forensic economist to a true offset rule (Column 2B), where wage growth and discount rates totally offset each other. Several of the states detailed in the "other" column (2C) specifically allow calculations under a total offset technique, but they do not seem to require total offset calculations. Some other states provide for variations of a total offset rule. As an example, Pennsylvania requires that inflation in wage growth be offset against both inflation and "real" interest on the other side of the equation. Calculations of future wage growth due to increased productivity are still allowed. Finally, a few states require that inflation be removed from wage growth and discount rates. This is very close to the method advocated in Chapter 3.

A comparison of these results with the survey published in 1987<sup>13</sup> does not support some prior predictions that limitations on the discretion of economic experts would increase. Specifically, there has been no discernible movement toward the adoption of total offset rules by late 1989.

It should be noted that the posture of a jurisdiction on the Teeter-Totter issues of wage growth versus discounting implies the same posture toward household service and medical cost growth versus discounting. If an economist has discretion to choose wage growth versus discount rates, he or she would seem to have discretion over medical cost growth rates versus discount rates. If a total offset rule limits discretion over wage growth versus discount rates, it would seem to do so for growth rates of household service costs versus discount rates.

#### D. *Work-Life Expectancy*

One of the most fundamental determinations in calculating any loss of future income is the period over which the losses are to be projected. In "loss to the estate" jurisdictions, loss of earning capacity should be projected over the full period of earning disability as in the underlying personal injury action upon which it is based. In the case of a wrongful death, since the decedent's earning capacity is interrupted permanently, his work-life expectancy is the period over which his estate has lost income which would have been earned if the decedent had lived. In "loss to the survivors" jurisdictions, however, the life expectancy of the beneficiaries is also relevant to the determination of loss of support and services. A particular survivor has no reasonable expectation of receiving benefits after life expectancy, since he would not have received such support or services if the decedent had lived. Similarly, there should be no recovery for loss of inheritance if the particular survivor would not be expected to outlive the decedent. Therefore, the rule in "loss to the survivors"

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<sup>13</sup> Michael L. Brookshire. *ECONOMIC DAMAGES: THE HANDBOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS* (Cincinnati: Anderson, 1987), pp. 214-215.



jurisdictions is that a particular beneficiary should not recover damages for loss of support, services, and inheritance beyond the period for which that survivor would have received such benefits from the decedent had he lived.<sup>14</sup> This logically requires that damages be calculated over the shorter of the decedent's work-life expectancy or the survivor's life expectancy. However, Alaska<sup>15</sup> and South Carolina<sup>16</sup> have rejected this rule, providing that the life expectancy of the beneficiaries is not to be considered in determining damages.

#### E. Collateral Source Rule

Columns 3A-3C of Table I concern the application of the collateral source rule to earnings loss estimates in wrongful death cases. The vast majority of states accept this rule (3A), which prevents the deduction of collateral source income from earnings. A handful of states reject the rule (3B) and provide for such deductions. Some states in the "other" category (3C) reject the rule in medical malpractice cases or vary the rule according to whether collateral source payments are gratuitous or contractual. Examples of gratuitous payments are welfare benefits or services gratuitously rendered by family and friends. Contractual collateral source payments would be private insurance payments or federal survivors or disability payments through the Social Security system. Again, the commentary to citations in Appendix I attempts to shed some light on specialized language and guidelines.

#### F. Income Tax Effects

It was demonstrated in Chapter 3 that income taxes have both an upward and a downward effect upon lump sum estimates. Consideration of income tax effects may, in net, either increase or decrease present value estimates of economic losses.

Columns 4A-E of Table I address whether income tax effects can or cannot be considered and whether juries are to be instructed on such issues. Thus, a jurisdiction may have an entry in more than one column with supporting citations in Appendix I.

A comparison of Columns 4A and 4C clearly indicates that most states prohibit the consideration of income tax effects. In only a few states, juries are instructed on the tax-free nature of lump sum awards (Column 4B). In most states, juries are not instructed on income tax effects (Column 4D). Court decisions in several of the "other" jurisdictions (Column 4E) were contradictory or unclear, and citations regarding income tax effects are not found for a few jurisdictions.

Interestingly, court decisions refer to deductions of income taxes from future wages but references are rare to the "reverse tax effect" discussed in Chapter 3. Forensic economists have often assumed that if the income tax effect upon wages is required or allowed, the reverse tax effect must also be considered unless specifically prohibited.

<sup>14</sup> See, e.g., *Runyon v. D.C.*, 963 F.2d 1319 (D.C. Cir. 1972); *FLA. STAT. ANN.* § 768.21 (1) (West Supp. 1983); *Cincotta v. United States*, 362 F.Supp. 386 (D. Md. 1973); *Baltimore Transit Co. v. State*, 194 Md. 421, 71 A.2d 442 (1950).

<sup>15</sup> *ALASKA STAT.* § 09.55.580 (1973); See generally, Solk & Griffin, *MEASURE OF DAMAGES IN ALASKA FOR THE WRONGFUL DEATH OF A MINOR*, 8 U.C.L.A.-ALASKA L. REV. 1 (1978).

<sup>16</sup> *Jones v. Drague*, 252 S.C. 261, 166 S.E.2d 99 (1969).



A comparison with the results of the similar survey published in 1987 is instructive.<sup>17</sup> A continuing trend toward more states requiring the consideration of income tax effects is not evident by late 1989.

#### G. Consumption Deductions in Death Cases

As discussed in Chapter 3, deductions from gross earning capacity are usually required in a wrongful death case to reflect the expenditures by a deceased exclusively on himself, had he not died. As seen in Table I, Column 5A, only the state of Kentucky prohibits any such deductions.

Sixteen states direct the economist to deduct from gross earnings the likely personal consumption of the deceased, had he lived (Column 5B). The economist, presumably, is told to use the best data and studies available for determining these likely consumption expenditures. Such deductions are a very large percentage of income for single persons.

A few states provide for a maintenance deduction from lost future earnings (Column 5C). This seems to mean the deduction for maintenance or subsistence level spending necessary to keep the wage earner healthy enough to keep working (and producing the projected stream of earnings). For single persons especially, this is a lesser deduction than under a likely consumption standard and, therefore, results in a higher net loss *ceteris paribus*.

Ten states appear to be silent on the issue and provide the economist with no guidance regarding the nature of a consumption deduction. Most economists will make a deduction to achieve a net loss figure, absent any guidelines. However, as has been discussed in previous chapters, the economist may link his decision on the nature of a deduction, absent guidelines, with his decision regarding the calculation of hedonic damages.

Eighteen states have been placed in the "other" category (Column 5D). Some discuss a "net accumulations" approach to this issue, but most are unclear or contradictory on the nature of the required deduction from projected gross earnings. For example, relevant language in a court decision may imply a likely consumption deduction but also lend support to a maintenance deduction approach. A few of the states discuss a maintenance deduction but seem to envision deductions for some expenditures above a mere subsistence level. This may mean an amount deducted which is greater than under a subsistence-maintenance approach but not as large as under a likely consumption standard.

More than half of the jurisdictions, therefore, either provide no parameters, or unclear or contradictory guidelines, for the forensic economist. Apparently, public policy must be stated more often and more clearly in this important area affecting economic loss calculations.

#### H. Lost Household Services

Household services damages involve the value of services which a deceased person would have provided to others. It is clear from Table I that the vast majority of jurisdictions now allow for the recovery of this element of damages (Column

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<sup>17</sup> Brookshire, *op. cit.*, pp. 216-217.

6A). In only three states is recovery not allowed or the legal guideline unclear (Column 6B).

The wide acceptance of this relatively new category of damages (compared to lost earnings) by 1990 may be even more notable because of the implications for hedonic damages testimony. Household services damages are imputed from labor markets based upon the cost of replacement services, rather than being directly based on earnings histories, as with wage and fringe benefit losses. Hedonic damages calculations also involve imputed values and are also less direct and tangible than earnings and medical cost estimates, as contrasting examples.

### 12.3 The Law and Personal Injury

#### A. *General*

Except for hedonic damages described in section 12.4 (along with accompanying guidelines and citations in Table II and Appendix II respectively), we have not provided a detailed cataloging, with citations, of major legal parameters affecting loss of earning capacity calculations in personal injury cases. This is primarily because the jurisdiction-by-jurisdiction detail on legal parameters and guidelines in wrongful death cases flows directly into parallel guidelines affecting personal injury cases. Alternatively, issues related to wrongful death cases are not relevant to personal injury cases.

An obvious example of the latter situation is that no issue exists in regard to a loss to the estate versus a loss to the survivors approach. By definition, the injured person and his family, if any, survive the deleterious event. Leaving aside issues of medical expenses and past lost income, future lost earning capacity must be some measure of earning capacity in the absence of injury less earning capacity given the injury, if any.

#### B. *Wage Growth and Discounting*

Whatever approach is taken by a jurisdiction toward this issue in wrongful death cases—evidentiary, offset, etc.—the same approach follows for personal injury cases. The pre- and post-injury earning power, and therefore their difference as economic loss, are still subject to all of the alternatives for handling earnings growth rates and interest (discount) rates.

#### C. *Work-Life Expectancy*

Again, because the injured party is not dead, the major issue is whether work-life expectancy after injury is less than before injury. This has been discussed before in regard to the LPE approach to work-life expectancy. However, depending upon case law in wrongful death cases, the stream of loss might be ended upon the end of life expectancy for a survivor if before the end of pre-injury work-life expectancy for the injured person.

#### D. *Income Taxes*

As discussed above, the treatment of income taxes by a given jurisdiction in wrongful death cases should logically and automatically apply in personal injury cases. The before-tax loss in wages due to injury must still be reduced to after-tax loss. Likewise, the lump sum loss estimate still requires substantial interest earnings to restore the earnings of the injured party, and the interest earnings are taxable. The lump



sum must be increased to account for the interest earnings being reduced by taxes (See Chapter 3). One possible change for personal injury cases would be different tax schedules and differing personal deductions because the individual is alive after the injury. Further, all income tax effects must be similarly considered in both pre-injury and post-injury calculations of earning capacity.

#### E. *Deduction of Personal Consumption*

This is obviously not an issue in personal injury cases. No deduction for the personal consumption from lost earnings of the decedent makes sense, since the injured party is not deceased.

#### F. *Household Services*

Jurisdictions which allow the consideration of either "replacement" or "opportunity" cost loss in household services in wrongful death cases would theoretically entertain this loss element for personal injury cases. Yet, it must be shown that an injury reduces the household services which would have been provided, absent the injury.

#### G. *Collateral Source Income*

The legal parameters in wrongful death cases, relative to whether collateral source income should be excluded in lost earning capacity cases, also directly apply to personal injury cases. If survivor's insurance income cannot be deducted from economic loss in a wrongful death case, for example, then disability insurance income would be similarly treated in a personal injury case.

## 12.4 The Law and Hedonic Damages

The statutes and case law concerning hedonic damages is extremely varied, primarily because there is no uniform language to describe these intangible losses. Table II (Columns A through C) and the accompanying citations in Appendix II contain a survey of hedonic damages, by jurisdiction, under the Wrongful Death and Personal Injury statutes, along with court decisions pertaining to these statutes. Table II, Column A shows that only Kansas explicitly does not allow for some recovery for the loss of the pleasure of life<sup>18</sup>. Nineteen states (Column B) allow for this loss in injury cases as part of pain and suffering, while another sixteen states (Column C) consider such loss separate and apart from pain and suffering. Some eleven States (Column D) permit consideration of the loss of the pleasure of life without additional specification as to its nature as a distinct element of damage. Several federal courts allow for this loss in Section 1983 cases involving civil rights violations. Many state court opinions blur the distinction between injury and death cases, but some states such as Connecticut<sup>19</sup> and Mississippi<sup>20</sup> explicitly allow for such loss in death cases. In some states, such as Illinois, the reduction in the pleasure of life due to injury may fall under the element of loss called disability.

Since forensic economic testimony on hedonic damages is relatively new, there is hardly any case law to support or deny admissibility of testimony. The only appellate

<sup>18</sup> Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28 (1938).

<sup>19</sup> See Katsetos v. Nolan, 170 Conn. 637, 368 A.2d 172 (1976) and other under Connecticut in Appendix 2.

<sup>20</sup> McGowan v. Estate of Wright, 524 So.2d 308 (Miss. 1988).



opinion expressly allowing such testimony is *Sherrod v. Berry*<sup>21</sup> in the 7th Circuit (See Appendix I, 7th Circuit and Illinois). This case was later reversed on other grounds when the 7th Circuit reheard the case *en banc*. But in reversing this case, the court implicitly agreed with the earlier appellate panel opinion upholding the trial court's decision to admit testimony on hedonic damages. It specifically advised the trial court on remand to review the earlier, vacated opinion regarding hedonic testimony and other matters. That opinion described the economic expert witness testimony as an "invaluable" guide to the jury in determining the hedonic value of the decedent's life. While such economic testimony has now been admitted in perhaps a dozen or more states, there has been no other appellate opinion as of the beginning of 1990 either affirming or denying admissibility.

With regard to the element of damage itself, some state courts have held that one must be cognitively aware of such losses, thus precluding their recovery in death cases and in injury cases where the victim has a severely reduced or vegetative mental capacity. The New York Court of Appeals in *McDougald v. Garber*<sup>22</sup> also held that hedonic damages should be considered as a part of pain and suffering and not as a separate element of damage so as not to inflate the overall awards. But in *Ruffino v. United States*,<sup>23</sup> the U.S. Court of Appeals for the Second Circuit held that cognitive awareness is not a prerequisite to recovery. Other state court opinions have also held the reverse, arguing that it leads to a perverse result: the worse the injury, the less the damage. Other states have also held that separate itemization of elements of damage tend to reduce overall awards. With the sharp division now between New York's highest court and the Second Circuit on the issue of cognitive awareness as a prerequisite for recovery and the diversity of opinion regarding the issue of itemization, these questions seem ripe for review by the U.S. Supreme Court.

## 12.5 Public Policy Recommendations

### A. Toward Economic Loss

From the perspective of economists, we recommend that statutory and case law regarding lost earning capacity gravitate toward a more "pure" concept of economic loss. Under such a general approach, economic loss would be the dollars, in present value, actually lost to someone as a result of a personal injury or wrongful death. The loss estimate would consider all relevant variables and be based upon the expert's best judgment and the most effective methods and analytical tools available at the time.

Obviously, loss to survivors would therefore be the measure of damages in wrongful death cases. This may diminish tangible damages in the cases of minor children and single adults, for example. However, earning capacity is not the only element of damages, and various categories of damages might still be allowed for persons other than spouses or children in such cases.

<sup>21</sup> *Sherrod v. Berry*, 629 F.Supp. 159 (N.D. Ill. 1985), *aff'd* 827 F.2d (7th Cir.), *Reh. gr.* and judgment vacated on other grounds, 835 F.2d 1222 (7th Cir.).

<sup>22</sup> *McDougald v. Garber*, \_\_\_ N.Y.2d \_\_\_, \_\_\_ N.E.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_, (N.Y. 1989) (1989 WL 13238).

<sup>23</sup> *Ruffino v. United States*, 829 F.2d 354 (2d Cir. 1987).



The specific effects of a public policy geared toward true economic loss in regard to earning capacity are described below.

#### *B. Work-Life Expectancy*

Public policy must require that projections of likely earnings be adjusted to reflect work-life expectancy. Life expectancy alone is not enough to consider if one is aiming at likely economic loss. Rather, “raw” projections of income from full-time work throughout a year should somehow be lowered to reflect the following: the probability of living throughout each year, the probability of labor force participation throughout the year, the probability of actually being employed throughout the year, and the possibility of less-than-full-time work in each year.

Yet the economist must be given flexibility and allowed to use his judgment in deciding how these factors are to be applied in a particular case. In the case of a female working continuously for 15 years since leaving school, for example, one should not adjust earnings to reflect participation rates of average females. Rather, this probability might be held at 100 percent, at least through her late fifties. Similarly, in personal injury cases, downward work-life adjustments because of the injury may be greater than for average persons without serious disabilities.

#### *C. Wage Growth and Discounting*

A first recommendation is that public policy provide for pre-judgment interest—compounding interest on loss amounts after the date of injury but before the date of an award. If downward adjustments (called discounting) for the time value of money are required on future sums, then parallel upward adjustments should be made on past sums. The source of interest rates should be parallel, preferably short term U.S. government securities for relevant time periods. Only in this way can economic loss be truly restored, especially where many years exist from injury to trial and/or when high interest rates prevail.

When projecting loss into the future, an evidentiary approach should be followed, so that the economist can tailor wage growth and discount rates both to the facts of a particular case and to the most current or relevant data. And, both rates of earnings growth and discounting must somehow be considered.

Given this, more specific parameters or guidelines placed upon the economist’s work must recognize that two primary forces influence both the earnings growth side of the equation and the discount side. The inflation rate is a primary influence on both sides. Removing inflation from historical data leaves either a positive or negative rate of growth due to productivity advance (also called real wage growth) for a particular person. A real interest return, also either positive or negative, remains on the discounting side.

We do not favor arbitrary rules of law which do not allow analyses to reflect the unique nature of a person’s wage growth history. If offset rules are used, for example, Figure 1 in Chapter 3 should at least be considered. When inflation on the “teeter” side is offset against the entire “totter” side, one factor on one side has been allowed to cancel both factors on the other. A more appropriate rule might offset inflation on both sides, leaving evidence of real (productivity) wage growth rates against real interest rates. Of course, the “judicial simplicity” advantage of an offset rule is lessened.



Finally, if specific rules are to be adopted, a promising approach seems to be the *Model Periodic Payments Act* recommended by the Uniform Law Commissioners.<sup>24</sup> Stated briefly, a future stream of earnings would be projected without inflation considered as part of wage growth. This stream would be reduced to a lump sum, and this would be divided into periodic payments over a fixed period. Then, in each year of payment, the payment would be adjusted by a predetermined index, such as the existing rate on 12-month U.S. government securities. Since this rate would largely reflect inflation at the time, the payments would be inflation-proofed. The purchasing power of the periodic payments would be ensured.

#### D. *Income Taxes*

True economic losses are seen after the effects of income taxes have been considered. Both effects previously discussed should be considered. After-tax earnings should be projected, but taxes on interest earnings used to restore a stream of after-tax earnings must also be projected. Moreover, all taxes on income should be considered—federal, state, and local. It will be interesting to see if jurisdictions adopting offset and other rules for simplicity also move to the consideration of income taxes, although both “offset” and “income tax” trends in the law have been halted. No element of lost earning capacity estimates is more complicated to calculate or explain than the effects of income taxes. Also, unless the automatic indexing of income tax brackets to the inflation rate remains a reality, jurisdictions which allow consideration of income taxes cannot disallow the consideration of inflation. Income tax effects cannot be accurately measured in the absence of assumptions about inflation, as long as “bracket creep” can occur.

#### E. *Personal Consumption Deductions*

In wrongful death cases, deductions from lost earnings for the personal consumption of the deceased (had he lived) are necessary to provide a true estimate of economic loss to survivors. A few states allow the deduction of only enough consumption of basic necessities to have allowed the deceased to live and work. The more appropriate deduction is that percentage of total family income that the deceased would have actually spent exclusively on himself. This provides the net dollars which would have been available to the survivors. Thus, the deduction would be 18-30% of wage income for married persons, depending upon the number of children, and 80% or more for single persons. If hedonic loss calculations are not allowed or made, however, Chapter 3 discusses a strong argument for allowing only minimum maintenance deductions.

#### F. *Household Services and Medical Costs*

The value of household services should be an element of economic loss if someone would have received the benefit of such services. Because of the serious injury or the death, the services must be replaced or foregone. Thus the anticipated hours of services should be valued at the market value replacement costs.

The logic of including past or anticipated medical costs is even more obvious.

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<sup>24</sup> Uniform Law Commissioners, *MODEL PERIODIC PAYMENTS ACT* (St. Paul, Minnesota, West Publishing Company, 1974 Supplement), ULA Vol. 14.



The same issues of inflation and discounting mentioned above are relevant to both household service and medical cost losses. Again, projections should be based on specific past and current data in regard to the growth in services and medical costs.

#### *G. Collateral Sources*

Logic exists for allowing the operation of the collateral source rule as a departure from estimates focusing upon “pure” economic loss. On the one hand, survivors receiving contracted or gratuitous resources or services from collateral sources lose only the dollars remaining after the deduction of collateral payments. On the other hand, life, medical, disability, and other insurance benefits payments are only received because premiums have been paid into an insurance fund. Insurance benefits are received as a matter of right and are unrelated to the tortious act. A good argument can be made that recovery should not be lessened for the prudent person who insures himself versus the person who does not.

#### *H. Hedonic Losses*

It is clear that in injury and death cases there are substantial intangible losses: (1) reduction in the pleasure of living to injury victims; (2) loss of the pleasure of life to death victims; and (3) losses of society and companionship to survivors of death victims and profoundly injured victims. When such profound losses are sustained, the value of money itself diminishes. For a quadriplegic, for example, so long as all maintenance costs are being paid, the value of money applies to only certain select other items, such as specialized computers, that can be of substantial value to such a person; money to spend on a ski trip would be of no use. Money generally has lower value in such instances and thus more of it is required to restore the original degree of satisfaction or utility. In death, the loss to the victim cannot be mitigated. The value that we attach to such losses, in probabilistic terms, can be measured, however. Our most important recommendation is that public policy regarding hedonic damages be made clear. If public policy provides for recovery of hedonic damages in death or injury cases, forensic economists have much to say of probative value to juries in reaching their decisions regarding such damages. Thus we recommend admissibility of such testimony. The objective measure of such losses, if allowed, is well beyond the average juror’s experience. Without guidance, jury awards based on subjective testimony and opinions can be wildly off the mark, and either high or low.

### **12.6 Summary**

Major legal parameters and guidelines with regard to calculations of lost earning capacity vary from jurisdiction to jurisdiction. However, major categories of alternative approaches have been documented in this chapter and supplemented with public policy recommendations in each area of importance.

**TABLE 1**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

<b>Measure of Damages—Wrongful Death and Survival</b>			
<b>Jurisdiction</b>	<b>1A Loss to the estate</b>	<b>1B Loss to the survivors</b>	<b>1C Other</b>
Federal		X	
Alabama			X
Alaska		X	
Arizona		X	
Arkansas		X	
California		X	
Colorado		X	
Connecticut	X		
Delaware		X	
District of Columbia		X	
Florida			X
Georgia	X		
Hawaii		X	
Idaho	X		
Illinois		X	
Indiana			X
Iowa			X
Kansas		X	
Kentucky			X
Louisiana		X	
Maine		X	
Maryland		X	
Massachusetts		X	
Michigan		X	
Minnesota		X	
Mississippi		X	



TABLE 1—Continued

Measure of Damages—Wrongful Death and Survival			
Jurisdiction	1A Loss to the estate	1B Loss to the survivors	1C Other
Missouri		X	
Montana		X	
Nebraska		X	
Nevada		X	
New Hampshire	X		
New Jersey		X	
New Mexico		X	
New York		X	
North Carolina		X	
North Dakota		X	
Ohio		X	
Oklahoma		X	
Oregon			X
Pennsylvania		X	
Rhode Island		X	
South Carolina		X	
South Dakota		X	
Tennessee			X
Texas		X	
Utah		X	
Vermont		X	
Virginia		X	
Washington		X	
West Virginia		X	
Wisconsin		X	
Wyoming		X	

**TABLE 1—Continued**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

Wage Growth and Discounting			
Jurisdiction	2A Discretionary	2B Total Offset	2C Other
Federal	X		
Alabama	X		
Alaska		X	
Arizona	X		
Arkansas	X		
California	X		
Colorado	X		
Connecticut	X		
Delaware	X		
District of Columbia	X		
Florida	X		
Georgia	X		
Hawaii			
Idaho			
Illinois			X
Indiana	X		
Iowa			X
Kansas	X		
Kentucky			X
Louisiana			X
Maine			X
Maryland	X		
Massachusetts			
Michigan	X		
Minnesota			X
Mississippi	X		



TABLE 1—Continued

Wage Growth and Discounting			
Jurisdiction	2A Discretionary	2B Total Offset	2C Other
Missouri	X		
Montana	X		
Nebraska			X
Nevada			X
New Hampshire			
New Jersey			X
New Mexico	X		
New York			X
North Carolina	X		
North Dakota			X
Ohio	X		
Oklahoma	X		
Oregon	X		
Pennsylvania			X
Rhode Island	X		
South Carolina	X		
South Dakota			
Tennessee	X		
Texas	X		
Utah	X		
Vermont	X		
Virginia			
Washington	X		
West Virginia			
Wisconsin	X		
Wyoming			

**TABLE 1—Continued**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

<b>Collateral Source Rule</b>			
<b>Jurisdiction</b>	<b>3A Rule accepted</b>	<b>3B Rule rejected</b>	<b>3C Other</b>
Federal	X		
Alabama		X	
Alaska	X		
Arizona	X		
Arkansas	X		
California	X		
Colorado	X		
Connecticut	X		
Delaware	X		
District of Columbia	X		
Florida	X		
Georgia	X		
Hawaii			
Idaho	X		
Illinois	X		
Indiana	X		
Iowa	X		
Kansas			
Kentucky			X
Louisiana			X
Maine			
Maryland	X		
Massachusetts	X		
Michigan	X		
Minnesota	X		
Mississippi	X		



TABLE 1—Continued

Collateral Source Rule			
Jurisdiction	3A Rule accepted	3B Rule rejected	3C Other
Missouri			X
Montana			
Nebraska	X		
Nevada			
New Hampshire	X		
New Jersey	X		
New Mexico	X		
New York		X	
North Carolina	X		
North Dakota	X		
Ohio	X		
Oklahoma	X		
Oregon	X		
Pennsylvania			X
Rhode Island	X		
South Carolina	X		
South Dakota			
Tennessee	X		
Texas	X		
Utah			
Vermont			
Virginia	X		
Washington	X		
West Virginia	X		
Wisconsin	X		
Wyoming	X		

**TABLE 1—Continued**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

<b>Income Tax Effects</b>					
Jurisdiction	<b>4A</b> Income tax effects considered	<b>4B</b> Jury instructed on tax free awards	<b>4C</b> Income tax effects not considered	<b>4D</b> Jury not instructed on income tax effects	<b>4E</b> Other
Federal	X	X			
Alabama					
Alaska					X
Arizona			X	X	
Arkansas			X	X	
California	X				X
Colorado			X	X	
Connecticut	X			X	
Delaware		X	X		
District of Columbia	X	X			
Florida			X	X	
Georgia			X	X	
Hawaii				X	
Idaho					
Illinois			X	X	
Indiana				X	
Iowa			X	X	
Kansas			X		X
Kentucky				X	
Louisiana			X		
Maine				X	
Maryland		X	X		
Massachusetts					X
Michigan			X		
Minnesota			X	X	
Mississippi	X				



TABLE 1—Continued

Income Tax Effects					
Jurisdiction	4A Income tax effects considered	4B Jury instructed on tax free awards	4C Income tax effects not considered	4D Jury not instructed on income tax effects	4E Other
Missouri			X	X	
Montana		X			
Nebraska			X	X	
Nevada					
New Hampshire			X		X
New Jersey	X	X			
New Mexico	X				
New York				X	X
North Carolina	X		X		
North Dakota				X	
Ohio			X	X	
Oklahoma					
Oregon				X	
Pennsylvania			X	X	
Rhode Island					X
South Carolina	X				
South Dakota				X	
Tennessee				X	
Texas			X	X	
Utah					
Vermont					
Virginia			X		
Washington			X	X	
West Virginia				X	
Wisconsin			X	X	
Wyoming				X	

**TABLE 1—Continued**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

<b>Consumption Deductions in Death Cases</b>				
<b>Jurisdiction</b>	<b>5A No deduction</b>	<b>5B Likely consumption</b>	<b>5C Maintenance consumption</b>	<b>5D Other</b>
Federal		X		
Alabama				
Alaska		X		
Arizona				
Arkansas		X		
California		X		
Colorado				X
Connecticut				X
Delaware		X		
District of Columbia				X
Florida				X
Georgia				X
Hawaii				X
Idaho				
Illinois			X	
Indiana				X
Iowa				X
Kansas				
Kentucky	X			
Louisiana		X		
Maine				
Maryland		X		
Massachusetts				X
Michigan				
Minnesota		X		
Mississippi				



TABLE 1—Continued

Consumption Deductions in Death Cases				
Jurisdiction	5A No deduction	5B Likely consumption	5C Maintenance consumption	5D Other
Missouri		X		
Montana		X		
Nebraska		X		
Nevada				
New Hampshire			X	
New Jersey				X
New Mexico				X
New York				X
North Carolina				X
North Dakota				
Ohio				X
Oklahoma		X		
Oregon				X
Pennsylvania				X
Rhode Island				X
South Carolina		X		
South Dakota				
Tennessee			X	
Texas				X
Utah				
Vermont				
Virginia				
Washington		X		
West Virginia				
Wisconsin		X		
Wyoming		X		

**TABLE 1—Continued**  
**LEGAL GUIDELINES ON DAMAGE CALCULATIONS**  
**FROM WRONGFUL DEATH STATUTES AND COURT DECISIONS**

<b>Household Services</b>		
Jurisdiction	<b>6A</b> Recovery allowed	<b>6B</b> Recovery not allowed or other
Federal	X	
Alabama		
Alaska	X	
Arizona		
Arkansas	X	
California	X	
Colorado	X	
Connecticut	X	
Delaware		X
District of Columbia		
Florida	X	
Georgia		X
Hawaii		
Idaho		
Illinois		X
Indiana	X	
Iowa	X	
Kansas	X	
Kentucky	X	
Louisiana	X	
Maine		
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota	X	
Mississippi	X	



TABLE 1—Continued

Household Services		
Jurisdiction	6A Recovery allowed	6B Recovery not allowed or other
Missouri	X	
Montana	X	
Nebraska	X	
Nevada	X	
New Hampshire		
New Jersey	X	
New Mexico	X	
New York	X	
North Carolina	X	
North Dakota	X	
Ohio	X	
Oklahoma	X	
Oregon	X	
Pennsylvania	X	
Rhode Island	X	
South Carolina	X	
South Dakota		
Tennessee	X	
Texas	X	
Utah	X	
Vermont	X	
Virginia		
Washington		
West Virginia	X	
Wisconsin	X	
Wyoming		

**TABLE 2**  
**LEGAL GUIDELINES ON HEDONIC DAMAGES IN PERSONAL INJURY AND**  
**WRONGFUL DEATH FROM STATUTES AND COURT DECISIONS**

Jurisdiction	A Recovery not allowed	B Recovery allowed as part of pain and suffering	C Recovery allowed as a separate element of damages	D Other
Federal				X
Alabama				X
Alaska		X		
Arizona				X
Arkansas		X		
California		X		
Colorado			X	
Connecticut			X	
Delaware				X
District of Columbia		X		
Florida			X	
Georgia		X		
Hawaii				X
Idaho			X	
Illinois			X	
Indiana				X
Iowa		X		
Kansas	X			
Kentucky		X		
Louisiana			X	
Maine		X		
Maryland			X	
Massachusetts				X
Michigan			X	
Minnesota		X		
Mississippi				X



TABLE 2—Continued

Jurisdiction	<b>A</b> Recovery not allowed	<b>B</b> Recovery allowed as part of pain and suffering	<b>C</b> Recovery allowed as a separate element of damages	<b>D</b> Other
Missouri		X		
Montana		X		
Nebraska			X	
Nevada				
New Hampshire				
New Jersey		X		
New Mexico				X
New York		X		
North Carolina				X
North Dakota		X		
Ohio		X		
Oklahoma		X		
Oregon				X
Pennsylvania			X	
Rhode Island				
South Carolina			X	
South Dakota		X		
Tennessee			X	
Texas			X	
Utah		X		
Vermont				
Virginia				X
Washington		X		
West Virginia			X	
Wisconsin			X	
Wyoming			X	

## APPENDIX 1

## CITATIONS SUPPORTING TABLE 1

## Federal

**1B** 45 U.S.C.A. § 51 (1972).

*Torchia v. Burlington N., Inc.*, 568 P.2d 558 (Mont. 1977), cert. denied, 434 U.S. 1035

**2A** *Magil v. Westinghouse Electric Co.*, 502 F.2d 1117 (3d Cir. 1972).

*Scruggs v. Chesapeake & Ohio Ry.*, 320 F.Supp. 1248 (W.D. Va. 1970).

*Burlington Northern Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975).

*Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982).

*McWeeney v. New York, N.H. & R.R.*, 282 F.2d 34 (2d Cir. 1960), cert. denied, 364 U.S. 870.

*Wetherbee v. Elgin, J. & E.R.R.*, 191 F.2d 302 (7th Cir. 1951).

**3A** *Kaczowski v. Bolubasz*, 421 A.2d 1027 (Pa. 1980).

*Standard Oil Co. v. United States*, 153 F.2d 958 (9th Cir. 1946), *aff'd* 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067.

*Siebrand v. Gossnell*, 234 F.2d 81 (9th Cir. 1956).

*Geffen v. Winer*, 244 F.2d 375 (D.C. App. 1957).

*Bryant v. Mathis*, 278 F.2d 19 (D.C. App. 1960).

Amount of Recovery from 3d person (defendant) who is responsible for personal injury is not to be reduced by the receipt by plaintiff from his employer of wages, salary or commissions during the period of disability regardless of whether such payments are made pursuant to a contractual obligation or as mere gratuities.

**4A, B** *Norfolk & W.R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), reh. den. 445 U.S. 972, 100 S.Ct. 1667, 64 L.Ed.2d 250.

In FELA actions, questions about the measure of damages are federal in character. Here, the trial court wrongfully refused to instruct the jury that an award would not be subject to income taxes and that the jury should not consider taxes in fixing the amount of damages.

**4A** *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975) (see California).

**4E** *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34 (2d Cir. 1960) (see New York).

**5B** *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975).

FTCA action. An award for lost wages contributing to support in a death action should be calculated after appropriate deductions are made for decedent's personal consumption and expenditures.

*Kansas City S.R. Co. v. Leslie*, 238 U.S. 599, 35 S.Ct. 844 (1915).

FELA action. Decedent's personal expenditures are to be deducted from award in an action for death.

**6A** *Metcalf v. Atchison, Topeka and Santa Fe Ry. Co.*, 491 F.2d 892 (10th Cir. 1974).

FELA action. Pecuniary value of services, which decedent previously performed, including painting, carpentry, plumbing, gardening, and maintaining family automobiles, was properly recoverable.



**Alabama**

- 1C** Code of Ala. § 6-5-410 (1975).  
*Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980).  
Applying Alabama law. Under the Alabama wrongful death statute, damages are not designed to compensate the plaintiff for decedent's loss of life, suffering, or pecuniary loss, but are strictly punitive.  
*Crenshaw v. Alabama Freight, Inc.*, 252 So.2d 33 (Ala. 1971).
- 2A** *Alabama Great Southern Railroad Co. v. Gambrell*, 78 So.2d 619 (Ala. 1955).  
Proper to consider present value of a yearly income equivalent to the probable reduction of plaintiff's earnings.
- 3B** *Montgomery & E.R. Co. v. Mallette*, 9 So. 363 (Ala. 1890).  
*Central of Georgia R. Co. v. Storrs*, 53 So. 746 (Ala. 1910).  
*Travis v. Louisville & N.R. Co.*, 62 So. 851 (Ala. 1913).  
*Mackintosh Co. v. Wells*, 118 So. 276 (Ala. 1928).  
*Whiddon v. Malone*, 124 So. 516 (Ala. 1929).  
But see,  
*Alabama Farm Bureau Mut. Casualty Co. v. Smelly*, 329 So.2d 544 (1976).  
Rule accepted for medical expense payments.

**Alaska**

- 1B** Alaska Stats. Sec. 09.55.580 (1973).
- 2B** *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Personal injury.  
*Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968). Wrongful death.
- 3A** *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).  
Contractual arrangement for benefits were for plaintiff's benefit, not defendant's. Rule applies.
- 4E** *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).  
Deduction for income taxes on future income is improper. However, taxes on past income should be deducted because they can be easily calculated.  
*Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428 (Alaska 1983).  
Proposed jury instruction was properly denied absent a showing that juries in general or this particular jury inflated the award in the amount of estimated taxes. Restatement that future taxes should not be considered.  
*Abille v. United States*, 482 F.Supp. 703 (N.D. Cal. 1980).  
Under Alaska law.
- 5B** *State v. Guinn*, 555 P.2d 530 (Alaska 1976).  
Personal consumption is properly deducted from award in death action.
- 6A** Alaska Stat. § 09.55.580 (1973).  
Loss of assistance or services shall be considered by the jury in assessing damages for wrongful death.

**Arizona**

- 1B** Ariz. Stats. Ann. § 12-612 (1982).  
Damages based on loss to survivors unless there are none, in which case, to decedent's estate.
- 2A** *Rodgers v. Bryan*, 309 P.2d 773 (Az. 1957).  
Evidence as to present value of award is admissible.

*Downs v. Sulphur Springs Valley Electric Coop.*, 297 P.2d 339 (Az. 1936).

Verdict should reflect the present worth of future accumulation or benefit.

**3A** *Rustin v. Cook*, 496 P.2d 316 (Ariz. App. 1984).

(general rule)

*Tucson v. Holliday*, 411 P.2d 183 (Ariz. App.)

Value of gratuitous nursing services is recoverable.

But see,

Ariz. Rev. Stat. Ann. § 12-565 (1982).

Rejecting rule as applicable to medical malpractice actions only.

**4C** *Seely v. McEvers*, 564 P.2d 394 (Ariz. App. 1977).

Deduction for income taxes on future income is improper.

**4D** *Mitchell v. Emblade*, 298 P.2d 1034 (Ariz. 1956).

Apparently recognizing rule that instruction to jury on tax free nature of award is improper.

*Young v. Environmental Air Products, Inc.*, 665 P.2d 88 (Ariz. App. 1982),  
modified, 665 P.2d 40.

### Arkansas

**1B** Ark. Stat. Ann. §§ 27-908; 27-909 (1979).

**2A** *Foster & Creighton Co. v. Jackson*, 388 S.W.2d 563 (Ark. 1965).

Amount of award is for jury's fair determination when supported by substantial evidence.

**3A** *East Texas Motor Freight Lines, Inc. v. Freeman*, 713 S.W.2d 456 (Ark. 1986).

General rule applied; there is no double recovery because plaintiff has lost sick leave or has paid insurance premiums and to set off the collateral source would give defendant a windfall.

**4C** *Cates v. Brown*, 645 S.W.2d 658 (Ark.).

Estimation of taxes is too speculative and deduction is improper.

But see,

*Strahan v. Webb*, 330 S.W.2d 291 (Ark. 1951).

Apparently approving consideration of tax liability.

**4D** *W.M. Bashlin Co. v. Smith*, 643 S.W.2d 526 (Ark. 1982).

Instruction to jury not required.

**5B** *Martin v. U.S.*, 448 F.Supp. 855 (E.D. Ark. 1977), reversed in part and remanded, 586 F.2d 1206 (8th Cir. 1978).

FTCA action. Cost of "customary personal expenses" is to be deducted from award in action for death.

**6A** *Vines v. Arkansas Power & Light Co.*, 337 S.W.2d 722 (1960).

Wrongful death pecuniary damages include loss of services.

*Martin v. U.S.*, 448 F.Supp. 855 (E.D. Ark. 1977), reversed in part and remanded, 586 F.2d 1206 (8th Cir. 1978).

Pecuniary value of household services deceased would have contributed to claimed beneficiaries may be recovered.

Ark. Stat. Ann. § 27-909 (1979):

### California

**1B** *Francis v. Sauve*, 34 Cal. Rptr. 754 (1963).



- 2A** *Fox v. Pacific Southwest Airlines*, 184 Cal. Rptr. 87, 133 Cal. App. 3d 565 (1982).

Although it was necessary to allow evidence of present value rates and to give instruction on reduction of damages to present value, evidence could be presented of future inflation rates which might partially offset effect of present value discounting.

*U.S. v. English*, 521 F.2d 63 (9th Cir. 1975).

Under California law, court may not assume that discount rate and inflation rate will offset to zero; court must first estimate future income and expenses, taking into account estimated changes in purchasing power of dollar, and then discount this future net income stream to its present value.

- 3A** *Bradford v. Edmonds*, 215 Cal. App. 2d 159, 30 Cal. Rptr. 185.

Value of nursing services gratuitously rendered are recoverable.

*Philip Chang & Sons Associates v. La Casa Novato*, 177 Cal. App. 3d 159, 222 Cal. Rptr. 800.

*Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir.).

Collateral source funds are intended for the benefit of the injured person, not for the one who injures him, and that intention should be effectuated.

*Standard Oil Co. of California v. United States*, 153 F.2d 958 (9th Cir. 1946), *aff'd* 332 U.S. 301.

- 4A** *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975).

Under both federal and California law, award for lost wages should be calculated after appropriate deductions are made for decedent's personal consumption, expenses, and taxes, reduced to present value. Finding that 30% of projected wage figure was appropriate sum to be deducted for personal consumption, expenses and taxes was not clearly erroneous.

- 4E** *Canavin v. Pacific Southwest Airlines*, 148 Cal. App. 3d 512, 196 Cal. Rptr. 82 (1983).

Instruction to jury on tax free nature of award not required.

*Henninger v. Southern Pacific Co.*, 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (1967).

Instruction to jury improper.

*Fox v. Pacific Southwest Airlines*, 133 Cal. App. 3d 565, 184 Cal. Rptr. 87 (1982).

The giving of an instruction on tax-free nature of award is within discretion of the trial court.

- 5B** *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975).

FTCA action. Under both federal and California law, an award for lost wages contributing to support in a death action should be calculated after appropriate deductions are made for decedent's personal consumption and expenditures.

*Syah v. Johnson*, 247 Cal. App. 534, 55 Cal. Rptr. 741 (1967).

- 6A** *Griffey v. Pac. Elec. Ry. Co.*, 209 P.45 (Cal. App. 1922).

Loss of services which have a pecuniary value may be compensated by an award of damages in a death action.

*Burke v. City and County of San Francisco*, 244 P.2d 708 (Cal. App. 1952).  
Opinion testimony from spouse and family of deceased regarding the value of services previously performed by the deceased is admissible and the amount of damages to be awarded is for the trier of fact to determine, bringing to bear its own general knowledge and is not bound by express evidence of the value of such services.

### Colorado

**1B** Colo. Rev. Stats. Ann. §§ 13-21-201; 13-21-203 (1973).

*Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981).

**2A** *Good v. A.B. Chance Co.*, 565 P.2d 217 (Colo. App. 1977).

Economist was properly permitted to project annual increase in wages where he also projected inflationary factors and deducted these figures from projected wage increases.

*Steckler v. U.S.*, 549 F.2d 1372 (10th Cir. 1977).

**3A** *Franklin v. Templeton*, 428 P.2d 361 (Colo.).

That time lost from work was mostly taken as sick leave and vacation was irrelevant and could not be used to defendant's advantage.

*Kistler v. Halsey*, 481 P.2d 722 (Colo. 1971).

Trial court erred in not permitting jury to consider plaintiff's claim for lost wages for period he didn't work, even though he was paid full wages for his time off due to injury pursuant to employer's sick leave policy.

But see,

*United States v. Guidys*, 194 F.2d 762 (10th Cir. 1952).

FTCA action applying Colorado law. Rejecting the rule.

**4C** *Good v. A.B. Chance Co.*, 565 P.2d 217 (Colo. App. 1977).

**4D** *Davis v. Fortino & Jackson Chevrolet Co.*, 510 P.2d 1376 (Colo. App. 1973).

Instruction to jury improper (by implication).

*Polster v. Griff's of America, Inc.*, 514 P.2d 80 (Colo. App. 1973), *reversed on other grounds*, 520 P.2d 745, *on remand*, 525 P.2d 1179.

Instruction improper.

**5D** *Morrison v. Bradley*, 622 P.2d 81 (Colo. App. 1980).

Wrongful death damages must be limited to the net pecuniary loss suffered by the survivor and there must be some prima facie evidence to establish the pecuniary loss. However, there was no evidence presented as to the deceased's personal expenses, and thus no way to estimate what would have been available for future expenditures on deceased's survivors.

*Herbertson v. Russell*, 371 P.2d 422 (Colo. 1962).

Wrongful death damages are to be reduced by the amount calculated as expenditures for maintenance. Appears to be in the "likely consumption" category. Use of the term "maintenance" in *Herbertson* may simply be an imprecise use of language.

**6A** *Herbertson v. Russell*, 371 P.2d 422 (Colo. 1962).

Net pecuniary loss as a measure of damages for the wrongful death of a child includes not only the loss to parents of services and earnings during child's minority but also loss of services and support during parents' declining years.



## Connecticut

- 1A** Conn. Gen. Stats. Ann. § 45-280 (1972).  
*Butler v. Steck*, 148 A.2d 246 (Conn. 1959).
- 2A** *Mather v. Griffin Hospital*, 540 A.2d 666 (Conn. 1988).  
 Court recognized that economics is an inexact science and hesitated to adopt any particular method for computing the present value of lost earnings and future costs.  
*Kiniry v. Danbury Hospital*, 439 A.2d 408 (Conn. 1981); and *Katsetos v. Nolan*, 368 A.2d 172 (Conn. 1976).  
 It's permissible for a jury to take inflation into consideration as a factor in deciding damages.  
*But see*,  
*Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975).
- 3A** *Hayes v. Morris & Co.*, 119 A. 901 (Conn. 1923).  
*Gorham v. Farmington Motor Inn, Inc.*, 271 A.2d 94 (Conn. 1970).
- 4A** *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.C. Conn. 1974),  
*aff'd in part and rev'd in part on other grounds*, 524 F.2d 384 (2d Cir.), and on remand, 452 F.Supp. 151.  
 Applying Connecticut law. Deduction for taxes on future income proper.
- 4D** *Gorham v. Farmington Motor Inn, Inc.*, 271 A.2d 94 (Conn. 1970).  
 Instruction to jury is improper (by implication).  
*But see*,  
*Floyd v. Fruit Industries, Inc.*, 136 A.2d 918 (Conn. 1957).  
 Wrongful death action. Loss to decedent was proper measure of damages under survivorship theory and decedent's probable tax liability must be deducted from his probable lifetime net earnings.  
*Moffa v. Perkins Trucking Co.*, 200 F.Supp. 183 (D.C. Conn. 1961).  
 Applying Connecticut law. (accord w/*Floyd*)
- 5C** *Moffa v. Perkins Trucking Co.*, 200 F.Supp. 183 (D. Conn. 1961).  
 Probable cost of future living expenses must be deducted from wrongful death damages.
- 5D** *Chase v. Fitzgerald*, 45 A.2d 789 (Conn. 1946).  
 Rejecting the net accumulations method.  
*Floyd v. Fruit Industries, Inc.*, 136 A.2d 918 (Conn. 1959).  
 Maintenance expenses of decedent deducted from future earning power. Personal expenses are those "which under the standard of living followed by a given decedent...would have been reasonably necessary for him to incur to keep himself in such a condition of health and well-being that he could maintain his capacity to enjoy life's activities, including the capacity to earn money."
- McKirdy v. Cascio*, 111 A.2d 555 (Conn. 1955).  
 A wage earner is subject to the expense of maintaining himself. Therefore, the factor to consider in fixing damages for the destruction of a deceased's earning capacity is his net and not his gross wages, that is, what remains after deducting the cost of his own personal maintenance. Majority of decisions appear to call for a "likely consumption" deduction. But the references to "maintenance" in *Floyd* and *McKirdy* make the guidelines

for the type of deduction unclear.

- 6A *Chase v. Fitzgerald*, 45 A.2d 789 (Conn. 1946).

Value of lost household services may be recovered as part of "just damages."

### Delaware

- 1B Del. Code Ann. tit. 10, § 3704 (1982).

- 2A *Thorpe v. Bailey*, 386 A.2d 668 (Del. 1978).

Delaware follows the general rule that an award for future lost earnings must be reduced to present value. Money earns money and if the sum were not discounted, it would result in overpayment.

- 3A *Campbell v. Brandenburg*, 162 A.354 (Del. 1932).

*Yarrington v. Thornburg*, 205 A.2d 1 (Del. (Sup.)).

- 4B *State Highway Dept. v. Buzzuto*, 264 A.2d 347 (Del. Ch. (Sup.) 1970).

Jury should be instructed (apparently recognizing rule).

*Abele v. Massi*, 273 A.2d 260 (Del. Sup. 1970).

Deduction for income taxes on future income is improper.

*Gushen v. Penn. Cent. Transp. Co.*, 280 A.2d 708 (Del. (Sup.) 1970).

*High v. State Highway Dept.*, 307 A.2d 799 (Del. (Sup.) 1973).

- 5B *Benson v. Lynch*, 416 F. Supp. 47 (D. Del. 1976).

Applying Delaware Law. Under the Wrongful Death Act, survivor may recover only the net amount which he would have received from deceased, rather than deceased's gross earnings.

- 6B Del. Code Ann. tit. 10 § 3724 (Supp. 1982).

Award may include pecuniary value for lost services.

*Benson v. Lynch*, 416 F.Supp. 47 (D. Del. 1976).

Loss of wife's services was not a pecuniary loss that was recoverable by husband under Delaware law inasmuch as such services were included in loss of consortium that was not recoverable under the Wrongful Death Act. Contradictory authorities make guidelines in this area unclear.

### District of Columbia

- 1B D.C. Code Encycl. Ann §§ 16-2701; 16-2703 (1981).

- 2A *Doe v. Binker*, 492 A.2d 857. (D.C. App. 1985).

Expert economic testimony represents only a guideline and may not be adopted at its face value as the sole basis for an award. However, the expert may properly project specific amounts.

*District of Columbia v. Barriteau*, 399 A.2d 563 (D.C. App. 1979).

Proper for jury to consider the impact of future inflation if the record contains a proper factual predicate consisting of competent evidence. Not reducing an award to present value is not to be used as a means of taking inflation into consideration (rejects total offset).

- 3A *Hudson v. Lazarus*, 95 App. D.C. 16, 217 F.2d 344.

(general rule)

*Reid v. D.C.*, 391 A.2d 776 (D.C. 1978), *amended*, 399 A.2d 1293.

- 4A *Runyon v. District of Columbia*, 150 App. D.C. 228, 463 F.2d 1319 (1972).

Applying D.C. law. Deduction for taxes on future income proper.



- 4B** *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619 (Dist. Col. App. 1986).

Trial court must, upon request, instruct jury as to tax-free nature of personal injury award.

- 5D** *Runyon v. D.C.*, 463 F.2d 1319 (D.C. Cir. 1972).

Award under the survival statute is to be reduced by amount deceased would have required to maintain himself and contribute to those entitled to recover under the Wrongful Death Act. Unclear whether this means a likely consumption or maintenance deduction.

## Florida

- 1C** Fla. Stat. Ann. § 768.21 (1983).

Allows for recovery for both loss to survivors and loss to the decedent's estate.

- 2A** *Seaboard Coast Line R. Co. v. Garrison*, 336 So.2d 423 (Fla. 1976).

Fair result obtained by permitting expert testimony not only on future inflation, but also on interest rate used in computing present value of award so that with all the evidence before it, the jury would be better able to fulfill its function. Failure to instruct the jury on reduction to present value is error, with question of specific interest rate to be determined by the jury.

- 3A** *Greyhound Corp. v. Ford*, 157 So.2d 427 (Fla. App. 1963).

But see,

*Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325 (Fla.).

Upheld statute abolishing the rule in automobile accident cases on the grounds that insurers lost their subrogation rights and plaintiffs were not entitled to double recovery or to recover monies that equitably belonged to their insurers.

- 4C, D** *Good Samaritan Hospital Ass'n. v. Saylor*, 495 So.2d 782 (Fla. App. 1986).

Future taxes are too conjectural and instruction should not be given.

But see,

*Frazier v. Ewell Eng'g. & Constr. Co.*, 62 So.2d 1202 (Fla. 1981);

and

*Downs v. United States*, 382 F.Supp. 713 (D. Fla. 1974).

- 5D** Fla. Stat. Ann. § 768.21 (1983).

Provides for recovery of the "decedent's probable net income available for distribution to the particular survivor." It is not clear if this means a "likely consumption" or "maintenance" deduction.

- 6A** *Etheridge v. Piper Aircraft Co.*, 559 F.2d 1027 (5th Cir. 1977).

Applying Florida law. Pecuniary value of lost household services may be recovered and it is not necessary to hire others as replacements for decedent in order to recover damages for loss of decedent's services.

*Lithgow v. Hamilton*, 69 So.2d 776 (Fla. 1954).

Persons qualified as "experts" in the employment service field may testify as to the proper value of the services of which the deceased's survivors are deprived.

**Georgia****1A** Ga. Code Ann. § 51-4-1

Providing for the recovery for the “full value of the life of the decedent,” meaning the full value of decedent’s life without deducting for any of the necessary or personal expenses of the decedent had he lived.

**2A** *Piggly-Wiggly Southern, Inc. v. Tucker*, 229 S.E.2d 804 (Ga. App. 1976).

Not error to charge the jury that they could reduce future damages to present value by any methods satisfactory to the jurors, or to admit evidence establishing local interest rates.

*Georgia Southern & Florida Ry. Co. v. Odom*, 623 S.E.2d 469 (Ga. App. 1979).

Evidence offered by an expert may take into account statistical studies and inflationary trends.

*Woods v. Andersen*, 243 S.E.2d 748 (Ga. App. 1978).

Department of Labor and Census studies admissible.

**3A** *Nashville, C. & St. L.R. Co. v. Miller*, 47 S.E. 959 (Ga. 1904).

(gen’l rule)

*Western & A.R. Co. v. Sellers*, 83 S.E. 445 (Ga. App. 1914).

(gen’l rule)

*Wachtel v. Leonard*, 163 S.E. 512 (Ga. App. 1932).

(gen’l rule)

*Limbert v. Bishop*, 101 S.E.2d 148 (Ga. App. 1957).

(gen’l rule)

*Story v. Pless*, 112 S.E.2d 407 (Ga. App. 1959).

(gen’l rule)

**4C, D** *Atlantic C.L.R. Co. v. Brown*, 92 S.E.2d 874 (Ga. App.) (F.E.L.A.)

Estimation of taxes is too speculative. Instruction to jury is improper.

**5D** *Miller v. Tuten*, 223 S.E.2d 237 (Ga. App. 1976).

All those expenses which relate to the production of earnings and which cease at death are to be deducted. This includes those expenses which would have been reasonably necessary to maintain the decedent in such a condition of health and well-being that he would maintain his earning power. This is a maintenance deduction standard.

*Contra*, Ga. Code Ann. § 51-4-1 (1982).

Providing for the recovery of the “full value of the life of decedent,” without any deduction for necessary personal expenses.

**6B** *Jordan v. Fowler*, 123 S.E.2d 334 (Ga. App. 1961).

Loss of decedent’s services may be considered when determining damages in death action.

*But see*,

*Southern Ry. Co. v. Turner*, 81 S.E.2d 291 (Ga. App. 1954).

Child’s deprivation of the guidance and assistance of her father was not recoverable as an item of damages separate from the value of the decedent’s life as a whole.

Obviously, loss of services may be considered, but apparently there may be no separate recovery for this item of damages.



## Hawaii

### 1B Hawaii Rev. Stats. § 663-3

Loss to survivors, except that reasonable expenses for decedent's last illness and burial may be recovered on behalf of the estate.

### 4D *Kawamoto v. Yasutake*, 410 P.2d 976 (Hawaii 1966).

Instruction to jury improper (by implication).

### 5D *Rohlfing v. Moses Akiona, Ltd.*, 369 P.2d 96 (Hawaii 1962).

Decedent's likely earnings to be reduced by probable cost of his own maintenance and provisions he would have made for his family and dependents and jury is to assume standard of living commensurate with supposed income.

*But see,*

### *Greene v. Texeira*, 505 P.2d 1169 (Hawaii 1973).

Holding that the probable net excess earnings of a decedent projected beyond his death are not a proper item of damages under the Hawaii Survival Statute, HRS § 663-7, expressly overruling *Rohlfing* to the extent its holding conflicts with this opinion.

### Hawaii Rev. Stat. § 663-8

Future earnings of decedent recoverable are those in excess of the probable cost of his own maintenance and the provision he would have made for his actual or probable family and dependents during the time he would have lived. Although *Greene* expressly overruled *Rohlfing* regarding the recovery of "net excess earnings" over and above a decedent's maintenance costs, the subsequent passage of Hawaii Rev. Stats. § 663-8 would seem to indicate a return to the "maintenance" deduction as held in *Rohlfing*.

## Idaho

### 1A *Gavica v. Hanson*, 608 P.2d 861 (Idaho 1980).

### 3A *Swift & Co. v. Gutierrez*, 277 P.2d 559 (1954).

## Illinois

### 1B Ill. Ann. Stats. ch. 70 § 2 (Smith-Hurd 1959).

Loss to survivors except where there are none.

### 2C *Powers v. Illinois Central Gulf RR. Co.*, 416 N.E.2d 1161 (Ill. App. 1981), affirmed in part and reversed in part, *Powers v. Illinois Central Gulf RR. Co.*, 438 N.E.2d 152 (Ill. 1982).

General testimony: Argument by counsel that wage of seven dollars per hour today was four dollars six years ago and will be \$13 or \$14 six years from now was not within scope of court's order prohibiting reference to specific rates of inflation.

### 3A *Wolfe v. Whipple*, 251 N.E.2d 77 (Ill. App. 1969).

*Cooney v. Hughes*, 34 N.E.2d 566 (Ill. App. 1941).

*Mineiko v. Rizzuto*, 212 N.E.2d 712 (Ill. App.)

### 4C *Wagner v. Illinois C.R. Co.*, 129 N.E.2d 771 (Ill. App.)

Estimation of taxes too speculative.

- 4D** *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 432 N.E.2d 920 (Ill. App. 1982).

Income tax instruction not required.

*Johnson v. Hoover Water Well Service, Inc.*, 439 N.E.2d 1284 (Ill. App. 1982).

(instruction)

*McCann v. Lisle-Woodridge Fire Protection Dist.*, 450 N.E.2d 1311 (Ill. App. 1983).

(instructions)

- 5D** *Wawryszyn v. Ill. C.R. Co.*, 135 N.E.2d 154 (1956).

F.E.L.A. action. Personal maintenance expenses to be deducted from gross earnings to constitute proper measure of damages under FELA.

Unclear if this means a likely consumption or a maintenance deduction.

- 6B** *Matter of Johns-Manville Asbestos Cases*, 511 F. Supp. 1235 (D.C. Ill. 1981).

Damages were not available under the Illinois Wrongful Death Act for the loss of consortium and services.

*Kaiserman v. Bright*, 377 N.E.2d 261 (Ill. App. 1978).

Loss of consortium and loss of services are not recoverable under the Illinois Wrongful Death Act.

But see,

*Eggimann v. Wise*, 206 N.E.2d 472 (Ill. App. 1964).

Personal services formerly performed by decedent was one element of pecuniary loss and could be recovered in death action. This earlier case may represent an abandoned approach.

## Indiana

- 1C** Ind. Stats. Ann. § 34-1-1-2 (1973).

Damages recovered for reasonable medical, hospital, funeral and burial expenses shall inure to the exclusive benefit of the decedent's estate for payment thereof; the remainder, if any, shall inure to the benefit of decedent's survivors, to be distributed in the same manner as decedent's personal property.

- 2A** *Richmond Gas Corp. v. Reeves*, 302 N.E.2d 795, (Ind. App. 1973).

Jury may consider factors such as general inflation and the constant depreciation and cheapening of money.

*Old Town Development Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976).

*FMC Corp. v. Brown*, 526 N.E.2d 719 (Ind. App. 1988).

Although evidence of present value of future damages may assist the jury in making a reasonable award, such evidence is not essential to an award.

- 3A** *Ohio & M.R. Co. v. Dickerson*, 59 Ind. 317 (1877).

*Pittsburgh, C. C. & St. L. R. Co. v. Bir*, 105 N.E.921 (Ind. App. 1914).

*Herrick v. Sayler*, 160 F.Supp. 25 (D. Ind. 1958).

Applying Indiana law.

- 4D** *Highshew v. Kushto*, 134 N.E.2d 555 (Ind. 1956).

Instruction regarding taxes improper (personal injury).

*Richmond Gas Corp. v. Reeves*, 302 N.E.2d 795 (Ind. 1973).

Apparently recognizing rule that instruction is improper (wrongful death).



- 5D** *Lustrick v. Hall*, 403 N.E.2d 1128 (Ind. App. 1980).  
 “Pecuniary loss” for purpose of wrongful death statute is the “reasonable expectation of pecuniary benefit” from the continued life of the deceased. A deduction is implied, but there seems to be no indication whether that deduction should be based on “likely consumption” or “maintenance.”
- 6A** *Lustrick v. Hall*, 403 N.E.2d 1128 (Ind. App. 1980).  
 Value of lost household services may be recovered as part of the “pecuniary loss” suffered in a wrongful death action.

## Iowa

- 1C** Iowa Code Ann. §§ 613.15; 633.336 (1982).  
 Damages for wrongful death shall be disposed of as personal property belonging to the estate of the deceased. However, if the damages include losses of support of a deceased spouse and parent, such damages shall be apportioned among the surviving spouse and children in such a manner as is consistent with the loss of services or support sustained by the survivors respectively. If decedent leaves survivors, damages shall not be subject to the debts of the decedent’s estate.
- 2C** *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974).  
 Where future inflation was shown by the evidence, yet the evidence further showed that the inflation rate and discount rate would offset each other, the present award of full amount of future damages was permissible. The total offset technique was allowed but not required.  
*But see,*  
*Von Tersch v. Ahrendsen*, 99 N.W.2d 287 (Iowa 1959).
- 3A** *United States v. Klein*, 153 F.2d 55 (8th Cir. 1946).  
 Applying Iowa law.  
*But see,*  
 Iowa Code Ann. § 147-136 (West Supp. 1982).  
 Rejecting rule in medical malpractice personal injury actions.
- 4C, D** *Combs v. Chicago, St. P., M. & O. R. Co.*, 135 F.Supp. 750.  
 Applying Iowa law—instruction on taxes improper and tax liability should not be considered.  
*But see,*  
*Adams v. Deur*, 173 N.W.2d 100 (Iowa 1969).  
 Damages to decedent’s estate and to his dependents should be calculated on estimated income after taxes.
- 5D** *Pagel v. Notbohm*, 188 N.W.2d 314 (Iowa 1971).  
 Wrongful death damages to deceased’s estate are measured by the present value of the amount decedent would reasonably be expected to have saved and accumulated as a result of his own efforts. As per the claim by decedent’s father for lost services, such damages should include the present value of decedent’s services and probable earnings, less the probable cost of his maintenance, from the date of death until attainment of his majority. In *Schmitt* and in the first part of *Pagel*, Iowa seems

to embrace the “net accumulations” approach to deductions. However, reference to a deduction for the “probable” cost of the decedent’s “maintenance” makes the guidelines in this area unclear.

**5E** *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632 (Iowa 1969).

Measure of damages for wrongful death may include present worth of estate which decedent would reasonably be expected to have saved and accumulated between time of death and end of natural life expectancy.

**6A** Iowa Code Ann. §§ 613.15; 633.336 (1982).

Pecuniary value of lost services recoverable.

*Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632 (Iowa 1969).

Measure of damages for wrongful death may include present worth of value of services which decedent would have conferred on his family but for his untimely death.

*Robeson v. Dilts*, 170 N.W.2d 408 (Iowa 1969).

Statute specifying measure of damages for wrongful death did not require that recovery for loss of services and support be limited to exact amount decedent would have earned.

## Kansas

**1B** Kan. Stats. Ann. §§ 60-1904; 60-1905 (1976).

**2A** *Hampton v. State Highway Com.*, 498 P.2d 236 (Kan. 1972).

**4C, E** *Spencer v. Martin K. Eby Constr. Co.*, 350 P.2d 18 (Kan.)

Estimation of taxes is too speculative. Trial court did not commit reversible error when, in response to the jury’s specific inquiry with respect to taxes, it gave an additional instruction to the effect that the jury was not to consider plaintiff’s potential tax liability, as such an instruction was correct as a matter of law.

**4C** *Conjeo v. Probst*, 630 P.2d 1202 (Kan. 1981).

**6A** *Chapman v. Gas Serv. Co.*, 190 P.2d 367 (Kan. 1948).

Value of lost household services is a pecuniary loss and is therefore properly considered in an action for wrongful death.

## Kentucky

**1C** Ky. Const. §§ 54; 241.

Ky. Rev. Stats. Ann. § 411.130 (1982).

Loss to survivors, unless there are none, and then the deceased’s estate.

**2C** *Paducah Area Public Library v. Terry*, 655 S.W.2d 19 (Ky. App. 1983).

The total offset technique may be required by the trial court, under the assumption that interest rates and rates of inflation are self-adjusting. However, the trial court has the discretion to allow other techniques.

**3C** *Davidson v. Vogler*, 507 S.W.2d 160 (Ky. App. 1974).

Amounts paid to employee for sick pay pursuant to contract including sick leave were not deductible from his recovery from defendant.

*But see,*

*Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767 (Ky.).



Where evidence presented question as to nature of payments made to plaintiff by his employer, cause was remanded to determine whether the arrangement was such as to render the payment a legal obligation and with direction to credit amount allowed at trial with such sum, if any, as jury found was paid to plaintiff in discharge of a legal duty to do so.

- 4D** *Paducah Area Public Library v. Terry*, 655 S.W.2d 19 (Ky. App. 1983).

Instruction to jury is improper.

*Louisville & N. R. Co. v. Mattingly*, 318 S.W.2d 844 (Ky. 1958).

(instructions)

- 5A** *Spangler's Adm'r v. City of Middlesboro*, 191 S.W.2d 414 (Ky. App. 1945).

Measure of damages in an action for wrongful death is the destruction of decedent's power to earn money, and such cause of action accrues to the deceased's estate. No deduction from estimates of earning power occurs.

- 6A** *Schulz v. Chadwell*, 558 S.W.2d 183 (Ky. 1977).

If person is disabled from performing essential household tasks as a direct result of a tortious injury, injured person should be able to recover reasonable expenses of hiring substitute help. Where injured person is married, spouse's claim for lost consortium includes loss of injured spouse's household services.

*Kentucky & I. T. R. Co. v. Becker's Adm'r*, 214 S.W.900 (Ky. App. 1919).

Evidence that deceased was a wife and housekeeper of good health, who performed all the household work except laundry supported a compensatory damage verdict of \$16,000 although no proof was found to adduce the value of her earning capacity.

## Louisiana

- 1B** La. Stats. Ann. art. 2315 (1983).

- 2C** *Philippe v. Browning Arms Co.*, 395 So.2d 310 (La. 1981).

A trial judge may, but need not, instruct the jury on applying a discount factor and to consider inflation. There was no error in permitting the jury to use the total offset method. Thus, the total offset is allowed but not required.

*But see,*

*Dunaway v. Rester Refrigeration Service, Inc.*, 428 So.2d 1064 (La. App. 1983).

Factors which may be considered include age, life expectancy, work-life expectancy, investment income factor, productivity increase and the inflation factor.

- 3C** *Perroux v. Murray-Brooks Hardware Co.*, 119 So. 453 (La. App. 1928).

Collateral source rule applies.

*Brasseaux v. Stand-By Corp.*, 402 So.2d 140 (La. App. 1981), cert. denied, 409 So.2d 617.

Payments to injured employee were made in lieu of compensation; thus, such payments could not be characterized as gratuitous so as to justify conclusion that plaintiff did not suffer loss of wages. This implies that

- gratuitous payments should be deducted from an award.  
*Sebren v. Millers Mut. Fire Ins. Co.*, 182 So.2d 99 (La. App.).  
 Plaintiff injured in wreck who was absent from work for 13 weeks was entitled to lost earnings for that period, notwithstanding payments made to him by employer as contractual sick leave benefits.  
*Pepper v. Glover*, 241 So.2d 269 (La. App.).  
 (accord *Sebren*)  
*McMullen v. Millers Mut. Fire Ins. Co.*, 246 So.2d 702 (La. App.)  
 (accord *Sebren*)  
*Cheatham v. New Orleans*, 378 So.2d 369 (La. 1979).  
*Fort v. Northern Ins. Co.*, 111 So.2d 874 (La. App. 1958).  
*Le Blanc v. Southern Farm Bureau Casualty Ins. Co.*, 104 So.2d 279 (La. App. 1958).  
**4C** *Harper v. Liggett Group, Inc.*, 459 So.2d 1260 (La. App. 1984), cert. denied, 462 So.2d 655.  
 Deduction for income taxes improper.  
*Reeves v. Louisiana & A.R. Co.*, 304 So.2d 370 (La. App. 1974), cert. denied, 305 So.2d 123.  
*Greene v. Wright*, 365 So.2d 551 (La. App. 1978).  
**5B** *Blanchard v. Rodrigue*, 340 So.2d 1001 (La. App. 1976).  
 Determination of damages for loss of support because of wrongful death should include consideration of decedent's probable future personal expenses.  
**6A** *Diefenderfer v. La. Farm Bureau Mut. Ins. Co.*, 383 So.2d 1032 (La. App. 1980).  
 Loss of services as a pecuniary loss is an element to be considered in fixing damages in a wrongful death case.  
*Marceleno v. State, Dept. of Highways*, 367 So.2d 882 (La. App. 1979).  
 Loss of a wife/mother's household services is a very real and substantial loss to the survivors and is a significant part of the damages they sustained through the wrongful death of the deceased; hence, such damages are recoverable; and testimony of experts such as economists as to the value or cost of replacement of such services has value to the trier of fact.

## Maine

- 1B** Me. Rev. Stats. Ann. tit. 18-A, § 2-804.  
**2C** *Michaud v. Steckino*, 390 A.2d 524 (Me. 1978).  
 Jurors must project themselves into probabilities of the future and evaluate the damages award in terms of present value, but no more approximations should be expected from the jury.  
*Stanley v. U.S.*, 347 F.Supp. 1088 (D. Me. 1972), vacated on other grounds, 476 F.2d 606 (1st Cir. 1972).  
 Federal Tort Claims Act.  
**4D** *Michaud v. Steckino*, 390 A.2d 524 (Me. 1978).  
 Instruction to jury is improper (by implication).



**Maryland**

- 1B** Md. Code Ann. § 3-904 (1980).
- 2A** *Lumber Terminals, Inc. v. Nowakowski*, 373 A.2d 282 (Md. App. 1977).  
Evidence of inflationary factor was admissible and evidence of present value was not necessary.
- 3A** *Leizear v. Butler*, 172 A.2d 518 (Md. 1961).  
*Gillespie-Linton v. Miles*, 473 A.2d 947 (Md. App. 1984).  
Rule applied notwithstanding arrangement made prior to injury that plaintiff would receive wages during time off for honeymoon, where plaintiff also lost wages in period before, during, and after honeymoon.  
*Simco Sales Service, Inc. v. Schweigman*, 205 A.2d 245 (Md.).  
Value of gratuitously rendered nursing services are also recoverable.
- 4B** *Blanchfield v. Dennis*, 438 A.2d 1330 (Md. 1982).  
Instruction to jury on tax-free nature of personal injury award proper.
- 4C** *Lumber Terminals, Inc. v. Nowakowski*, 373 A.2d 282 (Md. App. 1977).  
Estimation of taxes is too speculative and deduction for taxes on past and future income is improper.  
*Culley v. Pennsylvania R. Co.*, 244 F.Supp. 710 (D.C. Del. 1965).  
Applying Maryland law. (following *Lumber Term.*)
- 5B** *Cincotta v. U.S.*, 362 F.Supp. 386 (D. Md. 1973).  
F.T.C.A. action. Applying Maryland Wrongful Death Act. Measure of pecuniary loss is determined by ascertaining the pecuniary interest of plaintiff in the life of the person killed. Recovery under Maryland law is measured by present value of pecuniary benefit survivors of deceased "might reasonably have been expected" to receive from deceased had he not been killed. And under Maryland law, amount which decedent dedicated to his "personal use" and "consumption" must be deducted from his yearly income in computing survivors' pecuniary loss. Trial court could properly deduct 25% for decedent with son until age when son would complete college and 35% for both decedent/s because one had no children at all and the other would no longer have had to support his son after attainment of majority.
- 6A** *Sun Cab Co. v. Walston*, 289 A.2d 804 (Md. App. 1972), *aff'd in part and rev'd in part*, 298 A.2d 391 (1973).  
Pecuniary value of lost household services is recoverable in a wrongful death action.  
*Industrial Serv. Co. v. State*, 6 A.2d 372 (Md. App. 1939).  
Allowing witness to testify as to minimum and maximum wages earned by housekeepers in the area was proper in wrongful death action.

**Massachusetts**

- 1B** Mass. Gen. Laws Ann. ch. 229, § 2 (1983).
- 3A** *Donoghue v. Holyoke Street R. Co.*, 141 N.E. 278 (Mass. 1923).  
*Shea v. Rettie*, 192 N.E. 44 (Mass. 1934).  
*McElwain v. Capotosto*, 122 N.E.2d 901 (Mass. 1954).  
*Jones v. Wayland*, 402 N.E.2d 63 (Mass.).

**4E** *Griffin v. General Motors Corp.*, 403 N.E.2d 402 (Mass. 1980).

Apparently holding that treatment/instructions about taxes are within trial court's discretion.

**5D** Mass. Gen. Laws Ann. ch. 229 § 2 (1983).

Provides for the recovery of the "reasonably expected net income" of the decedent, implicitly calling for a deduction of decedent's personal consumption, but not indicating whether the deduction should be based on likely consumption or maintenance.

**6A** Mass. Gen. Laws Ann. ch. 229 § 2 (1983).

Loss of household services to be considered.

### Michigan

**1B** Mich. Comp. Laws Ann. § 600.2922 (1982).

**2A** *Kovacs v. Chesapeake & Ohio Ry. Co.*, 397 N.W.2d 169 (Mich. 1986).

Jury should consider inflation possibility although plaintiff is not required to present evidence of inflation.

*Tiffany v. Christman Co.*, 287 N.W.2d 199 (Mich. App. 1979).

Expert testimony based on six percent annual wage increase rate, taking into account 3½% inflation and 2½% annual productivity wage increase was permissible where other party had opportunity to cross examine on data underlying the conclusions.

**3A** *Blacha v. Gagnon*, 209 N.W.2d 292 (Mich. App. 1973).

*Motts v. Michigan Cab Co.*, 264 N.W. 855 (Mich. 1936).

*Royer v. Eskovitz*, 100 N.W.2d 306 (Mich. 1960).

*Canning v. Hannaford*, 127 N.W.2d 851 (Mich. 1964).

**4C** *Dinger v. Department of Natural Resources*, 383 N.W.2d 606 (Mich. App. 1985).

Deduction for income taxes improper.

*Peterson v. Department of Transp.*, 399 N.W.2d 414 (Mich. 1986), app. denied; 428 Mich. 914.

*Draisman v. United States*, 492 F.Supp. 1317 (W.D. Mich. 1980).

**6A** *Zolton v. Rotler*, 32 N.W.2d 30 (Mich. 1948).

Pecuniary value of lost household services recoverable.

*Crook v. Eckhardt*, 275 N.W. 739 (Mich. 1937).

In action by husband as administrator of deceased wife's estate to recover for her death, husband could recover for the loss of her services.

### Minnesota

**1B** Minn. Stats. Ann. § 573.02.

**2C** *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975).

Only general testimony on wage, price, and interest rate levels and trends is allowed.

**3A** *Hueper v. Goodrich*, 314 N.W.2d 828 (Minn.).

(gen'l rule)

*Hubbard Broadcasting, Inc. v. Loescher*, 291 N.W.2d 216 (Minn. 1980).

**4C** *Briggs v. Chicago G.W.R. Co.*, 80 N.W.2d 625 (Minn.).

Estimation of taxes is too speculative.



- 4D** *Anunti v. Payette*, 268 N.W.2d 52 (Minn. 1978).  
Instruction to jury improper. (Apparently recognizing the rule.)
- 5B** *Cummins v. Rachner*, 257 N.W.2d 808 (Minn. 1977).  
In fixing pecuniary loss in a death action, jury should consider deceased's past contributions, natural life expectancy, health, age, habits, occupation and "personal living expenses."
- 6A** *Cornfeldt v. Tongen*, 262 N.W.2d 684 (Minn. 1977).  
Value of lost household services is recoverable.

### Mississippi

- 1B** Miss. Code Ann. § 11-7-13 (1982).  
Loss to survivors except where an amount is recovered for property damage, funeral, medical or other related expenses, which shall be subject only to the payment of such debts.
- 2A** *Jesco, Inc. v. Whitehead*, 451 So.2d 706 (Miss. 1984).  
Error to instruct jury on damages without advising to discount to present net cash value.  
*Walters v. Gilbert*, 158 So.2d 43 (Miss. 1963).  
Judicial notice taken of a specific rate of inflation.
- 3A** *Preferred Risk Mut. Ins. Co. v. Courtney*, 393 So.2d 1328 (Miss.).
- 4A** *Smith v. Industrial Constructors, Inc.*, 783 F.2d 1249 (5th Cir. 1986).  
Applying Mississippi law. Trial court properly reduced damage award by amount of income tax decedent would have had to pay on lost earnings.
- 6A** *Standard Coffee Co. v. Carr*, 157 So. 685 (Miss. 1934).  
Value of lost services is recoverable.

### Missouri

- 1B** Mo. Ann. Stats. §§ 537.080; 537.090 (1983).
- 2A** *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. 1985).  
Disparity in discount rates used by economic experts to compute present value of future damages is question for jury—jury could evaluate the conflicting opinions and decide between them.
- 3C** *Minster v. Citizens' R. Co.*, 53 Mo. App. 276.  
Rejecting rule.  
*But see*,  
*Moon v. St. Louis Transit Co.*, 152 S.W. 303 (Mo. 1912).  
Accepting rule.  
*Williams v. St. Louis & S.F.R. Co.*, 27 S.W. 387 (Mo. 1894).  
Accepting rule.
- 4C** *Tennis v. General Motors Corp.*, 625 S.W.2d 218 (Mo. App. 1981).  
*Senter v. Ferguson*, 486 S.W.2d 644 (Mo. App. 1972).
- 4D** *Hall v. County of New Madrid*, 645 S.W.2d 149 (Mo. 1982).  
Instruction not required.
- 5B** *Heppner v. Atchison, T. & S.F. Ry. Co.*, 297 S.W.2d 497 (Mo. 1956).  
Plaintiff in F.E.L.A. action was entitled to recover either the present value

of the future pecuniary benefits of which she was deprived or the amount of her deceased husband's take-home pay less his personal expenses.

**6A** Mo. Ann. Stat. § 537.090 (1983).

Value of services recoverable.

*Hartzler v. Metropolitan St. Ry. Co.*, 126 S.W. 760 (Mo. App. 1910).

Evidence as to capacity of deceased to do housework was admissible because death statute allows compensatory as well as punitive damages.

### Montana

**1B** Mont. Code Ann. § 27-1-323 (1981).

*Swanson v. Champion International Corp.*, 646 P.2d 1166 (Mont. 1982).

**2A** *Swanson v. Champion International Corp.*, 646 P.2d 1166 (Mont. 1982).

Measure of damages in survival action was present value of future losses.

**4B** *Anderson v. Burlington Northern, Inc.*, 709 P.2d 641 (Mont. 1985), cert denied, 106 S.Ct. 2902.

Although instruction on tax-free nature of award in personal injury action should be given, jury here awarded exact amount projected by defense economist, and any error in failure to give instruction was harmless.

**5B** *Miller v. Boeing Co.*, 245 F.Supp. 178 (D. Mont. 1965).

Amount of recovery by widow for wrongful death of her husband was required to be limited to the amount that husband might "reasonably have contributed" to widow had he not died, excluding that portion of his earnings which would have been applied to his own support.

**6A** *Beebe v. Johnson*, 526 P.2d 128 (Mont. 1974).

Pecuniary value of lost household services is recoverable and expert testimony as to such value is helpful in assisting the jury in fixing damages.

### Nebraska

**1B** Neb. Rev. Stats. § 30-810 (1979).

**2C** *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975), affirmed, 533 F.2d 105.

Under Nebraska law, expert testimony on projected rate of inflation and its effect on future earning capacity was inadmissible.

**3A** *Tetherow v. Wolfe*, 392 N.W.2d 374 (Neb.).

**4D** *Ott v. Frank*, 277 N.W.2d 251 (Neb. 1979).

Instruction to jury improper.

*Maricle v. Spiegel*, 329 N.W.2d 80 (Neb. 1983).

*Steinawer v. Sarpy County*, 353 N.W.2d 715 (Neb. 1984).

**5B** *Darnell v. Panhandle Cooperative Ass'n.*, 120 N.W.2d 278 (Neb. 1963).

Although plaintiff in death action may introduce evidence of deceased's earnings, plaintiff may not recover full value of earnings lost and instructions should state clearly that, so far as earnings are concerned, recovery must be limited to the value of amount which statutory beneficiaries would have received from deceased's earnings.

**6A** *Missouri Pac. Ry. Co. v. Baier*, 55 N.W. 913 (Neb. 1893).



In an action by an administrator to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased which the next of kin could reasonably expect, but for the death, would have been rendered in their behalf.

### Nevada

- 1B Nev. Rev. Stats. § 41.085 (1979).
- 2C *Porter v. Funkhouser*, 382 P.2d 216 (Nev. 1963).  
Refusal to instruct jury regarding present value of damages to be suffered in the future was proper in a wrongful death action.
- 6A *Wells, Inc. v. Shoemake*, 177 P.2d 451 (Nev. 1947).  
In death action, a calculation based on decedent's earning capacity for his natural life is a basis for an estimate to be considered, and to this should be added the "proved value" of services, if any, of decedent to his beneficiaries which they might reasonably have received from him and which can only be supplied by the services of others for compensation.

### New Hampshire

- 1A N.H. Rev. Stats. Ann. §§ 556:12; 556:14.
- 3A *Bell v. Primeau*, 183 A.2d 729 (N.H. 1962).
- 4C *Estate of Spinosa*, 621 F.2d 1154 (1st Cir. 1980).
- 4E *Kennett v. Delta Airlines, Inc.*, 560 F.2d 456 (1st Cir. 1977).  
Applying New Hampshire law. No error where trial court instructed jury not to deduct for taxes on future income where no evidence was presented by defendant relating to plaintiff's potential tax liability.
- 5C *Pittman v. Merriman*, 117 A. 18 (N.H. 1922).  
"While decedent's earning capacity for himself would be the gross amount he could obtain as the fruits of his efforts, ... the amount which he could earn for his estate or the benefit of others would be what remained after deducting the necessary expense of his own living. His earning capacity, which tends to augment his estate or to permit him to aid those naturally dependent upon his bounty, is necessarily his net earning capacity; his capacity to acquire money, less the necessary expense of acquisition."  
*Morrell v. Gobeil*, 147 A. 413 (N.H. 1929).  
The deduction encompasses the expense of maintaining the decedent's cost of production.

### New Jersey

- 1B N.J. Stats. Ann. §§ 2A:31-4; 2A:31-5 (1982).
- 2C *Tenore v. Nu Car Carriers, Inc.*, 341 A.2d 613 (N.J. 1975).  
In wrongful death action, it was error to exclude proffered expert economic testimony regarding expected inflationary wage trends; however, it was not error to refuse to allow the expert to present his conclusion as to damages in aggregate dollar terms. Function of expert

generally is to give testimony on issue of effect of future inflation with analysis of trends of future wage increases and discount interest rates only.

**3A** *Melson v. Allman*, 244 A.2d 85 (Del.)

Stating New Jersey law.

*Tichenor v. Santillo*, 527 A.2d 78 (N.J. Super.).

Stating New Jersey law.

*Long v. Landy*, 171 A.2d 1 (N.J. 1961).

Stating New Jersey law.

**4A, B** *Tenore v. Nu Car Carriers, Inc.*, 341 A.2d 613 (N.J. 1975).

Jury should be instructed in wrongful death case, and deduction for taxes on future income was proper.

**4A** *Curtis v. Finneran*, 417 A.2d 15 (N.J. 1980).

Deduction for future taxes proper.

*Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976).

Deduction for future taxes proper.

*Meehan v. Central R. Co. of N.J.*, 181 F.Supp. 594 (S.D. N.Y. 1960).

Applying New Jersey law. Deduction for future taxes proper.

**5D** *Melendez v. Rodde*, 422 A.2d 1047 (N.J. Super. 1980).

Amount of recovery in wrongful death action is based upon a showing of contributions which decedent "reasonably might have been expected" to make to survivors.

*Meehan v. Central R. Co. of N.J.*, 181 F.Supp. 594 (S.D. N.Y. 1960).

Applying New Jersey law. In determining damages for wrongful death, jury should consider the fair portion of "household expenses" attributable to the decedent. Pecuniary loss to survivors could not be more than his net earnings less expenses necessary to create such income and to sustain himself. *Melendez* appears to embrace the "likely consumption" approach to personal consumption deductions. *Meehan*, however, seems to direct a maintenance deduction.

**6A** *Alfone v. Sarno*, 403 A.2d 9 (N.J. App. 1979), *modified on other grounds*, 432 A.2d 857.

In a wrongful death action, damages may include the monetary value of the loss of services of deceased, but such recovery is solely for pecuniary loss and does not include lost companionship, etc.

## New Mexico

**1B** N.M. Stats. Ann. § 41-2-3 (1978).

**2A** *Strickland v. Roosevelt County Rural Electric Co-op*, 657 P.2d 1184, (N.M. App. 1982).

Economist testifying as an expert as to monetary value of decedent's life, although uncontradicted, was not conclusive of the issue.

*Varney v. Taylor*, 448 P.2d 164 (N.M. 1968).

**3A** *Martinez v. Knowlton*, 536 P.2d 1098 (N.M.), *cert. denied*, 536 P.2d 1084.

*Hansen v. Skate Ranch, Inc.*, 641 P.2d 517 (N.M. App. 1982).

*Trujillo v. Chavez*, 417 P.2d 893 (N.M.).

Evidence that sick leave pay equalled salary not admissible because



collateral source income does not operate to reduce damages recoverable from wrongdoer.

**4A** *Varney v. Taylor*, 448 P.2d 164 (N.M. 1968).

**5D** *Varney v. Taylor*, 448 P.2d 164 (N.M. 1968).

Decedent's anticipated personal living expenses should be deducted from amount otherwise determined as reasonable compensation for deprivation of "expected pecuniary benefit" that would have resulted from decedent's continued life; however, each case must depend on its facts and recreational expenses should ordinarily not be included.

*Barnes v. Smith*, 305 F.2d 226 (10th Cir. 1962).

Under New Mexico law, instructions were proper in charging jury to consider decedent's possible contributions to survivors and the expenditures which must be incurred during a lifetime as well as probable income. The language of both cases makes it unclear whether likely consumption or maintenance expenditures are to be considered.

**6A** *Lujan v. Gonzales*, 501 P.2d 673 (N.M. App. 1972), *cert. denied*, 501 P.2d 663.

Testimony as to the value of plumbing, carpentry, and other services performed by decedent for his family was admissible. Loss of such services was a pecuniary loss.

#### New York

**1B** N.Y. Const. Art. 1, § 16.

Amount recoverable shall not be subject to any statutory limitation. N.Y. E.P.T.L. § 5-4.3.

**2C** *Stanley v. Ford Motor Co.*, 374 N.Y.S.2d 370 (N.Y.A.D. 1975).

In personal injury action, testimony of economist expert as to effect of inflation was admissible.

*But see,*

*Zaninovich v. American Airlines*, 271 N.Y.S.2d 866 (N.Y.A.D. 1966).

Speculation as to continuing inflation should not be considered in determining damages for wrongful death.

**3B** *Nelson v. State*, 431 N.Y.S.2d 955 (1980).

Plaintiff was not entitled to recover lost wages where he was paid for the missed days and it was not shown that the payments were not gratuitous.

*Meisner v. Healey*, 239 N.Y.S.2d 352 (1963).

Rule rejected.

**4D** *Coleman v. New York City Transit Authority*, 332 N.E.2d 850 (N.Y. 1975).

Instruction to jury improper.

**4E** *Vasina v. Grumman Corp.*, 644 F.2d 112 (2nd Cir. 1981).

Applying New York law—instruction improper.

*But see,*

*Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2nd Cir. 1982).

Instruction on tax-free nature of personal injury award should be given where requested and deduction is proper.

and

*McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34 (2nd Cir. 1960).

F.E.L.A. Action. Refusal of instruction that jury should consider only plaintiff's net income after taxes was not error, although such instruction might be proper in case of plaintiff with great earning power, and an instruction to jury that it should not increase amount of award on account of taxes is proper because award is tax-free.

**5D** *Lucivero v. Long Island R.R.*, 200 N.Y.S.2d 728 (N.Y. Sup. Ct. 1960).

Jury was entitled to consider decedent's work habits, amount contributed by him for support of his family, and loss to his survivors of his guidance, care, etc. A deduction for likely consumption is implied but left unclear.

**6A** *Ashdown v. Kluckhohn*, 404 N.Y.S.2d 461 (App. Div. 1978).

Trial court did not err in excluding expert testimony regarding costs of providing replacement to perform household services as jury could use its own knowledge in fixing amount, if any, decedent's husband lost by virtue of loss of his wife's ability to perform household duties.

*Hornton v. State*, 272 N.Y.S.2d 312 (Ct. Cl. 1966).

In action for wrongful death of woman survived by children, award of damages under the "substitute wife-mother" theory is allowed, if such services are proved necessary, even though there is no evidence that deceased performed such services.

*Merrill v. United Airlines, Inc.*, 177 F.Supp. 704 (S.D. N.Y. 1959), *aff'd*, 288 F.2d 218 (2nd Cir. 1961).

Plaintiff was entitled to prove monetary equivalent of loss, in terms of estimated replacement costs, to surviving children caused by deprivation of their mother's services, through testimony of an expert witness.

### North Carolina

**1B** N.C. Gen. Stats. § 28A-18-2 (1981).

**2A** *Beck v. Carolina Power and Light Co.*, 291 S.E.2d 897 (N.C. App. 1982).

In wrongful death action, testimony of economic expert on prospect of future losses was not objectionable as being unduly speculative, because some speculation is necessary in determining damages.

*King v. Britt*, 148 S.E.2d 594 (N.C. 1966).

In assessing damages for personal injuries, only the present worth of such damages is to be awarded as the plaintiff is to be paid in advance for future losses.

**3A** *Andrews v. Peters*, 330 S.E.2d 638 (N.C. App. 1985), *review denied*, 337 S.E.2d 65, *aff'd*, 347 S.E.2d 409.

**4A** *Mosley v. United States*, 538 F.2d 555 (4th Cir. 1976).

Applying North Carolina law.

**4D** *Scallon v. Hooper*, 293 S.E.2d 843, (N.C. App. 1982), *petition denied*, 295 S.E.2d 480.

Instruction to jury not required.

**5D** *Mosley v. U.S.*, 499 F.2d 1361 (4th Cir. 1974).

FTCA action. Evidence relating to decedent's personal expenditures was



necessary for a proper review of award in a death action.

N.C. Gen. Stats. § 28A-18-2 (1981).

Providing for recovery of the “net income” of the decedent.

**6A** N.C. Gen. Stats. § 28A-18-2 (1981).

Includes services of decedent as one proper item of damages for wrongful death.

### North Dakota

**1B** N.D. Cent. Code §§ 32-21-01; 32-21-02; 32-21-04 (1976).

**2C** *Brauer v. James J. Igoe & Sons Construction, Inc.*, 186 N.W.2d 459 (N.D. 1971).

Where no exception was made to omission of instruction on present value, such omission could not be raised on appeal, absent misdirection in trial court’s instructions.

**3A** *Keller v. Gamma*, 378 N.W.2d 867 (N.D. 1985).

**4D** *Anderson v. Teamsters Local 116 Bldg. Club, Inc.*, 347 N.W.2d 309 (N.D. 1984).

Instruction not required.

*Eriksen v. Boyer*, 225 N.W.2d 66 (N.D. 1974).

*South v. National Railroad Passenger Corp. (AMTRAK)*, 290 N.W.2d 819 (N.D. 1980).

**6A** *Stejskal v. Darrow*, 215 N.W. 83 (N.D. 1927).

In awarding damages for death, jury may consider pecuniary value of services which beneficiary might reasonably have expected.

### Ohio

**1B** Ohio Const. Art. I, § 19a

Amount of damages recovered for wrongful death shall not be limited by law.

Ohio Rev. Code Ann. §§ 2125.01; 2125.02.

**2A** *Petition of U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), *reh’g denied*, 403 U.S. 924.

An award for future damages must be reduced to present value in order to take into account the earning power of money; prospect of a future decline in purchasing power of the dollar may not be used to offset the reduction to present value. Maritime action.

**3A** *Pryor v. Webber*, 263 N.E.2d 235 (Ohio St. 1970).

*Rigney v. Cincinnati Street R. Co.*, 131 N.E.2d 413 (Ohio App. 1954).

**4C** *Maus v. New York, C. & S.L.R. Co.*, 135 N.E.2d 253 (Ohio).

Estimation of taxes is too speculative.

*Kalavity v. United States*, 584 F.2d 809 (1978).

Federal Tort Claims Act.

**4D** *Terveer v. Baschnagel*, 445 N.E.2d 264 (Ohio App. 1982).

Instruction not required.

*Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973).

Applying Ohio law.

**5D** Ohio Rev. Code Ann. § 2125.02 (1982).

Provides for "loss of support" damages to survivors in wrongful death actions. While a deduction is implied by the term "loss of support," it is unclear whether the deduction should be for likely consumption or for maintenance expenditures.

**6A** *Davis v. Guarnieri*, 15 N.E. 350 (Ohio 1887).

In action by administrator of deceased wife for the benefit of her surviving husband and children, evidence that the husband has remarried and that his new wife performed the same services contributed by decedent is not admissible in mitigation of damages.

## Ohio Rev. Code Ann. § 2125.02.

Providing for the recovery for loss of decedent's services.

**Oklahoma****1B** Okla. Stats. Ann. tit. 12, § 1053 (1982).**2A** *Holland v. Dolese Co.*, 643 P.2d 317 (Okla. 1982).

Evidence of prospective future inflation or deflation and its effect upon the future purchasing power of the dollar was competent and relevant in proving loss of future earnings in wrongful death action.

**3A** *Hughey v. Stephens*, 275 P.2d 254 (Okla. 1954), *overruled on other grounds*, *Hayward v. Ginn*, 306 P.2d 320 (Okla. 1957).

*Keispert v. Williams*, 333 P.2d 514 (Okla. 1958).

*Denco Bus Lines, Inc. v. Hargis*, 229 P.2d 560 (Okla.).

**5D** *O'Connor v. U.S.*, 269 F.2d 578 (2nd Cir. 1959).

FTCA action. Applying Oklahoma law. In computing damages for wrongful death, allowance must be made for deceased's own share in money available for family use.

**6A** *Cartwright v. Atlas Chem. Indus. Inc.*, 593 P.2d 104 (Okla. App. 1979).  
Pecuniary value of lost services may be recovered in wrongful death action.**Oregon****1C** Ore. Rev. Stats. § 30.020.

Provides for both measures of damages: loss to the estate and loss to the survivors.

**2A** *Parries v. Labato*, 597 P.2d 356 (Or. App. 1979).

Jury was not required to be instructed to use a particular formula or specific rate of interest or inflation, especially since the expert economists differed not only as to the interest rate but also as to whether and to what extent to consider the rate of inflation.

**3A** *Henderson v. Hercules, Inc.*, 646 P.2d 658 (Or. App. 1982).**4D** *Salsgiver v. E.S. Rutter Co.*, 608 P.2d 951 (Or. 1979).**5D** *Durkoop v. Mishler*, 378 P.2d 267 (Or. 1963).

Under wrongful death statute, the measure of damages is the pecuniary benefit which could "reasonably have been anticipated" by the beneficiary of the statute through the continued life of the decedent.



Ore. Rev. Stats. § 30.020.

Providing for survivor's recovery of "pecuniary loss" due to death of decedent. These cases implicitly suggest that a deduction be made but do not indicate whether it should be calculated as likely consumption or maintenance expenditures.

**6A** *Durkoop v. Mishler*, 378 P.2d 267 (Or. 1963).

Trial court properly refused to instruct the jury that the measure of damages was limited to the economic loss sustained by the widow from her husband's death in that, during his lifetime, he had rendered personal services which were of benefit to her.

*Ross v. Robinson*, 124 P.2d 918 (Or. 1942).

Evidence as to what household duties deceased wife performed was admissible on issue of damages.

Ore. Rev. Stats. § 30.020.

Providing for the recovery of damages for lost services of the decedent.

### Pennsylvania

**1B** PA. Consol. Stats. Ann. tit. 42 § 8301 (1982).

**2C** *Kaczowski v. Bolubasz*, 421 A.2d 1027 (Pa. 1980).

In awarding damages for lost future earnings, the court, upon proper foundation, shall consider the victim's lost future productivity and, as a matter of law, future inflation shall be presumed equal to future interest rates with those factors offsetting; thus the practice of discounting to present value will be abandoned so that the impact of inflation will be reflected without specifically submitting the question to the jury. In other words, productivity or real wage growth may be considered, but neither wage growth due to inflation nor discounting can be considered.

**3C** *Kagarise v. Shover*, 275 A.2d 855 (Pa. Super.).

Rule was violated where court allowed jury to consider evidence that plaintiff was paid for some of the days she was absent from work due to accident.

*Leeper v. United States*, 756 F.2d 300 (3rd Cir. 1985).

Applying Pa. law. Trial court erred in declining to apply collateral source rule. Diminution in pension benefits due to sick leave and wages lost due to sick leave payments could have been used for some other illness not caused by defendant.

*Stevenson v. Pennsylvania Sports & Enter.*, 93 A.2d 236 (Pa. 1952).

Rejecting rule for contractual obligations.

*Kite v. Jones*, 132 A.2d 1027 (1980).

Rejecting rule for contractual payments.

*Kelly v. Carpenter*, 32 Del. Co. R. 277 (1943).

Rejecting rule for contractual obligations.

**4C** *Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co.*, 190 A.2d 293 (Pa. 1963).

Deduction for taxes improper.

*Tarter v. Souderton Motor Co.*, 257 F.Supp. 598 (E.D. Pa. 1966).

Applying Pennsylvania law, deduction improper.

*Vizzini v. Ford Motor Co.*, 569 F.2d 754 (3rd Cir. 1977).

Applying Pennsylvania law. Deduction for taxes on future income is improper.

**4D** *Gradel v. Inouye*, 421 A.2d 674 (Pa. 1980).

Instruction to jury improper.

*Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 474 A.2d 605 (Pa. Super. 1984).

**5D** *Murray v. Philadelphia Transportation Co.*, 58 A.2d 323 (Pa. 1948).

"Cost of maintenance" deduction.

*Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971).

*McClinton v. White*, 427 A.2d 218 (Pa. Super. 1981), vacated on other grounds, 444 A.2d 85 (Pa. 1982).

View of decedent as "an economic unit capable of producing earnings, but subject to the costs of production." Cost of maintenance deduction to include the "necessary and economical sum which a decedent would be expected to spend, based upon his station in life, for food, clothing, shelter, medical attention and some recreation." While a maintenance deduction is suggested, the terms "station in life" and "some recreation" suggest a deduction somewhat greater than necessary for minimum maintenance (subsistence). This may mean an amount deducted that is somewhere between a maintenance deduction and a likely consumption deduction.

**6A** *Haddigan v. Harkins*, 441 F.2d 844 (3rd Cir. 1971).

In wrongful death action, administrator of decedent's estate was entitled to recover the present value of the services which decedent would have rendered to her family had she lived, less the probable cost of her maintenance during her life expectancy.

*Gaydos v. Domabyl*, 152 A. 549 (Pa. 1930).

In wrongful death action, pecuniary loss may be shown through services, food, clothing, education, entertainment, gifts bestowed, and in other ways.

## Rhode Island

**1B** R.I. Gen. Laws § 10-7-10 (1971).

**2A** *Markham v. Cross Transportation, Inc.*, 376 A.2d 1359 (R.I. 1977).

Predictions of wage growth due to economic conditions over period of time are not so speculative as to be patently inadmissible.

**3A** *Bookbinder v. Rotondo*, 285 A.2d 387 (R.I.).

*Perry v. New England Transp. Co.*, 45 A.2d 481 (R.I. 1946).

In absence of statute to the contrary, weight of authority favors general rule.

*Audette v. New England Transp. Co.*, 46 A.2d 570 (R.I. 1946).

*Coia v. Eastern Concrete Products Co.*, 127 A.2d 858 (R.I. 1956).

*Soucy v. Martin*, 402 A.2d 1167 (R.I. 1979).



*Oddo v. Cardj*, 218 A.2d 373 (R.I. 1966).

Value of nursing services gratuitously rendered is also recoverable.

4E *Oddo v. Cardj*, 218 A.2d 373 (R.I. 1966).

Deduction for taxes on future income is improper. (Personal injury.)

But see,

*Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

Applying Rhode Island law. Deduction for future taxes allowed in a wrongful death action.

5D *Wiesel v. Cicerone*, 261 A.2d 889 (R.I. 1970).

Projected future earning power to be reduced by cost of personal maintenance.

*McCabe v. Narragansett Lighting Co.*, 59 A. 112 (R.I. 1904).

Deduction for decedent's personal expenses to be based on "what the deceased would have to lay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits."

*Romano v. Duke*, 304 A.2d 47 (R.I. 1973).

Damages in wrongful death actions are determined by ascertaining gross amount of decedent's prospective income, deducting what decedent would have had to spend as a producer computed according to his status in life, his means and personal habits to acquire such income, and reducing to present value. Apparent combination of the likely consumption (reference to station in life, means, habits) approach and the maintenance expenditures (money required to be spent as a producer to generate income) approach.

5E R.I. Gen. Laws § 10-7-1.1

Providing for the deduction from gross earnings of decedent of his personal expenses.

6A *Burns v. Brightman*, 117 A. 26 (R.I. 1922).

Damages in wrongful death action for the death of a married woman are allowed, even though she was not employed, because she devoted her time and energy to the maintenance of her household and the care of her husband and children.

## South Carolina

1B S.C. Code Ann. §§ 15-15-20- 15-51-40 (1977).

2A *Brooks v. U.S.*, 273 F.Supp. (D. S.C. 1967).

Federal Tort Claims Act. Determination of damages should be established through facts and data duly proven, sufficient to furnish the basis from which a jury or court may approximate the proper amount with reasonable certainty. Discount rate to be used was governed largely by facts of which the court took judicial notice.

3A *Rhodes v. Spartanburg County*, 207 S.E.2d 85 (S.C.).

*Young v. Warr*, 165 S.E.2d 797 (S.C.).

Trial court properly sustained objection to cross examination of plaintiff

that would have shown plaintiff was still drawing regular pay and receiving allotment from Veteran's Association.

*Powers v. Temple*, 156 S.E.2d 759 (S.C.).

**4A** *Brooks v. United States*, 273 F.Supp. 619 (D. S.C. 1967).

**5B** *Smith v. Wells*, 188 S.E.2d 470 (S.C. 1972).

In fixing damages under the Wrongful Death Act, the question is not the value of the human life lost, but rather what are the damages sustained by the beneficiaries from the death.

*Brooks v. United States*, 273 F.Supp. 619 (D. S.C. 1967).

"Probable" cost of South Carolina decedent's living and other expenses was deductible in fixing pecuniary loss as result of wrongful death; determination of amount to be deducted largely rested upon considerations of common sense and normal experience. Amount was determinable by allocating 80% of prospective earnings to the widow and 3 children, subject to reduction of 10% as each child attained majority and levelling off at 50% for wife alone after all children reached majority.

**6A** *Brooks v. United States*, 273 F.Supp. 619 (D. S.C. 1967).

To recover reasonable value of South Carolina decedent's services around the house, evidence that such help and care were being given and were likely to continue was necessary.

### South Dakota

**1B** S.D. Comp. Laws § 21-5-7 (1979).

**2C** *Flagtwet v. Smith*, 367 N.W.2d (S.D. 1985).

Where defendant in wrongful death suit presented no expert opinion evidence on damages, trial court did not clearly err in adopting analysis as to amount of damages proposed by widow's expert under the total offset rule. In other words, a total offset is allowed but not required.

**4D** *Dehn v. Prouty*, 321 N.W.2d 534 (S.D. 1982).

Instruction not required.

*Armstrong v. Minor*, 323 N.W.2d 127 (S.D. 1982).

### Tennessee

**1C** Tenn. Code Ann. §§ 20-5-106; 20-5-113

Language appears to indicate a "loss to the estate" approach. However, reference to the "damages resulting to the parties for whose use and benefit the action survives" adds the element of "loss to survivors."

*Newman v. Simmons*, 466 S.W.2d 506 (Tenn. App. 1970).

Measure of damages for wrongful death is the pecuniary value of decedent's life and is the same as the loss suffered by his estate.

*Memphis Street Ry. Co. v. Cooper*, 313 S.W.2d 444 (Tenn. 1958).

In a wrongful death action, neither the claim nor the recovery becomes a part of the estate. However, the measure of damages is based on the pecuniary value of decedent's life and not on the pecuniary loss to the survivors.



- 2A** *Monday v. Millsaps*, 264 S.W.2d 6 (Tenn. App. 1953).  
In determining whether damages award is excessive, court has duty to consider inflation and high cost of living.
- 3A** *Illinois C. R. Co. v. Porter*, 94 S.W. 666 (Tenn. 1906).
- 4D** *Dixie Feed and Seed Co. v. Byrd*, 376 S.W.2d 745 (Tenn. App. 1963), *appeal dismissed*, 379 U.S. 15, 85 S.Ct. 147.  
Instruction improper. (apparently recognizing rule) (personal injury)  
*Stallcup v. Taylor*, 463 S.W.2d 416 (Tenn. App. 1970).  
(instruction improper) (wrongful death)  
*Johnson v. Husky Industries, Inc.*, 536 F.2d 645 (6th Cir. 1976).  
Applying Tennessee law. (wrongful death)
- 5C** *Wallace v. Couch*, 642 S.W.2d 141 (Tenn. 1982).  
Wrongful death damages to be reduced by the amount decedent's probable living expenses had decedent lived. This includes those costs which, under the standard of living followed by decedent, would have been reasonably necessary to keep himself in such condition of health and well-being that he could maintain his capacity to earn money. Especially because of this last phrase, it appears that only maintenance-level expenditures, necessary to keep the worker sufficiently healthy to sustain his capacity to earn income, are to be deducted.
- 6A** *Knoxville Ry. & Light Co. v. Davis*, 3 Tenn. ch. App. 552 (Higgins) (1912).  
Pecuniary value of lost household services may be recovered.

## Texas

- 1B** Tex. Civ. Stats. Ann. tit. 4 § 71.010.
- 2A** *International Harvester Co. v. Zavala*, 623 S.W.2d 699 (Tex. Civ. App. 1981).  
In reviewing jury damages award, appellate court may consider the effects of double-digit inflation.
- 3A** *Greyhound Lines, Inc. v. Craig*, 430 S.W.2d 573 (Tex. Civ. App.).  
*Ryan v. Hardin*, 495 S.W.2d 345 (Tex. Civ. App.).  
*Missouri P.R. Co. v. Jarrard*, 65 Tex. 560 (1886).  
*Houston Belt and Terminal R. Co. v. Johansen*, 179 S.W. 853 (Tex. 1915).  
*Jordan v. Walker*, 448 S.W.2d 837 (Tex. Civ. App.), error ref n.r.e.  
*Green v. Rudsenske*, 320 S.W.2d 228 (Tex. Civ. App. 1959).
- 4C** *John F. Buckner & Sons v. Allen*, 289 S.W.2d 387 (Tex. Civ. App.).  
Estimation of taxes is too speculative. Deduction improper.
- 4D** *Missouri K. T. R. Co. v. McFerrin*, 291 S.W.2d 931 (Tex. 1956).  
Instruction improper. (by implication) (wrongful death)  
*Turner v. General Motors*, 584 S.W.2d 844 (Tex. 1979).  
(instr.) By implication (personal injury).  
*Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), rehearing denied, 744 F.2d 94, and cert. denied, 105 S.Ct. 1739.  
Applying Texas law—(instructions).  
*Texas Consol. Trans. Co. v. Eubanks*, 340 S.W.2d 830 (Tex. Civ. App. 1960).
- 5D** *Halliburton Co. v. Olivas*, 517 S.W.2d 349 (Tex. Civ. App. 1974).  
Calculation of pecuniary loss in a wrongful death action should bear

some relation to the pecuniary benefits which decedent's spouse or child might reasonably have expected to receive had the wrongful death not occurred. Deduction for decedent's personal consumption is implied, but there is no indication of whether that deduction is measured by likely consumption or maintenance expenditures.

- 6A** *Dover Corp. v. Perez*, 587 S.W.2d 761 (Tex. Civ. App. 1979), *Supp. op.*, 591 S.W.2d 547 (Tex. Civ. App. 1979).

In wrongful death action, compensable elements to be considered for wife's loss of husband are not only future pecuniary loss but also intangibles such as loss of care, maintenance, support, services, advice, and counsel.

### Utah

- 1B** Utah Const. Art. XVI, § 5.

*Platis v. U.S.*, 288 F.Supp. 254 (D. Utah 1968), *aff'd.*, 409 F.2d 1009 (10th Cir. 1969).

- 2A** *Duffy v. Union Pacific R. Co.*, 218 P.2d 1080 (Utah 1950).

The present cost of living and diminished purchasing power of the dollar may be considered by the jury.

*Platis v. U.S.*, 288 F.Supp. 254 (D. Utah 1968), *aff'd.*, 409 F.2d 1009 (10th Cir. 1969).

Under Utah law, award may consider as a factor the decreased purchasing power of the dollar.

- 6A** *Platis v. U.S.*, 288 F.Supp. 254 (D. Utah 1968). *aff'd.*, 409 F.2d 1009 (10th Cir. 1969).

Utah Wrongful Death Act allows recovery only for deprivation of some service, attention, or care that has in it the element of pecuniary value. Plaintiff in personal injury action may recover as special damages the cost of household help necessitated by the injury.

### Vermont

- 1B** Vt. Stats. Ann. tit. 14, § 1492 (1982).

- 2A** *Halloran v. New England Tel. & Tel. Co.*, 115 A. 143 (Vt. 1921).

Jury may consider impaired purchasing power of money even though no evidence on the issue was presented.

- 6A** *Allen v. Moore*, 199 A. 257 (Vt. 1938).

Damages recoverable in a parent's action for the death of a minor child are determined on evidence of the same character and quantum as in ordinary cases, that is, in order to recover for loss of services, there must be some evidence from which their value may at least be inferred.

### Virginia

- 1B** Va. Code Ann. §§ 8.01-52; 8.01-54 (1977).

- 3A** *Phillips v. United States*, 182 F.Supp. 312 (D.C. Va. 1960).

Applying Virginia law.

*Gainar v. S.S. Longview Victory*, 226 F.Supp. 912 (D. Va.).

Applying Virginia law. Court would disallow claim for value of wife's



services occasioned by necessary nursing care to injured husband.  
*Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958).

Applying Virginia law.

Va. Code § 8.01-35 (1977).

- 4C** *Hoge v. Anderson*, 106 S.E.2d 121 (Va.).

Estimation of taxes is too speculative. Plaintiff's gross pay at time of injury controls, not the net or "take home" pay.

### Washington

- 1B** Wash. Rev. Code Ann. § 4.20.020.

- 2A** *Perez v. Pappas*, 659 P.2d 475 (Wash. 1983).

Appropriate discount rate to be applied to structured settlement of personal injury action constantly changes based on a variety of figures best understood by economists and was not appropriate item for court to strictly define for all cases.

- 3A** *Stone v. Seattle*, 391 P.2d 179 (Wash.).

Loss of future earnings not to be reduced because of payments from collateral source, such as social security or veteran's pension.

- 4C** *Hinzman v. Palmanteer*, 501 P.2d 1228 (Wash. 1972).

Deduction for taxes on future income improper on the facts in this case. However, possible exception for large incomes.

*Boeke v. International Paint Co.*, 620 P.2d 103 (Wash. App. 1980).

Apparently recognizing rule that instruction to jury is improper.

- 5B** *Hinzman v. Palmanteer*, 501 P.2d 1228 (Wash. 1972).

Appropriate means for measuring lost earning capacity of decedent, in suit brought in behalf of estate, was to deduct personal expenses from gross earnings.

### West Virginia

- 1B** W. Va. Code Ann. § 55-7-6 (1982).

- 3A** *Ellard v. Harvey*, 231 S.E.2d 339 (W. Va. 1976).

*Kretzer v. Moses Pontiac Sales, Inc.*, 201 S.E.2d 275 (W. Va.).

Value of gratuitously rendered nursing care is recoverable.

*Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va.).

- 4C** *Flannery v. U.S.*, 297 S.E.2d 433 (W. Va. 1982), later proceeding, 718 F.2d 108 (4th Cir.)

Deduction for income taxes improper.

- 4D** *Crum v. Ward*, 122 S.E.2d 18 (W. Va. 1961).

Apparently recognizing rule that instruction is improper.

- 6A** W. Va. Code § 55-7-6 providing for recovery for lost services of decedent.

*Salerno v. Manchin*, 213 S.E.2d 805 (W. Va. 1974).

In wrongful death action, a dependent distributee of decedent is entitled to recover damages for pecuniary loss occasioned by the death only if he was, in fact, dependent upon the deceased for support, though such support may have been monetary or for services.

**Wisconsin**

- 1B** Wis. Stats. Ann. § 895.04 (1982).
- 2A** *Cords v. Anderson*, 259 N.W.2d 672 (Wis. 1977).  
It was an abuse of discretion to refuse to consider the effect of inflation in awarding damages for future medical costs. Although trial court was not limited to mathematically applying a 5% annual inflation rate indefinitely, it was to consider inflation as it seemed reasonably probable in reaching a reasonable damage figure.
- 3A** *Cunnen v. Superior Iron Works Co.*, 184 N.W. 767 (Wis. 1921).  
*Campbell v. Sutliff*, 214 N.W. 374 (Wis. 1927), *ovrld on other grounds*, *Powers v. Allstate Ins. Co.*, 102 N.W.2d 393 (Wis. 1960).  
If either party is to profit from payments by a collateral source, it should be the injured party.  
*Prunty v. Vandenberg*, 44 N.W.2d 246 (Wis. 1950).  
*Ashley v. American Auto. Ins. Co.*, 119 N.W.2d 359 (Wis. 1963).  
*Thoreson v. Milwaukee & Suburban Trans. Co.*, 201 N.W.2d 745 (Wis. 1972).
- 4C** *Behringer v. State Farm Mut. Auto. Ins. Co.*, 95 N.W.2d 249 (Wis.).  
Estimation of taxes is too speculative.
- 4C, D** *Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc.*, 94 N.W.2d 577 (Wis. 1959).  
Apparently recognizing rule.
- 5B** *Neuser v. Thelen*, 244 N.W. 801 (Wis. 1932).  
Instruction in wrongful death action implying that wife was entitled to recover for husband's death the full amount of his future earnings was error. Such instruction was error since widow was not entitled to recover her decedent's earnings, but only the value of the support and pecuniary benefit she would "probably" have received from him during his life had he lived.
- 6A** *Herro v. Northwestern Malleable Iron Co.*, 194 N.W. 383 (Wis. 1923).  
Apparently allowing for recovery of the pecuniary value of lost household services.

**Wyoming**

- 1B** Wyo. Const. Art. 10, § 4.  
Damages not to be limited.  
Wyo. Stats. Ann. § 1-38-102 (1977).
- 3A** *Grayson v. Williams*, 256 F.2d 61 (10th Cir.).
- 4D** *Barnette v. Doyle*, 622 P.2d 1349 (Wyo. 1981).  
Instruction to jury is improper.
- 5B** *Coliseum Motor Co. v. Hester*, 3 P.2d 105 (Wyo. 1931).  
One criterion of damages for wrongful death is not what deceased would have earned, but amount which survivors probably failed, by reason of death, to receive out of such earnings.



## APPENDIX 2

### CITATIONS SUPPORTING TABLE 2

#### Federal

Courts of Appeals have addressed the issue of hedonic damages in different ways. Some of the more significant decisions follow:

#### Second Circuit

*Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (1974), *aff'd in part and rev'd in part*, 524 F.2d 384 (2d Cir.).

Evidence failed to show that decedent remained conscious after the impact so as to justify an award for conscious pain and suffering. However, no such showing is required for an award for future loss of enjoyment of life which here was seen to be substantial and justified a separate award of \$100,000.

*Rufino v. United States*, 829 F.2d 354 (2d Cir. 1987).

F.T.C.A. action where the Circuit Court held loss of enjoyment is a separately compensable injury and cognitive awareness is not a prerequisite to recovery. The 2d Circuit here citing its express disagreement with the 4th Circuit's decision in *Flannery*.

#### Third Circuit

*Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973).

Contention that the shortening of life expectancy and loss of enjoyment claims should be separate from pain and suffering are without merit. The District Court awarded damages for the "inclusive area of pain and suffering" and lost enjoyment was included in that award.

#### Fourth Circuit

*Sweeney v. Car/Puter International Corp.*, 521 F.Supp. 276 (D.S.C. 1981).

Award for loss of enjoyment of life where permanent spinal injury adversely affected previous relationships and precluded activities.

*McNeill v. United States*, 519 F.Supp. 283 (D.S.C. 1981).

F.T.C.A. action. Loss of enjoyment of life is a separate element of damages in determining damages for personal injury.

*Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), *cert. den'd*, 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874 (1984).

F.T.C.A. action. Damages that are not compensatory are punitive. To be compensatory, the damages must be meaningful to the injured plaintiff, therefore cognitive awareness is required.

#### Sixth Circuit

*Pierce v. New York Cent. R.R.*, 409 F.2d 1392 (6th Cir. 1969), *rem'd* 304 F.Supp. 44 (W.D. Mich.).

Applying Michigan law. Not reversible error for a judge to make distinct awards

for pain and suffering and lost enjoyment. However, submission of these two components of damages to a jury as separate items is not authorized. The fear is of speculative and/or duplicative awards.

*Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978).

Applying Ohio law, held that damages are punitive and not compensatory, when awarded solely for the purpose of punishing a tortfeasor.

*Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980), cert. den'd, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497.

Applying state law. Trial court did not err in itemizing damages for both loss of enjoyment of life and permanent injury, since the elements were properly treated as distinct.

### **Seventh Circuit**

*Sherrod v. Berry*, 629 F.Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir.), reh. gr. and judgment vacated on other grounds, 835 F.2d 1222 (7th Cir.).

Action for wrongful death under Section 1983. Economist's testimony concerning the hedonic value of human life was admissible and deemed "invaluable".

*Nemmers v. United States*, 681 F.Supp. 567 (C.D. Ill. 1988).

F.T.C.A. action. Non-pecuniary damages limited by plaintiff's disability, which restricted his ability to appreciate his loss.

### **Ninth Circuit**

*Felder v. United States*, 543 F.2d 657 (9th Cir. 1976).

F.T.C.A. action. Statutory provisions that damages be assessed under state law but requiring damages to be "compensatory" in nature and not "punitive" govern amount of non-pecuniary damages as well as pecuniary damages.

*Guyton v. Phillips*, 532 F.Supp. 1154 (N.D. Cal. 1981).

Section 1983 action based on California survival statute.

*United States v. English*, 521 F.2d 63 (9th Cir. 1975).

F.T.C.A. action for wrongful death. Amount of damages to be awarded under F.T.C.A. is governed by law of place of wrongful act, but if local law provides for punitive damages, or permits standards which result in plaintiff getting more than compensatory damages, only compensatory damages may be awarded.

*Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984).

F.T.C.A. action. Components and measure of damages in F.T.C.A. actions are taken from law of state where tort occurred. Washington law entitles tort plaintiff to damages for pain and suffering, mental anguish, and loss of capacity to lead a normal life, and characterizes such awards as compensatory.

### **Tenth Circuit**

*DeWeese v. United States*, 419 F.Supp. 170 (D. Colo. 1976), *aff'd in part and rem'd in part*, 576 F.2d 802 (10th Cir. 1976), 47 A.L.R.Fed. 723.

Applying Colorado law. Loss of enjoyment of life as a separate element of damages.

*Rodriguez v. Denver & Rio Grande Western Rail Road Co.*, 512 P.2d 652 (Colo. App. 1973).

FELA action. Loss of enjoyment of life as a separate element of damages.



**Alabama**

*Alabama Power Co. v. Henderson*, 342 So.2d 323 (Ala. 1976).

Foregone pleasures of life considered in appellate review and upholding of award to plaintiff.

**Alaska**

*Morrison v. State*, 516 P.2d 402 (Alaska 1973).

It was not error for trial court to include award for pain and suffering in category of damages labeled "diminished enjoyment of life."

**Arizona**

*Felder v. United States*, 543 F.2d 657 (9th Cir. 1976).

*Pacht v. Morris*, 107 Ariz. 392, 489 P.2d 29 (1971).

Restricted activities, pain and suffering and future complications coupled with permanency of injury considered on review of award for excessiveness.

**Arkansas**

*Bailey v. Bradford*, 247 Ark. 1048, 449 S.W.2d 180 (1970).

*Chicago, Rock Island and Pacific Railway Co. v. Lockwood*, 244 Ark. 122, 424 S.W.2d 158 (1968).

Includes change of disposition and physical impairment along with restricted activities.

**California**

*Akers v. Kelley Company*, 173 Cal. App. 3d 833, 219 Cal. Rptr. 513 (1985), *reh. denied*, 220 Cal. Rptr. 299.

Error to combine "pain and suffering" with "loss of enjoyment of life." The vice of coupling the two is that the door is thereby opened to double compensation.

*Guyton v. Phillips*, 532 F.Supp. 1154 (N.D. Cal. 1981).

Section 1983 action based on California survival statute.

*Huff v. Tracy*, 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976).

Loss of enjoyment recovery is allowed, but not in addition to recovery for pain and suffering. To award as a separate element would be to allow duplicative or double recovery.

*Purdy v. Swift*, 34 Cal. App. 2d 656, 94 P.2d 389 (1939).

Loss of enjoyment of life is "a factor" used to determine whether an award was excessive, even though the issue was not raised on appeal.

*United States v. English*, 521 F.2d 63 (9th Cir. 1975).

F.T.C.A. action for wrongful death. Amount of damages to be awarded under F.T.C.A. is governed by law of place of wrongful act, but if local law provides for punitive damages, or permits standards which result in plaintiff getting more than compensatory damages, only compensatory damages may be awarded.

**Colorado**

*DeWeese v. United States*, 419 F.Supp. 170 (D. Colo. 1976), *aff'd in part and rem'd in part*, 576 F.2d 802 (10th Cir. 1976), 47 A.L.R.Fed. 723.

Applying Colorado law. Loss of enjoyment of life as a separate element of damages. *Hildyard v. Western Fasteners, Inc.*, 33 Colo. Ct. App. 396, 522 P.2d 596 (1974). *Rauschenberger v. Radetsky*, 712 P.2d 1089 (Colo. App. 1985).

Wrongful death action. Survivors claimed damages for loss of enjoyment of life and claim was dismissed.

*Rodriguez v. Denver & Rio Grande Western Rail Road Co.*, 512 P.2d 652 (Colo. App. 1973).

FELA action. Loss of enjoyment of life as a separate element of damages. *Wells v. Colorado College*, 478 F.2d 158 (10th Cir. 1973).

Applying Colorado law, instruction would not have been improper if it submitted loss of enjoyment of life separate and apart from pain and suffering.

### Connecticut

*Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (1974), *aff'd in part and rev'd in part*, 524 F.2d 384 (2d Cir.).

Evidence failed to show that decedent remained conscious after the impact so as to justify an award for conscious pain and suffering. However, no such showing is required for an award for future loss of enjoyment of life which here was seen to be substantial and justified a separate award of \$100,000.

*Floyd v. Fruit Industries*, 144 Conn. 659, 136 A.2d 918 (1957).

The question of "an informed valuation of the total destruction of the capacity to carry on life's activities" is separate from the question of destroyed earning capacity and may enhance the verdict (but the loss is measured as it affected the decedent, not the family).

*Katsetos v. Nolan*, 170 Conn. 637, 368 A.2d 172 (1976).

The "just damages" in wrongful death are 1) value of the lost earning capacity less deductions for necessary living expenses reduced to present value 2) compensation for the destruction of the capacity to carry on and enjoy life's activities in a way the decedent would have done had she lived, and 3) compensation for conscious pain and suffering.

*Kiniry v. Danbury Hospital*, 183 Conn. 446, 439 A.2d 406 (1981).

Wrongful death damages include three elements: conscious pain and suffering, lost earnings (minus necessary living expenses), and loss of enjoyment of life.

*Pool v. Bell*, 209 Conn. 538, 551 A.2d 1254 (1988).

Closing argument may not include any mathematical formula for arriving at pecuniary value of plaintiff's injuries.

### Delaware

*Hanson v. Reiss Steam Ship Co.*, 184 F.Supp. 545 (D. Del. 1960).

Loss of enjoyment of life used in calculating damages for pain and suffering.

*Prettyman v. Topkis*, 39 Del. 568, 3 A.2d 708 (1938).

Lost enjoyment of living may be considered on appellate court review of an award's adequacy.

*Winter v. Pennsylvania Rail Road*, 45 Del. 108, 68 A.2d 513 (1949).

No separate recovery for deprivation of life's pleasures. However, such evidence may be viewed in light of the effect a permanent disability has on activities.



**District of Columbia**

*Taylor v. Washington Terminal Company*, 409 F.2d 145, 133 U.S. App. D.C. 110 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, and *on remand*, 308 F.Supp. 1152.

FELA action. Recovery for lost enjoyment for ulcer and removal of  $\frac{3}{4}$  of stomach resulting from injury.

**Florida**

Art. I Section 21 Florida Constitution as Amended.

*In re Advisory Opinion to Attorney General, Limitations of Non-economic Damages in Civil Actions*, 520 So.2d 284 (1988).

Damages for personal injury cannot exceed \$100,000 aggregate for non-pecuniary losses, including pain and suffering, loss of enjoyment of life, loss of consortium, etc. *Florida Patients Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985), *decided on other grounds*, Overton, J., concurring in part and dissenting in part.

Would reject *Flannery (WV.)* rule requiring plaintiff's awareness of loss as essential for recovery.

*Food Fair Stores, Inc. v. Morgan*, 338 So.2d 89 (Fla. Dist. Ct. App. 1976).

Lost enjoyment is compensable in addition to pain and suffering.

*Powell v. Hegney*, 239 So.2d 599 (Fla. Dist. Ct. App. 1970).

Lost enjoyment incorporated into standard jury instructions as inability to lead a normal life; refusal to give this instruction is reversible error.

**Georgia**

*Aretz v. United States*, 456 F.Supp. 397 (S.D. Ga. 1978), *aff'd*, 604 F.2d 417 (5th Cir. 1979), *reh. gr.*, 616 F.2d 254 (5th Cir.), *later proceeding*, 248 Ga. 19, 280 S.E.2d 345, and *rem'd*, 660 F.2d 531 (5th Cir.), *later app.*, 733 F.2d 760 (11th Cir.).

F.T.C.A. action interpreting state law. Georgia seems to recognize lost enjoyment as a category of pain and suffering.

*Underwood v. Atlanta & West Point Railroad Co.*, 105 Ga. Ct. App. 340, 124 S.E.2d 758 (1962), *aff'd in part and rev'd in part on other grounds*, 218 Ga. 193, 126 S.E.2d 785.

Mental distress, caused by impairment of capacity to enjoy life, resulting from a physical injury, "appears to be recognized in Georgia as a proper element of damages."

**Hawaii**

*Rohlfing v. Akiona*, 45 Haw. 373, 369 P.2d 96 (1961), *overruled as to excess earnings by*, *Greene v. Texeira*, 54 Haw. 231, 505 P.2d 1169.

Award under the survival statute must not include compensation for the enjoyment of the life of the deceased. Compensation for "sentimental losses" is recoverable under the wrongful death act.

**Idaho**

*Ranta v. Rake*, 91 Idaho 376, 421 P.2d 747 (1967).

Amount of award upheld because of lost enjoyment of activities even though pecuniary and pain and suffering damages were small.

**Illinois**

*Exchange National Bank of Chicago v. Air Illinois, Inc.*, 167 Ill. App. 3d 1081, 522 N.E.2d 146 (1988).

Holding upheld plaintiff's counsel's request to jury to place a value on human life. *Ferguson v. Vest, et al.*, #87-L-207, Third Judicial Circuit, Madison County, Ill. (1989).

Jury verdict in personal injury action based on the hedonic model of damages. *Nemmers v. United States*, 681 F.Supp. 567 (C.D. Ill. 1988).

F.C.T.A. action. Non-pecuniary damages limited by plaintiff's disability, which restricted his ability to appreciate his loss.

*Sherrod v. Berry*, 629 F.Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir.), *reh. gr. and judgment vacated on other grounds*, 835 F.2d 1222 (7th Cir.).

Action for wrongful death under Section 1983. Economist's testimony concerning the hedonic value of human life was admissible, and deemed "invaluable."

**Indiana**

*Grubbs v. United States*, 581 F.Supp. 536 (N.D. Ind. 1984).

Applying Indiana law. Physical impairment's impact on quality and enjoyment of life is compensable.

**Iowa**

*Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985).

Loss of enjoyment of life is considered as a part of pain and suffering. As a separate element, it would be clearly duplicative.

**Kansas**

*Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938).

Lost enjoyment held not a proper element of damages because of speculative nature. However, a dissenting opinion stated that it would be no more speculative than humiliation, embarrassment, mental pain, suffering or fright, all of which are compensable.

**Kentucky**

*Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S.W. 706 (1988).

Lost enjoyment is a proper factor in determining damages in general.

*Power v. Augusta*, 191 F. 647 (C.C. Ky. 1911).

Award for personal injury is not limited to reducing earning power, loss of time, expense of cure, and pain and suffering. Compensation for the impairment of the ability to act as one would like and the mental pain in contemplation of it is no more difficult to ascertain than is pain and suffering. Substantial justice would not be done in so limiting the measure of recovery. The restrictive view of damages in Kentucky originated in a death action which should have no bearing on the outcome of a personal injury without death case. In a death case, compensation is properly limited to the commercial value of the life, because the award is given to someone else.

**Louisiana**

*Andrews v. Mosley Well Service*, 514 So.2d 491 (La. Ct. App. 1987).



Award for lost enjoyment separate from amount for physical and mental pain and suffering and permanent disability.

*Reed v. John Deere*, 569 F.Supp. 371 (M.D. La. 1983).

To support an award for conscious pain and suffering in a death action, Louisiana law requires a showing that decedent was in fact conscious after the injury and did in fact suffer pain.

### Maine

*Haynes v. Waterville & O. Ry.*, 101 Me. 335, 64 At. 614 (1906).

Upheld award because injury took usefulness and enjoyment out of plaintiff's life and loss of earning power was by no means the extent of the injury.

*Packard v. Whitten*, 274 A.2d 169 (Me. 1971).

Upheld award for pain and discomfort and physical deterioration which left plaintiff an invalid with little ability for the enjoyment of life.

### Maryland

*Culley v. Pennsylvania Railroad*, 224 F.Supp. 710 (D. Del. 1965).

Applying Maryland law. Loss of enjoyment of life as a separate element of damages. Past and future loss of enjoyment of the usual and familiar things of life is a proper element of damages. *But see, Burke v. United States*, 605 F.Supp. 981 (D. Md. 1985). Also applying Maryland law. Loss of enjoyment of life is a factor in determining general damages or damages for pain and suffering.

*McAlister v. Carl*, 233 Md. 446, 197 A.2d 140 (1964).

Loss of enjoyment of life as a separate element of damages.

### Massachusetts

*Clicklich v. Spievack*, 16 Mass. App. 488, 452 N.E.2d 287 (1983), *review den'd*, 390 Mass 1103, 454 N.E.2d 1276.

Lost enjoyment is not compensable for the life that plaintiff would have had if her life had not been shortened. However, plaintiff may recover for shortened life expectancy.

*O'Leary v. U.S. Lines*, 111 F.Supp. 745 (D. Mass 1953).

The common law right to recover for damages for suffering, medical expenses, or actual loss of earning capacity sustained before death survives under Massachusetts law. Claim for mutilation, loss of prospective earnings, or loss of future life expectancy does not survive except insofar as plaintiff feared such loss before death and hence, fell within conscious pain and suffering.

### Michigan

*Dyer v. United States*, 551 F.Supp. 1266 (W.D. Mich. 1982).

*Nice v. Chesapeake & O. R. Co.*, 305 F.Supp. 1167 (W.D. Mich. 1969).

Applying Michigan law. Lost enjoyment as a separate element.

*Pierce v. New York Cent. R.R.*, 409 F.2d 1392 (6th Cir. 1969), *rem'd*, 304 F.Supp. 44 (W.D. Mich.).

Applying Michigan law. Not reversible error for a judge to make distinct awards for pain and suffering and lost enjoyment. However, submission of these two

components of damages to a jury as separate items is not authorized. The fear is of speculative and/or duplicative awards.

**Minnesota**

*Leonard v. Parrish*, 420 N.W.2d 629 (Minn. Ct. App. 1988).

*Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672 (Minn. 1977).

**Mississippi**

*McGowan v. Estate of Wright*, 524 So.2d 308 (Miss. 1988).

Construing state's wrongful death statute. Plaintiff's relationship with the decedent did not support an award. Dissenting opinion by Robertson, J., however, stated earning power is not the only value destroyed by wrongful death—there is a social and psychological value to life over and above pecuniary value. Dissent was joined by members of the majority on this issue.

**Missouri**

*Kohler v. Burlington Northern, Inc.*, 573 S.W.2d 938 (Mo. App. 1978).

*Manko v. United States*, 636 F.Supp. 1419 (W.D. Mo. 1986), *modified by* 830 F.2d 831 (8th Cir.).

Applying Missouri law.

*Walton v. United States Steel Corp.*, 362 S.W.2d 617 (Mo. 1962).

**Montana**

*Walls v. Rue*, 759 P.2d 169 (Mont. 1988).

Awarding damages for present pain and suffering and loss of enjoyment, but denying damages for future pain and suffering and enjoyment of life.

**Nebraska**

*Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.E.2d 697 (1979).

**Nevada**

No citations.

**New Hampshire**

No citations.

**New Jersey**

*Law v. Newark Board of Education*, 175 N.J. Super. 26, 417 A.2d 560 (1980).

*Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973).

Contention that the shortening of life expectancy and loss of enjoyment claims should be separate from pain and suffering are without merit. The District Court awarded damages for the "inclusive area of pain and suffering" and lost enjoyment was included in that award.

**New Mexico**

*Hoskie v. United States*, 666 F.2d 1353 (10th Cir. 1981).



F.T.C.A. action. Although defendant argued that New Mexico had not recognized a cause of action for loss of enjoyment of life, the Court held award was inadequate and that under New Mexico law, the trial judge is required to take into account future pain and suffering caused by mental and physical disabilities.

### **New York**

*McDougald v. Garber*, \_\_\_ N.Y.2d \_\_\_, \_\_\_ N.E.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_ (N.Y. 1989) (1989 WL 13238).

Cognitive awareness held to be a prerequisite to recovery for the loss of enjoyment of life, echoing the analysis of the 4th Circuit in *Flannery*.

*Nussbaum v. Gibstein*, \_\_\_ N.Y.2d \_\_\_, \_\_\_ N.E.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_ (N.Y. 1989).

Accord with *McDougald* as that loss of enjoyment should not be a separate element of damages.

But see, *Rufino v. United States*, 829 F.2d 354 (2d Cir. 1987).

F.T.C.A. action where the Circuit Court held loss of enjoyment is a separately compensable injury and cognitive awareness is not a prerequisite to recovery. Guessing as to New York law. The 2d Circuit here citing its express disagreement with the 4th Circuit's decision in *Flannery*.

### **North Carolina**

*Morrison v. Stallworth*, 73 N.C. App. 196, 326 S.E.2d 387 (1985).

Shortened life expectancy is a compensable element of damages, analogous to loss of enjoyment of life in and to the ability to engage in avocations.

### **North Dakota**

*First Trust Company of North Dakota v. Scheels Hardware and Sports Shop*, 429 N.W.2d 5 (N.D. 1988).

Appropriate for counsel to argue loss of enjoyment of life as a component of pain, discomfort, mental anguish, and impairment of health, mind or person.

### **Ohio**

*Binns v. Fredendall*, 32 Ohio St.3d 244, 513 N.E.2d 278 (1987).

Recovery for emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief, or loss of enjoyment of life caused by the death of another, provided that plaintiff is directly involved and contemporaneously injured in same motor vehicle and accident with deceased or other injured person.

*Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978).

Applying Ohio law, held that damages are punitive and not compensatory, when awarded solely for the purpose of punishing a tortfeasor.

### **Oklahoma**

*Bready v. Tipton*, 407 P.2d 194 (Okla. 1965).

Award for social and economic pleasures of life, suffering and mental anguish upheld.

**Oregon**

*Staples v. Union Pacific R.R.*, 265 Or. 153, 508 P.2d 426 (1973).

FELA action. Recovery permitted for some degree of permanent soreness, fatigue, recurring headaches, sleep problems, worsened disposition and limited participation in activities.

**Pennsylvania**

*Christides v. Little*, 418 A.2d 438 (Pa. Super. Ct. 1980).

Lost enjoyment recovery for surgeon who was permanently incapacitated. He lost his ability to practice his profession.

*Lebesco v. Southeastern Pennsylvania Transp. Authority*, 251 Pa. Super. 415, 380 A.2d 848 (1977).

Permit recovery for loss of enjoyment of life as a separate element.

*Rother v. Interstate and Ocean Transport Co.*, 540 F.Supp. 477 (E.D. Pa. 1982).

Lost enjoyment award for loss of a man's "macho sense of self."

*But see, Willinger v. Mercy Catholic Medical Center*, 482 Pa. 441, 393 A.2d 1188 (1978).

Loss of enjoyment of life is compensable in a survival action only if the decedent "survived" the injury. Lost enjoyment is not a separate element of damages.

**Rhode Island**

No citations.

**South Carolina**

*McNeill v. United States*, 519 F.Supp. 283 (D.S.C. 1981).

F.T.C.A. action. Loss of enjoyment of life is a separate element of damages in determining damages for personal injury.

*Sweeney v. Carl/Puter International Corp.*, 521 F.Supp. 276 (D.S.C. 1981).

Award for loss of enjoyment of life where injury adversely affected previous relationships and precluded activities.

**South Dakota**

*Klug v. Keller*, 328 N.W.2d 847 (S.D. 1982).

Award included damages for severe changes in personal lifestyle and loss of enjoyment of life.

**Tennessee**

*Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980), *cert. den'd*, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497.

Applying state law. Trial court did not err in itemizing damages for both loss of enjoyment of life and permanent injury, since the elements were properly treated as distinct.

**Texas**

*Allen v. Whisenhut*, 603 S.W.2d 244 (Tex.Civ.App. 1980).

Impairment extended beyond any impediment to earning capacity and beyond pain and suffering. Proof of this independent loss is needed to recover.



*Galveston Electric Co. v. Biggs*, 14 S.W.2d 307 (Tex.Civ.App. 1929).

Lost enjoyment is a factor in determining damages for pain and suffering.

### Utah

*Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980).

Lost enjoyment is a factor for pain and suffering.

*Paul v. Kirkendall*, 1 Utah2d 1, 261 P.2d 670 (1953).

Lost enjoyment is a factor in determining damages in general.

### Vermont

No citations.

### Virginia

*Boyd v. Bulala*, 647 F.Supp. 781 (W.D. Va. 1986).

Cap on medical malpractice recovery in Virginia is unconstitutional. Capacity to enjoy life was permanently destroyed, and this was an "injury actually received."

*Reuwer v. Hunter*, 684 F.Supp. 1340 (W.D. Va. 1988).

In the absence of a clear ruling from the Virginia court, this court has ruled that the loss of enjoyment of life is a proper element of damages.

### Washington

*Blodgett v. Olympic Savings and Loan Assn.*, 32 Wash. App. 116, 646 P.2d 139 (1982).

Error to allow a jury instruction on damages that added the phrase "loss or impairment of the capacity to enjoy life"—such a phrase is duplicative because it is contained in physical and mental disability.

*Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984).

F.T.C.A. action. Components and measure of damages in F.T.C.A. actions are taken from law of state where tort occurred. Washington law entitles tort plaintiff to damages for pain and suffering, mental anguish, and loss of capacity to lead a normal life, and characterizes such awards as compensatory.

*Wooldridge v. Woolett*, 626 P.2d 1007 (Wash. App. 1981), *aff'd* 638 P.2d 566.

Recovery for the loss of the ordinary pleasures of life.

### West Virginia

*Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), *cert. den'd* 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874 (1984).

F.T.C.A. action. Damages that are not compensatory are punitive. To be compensatory, the damages must be meaningful to the injured plaintiff, therefore cognitive awareness is required.

*Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982).

Loss of enjoyment of life is a separate element of damages distinct from pain and suffering and cognitive awareness of the injured individual is no prerequisite for recovery.

*Nees v. Julian Goldman Stores, Inc.*, 109 W. Va. 329, 154 S.E. 769 (1930).

Lost enjoyment is a separate element of damages.

*Warth v. Jackson County Court*, 71 W. Va. 184, 76 S.E. 420 (1912).  
Lost enjoyment is a separate element of damages.

**Wisconsin**

*Bassett v. Milwaukee No. Ry.*, 169 Wis. 152, 170 N.W. 944 (1919).

Lost enjoyment is a separate element.

*Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911).

Lost enjoyment is a separate element.

**Wyoming**

*Fox v. Fox*, 75 Wyo. 390, 296 P.2d 252 (1956).

Lost enjoyment is a separate element of damages. Considers the foreclosure of opportunity.

*Mariner v. Marsden*, 610 P.2d 6 (Wyo. 1980).

Where proved, separate recovery for lost enjoyment may be had.