

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

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Abstract

Contributors to the *Journal of Forensic Economics* are compiling a state-by-state series of papers on how economic damages are assessed in personal injury and wrongful death cases. This paper discusses the rules of the court, the court system, and case law for the state of New Jersey. Overall, New Jersey is both different and the same as many other states. The court requires experts to discount to present value, use gender-neutral life expectancy tables, and take personal income taxes into account when estimating earnings losses. New Jersey also accepts expert testimony regarding the loss of companionship services and advice and counsel services in death cases. This paper discusses these issues and others, with the goal of familiarizing forensic economists with the relevant court rules and rulings and standard practices when performing economic damage appraisals in the state of New Jersey.

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I. Introduction

Contributors to the *Journal of Forensic Economics* are compiling a state-by-state series of papers on how economic damages are assessed in personal injury and wrongful death cases. This paper discusses the court system, relevant statutes, and case law for the state of New Jersey. Overall, New Jersey is both different and the same as many other states. The court requires experts to discount to present value, use gender-neutral life expectancy tables, and take personal income taxes into account when estimating earnings losses. New Jersey also accepts expert testimony regarding the loss of companionship services and advice and counsel services in death cases. This paper discusses these issues and others, with the goal of familiarizing forensic economists with the relevant court rules and rulings and standard practices when performing economic damage appraisals in the state of New Jersey.

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This paper is structured as follows. The next section provides an overview of the New Jersey Court system. Section III discusses the relevant statutes in New Jersey as they pertain to personal injury and wrongful death. This section also covers how the Court treats collateral sources and addresses installment payments for damages. Section IV focuses on specific elements of damages such as worklife, earnings capacity, discounting to present value, and personal consumption deductions, among others. Section V provides some additional relevant information for forensic economists who may be asked to calculate economic damages in the State of New Jersey. The final section summarizes the paper.

II. Overview of the Court System

The New Jersey judicial system consists of Municipal Court, Tax Court, Superior Court, which includes an Appellate Division, and the Supreme Court. Civil cases, such as wrongful death and personal injury cases, are tried in Superior Court, aptly referred to as the trial court. Criminal cases and family cases are also tried in Superior Court. New Jersey has 21 Superior Courts, one for each county, and 15 districts called “vicinages.”

The Superior Court system consists of about 360 trial judges who preside over civil jury trials with six jurors. Either party in a Civil Part case may request a jury trial. There are approximately 95,000 cases filed in the Civil Part each year.

Outcomes of the trial court can be appealed to the Appellate Division, which consists of two levels: the Appellate Division of the Superior Court and the Supreme Court. An appeal through the Appellate Division of the Superior Court consists of a review by a two- or three-member panel. No new evidence is allowed in an appeal. Rather, attorneys make their arguments directly to the panel members and the judges determine whether the lower courts decisions were correct under the law. Like the trial court, the appeals court considers the New Jersey and United States constitutions. The appeals court also interprets statutes drafted by the legislature. In total, there are about 32 Appellate Division judges in New Jersey.

Decisions from the Appellate Division can be appealed to the New Jersey Supreme Court, the highest court in the State, if there is a split decision in the Appellate Court ruling or if a significant constitutional issue is involved. The Supreme Court of New Jersey consists of seven judges, one Chief Justice and six Associate Justices. Again, the Supreme Court does not consider new evidence when drafting a decision. The Supreme Court reviews evidence from trial and other court rulings in New Jersey. The Supreme Court also interprets laws drafted by the State Legislature that are either unclear or in conflict with existing laws. New Jersey Supreme Court rulings can be appealed to the United States Supreme Court.

Judges in New Jersey are nominated by the governor and their names are sent to the Senate for confirmation. If confirmed, a judge serves an initial seven-year term. After seven years, judges are up for reappointment and the governor decides if a judge should be re-nominated to the Senate. If so, and the Senate approves the re-nomination, the judge receives tenure and can remain a judge through age 70, at which point the New

Jersey constitution requires that judges retire.¹

III. Relevant Statutes, Case Law and Court Rules

Prevailing New Jersey law is determined both by statutes, which are drafted by the state legislature, and case law, which is determined by court rulings. New Jersey's model jury instructions reflect the latest court rules and provide general directions as an aid to judges who are responsible for charging the jury with its scope of work and requirements to follow in its deliberations. The published directions are rich in both providing appropriate wording to describe each particular claim or aspects of the claim and in citing case decisions on point. The bar's Committee on Model Civil Jury Charges meets regularly and makes recommendations for changes in the jury charge instructions. When a substantive revision is adopted, the date of adoption is listed in the revised Jury Charge and often the Committee's comments or concerns are footnoted.

There are eleven chapters in the Model Civil Jury Charges document. Most of them are not applicable to personal injury and/or death matters; this paper focuses on Chapter Six, Damages Charges, and touches on a few others of relevance to forensic economists.

A. Definition of Damages in PI and WD

Chapter (or Charge) 6.16 explains that the claimants are survivors of the decedent who have suffered financial loss due to the death of the decedent. Pecuniary injuries or money losses "should not include emotional distress, anguish, grief and sorrow or loss of emotional satisfaction derived from the society and companionship of the decedent." The financial loss does include "the reasonable value of benefits which would have been received in the nature of services, assistance and care as well as training, guidance and counsel the decedent's survivors (such as children, parents or spouse) would have

¹ More information about New Jersey's judicial system can be found at: www.judiciary.state.nj.us.

received had the decedent lived.”

As will be described below, New Jersey is unusual because it is one of the few states that specifically provides for and allows expert valuation of damages described as “advice and counsel services” and “companionship services” in addition to the more traditional household services.

B. Treatment of Collateral Sources

Most traditional prohibitions regarding collateral sources are found in New Jersey court rules. For example, the fact that a plaintiff has remarried or that life insurance was paid cannot be mentioned to a jury. Moreover, any consideration for offsets is determined by the Court, not the jury. Regarding auto insurance coverage, for example, the state statute states that “counsel should disclose to the Court if the plaintiff was covered by a policy of insurance that would provide PIP wage loss benefits. The Court would then mold the jury’s verdict to credit defendant with \$100 for each week that the jury found plaintiff lost wages. Unless the plaintiff purchased supplemental, increased PIP coverages, the maximum credit would be \$5,200.” (N.J.S.A. 39:6A-4.) A discussion of collateral sources is found in *Adamson v. Chiavaro*, 308 N.J. Super. 70, 78-81 (App. Div. 1998).

The collateral source rule applies to loss of earnings as well as to medical and hospital expenses. Plaintiff may recover damages for loss of earnings although having been paid wages or their equivalent by the employer pursuant to sick or annual leave benefits or retirement on half salary under a pension contract. Since, 1987, deduction of benefits, less premiums, is done by the court, not the jury.

One noticeable exception to the collateral source rule concerns Social Security disability benefits and survivors benefits. Case law and/or statutes allow to be subtracted from projected lost earnings those Social Security benefits triggered by the litigated incident (such as injury or death). Thus, damages experts working in New Jersey are

frequently asked to calculate lost net earnings less any Social Security payments, both past actual benefits and projected future benefits. The alternative would be not to make such a subtraction in the expert report, and then for the parties to estimate the value of the benefits in negotiating a settlement. If the matter were brought to trial, there would be a post-award determination by the judge, most likely in conjunction with the attorneys for both sides, as to the appropriate Social Security offsets.

In one injury case in which the author testified, defense successfully argued to preclude any mention of Social Security Disability payments (which, in my report for plaintiff, I had subtracted from my estimates of lost net earnings) even though inclusion would have reduced claimed damages. The reason, as it turns out, was because defense did not want the jury to hear that the Social Security Administration had declared the plaintiff disabled. Its entire case strategy was based on a belief in the continuing ability of the plaintiff to obtain gainful employment.

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C. Installment Payments of Damages

Unlike in some other states such as California and New Jersey, nothing special is prescribed regarding damages payouts. Once an award is made, which is expressed in present value dollars, the parties may negotiate the form of payment.

IV. Elements of Damages

A. Earnings Capacity and Expected Earnings

Either measure is acceptable to the courts, depending on the facts of a particular case. In most adult death cases, the jury is instructed to consider the earnings after taxes “as of the time of his/her death.” (Ch. 6.16.2.) Court interpretation of this definition has been liberal. For example, a person may have been in between jobs and not had much earnings at the time of death. In those cases, the courts will allow testimony demonstrating the decedent’s reasonably expected earnings.

In cases where the decedent is a minor child, the infant’s future earning capacity

may be considered. Ch. 6.11D.2. states that the jury should consider “the value of the reasonably anticipated direct financial contributions which would have been made by the child to the survivors after he/she became a wage earner.

When an injured party is a business owner, the measure of damages for loss of profits “is the value of the plaintiff’s services in carrying on that business which were lost as a proximate result of his/her injuries.” (Ch. 6.11E.) *Woschenko v. Schmidt & Sons*, 2 N.J. 269, 278 (1949) elaborated on the concept: “The value of his/her services is manifestly worth more than the mere cost of hiring another temporarily to fill his/her place. ... The evidence must be such as to directly point up the value of the plaintiff’s services in the operation of the business in which case it is not conjectural.” It is also interesting to note that the other case cited in this part of the Damages Charge is an 1897 decision, *East Jersey Water Co. V. Bigelow*, 60 N.J.L. 201 (E. & A. 1897) which stated that damages “may be awarded for future loss of profits if capable of being estimated with a reasonable degree of certainty.”

Injured persons must try to “minimize the damages resulting from a loss of earnings, but extraordinary or impractical efforts are not necessary. All that is required are reasonable efforts and ordinary care in trying to reduce the loss.” (Ch. 6.11D.1.) The general duty to mitigate damages refers to *McDonald v. Miannecki*, 79 N.J. 275, 299 (1979). Readers are also referred to *Assoc. Metals Corp. v. Dixon Chem.*, 82 N.J.Super. 281, 307 (App. Div. 1964), and *Robinson v. Gonzalez*, 213 N.J.Super. 364, 371 - 372 (App. Div. 1986).

B. Worklife Expectancy and Life Expectancy

In New Jersey courts, juries are instructed to consider a “plaintiff’s life expectancy and work-life expectancy before the injury.” (Ch. 6.11D.2.b.) Life expectancy “today (at the time of the accident)” is rightly described as “an estimation of his/her probable length of life based upon statistical data. Since it is a general estimate,

you should use it with caution in an individual case. The plaintiff may live a longer or shorter period than the estimated figure. You should exercise your sound judgment in applying the life expectancy figure without treating it as a necessary and fixed rule.” (Ch. 6.11H.)

However, in practice, court rules mandate the use of a life expectancy chart placed in the Appendix to the NJ Rules of Court. Besides being outdated (it uses 1993 data), it is a combined “unisex” (gender- and race-neutral) life expectancy table. Sometimes when an expert unknowingly uses current national life expectancy data, they are challenged on the grounds that their use is not consistent with state statute. This has not stopped some attorneys from arguing that, say, a female client really has a longer life expectancy than given by the New Jersey unisex table, and that the longer life expectancy should be allowed to be considered by the jury. (For an elaboration of the problem, see Pounds, Tinari, Cahill.)

Worklife expectancy is generally testified to in New Jersey courts without objection. A simple definition and explanation suffices to help ensure against uninformed cross-examination.

C. Increasing Earnings by Growth Rate and Discounting to Present Value

Juries are charged to consider “the probabilities of increases in earnings resulting from raises for productivity or promotion” (Ch. 6.11D.2.b.) Unfortunately, in attempting to explain the “effects of interest and inflation” on future earnings, wage increases associated with productivity or promotions are no longer mentioned. Instead, the discussion in Ch. 6.11.D.2.c. refers to inflation that reduces the purchasing power of money. While likely confusing to a jury, especially if a jurist were to ask if this adjustment for inflation should be additive to the other causes of pay raises, the instruction is not wrongheaded. In those cases where economic experts provide

testimony, accounting for annual wage increases is (hopefully) made clear.² Moreover, whether calculating the value of future losses to a plaintiff or decedent's survivors, the jury is wisely advised that "the law does not require of you mathematical exactness. Rather, you must use sound judgment based on reasonable probability." (Ch. 6.11D.2.b.)

In both injury cases and death cases, the present value section begins with an advisory note to judges: "Do not charge if parties stipulate that interest and inflation rates will offset each other." (Ch. 6.11.D.2.c.) In Ch. 6.11K, the very first footnote refers to the possibility that "If the attorneys will stipulate as a fact that the interest and inflation rates will offset each other ...", then a much restricted charge would need to be given the jury. Based on my experience in hundreds upon hundreds of trial testimonies in New Jersey, this is an odd instruction. I don't ever recall being asked by an attorney to assume the total offset method. It is likely that few attorneys fully understand it anyway, and in the stage of the case where they are hiring experts, this jury instruction is likely very far from their thoughts. I suspect that when experts are not involved in case testimony, the attorneys may agree to this stipulation as a means of simplifying their work. A footnote to Ch. 6.16 says as much: "The Committee expresses no opinion as to the need for expert testimony on interest (discount) or inflation factors. It recognizes that cases involving wrongful death claims are tried without expert testimony. The charge is structured to be used in either event."

An important issue for forensic economists is whether or not any guidance is provided on the appropriate basis for selecting a discount rate. The jury charge gives only a vague explanation: "an allowance for the interest that this total sum of money

²This author, together with another economist, was involved in assisting the judicial committee to re-write the Model Civil Jury Wrongful Death Charge, Ch. 6.16. One of the changes we suggested was to refer to "annual wage increases" instead of wage 'inflation'. The revised charge may be implemented in 2006. The present version continues to be the available version on-line and in hard copy.

would earn for such period of time.” It also states: “award a lump sum which when invested will pay” Further, selection of an interest rate “must be based upon your own sound judgment” (Ch. 6.16) In practice, however, most economists working in New Jersey venues utilize Treasury or municipal bond rates. Among experts, it is not as contentious an issue as might appear from the written directions. But what a jury does in the absence of expert testimony is another matter. In either case, the judge gives each juror a worksheet that contains step-by-step instructions (with an illustrative example) on how to compute the present value of a future loss.³

I have analyzed the mechanics of the present value worksheet and have found that the directions represent a tradeoff between accuracy and simplicity. The simplified directions don't quite give the correct calculation which we would get from our spreadsheets. I do have a problem with other aspects of the instructions. For example, they are silent in the treatment of fringe benefits, and provide no assistance to the jury if testimony reveals, for example, that a person would have been promoted in a few years to a higher paying job. Starting the calculation of loss at some point in the future is not illustrated in the instructions to the jury. The same goes for attempting to value the loss of services over time when the quantity of services would reasonably be expected to change. Improvements to the Wrongful Death Jury Charge have been recommended by the Committee and it is likely that some if not all of the changes will be implemented in 2006.

D. Treatment of Income Taxes

Net, not gross, earnings must be calculated, i.e., earnings net of federal and state income tax liabilities that would have been paid on the projected earnings lost: “any award for loss of earnings must be based on net or take-home pay and not on gross income. This is because only the take-home pay — the amount left after taking out taxes

³ The worksheet is appended herein.

— would have been available to plaintiff, and the amount you award is not subject to Federal and New Jersey income taxes.” (Ch. 6.11D) Two cases are cited as support for this instruction: *Ruff v. Weintraub*, 105 N.J. 233, 238 (1987) and *Bussell v. DeWalt Products*, 105 N.J. 233, 228-229 (1987). Elsewhere, another case is cited which requires that the plaintiff prove net income in personal injury and wrongful death cases. The case is *Caldwell v. Haynes*, 136 N.J. 422, 436 (1994).

While we are not aware of any reference in the statutes or case law, it is generally accepted that Social Security contributions (i.e., taxes) are not to be subtracted.

An added issue address by the courts concerns the taxability of future interest that presumably would be earned on a lump-sum award. The jury instruction reads as follows: “You should also know that any award you make is not subject to Federal income tax. However, the interest earned on the amount of your award will be subject to income taxation. And, therefore, you should increase the fund to account for the survivors’ increased tax liability.” (Ch. 6.16)

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E. Treatment of Fringe Benefits

Nothing very explicit is presented to juries regarding the method by which to calculate the value of lost benefits such as medical insurance. Forensic economists regularly testify to these losses and they are generally understood to be claimable losses. It is interesting to find that only a footnote to the personal injury damages section of the Civil Jury Charges addresses loss of benefits: “This section applies only where the plaintiff alleges a loss of salary. Where there is an allegation that plaintiff lost other benefits, such as medical coverage, pension benefits, etc., the instructions must be molded to incorporate those concepts.” (Ch. 6.11D.1)

F. Personal Consumption Deduction in Wrongful Death Claims

“You should also consider the decedent's own personal expenses. Therefore, it is necessary that you find to what extent the net earnings of the decedent were necessary

for his/her own use, maintenance and personal needs. In determining the pecuniary loss of the survivors there must be deducted from the net earnings of the decedent whatever sums fairly represent expenses for his/her own maintenance since it is obvious that these monies could not have been used for the benefit of the survivors.” (Ch. 6.16)

The practice among forensic economists is to treat this deduction as a straightforward personal consumption deduction though the wording would seem to lead the analyst towards a maintenance standard. Possible debating points hinge on the meanings of “maintenance and personal needs” and “monies could not have been used for the benefit of the survivors.”

G. Household Services **NOT TO BE QUOTED WITHOUT AUTHOR’S PERMISSION**

Calculation of lost services is well established in New Jersey. Proof is generally part of the direct testimony of the plaintiff or the decedent’s survivors. The jury instruction in Ch. 6.12B states: “Damages may include but are not limited to out of pocket expenses incurred in engaging the services of others to perform household duties previously attended to by his or her spouse.”⁴

The wrongful death jury charge (Ch. 6.16) explains that the pecuniary loss “includes the reasonable value of benefits which would have been received in the nature of services, assistance and care as well as training, guidance and counsel that the decedent’s survivors (such as children, parents or spouse) would have received had the decedent lived.”

H. Companionship Services

By statute and established case law, New Jersey is unique in permitting experts to compute the value of companionship services in wrongful death cases. This author had an article published in 1998 detailing the nature of this type of service, described as

⁴ Cases cited include *Schuttler v. Reinhardt*, 17 N.J. Super. 480 (App. Div. 1952) and *Rex v. Hunter*, 26 N.J. 489 (1958).

follows: “Companionship is defined here simply as the presence of another person during one's daily activities. Such companionship provides a sense of security and reassurance that is decidedly absent when activities are undertaken alone. It is critical to the definition not to include consortium, intimate relations, love and affection. Rather, companionship services are more akin to those provided by a ‘pal’ or acquaintance who provides a reassuring presence such as when one goes shopping with another person and seeks the opinion of the other in making purchasing decisions, or when acquaintances attend a movie, play cards, or take a stroll together. In an important sense, therefore, the primary purpose of companionship is to relieve loneliness. Companionship services require the presence of another person but not any particular physical work activity or intimacy.” (Tinari 1998, p. 257)

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The primary case that began a twenty-five year tradition of measuring the pecuniary value of companionship services is *Green v. Bittner* (1980). In that case companionship services are described by example, referring to “‘companions’ often hired today by the aged and infirm” as the leading descriptor. The footnote to the passage elaborates: “Hired companions today perform a variety of services, primarily, however, simply keeping the employer company and administering basic needs.” Judge Wilentz was attempting to distinguish between intimacy, consortium and emotional feelings, on the one hand, and companionship services that a hired companion might provide to relieve loneliness, on the other. The former types of losses are noneconomic in nature and are best left to the trier of fact to consider. The latter services were viewed as compensable pecuniary losses amenable to measurement by reference to market wages.

Court rulings on the valuation of companionship services did not end with *Green v. Bittner*. Cases that have involved claims by persons other than parents have built upon and expanded the scope of claimed losses of companionship services. (For

examples, see Tinari 2004)

The New Jersey statute that addresses this type of claim states: “While pecuniary damages which are recoverable in wrongful death action include loss of guidance, advice and counsel, and companionship, evaluation of such benefits must be limited strictly to their pecuniary element, and their estimation may not include any consideration of emotional loss relating to either decedent’s death or plaintiff’s pleasure in having next of kin, rather than stranger, perform the activities.” (N.J.S.A. 2A:31-4.) In turn, the model jury charge incorporates wording instructing jurors to include their valuation of the loss of companionship services, especially with respect to the future services lost to parents from the death of a child. (Ch. 6.16)

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I. Advice and Counsel Services

In a similar vein, the pecuniary value of loss of advice and counsel services is permitted in New Jersey civil claims. The charge to the jury includes this type of service along with companionship services: “The loss of the decedent's guidance, advice and counsel to the survivors is likewise to be confined to its pecuniary element. It is not the loss simply of the exchange of views, no matter how perceptive, when the child and parent (or other survivor, where appropriate) are together; it is certainly not the loss of pleasure which accompanies such an exchange. Rather, it is the loss of guidance, advice and counsel which all of us need from time to time in particular situations, for specific purposes, perhaps as an aid in making a business decision, or a decision affecting one's life generally, or even advice and counsel needed to relieve depression or personal dilemmas. It must be the kind of advice and guidance that could be purchased from a business advisor, a therapist, or a trained counselor, for instance.” (Ch. 6.16)

A further instruction is telling: “remember that there need be no proof that the parents (or other survivors, where appropriate) will probably purchase such companionship and advice; it is sufficient that the deceased would have rendered them if

he/she had lived.” One way of placing an economic value on the loss of this service is to get details from family members about the type and extent of advice and counsel that had been provided, if applicable, by the decedent. Then, a proxy market wage or wages could be established to be applied to the estimated hours of services lost.

J. Hedonic Damages

Claims for the value of loss of life are generally not allowed in New Jersey courts. For example, the judges in *DeHanes* state: “Some losses in life cannot be measured in dollars and cents. No expert can properly aid a jury in determining what is just compensation for non-economic damages such as pain and suffering.” (Need other case ruling citations here.)

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K. Allowing the Expert to Give the Bottom Line

There was time when expert economists were precluded from giving the sum total of any chart/spreadsheet showing losses of any component of damages, or the grand total tallying the components of damages. The grounds were that any such total number presented by an expert would unduly influence the jury. Instead, the expert was to present a methodology to the jury by which it could make its own calculations and tally the numbers themselves.

Tenore v. Nu Car Carriers, Inc., 67 N.J. 466 (1975) sanctioned the use of expert opinion evidence to establish the effect of inflation on future wage losses in a wrongful death action, but prohibited the expert from testifying about the aggregate damages for two reasons. First, the Court found that the expert’s tables reflecting aggregate damages assumed findings of fact outside of the expert’s scope of expertise. Second, the Court found that the “[expert’s] projection of a gross figure ... tends to exert an undue psychological impact leading to the danger of its uncritical acceptance by the jury in the place of its own function in evaluating the proofs.” (pp. 482-83.)

But the *DeHanes* court argued that jurors “today are far more sophisticated. They

bring many suppositions into the courtroom sufficient to counter the influence of ‘undue psychological impact’ exerted by the words of an expert witness.” So much for the role we forensic economists play!

In the “Preliminary Charge to be Given Before Any Expert Testimony”, New Jersey judges state the following: “In this phase of the case, you are about to hear expert opinion testimony on certain economic claims made. You will be the final judges of the reliability of the experts’ projections of future economic losses. Any bottom line figure offered by the expert will be based on certain assumptions that the expert will make concerning probable future economic trends.”

“In evaluating the reliability of the expert’s projections, you may consider the cross-examination by the attorneys and also any evidence presented by the opposing parties on this issue such as other expert testimony. At this stage of the case, you should keep an open mind regarding the reliability of these bottom-line figures and not give them automatic acceptance. I repeat, it will be your responsibility and your responsibility alone to determine at the close of the case the amount of economic losses suffered by the plaintiff, based upon all the credible evidence you choose to accept on this question.”
(Ch. 6.11D.)

Again, in the “Final Charge to be Given at Conclusion of Case If There was Expert Testimony on the ‘Bottom Line’”, the jury hears the following instructions: “You have heard one (or an expert for each side) discuss the present value of plaintiff’s future earning loss including their projections as to future interest, including its tax consequences, and inflation rates. You may consider some, all, or none of the opinions of the experts in determining a fair figure to compensate plaintiff for his or her future lost earnings. The experts have also given you their ‘bottom line’ figures as to plaintiff’s future lost earnings. As I told you previously, you need not give any of these ‘bottom line’ figures automatic acceptance. You are free to determine, based on all the evidence,

including the expert testimony you choose to accept, what amount of dollars will fairly compensate plaintiff for his/her future lost earnings. (Ch. 6.11D)

L. Punitive Damages

Extensive statutory changes were made in Public Law 1995 (ch. 142, N.J.S.A. 2A:15-5.9 et seq.) called the Punitive Damages Act. In New Jersey civil cases, punitive damages cannot be awarded if only nominal compensatory damages have been found. And it is now customary to bifurcate punitive damages claims for a separate trial. Further, there is a cap on punitive damages — five times the amount of compensatory damages or \$350,000, whichever is greater. However, the jury is not informed that there is a cap on punitive damages.

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Both Chapter 5 and Chapter 6 of the Model Jury Charge contain comparable descriptions of how the jury is to calculate punitive damages:

“If you decide that the defendant has engaged in the type of wrongdoing that justifies punitive damages, you must then decide the amount of punitive damages that should be awarded. ... In determining that amount of punitive damages you must consider all relevant evidence, including but not limited to, evidence of the four factors that I previously mentioned to you in connection with your determination as to whether punitive damages should be awarded at all. ... In addition to these factors, you should also consider the profitability of the misconduct to the defendant; consider when the misconduct was terminated; and consider the financial condition of the defendant or the defendant’s ability to pay the punitive damages award. Finally you should make sure that there is a reasonable relationship between the actual injury and the punitive damages.”

(Ch. 5.34J) Regarding the defendant firm’s “financial condition”, see *Herman v. Sunshine Chemical Specialities, Inc.*, 133 N.J. 329, 345 (1993).

V. Other Practice Issues for the State of New Jersey

New Jersey requires the naming of experts by the two sides, and that expert

reports be submitted and exchanged prior to the end of the discovery phase of the case. This puts New Jersey, together with a number of other states, in line with federal practice. Depositions are allowed and taken when the facts of a case warrant it. Defendants frequently do name an economic expert but utilize their services as consultants to critique plaintiff expert reports and to assist in preparing cross-examination questions for the opposing expert.

Jurors may be allowed to take notes during a trial. This is an option determined by the presiding judge at the start of a trial. At no time, however, are notes to be considered demonstrative evidence but merely as an aid to a juror's recollection of testimony. [Ch. 1.14] **NOT TO BE QUOTED WITHOUT
AUTHOR'S PERMISSION** An expert witness may give an opinion on a matter in which the witness has some special knowledge, education, skill, experience or training. "In examining each expert's opinion(s), you may consider the person's reasons for testifying, if any. You may also consider the qualifications of the individual(s) and the believability of the expert, including all the considerations that generally apply when you are deciding whether or not to believe a witness' testimony." [Ch. 1.15]

For a few years now, judges may allow jurors to ask questions of economic experts upon completion of their testimony. The typical procedure is to ask jurors to submit their questions in writing on pads provided by the court. Then, at sidebar, the judge, in consultation with the attorneys representing both sides, will review the questions for appropriateness, relevance, redundancy, etc., and will obtain agreement to ask the expert the accepted questions. I have found this to be very informative since there are nearly always perceptive questions on aspects of the damages calculations that were not elicited by either of the opposing attorneys.

Besides wrongful death and personal injury claims, there is a relatively new area in the medical malpractice field, namely, wrongful birth claims. In such cases the damages expert will typically calculate the value of a life care plan. The jury charge

reads as follows: “If you conclude that the plaintiff would have had an abortion, if warned of the risk of a birth defect, the plaintiff is entitled to damages consisting of both: (1) the special medical expenses and other extraordinary expenses attributable to raising a child with a birth defect over the child's lifetime; and (2) [emotional damages].” (Ch. 5.36F) There is also a mandatory “verbal threshold” that limits lawsuits if they do not rise to minimum standards of physical harm or permanent impairment to the injured party. (Ch. 5.41)

VI. Summary

Readers should have gleaned from this article that New Jersey has standard rules for the calculation of damages that are found in many other state venues. Court rules require the naming of experts and exchange of reports, and allow depositions of experts to take place. Also, traditional collateral source rules apply. Punitive damages are allowed, though they are capped by statute.

Earnings losses must be calculated net of income tax liabilities, and discounting is required but no specific financial instrument is specified. Calculations in death cases would include not only loss of earnings and benefits, net of personal consumption spending, but also valuation of lost household services, companionship services, and advice and counsel services. Life expectancy data are to be taken from the unisex life expectancy chart published in the New Jersey Rules of Court. Jurors are given precautionary instructions prior to an economic damages expert's testimony, and also during the jury charge before beginning its deliberations. In most New Jersey state courts, jurors are permitted to ask questions in writing of the testifying expert.

References

- Adamson v. Chiavaro*, 308 N.J. Super. 70, 78-81 (App. Div. 1998)
- Assoc. Metals Corp. v. Dixon Chem.*, 82 N.J. Super. 281, 307 (App. Div. 1964)
- Bussell v. DeWalt Products*, 105 N.J. 233, 228-229 (1987).
- Caldwell v. Haynes*, 136 N.J. 422, 436 (1994).
- DeHanes v. Rothman*, 158 NJ 90 (1999)
- East Jersey Water Co. V. Bigelow*, 60 N.J.L. 201 (E. & A. 1897)
- Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980)
- Herman v. Sunshine Chemical Specialities, Inc.*, 133 N.J. 329, 345 (1993).
- McDonald v. Miannecki*, 79 N.J. 275, 299 (1979)
- New Jersey Judiciary, Model Civil Jury Charges,
<http://www.judiciary.state.nj.us/civil/civindx.htm>.
- N.J. Public Law 1995 (ch. 142, N.J.S.A. 2A:15-5.9 et seq.), the Punitive Damages Act.
- Rex v. Hunter*, 26 N.J. 489 (1958)
- Robinson v. Gonzalez*, 213 N.J. Super. 364, 371 - 372 (App. Div. 1986).
- Ruff v. Weintraub*, 105 N.J. 233, 238 (1987).
- Schuttler v. Reinhardt*, 17 N.J. Super. 480 (App. Div. 1952).
- Tenore v. Nu Car Carriers, Inc.*, 67 N.J. 466 (1975).
- Tinari, Frank D. (1998) "Household Services: Toward A More Comprehensive Measure," *Journal of Forensic Economics* 11(3), pp. 253-265.
- Tinari, Frank D. "A Note on 'Household Services: Toward a More Comprehensive Measurement,'" *Journal of Forensic Economics*, 17(3), Fall 2004 (published December 2005), pp. 383-385.
- Tinari, Frank D., Kevin E. Cahill and LeeAnn M. Pounds, "Is the NJ Unisex Life Expectancy Table Unfair to Females?," Tinari Economics Group Working Paper, July 25, 2005.
- Woschenko v. Schmidt & Sons*, 2 N.J. 269, 278 (1949)