

## Is the NJ Unisex Life Expectancy Table Unfair to Females?

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The life expectancy table authorized by the *New Jersey Court Rules* (“Court Rules”) makes no distinction based on gender, only age. The Table, found in Appendix I of the Court Rules, was converted to its current unisex form in 1992 to eliminate gender distinctions in life expectancy estimates. According to the Rules Committee report, the elimination of gender-based differentiation was made in light of the decision In the Matter of the November 14, 1989 Non-Group Rate Filing by Blue Cross and Blue Shield of New Jersey, 239 N.J. Super. 434 (App. Div. 1990)(“Blue Cross and Blue Shield case”). 130 N.J. Law J. Index 537. The Appellate Division in this case reversed a decision by the Commissioner of Insurance and determined that the use of a demographic rating system, which included gender, would subvert Blue Cross and Blue Shield’s statutory purpose of providing affordable protection to a broad-based community, in accordance with their establishment as a health service corporation under N.J.S.A. 17:48e-1 et seq.

Around the same time as the Blue Cross and Blue Shield decision was published, several other New Jersey courts wrestled with the appropriateness of gender considerations when determining life expectancy. In Estate of Darrin v. Director of the Division of Taxation, 9 N.J. Tax 419 (1987), rev’d, 232 N.J. Super. 437 (App. Div. 1989), on remand 11 N.J. Tax 482 (1991),

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a female taxpayer contested the valuation of a life estate for transfer inheritance tax purposes. The taxpayer challenged the use of gender-based tables as unconstitutionally discriminatory due to the substantial higher value and tax resulting from their application to the circumstances. Because the life expectancy tables used at that time were gender-specific and females were determined to have a longer life expectancy, any life estate given to a female was considered more valuable, thereby requiring payment of more taxes.

The Tax Court in the Darrin case initially agreed with the female taxpayer and held that the discriminatory impact of these gender-based valuation tables upon women was not substantially related to the achievement of an important government objective. 9 N.J. Tax 419. However, after the Appellate Division reversed and required a more comprehensive consideration, the Tax Court, on remand, was persuaded by the testimony of the Director of Taxation's expert that any discrimination caused by gender-based tables was substantially related to the important government interest in increased accuracy when forecasting life expectancy. 11 N.J. 482.

While the outcome in Darrin suggests the benefits of use of gender-specific tables, the Court Rules require economists to rely on a unisex life expectancy table when calculating economic losses. In light of this reality, we examine whether or not the unisex table systematically favors some plaintiffs over others. A key finding is that the answer depends not only on the gender of the plaintiff or decedent but also on the type of case and the age of the plaintiff.

Statistics show that, more often than not, women live longer than men. The average life expectancy of women at birth is about 79.7 years; for men, it is 74.3 years. The difference between the two estimates persists at different ages, as shown in Table 1, although the size of the

gap diminishes. For example, life expectancy at age 65 is 19.3 years for women and 16.2 years for men.

Table 1

Life Expectancies by Age and Sex: 2000

age	male	female	all*
birth	74.3	79.7	77.0
45	32.3	36.5	34.5
50	27.9	32.0	30.1
65	16.2	19.3	18.0

Source: U.S. National Center for Health Statistics, *Vital Statistics of the United States*, annual; *National Vital Statistics Report*, Vol. 51. No. 5; [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_05.pdf)

\* Estimates here are higher than those reported in New Jersey Court Rules because these are based on the most current data release, rather than the 1985 data, applying statistics on years 1979-81, incorporated in Appendix I of the Court Rules. This article does not address the obvious need to update life expectancy data in Appendix I.

The life expectancy table currently used in Appendix I of the Court Rules combines men and women into one group and forms gender-neutral life expectancy estimates. According to national data, life expectancy at birth for men and women combined is 77.0 years. Life expectancy at age 65 is 18.0 years. This means that a gender-neutral table yields a life expectancy estimate at birth that is 2.7 years higher for men and 2.7 years lower for women than when using a gender-specific table.

The difference in life expectancies directly impacts calculations of economic losses in many types of cases including employment cases and personal injury or wrongful death actions where loss of services or companionship is asserted. The direction and magnitude of the distortion related to gender depends primarily on the type of case under consideration and the age of the plaintiff.

In **employment matters**, the impact of using a gender-neutral life expectancy table versus a gender-specific one is somewhat limited. Future earnings losses (“front pay” losses) are typically calculated for a constrained number of years into the future, based on the amount of time it likely will take for the plaintiff to find employment comparable to what he or she had prior to the termination. The forensic economist oftentimes provides a range of, say, one to six years into the future for younger plaintiffs. For older individuals, the forensic economist typically evaluates future earnings losses through retirement. By and large, the New Jersey life expectancy figures have little bearing on lost earnings calculated in employment litigation.

But pension losses are often considered in employment matters, and use of a gender-neutral life expectancy table influences the present value of a defined-benefit pension plan. Defined-benefit pension plans typically pay benefits on a monthly basis, starting at some “normal” retirement date and extending through the lifetime of the individual. When pension losses are calculated using a gender-neutral table as opposed to a gender-specific table, males are credited with more years of payments and females are credited with fewer years. Thus, taking earnings and pension losses together, use of a gender-neutral life expectancy table in employment cases serves to benefit male plaintiffs and works to the disadvantage of female plaintiffs.

The impact of life expectancy is more pronounced in **personal injury cases** since plaintiffs may also experience a diminution in their lifetime ability to perform household services in addition to earnings and pension losses and thereby be awarded additional damages to make them whole for this loss of ability. When household service losses extend through a plaintiff’s life expectancy, which they oftentimes do, use of a gender-neutral life expectancy table increases household service losses for men and reduces them for women, compared to the gender-specific table. So, as in employment cases, the use of a gender-neutral life expectancy table in injury

matters serves to benefit male plaintiffs and reduces the damage calculations for female plaintiffs.

In cases involving the **death of a spouse**, the story is more complicated, and the impact on male and female plaintiffs is mixed. With respect to earnings and pension losses, if the plaintiff is female, economic losses are based on the male decedent for whom the gender-neutral life expectancy table yields a higher estimate of life expectancy compared to the gender-specific table. Hence, females gain with the use of gender-neutral life expectancies, since the male decedent's life expectancy is the relevant factor.

Economic losses from the death of a spouse also typically include household services, as in personal injury cases, as well as other services, such as companionship services, and advice/counsel services to both the decedent's spouse and children. The relevant future time period over which losses take place is the key issue here. Losses to the surviving spouse are typically calculated over the lesser of the plaintiff's life expectancy and the decedent's but-for life expectancy. When women marry older men, which is more often the case than not,<sup>2</sup> the lower life expectancy of the couple is determined by the male. A gender-neutral life expectancy table boosts the life expectancy of males, so use of this table yields a higher economic loss for services for most female-spouse plaintiffs. In contrast, plaintiffs from couples in which the female is significantly older than the male will experience a lower economic loss valuation with the use of a gender-neutral table versus gender-specific ones. Table 2 summarizes these effects.

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<sup>2</sup> Fields, Jason. "America's Families and Living Arrangements: 2003." 2004. Current Population Reports. U.S. Bureau of the Census, Washington, DC (November).

Table 2

The Impact on Calculated Service Losses  
of Using a Gender-Neutral Life Expectancy Table  
in Death Cases Involving a Spouse

in married couples:	surviving spouse
male expected to die first	gains
female expected to die first	loses

The distortions continue in cases involving the **death of a child**. Economic losses to the parents typically include future potential financial assistance (as a small fraction of the child’s but-for future earnings), plus future companionship and advice/counsel services when the child would have reached adulthood. The relevant future loss period for financial support typically extends through each parent’s life expectancy, under the assumption that the parents’ life expectancies are shorter than the child’s but-for statistical retirement age. Use of a gender-neutral life expectancy table therefore yields a higher economic loss for fathers and a lower economic loss for mothers, compared to losses based on a gender-specific table.

The same holds true with respect to companionship and advice/counsel services in child death cases. Estimates of loss of these services do not require assumptions about the relationship between the child’s expected retirement age and the parents’ life expectancies. Rather, the loss is based entirely on the life expectancy of the parents. Use of a gender-neutral table instead of a gender-specific one necessarily results in fathers having inflated economic losses for companionship and advice/counsel services in child death cases and mothers having devalued economic loss amounts.

Perhaps the most perverse outcome of using a gender-neutral table arises when calculating service losses to children in cases involving the **death of a parent**. Children who lose a father

have elevated economic losses when a gender-neutral table is used compared to a gender-specific table, while children who lose a mother receive lower damages.

Table 3 summarizes our main findings. First, in employment and injury cases, male plaintiffs have higher economic losses (“gains”) than warranted when a gender-neutral life expectancy table is used instead of a gender-specific one, while female plaintiffs have lower economic losses than warranted (“loses”). Second, in death cases involving a spouse, male plaintiffs lose and female plaintiffs gain when calculating earnings losses. In contrast, plaintiffs from different types of *couples* (i.e., those in which women marry older men) gain when a gender-neutral life expectancy table is used to compute companionship and advice/counsel services. Third, in child death cases, fathers gain and mothers lose with a gender-neutral table. And, finally, in cases involving the death of a parent, plaintiffs gain with the death of a father and lose with the death of a mother.

Table 3

Summary of the Impact on Calculated Damages  
of Using a Gender-Neutral Life Expectancy Table

Case Type	Gender of Plaintiff	
	male	female
Employment <sup>^</sup>	gains	loses
Injury#	gains	loses
Death of a spouse*		
Earnings	loses	gains
Services	mixed	mixed
Death of a child**	gains	loses

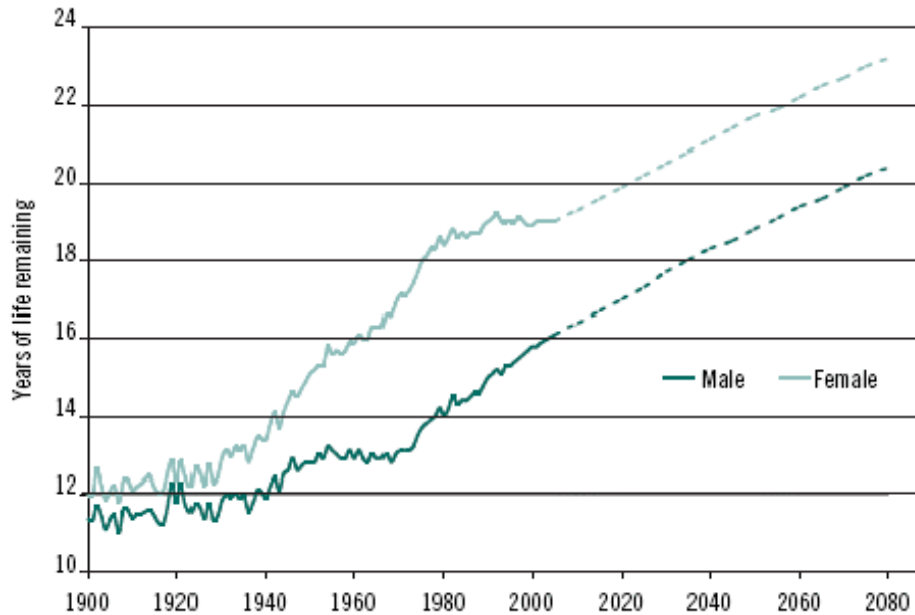
  

Case Type	Child of:	
	male decedent	female decedent
Death of a parent^^	gains	loses

- ^ includes earnings and pension losses
- # includes earnings, pension and household service losses
- \* includes earnings and pension losses; household service losses; and companionship and advice/counsel services to both spouse and children
- \*\* includes future financial support, and companionship and advice/counsel services to parents
- ^^ includes losses of earnings, household services, and companionship and advice/counsel services

The distortions noted in Table 3 call into question the fairness of a gender-neutral life expectancy table. Still, equity concerns may be moot if the difference between male and female life expectancies is expected to converge over time. Figure 1 shows that the gap between male and female life expectancies widened over the last half century. Future projections also show no sign of a convergence in life expectancies, only a stabilization of the gap. Gender differences in life expectancies are expected to persist.

Figure 1 Life Expectancy at Age 65, 1900-2080



Source: Bell, Felicitie C. and Michael L. Miller. 2002. "Life Tables for the United States Social Security Area 1900-2100." Actuarial Study No. 116 (August). Washington D.C.: Social Security Administration. <http://www.ssa.gov/OACT/NOTES/as116/as116TOC.html>

Ethnicity influences life expectancies as well. We know, for example, that White females live, on average, about five years longer than Black females when life expectancy is measured at birth, and that the difference is even larger among males.<sup>3</sup> However, the census categorization by ethnicity lends itself to subjective determinations and potential double counting inaccuracies because ethnic categories are not mutually exclusive. Respondents in the Census 2000, for example, could categorize themselves as belonging to more than one ethnic group.

Life expectancies may differ systematically by other factors as well, such as urban or rural location or even region of the country. Should these be considered? While differences in life

<sup>3</sup> U.S. National Center for Health Statistics, *Vital Statistics of the United States*, annual; *National Vital Statistics Report*, Vol. 51, No. 5.

expectancies may indeed exist by region, factors such as these are not pre-determined.

Individuals choose where to live, and in what type of setting. Thus, calculation of long-term economic losses based on these factors would be tenuous.

Gender, on the other hand, is unique; it is predetermined, well defined, and time invariant. Use of a gender-specific life expectancy table is, therefore, logical and straightforward in practice. Indeed, some attorneys, mainly those for plaintiffs who reside out of state and who are litigating in New Jersey, request that the economist rely on a gender-specific table for many of the same reasons outlined in this article. They argue that gender-specific tables are fairer.

The courts have imposed gender neutrality with respect to life expectancy, presumably to promote equal treatment for men and women. But the gender-neutral approach to life expectancy hurts some plaintiffs and benefits others, often in unintended ways. The end result of ignoring statistical differences by gender when calculating economic losses is, ironically, discrimination against female claimants in a number of types of cases and an undervaluation of the economic contributions of a female's role to her family in other cases. The important government interest in accuracy when forecasting life expectancy, recognized by the court in the Darrin case, has been discarded in a counterproductive quest for gender equality.