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

Frank Slesnick and Cynthia Mulliken*

I. Introduction

Personal injury and death cases are part of tort law. The focus of this paper is to discuss the method of calculating damages in these cases within the Commonwealth of Kentucky. Part II will examine the general principle of damages in Kentucky. This section will include the relevant law and jury instructions. Part III will focus on specific questions related to the calculation of economic damages that are normally undertaken by the forensic economist. Part IV will discuss a sample case designed to highlight many of the features of Kentucky law. Part V presents a list of “practical items” that should aid the forensic economist when testifying in the Commonwealth. The last section will then provide some concluding remarks. Throughout, important cases will be cited. In particular, Paducah Area Public Library v. Terry, 655 S.W.2d 19 (Ky. App. 1983) will be extensively discussed because it is perhaps the key case with regards to estimating economic damages in personal injury and death litigation.

II. The Law of Damages

A. The Controlling Law in Kentucky–General Issues

In the Commonwealth of Kentucky, damages are primarily used to compensate the injured party, although punitive damages may be assessed for such other purposes as punishment and deterrence.

Compensation is always the aim of the law. It is the bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position is the purpose of allowing a money equivalent of his property which has been taken, injured, or destroyed. *(Hughett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 92, 96, 1950)*

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*Frank Slesnick is Professor of Economics, Bellarmine University, Louisville, KY. Cynthia Mulliken has a BA from Indiana University, an MBA from Bellarmine College, and a JD from Mercer University. She practiced law for 12 years in eastern Kentucky and has taught medical ethics at Pikeville College School of Osteopathy and business law at Bellarmine University. At present, she is the Director of Advertising Review at the Better Business Bureau serving Louisville, Western Kentucky and Southern Indiana.

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In seeking damages, the original action is normally filed in circuit court, although it may be filed in district court or the small claims division of the district court if the amount sought is limited. Recovery under the Kentucky Workers’ Compensation Act is covered under separate legislation heard before an arbitrator. Kentucky Revised Statutes (KRS) 342.690.

The burden of proof is on the plaintiff. Pleadings contain a statement showing that the pleader is entitled to relief and a demand for relief to which he feels he is entitled. There are few rules here except that “fair notice” must be given of the claim. The defendant responds in his answer to the complaint. If the defendant fails to provide an answer, it is usually considered an admission of the claims. There are also numerous rules governing limitation periods for various actions. See Eades, 2003, Chapter 12.

The evidence of the case must prove both liability and damages with reasonable certainty. The law in Kentucky is similar to that as outlined in most Law and Economics texts on the subject. As indicated in Cooter and Ulen (2003), to recover under tort law there must be three elements present: 1) the plaintiff suffered harm; 2) the defendant’s act or failure to act caused the harm; and 3) the defendant’s act or failure to act must constitute the breach of a duty owed to the plaintiff by the defendant. As stated clearly in Combs v. Hargis Bank & Trust Co., 234 Ky. 202, 27 S.W.2d. 955, 956 (1930), “A legal injury must be a violation of some legal right, and is distinct in meaning from that damage that may flow from the injury. The damage is the harm, or loss, sustained by reason of the injury.” The plaintiff is entitled to the damages arising from the wrong. If the breach of duty was not a substantial factor in causing the injury, the plaintiff cannot recover damages.

In addition to duty and breach of that duty, a tort requires causation. This has been legally defined as the proximate cause of the injury. Proximate cause is sometimes expressed as the “but for” test where but for the act of the tortfeasor, the injury would not have occurred. Once the duty, breach, and causal connection are demonstrated, the tortfeasor is then liable for the damages flowing from the wrongful act.

The idea of reasonable certainty is quite controversial and is subject to much debate. Clearly, damages which are “uncertain, contingent, and speculative” are not recoverable. (Spencer v. Woods, 282 S.W.2d 851, 852, Ky. 1955) However, Kentucky law recognizes that forecasting the future can never be accomplished with certainty. The courts have distinguished between the certainty of a causal connection between a wrongful act and damages and the amount of the damages itself.

The test...is not whether the amount thereof can be ascertained with exactness or certainty, but whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. If it is established with reasonable certainty that damage has resulted from a breach of duty or a wrongful act of defendant, mere uncertainty as to the amount will not preclude recovery....But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made from other sources. (Roadway Exp, Inc. v. Don Stohlman & Associates, Inc., 436 S.W.2d 63, 62, Ky. 1968)
It should be noted that with regard to damages, it must be determined that an injury or loss has occurred even if only slight or trivial. Fear of future harm is normally not compensable, although it can be considered an element of mental suffering. (*Capital Holding v. Bailey*, 873 S.W.2d 187, 193-194, Ky. 1994)

B. The Wrongful Death Statute and Other Statutes

Following English common law, in 1853 the Court of Appeals in Kentucky stated that there was no cause of action under the law for death. (*Eden v. Lexington & Franklin RR Co.*, 53 Ky. 204, 14 B. Mon. 204, 1853 WL 3927, 1853) In 1890, a constitutional convention convened and one of the issues related to wrongful death actions. First, Ky. Const. Section 54 bars the General Assembly from limiting recovery arising from wrongful death. Ky. Const. Section 241 specifies that a personal representative would be designated to bring the wrongful death action and that recovery would go to the estate.

The courts recognized two claims for relief. One related to injuries suffered prior to death, while the other related to losses suffered by beneficiaries who survived death. The first is a survival action because it allows the deceased’s estate to claim damages as if the decedent were still alive. The second is a wrongful death action. Until 1968, the personal representative had to elect one cause of action or the other. However, in that year this required election was changed by statute and now both types of losses can be pursued simultaneously with the provision that losses cannot be duplicated.

In addition to provisions in the Kentucky Constitution, the General Assembly passed a general wrongful death statute, KRS 411.130. The statute specifies who shall bring the action, who shall receive any award, that damages will be received from the person who caused the death, and that punitive damages may be recovered if the act involved willful or gross negligence. Ordinary negligence is sufficient proof to satisfy statutory requirements. This level of proof can be defined as “the conduct of the reasonable man of ordinary prudence under the circumstances.” (*Louisville Transit Co. v. Sexton*, 471 S.W.2d 20, 22, Ky. 1971)

With regard to who will receive the award, initially funeral expenses, cost of administration, and cost of recovery (attorney fees) are subtracted. The remaining amount is distributed in the following manner:

1. The entire amount to the spouse given no surviving children.
2. The whole to surviving children given no surviving spouse.
3. If there are surviving children and spouse, one-half goes to the children and one-half to the spouse.
4. If there is no surviving spouse or children, the whole goes to surviving parents.
5. If there are no surviving children, spouse, or parents, the recovery goes to the estate, which is distributed by another set of rules.

As stated above, Kentucky provides for survival of claims prior to death as well as relief from a wrongful death. These claims are joined together, usually
by the personal representative. Based upon the survival claim, injuries that result from the tortuous act are compensable. Like other claims, in addition to breach of duty and actual harm, such a claim requires proof of causation. The usual situation is that the injuries were sustained due to the tortious act and that such injuries eventually led to death. It is those injuries which are considered in the action.

There is a special remedy when the deceased is a minor child. First, there must be a surviving parent or parents. Further, the parents may recover “for loss of affection and companionship that would have been derived from such child during its minority.” (KRS 411.135) Thus, since this loss is brought specifically by the parents, there may be two different actions—one by the parents for loss of affection and companionship and one by the personal representative for other types of damages. This dual strategy also holds for some of the other types of damages outlined below. A related issue that has proved difficult is the injury to an unborn child that results in death. Under the wrongful death statute, an unborn child is considered a “person” if at the time of the injury the child was a “viable fetus.” (Mitchell v. Couch, 285 S.W.2d 901, 905, Ky. 1955) A viable fetus usually is one starting between the sixth and seventh month.

Kentucky also provides a remedy for loss of consortium. Consortium is defined as “the right to the services, assistance, aid, society, companionship and conjugal relationship.” (KRS 411.145) This is for the benefit of the surviving spouse and exists only for the period between injury and the date of death. Prior to 1970, Kentucky courts allowed a husband to recover for loss of consortium of his wife, but a wife could not recover for loss of her husband. Since that time, a statute has granted recovery to either spouse.

In 1997, the Kentucky Supreme Court recognized a new claim for loss of parental consortium. If the parent of a child was killed, a claim could be brought in the name of the child for loss of love and affection of the parent. (Giuliani v. Guiler, 951 S.W.2d 318, 322, Ky. 1997) In 2001, there was an effort to expand the scope of this claim by allowing recovery by adult children for the death of their parent or parents. The Kentucky Court of Appeals declined, stating that such expansion would have to be undertaken by the legislature. (Clements v. Moore, 55 S.W.3d 838, 840, Ky. App. 2001)

There are a number of specific circumstances that may be treated differently. A specialized wrongful death statute applies, KRS 411.150, when death occurs due to use of a deadly weapon. If the deceased is survived by a spouse and/or children and the killing occurs by the “careless, wanton, or malicious use of a deadly weapon, not in self defense,” the statute may apply. In addition to the usual damages, so-called “vindictive damages” may be recovered.

As another example, the Kentucky General Assembly has passed legislation which seems to relieve sellers of alcohol from any liability.

No person...who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death... (KRS 413.241)
There is, however, an interesting exception clause which states that “unless a reasonable person under the same or similar circumstance should know that the person served is already intoxicated at the time of the serving.”

C. Important Jury Instructions and Review of Jury Decision

In general, the amount of damages is a prerogative of the jury and a question of fact for the jury. Prior to rendering an award, the jury requires instructions about how to arrive at a proper award. It is not sufficient for the jury to be told to compensate the injured party for losses. Instructions are provided in broad terms and couched in terms of duty. Details are provided by attorneys in closing argument. In one case, the court reversed a lower court decision because the judge gave “undue prominence to facts and issues.” (Rogers v. Kasdan, 612 S.W.2d 133, 136, Ky. 1981) Normally, whether there is liability is a question for the jury. However, if there is not enough evidence to sustain the claim, then the case will not be submitted to the jury. In that case, there is a directed verdict entered by the judge in favor of the defense and the jury is released. However, the fact that a decision will be difficult is not, in and of itself, a reason to take a case away from a jury.

The following pattern jury instructions are taken from Palmore and Eades (1989, Supplement, 2003). Attorneys of both parties submit their preferred jury instructions based on these patterns and fleshed out with specific information from the case at hand. The Court accepts the most appropriate instructions for the case, whether the submission of one party or the other, or a combination of the two. “P” refers to the plaintiff.

**Sec. 39.01 Wrongful death**
If you find for P you will determine from the evidence and award him a sum of money that will fairly compensate X’s estate for the destruction of his power to earn money, not exceeding $_____, together with funeral expenses not exceeding $_____.

**Sec. 39.02 Personal injury; pain and suffering**
If you find for P you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for whatever physical or mental suffering you believe from the evidence he has sustained or is reasonably certain to endure hereafter as a direct result of [the accident] [his injuries]. Comment. In view of the amendment of CR 8.01(2) effective January 1, 1987, there is no longer a monetary limitation to which the instructions can refer with regard to items of unliquidated damages, such as pain and suffering, that cannot be proved in terms of money.

**Sec. 39.03 Same; medical expenses**
If you find for P you will determine from the evidence and award him a sum of money that will fairly compensate him for whatever necessary and reasonable expenses for medical services you believe from the evidence he has incurred or is reasonably certain to incur hereafter as a direct result of his injuries, not to exceed $_____.

Sec. 39.04 Same; loss of time
If you find for P you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for such loss of wages and income as you believe from the evidence he sustained directly by reason of his injuries, not to exceed $_____.

Sec. 39.05 Same; future loss of earnings
If you find for P you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for such loss or impairment of his power to earn money in the future as you believe from the evidence he has suffered directly by reason of [his injuries] [the accident], not to exceed $_____.

Sec. 39.06 Same; loss of consortium
If you find for P you will determine from the evidence a sum of money that will fairly and reasonably compensate her for whatever loss of services, assistance, aid, society, companionship and conjugal relationship of her husband you believe from the evidence she has sustained or is reasonably certain to sustain in the future as a direct result of his injuries. Comment. KRS 411.145 provides that either the husband or wife may recover damages for loss of consortium.

Most jury instructions are set up to return a single figure, but the plaintiff can request an itemization of the award. In addition to specific instructions concerning how to determine the award, the court may indicate the maximum award that can be assessed. In the usual case, this maximum is the amount claimed in the pleadings and through discovery. This amount is usually itemized in the discovery and pleadings, but does not necessarily have to be itemized in the actual jury instructions unless the attorneys or the court consider it appropriate.

D. Expert Testimony

Expert testimony is often utilized in tort cases. It is used either to determine the causal connection between the wrongful act and the harm as well as the level of harm itself. Medical testimony is usually required to prove causation when the case involves an injury accident. In such cases, however, economists are only called upon to measure the extent of economic damages. Deciding whether a witness is qualified is up to the discretion of the court. The evidence from the economist, however, “is not conclusive, and the jury retains the right to weigh that evidence.” (Eades, 2003, p. 137)

Although rules of evidence have been controlled by the common law, they are now controlled by the Rules of Evidence, passed by the Legislature in 1992. These Rules govern all courts in Kentucky and also control the testimony of expert witnesses. Where the witness has specialized knowledge that will assist the trier of fact, the expert may testify with regards to his or her opinion.
III. Calculation of Economic Damages

A. Income Loss

In a personal injury or death claim, time lost from work is compensable. This relates to both past and future earnings. Specifically, Kentucky law compensates for lost power to earn money, not expected earnings.

The damages recoverable in a wrongful death action have been clearly defined and limited almost from its inception. The damages are such sum as will fairly and reasonably compensate the decedent’s earning power and do not include the affliction which has overcome the family by reason of the wrongful death. (*Louisville and N.R. Co. v. Eakins’ Adm’r*, 103 Ky. 465, 45 S.W. 529, 530, 1898)

Many factors including age, health, ability to work, occupation, and historical earnings affect such capacity. However, it is not a loss for a specific occupation. Nor is it necessary that the individual actually be working at the time of the injury. In short, the forensic economist is able to use whatever information is available in estimating lost earnings but with the understanding that the focus is on the capacity to labor and earn money. Historical earnings are useful only to the extent these figures help understand the earning capacity of the individual. See Horner and Slesnick (1999). As stated by Eades, “In short, direct factual proof of earning capacity is not required. Where such evidence is available, however, it is admissible and can be considered by the jury.” (*Eades, 2002, p. 201*)

Actions related to minors are similar to those for an adult. In an 1899 case, it was held that damages were “fair compensation to the estate of the child for the destruction of his capacity to earn money.” (*Louisville & Nashville R.R. Co. v. Creighton*, 106 Ky. 42, 20 Ky.L.Rptr. 169, 50 S.W. 227, 1899) Again, a wide variety of information may be utilized including age, life span, health, mental capacity, grades in school, and personality.

Estimates of lost earnings, as well as other types of economic damages, require that the plaintiff attempt to mitigate such damages. Liability may itself be affected if the plaintiff did not use reasonable care. Mitigation may also be a factor after a tort occurs. For example, an individual is obligated to seek proper care following an injury. Of more concern to the forensic economist, mitigation may relate to the behavior of the plaintiff, given the injury, in terms of his effort to attain employment. As an example, if the plaintiff is injured and subsequently never was employed, the jury may determine that he or she did not adequately mitigate lost earnings. Therefore, the jury may impute some level of post-injury earnings when estimating economic loss even though actual earnings were zero. This is another application of the concept of earning capacity expressed as a concept distinct from expected earnings, but related to post-injury rather than pre-injury earnings. In this example, post-injury earning capacity is positive while post-injury expected earnings, at least based upon past behavior, is zero.
B. Discounting to Present Value

A discussion of discounting to present value in the Commonwealth of Kentucky always relates back to Paducah Area Public Library v. Terry. This article will provide an extensive commentary on this case both because of its importance and because interpretation of its rulings is so difficult. Quotes will be employed liberally so the reader can fully understand the seemingly contradictory pronouncements of the court. The case involved injuries sustained by a 12-year-old passenger when struck by a bookmobile. Damages were found for the plaintiff, and the bookmobile owner and driver appealed on several grounds. Those related to economic considerations included the following: (1) the award of damages was excessive; (2) there was error in failure to instruct the jury that any award was not subject to federal and state income tax; and (3) error in refusing to reduce the damage award to present worth. Clearly, the first consideration is related to the other two points. That is, failure to indicate that an award is not taxable could lead to an excessive judgment if the jury believes it is taxable and increases the award accordingly. Further, discounting to present value normally reduces the estimated award. In the end, on June 10, 1983, the Court of Appeals of Kentucky upheld the initial ruling of the McCracken Circuit Court in favor of the plaintiff.

The court commentary began by explaining the basic purpose of compensation.

Here we should observe that under our system the emphasis is not upon retribution but upon compensation…The object of tort law is to, so far as possible with money, place the injured party in the position he would have been if no tort had been committed. It is to provide full recompense and nothing more….To provide for full compensation for the tort victims and at the same time guard against oppressive retribution against wrongdoers is a salient objective of the trial court. (Paducah Library, 23)

Thus, the court reiterated the belief that it is important to calculate estimated loss objectively as a matter of fairness to both sides of the issue. Implicit in such a pronouncement is that all relevant evidence that has a significant impact upon that estimate should normally be considered.

The court further emphasized that the Commonwealth focuses on loss of earning capacity in both injury and death cases.

In this state the traditional method of determining damages for permanent injury is to instruct the jury to fairly and reasonably compensate plaintiff for impairment of power to earn money….In cases of death it is the destruction of decedent’s power to earn money. (Paducah Library, 24)

The court then stated that the ruling disallowing consideration of taxes, whether related to the award or any other aspect of the case, was correct.
We believe the trial court was correct in excluding evidence of tax impact on the basis of *Louisville & Nashville Railroad Co. v. Mattingly*, KY, 318 S.W.2d 844 (1958). It may be true as indicated in Liepelt that jurors are “tax conscious” and may overly award the plaintiff in anticipation of tax impact, but this is a matter that will have to be dealt with by the trial judge in reviewing the size of the verdict. To inject the incidence of the ever changing tax scheme, federal or state, into a jury damage trial would lead the jury into a hopeless quagmire of confusion and conjecture….It can neither be inquired into on cross-examination or submitted to the jury for consideration in making the award. In this regard the ruling of the trial court is correct. (*Paducah Library*, 23 and 24)

The most important issue focuses on precedent concerning discounting to present worth. The court was aware of FELA rulings that required reduction to present worth and that juries were so instructed as to its use. Nevertheless, the court went on to say,

> We find no Kentucky case nor have we been directed to any other than those cases under the Federal Employers’ Liability Act to suggest that the jury should be instructed to reduce an award to present worth. (*Paducah Library*, 24)

This statement appeared to imply that discounting to present worth was not necessary in Kentucky. However, in the next paragraph, the court’s thinking seemed to change in the opposite direction.

> Our examination of the law of this state, as well as the law of other states, leads us to believe that the universal rule requires that awards for lost future earnings be in present worth….Any other rule may tend to overcompensate. It may turn injury into profit, a result forbidden under our sense of justice. (*Paducah Library*, 24)

If, in fact, a “sense of justice” requires discounting to present worth, then it would follow that a jury should be provided information concerning such discounting by an appropriate expert witness since this is a topic that is not common knowledge. However, this was not the course followed by the court.

Specifically, the court stated that juries can and do discount to present value without guidance from expert testimony or even instructions from the bench.

> We believe that Kentucky cases have, in fact, been tried upon this basis. Plaintiffs have generally reduced their claims by directing their own evidence toward present worth or defendants have shown a reduction by cross-examination. The jurors have then, whether instructed or not, presumptively measured their award in present worth. (*Paducah Library*, 24 and 25)
The court’s conclusion that discounting is important yet should not be explicitly introduced into evidence was summarized as follows:

From the foregoing we conclude the rule to be substantially universal that any award for future lost wages must ultimately be viewed in present worth. Whether the jury as fact finders reduces the award in the first instance based upon evidence of an appropriate rate of interest, or whether the Court considers present value in determining excessiveness, there is no clear rule....We believe jurors are sufficiently sophisticated in considering future lost wages to understand that 'a smaller sum today equals a larger sum in the future.' Further, jurors are inescapably aware that any award for future damages is likely to suffer the erosion of inflation. It requires no evidence of discount rates or the rate of inflation for the jury to render a fair and reasonable award for future losses. Nor is it necessary to instruct the jury on present worth. The jury’s knowledge of these factors is presumed. (Paducah Library, 25)

There are two other issues that should be raised with regard to this case. One issue is that the court indicated that barring testimony concerning discounting to present worth will streamline the court proceedings. Testimony related to discounting may reduce to the “battle of the experts” and obfuscate the deliberative process. The second issue is that the court ruling specifically stated that damages should be estimated given the assumption that interest rates and the rate of inflation are equal. That assumption, along with the apparent bar of testimony regarding discounting, has led to significant confusion.

Concerning the first issue, courts have traditionally noted that there may be a tradeoff between the twin goals of estimating damages accurately and arriving at this estimate efficiently with a minimum of confusion and legal wrangling. As stated in this case,

Much can be said for the rule of the trial judge, and much may be said against it, but suffice it to say that such a rule goes far to eliminate the contest between litigants who have the resources to marshal mountains of expert testimony relative to money, its worth and the nebulous art of economic forecasting, all of which encumber the trial proceedings and confuse the deliberation of jurors. (Paducah Library, 25)

Concerning this line of thought, the following question could be raised: If, in fact, jurors are capable of understanding the concept of present worth and apply it to damage estimation without any guidance whatsoever, why would introduction of expert testimony or even jury instructions concerning present worth confuse the judicial process?

The second issue has, perhaps, been the most troubling in terms of determining what is the proper course of action when discounting to present worth. The court stated:

We adopt the reasoning that the relationship of interest rates and rates of inflation are ‘self-adjusting’ and it is unnecessary to concern
the jury with either. Because the two totally offset each other, the jury may make a fair and reasonable award in present worth without introduction of evidence or instruction. The injection of such matters in the trial is not prejudicial but irrelevant and non-essential; all however within the discretion of the trial court. *(Paducah Library, 25)*

In reviewing the entire commentary, the court provided several reasons for excluding explicit consideration of present worth. First, the average juror is capable of adjusting for present worth without expert guidance. Second, introduction of present worth tends to confuse the deliberative process. But now a third reason is introduced—namely, economic reality makes it unnecessary to consider present worth.

In the above quote, the court implied that the real rate of interest was 0%. However, the court did not say that the rate of increase in real income could not be explicitly considered. In the authors’ experiences, the most commonly accepted practice is the so-called total offset rule, which assumes that the rate of increase in earnings is equal to the interest rate. In fact, the court cited this rule, though not the specific economic interpretation. “We are also influenced by what we believe to be an expanding recognition of the total offset rule.” *(Paducah Library, 26)* Several well-known cases were cited including *Alaska Airlines, Inc. v. Sweat*, *Beaulieu v. Elliott*, and *Kaczkowski v. Bolubasz*.

A second practice relates to several passages in the ruling which indicate that the final decision whether present worth may be introduced is “within the discretion of the trial court.” One of the authors usually calculates economic loss employing the total offset rule as defined above but also incorporates a calculation based upon economic judgment for both the rate of increase in income and the relevant discount rate. This strategy allows presentation of evidence irrespective of the judge’s ruling, although use of the total offset rule is, in the experience of the authors, the most common decision. Finally, some forensic economists have set the real interest rate equal to zero but they then incorporate real wage growth due to both general productivity factors and age-earnings factors.²

For some time efforts have been made to change the legal parameters in the Commonwealth based upon the Kentucky Rules of Evidence. The Rules, codified in 1992, closely follow the Federal Rules of Evidence. KRE 401 indicates that all relevant evidence, which makes a fact more or less probable, should be included. As a result of the implementation of the Kentucky Rules of Evidence, the courts are more willing to consider on a case-by-case basis whether the older *Paducah Library* interpretation is appropriate for the issues before them. This is becoming a classic battle of statutory law versus case law on which the Kentucky Supreme Court has yet to rule. It is clear that any economic expert testifying in Kentucky should inquire about rulings related to taxes, consumption, inflation, and present worth.³

²The assumption that real interest rates are zero is contrary to historical evidence and leads to an overstatement of economic loss. See Thornton (1994).
³There is one other issue related to discount rates that is important. In the Commonwealth of Kentucky, KRS 360.040 states that the prevailing party has the right to post-judgment interest from
C. Fringe Benefits

To the authors’ knowledge, there is neither law nor relevant court precedent specifically related to estimation of fringe benefits. A wide variety of fringe benefits can be considered including private insurance, mandatory benefits, and retirement benefits. One of the authors has also calculated more esoteric benefits such as the value of a company car and stock options. However, estimating the rate of increase in fringe benefits and discounting back to present value is subject to the rulings as handed down in the Paducah Library case discussed above.

D. Income Taxes

As suggested in the discussion of the Paducah Library case, courts in Kentucky are disallowed from raising the issue of taxes. Estimated loss relates to pre-tax earning capacity, and invested returns are calculated on a before-tax basis as well.

E. Consumption

Kentucky rules related to loss to the estate are different from most other jurisdictions. Put simply, the measure of loss is what the decedent would have earned, not what the beneficiaries are expected to receive.

Most wrongful death statutes provide that damages are to be assessed in accordance with the loss to the surviving beneficiaries...Ours is one of the so-called 'true' wrongful death statutes which have been construed to measure damages by loss to the decedent's estate... (Empire Metal Corp. v. Wohlwender, 445 S.W.2d 685, 687, Ky. 1969)

What is meant here is that awards will not be reduced for personal consumption. “The judge cannot instruct on the issue nor can counsel argue the point.” (Eades, 2003, p. 16) Also see Johnson v. Cormney, 596 S.W.2d 23 (Ky. Ct. App. 1979).

the date of judgment to actual payment. This may arise when the defendant appeals the verdict. It is different from pre-judgment interest, which is disallowed in Kentucky. Pre-judgment interest relates to the time period from the date of injury to the date of judgment and hence refers to past rather than future economic loss. There is significant controversy with regards to KRS 360.040 because the stipulated interest rate equals a compound rate of 12% per annum. The purpose of the Statute is straightforward and understandable. As stated in Stone v. Kentucky Ins. Guar. Ass'n., 908 S.W.2d 675 (Ky. App. 1995), “The statute’s obvious purpose is to encourage a judgment debtor to promptly comply with the terms of the judgment and to compensate the judgment creditor for the judgment debtor’s use of his money.” The annual interest rate was raised from 8% to 12% in 1982. Given the prevailing interest rates at the time, an increase to 12% per annum was understandable. However, in today’s economic climate that is not the case. In fact, some states tie pre- or post-judgment interest to current market rates. Thus far, efforts to change this rate have not been successful.
In death cases, this ruling implies that loss for a case in Louisville, Kentucky would be significantly higher than a case that took place across the river in Indiana. The reason for barring consideration of personal consumption is not entirely clear, but one factor considered by the court was that it feared that such inquiries would lead to confusion and speculation.

F. Medical Expenses

In Kentucky the injured party may recover reasonable medical expenses. These expenses are not limited to those which have already occurred. Such expenses require a present physical injury. Thus, fear of future harm is not compensable, nor is monitoring of potential illnesses. Similar to the discussion of fringe benefits, no significant legal constraints exist, at least with reference to the types of costs that may be included. Thus, the forensic economist may follow a more general reference. (See Martin, 2002, Ireland, 2002, Slesnick, 1990.)

An interesting question is whether the Paducah Library ruling, which governs loss of earnings, also applies when estimating the present value of future medical costs. The authors have been unable to find relevant case law regarding this question. Some forensic economists have utilized increases in medical costs and interest rates based upon actual economic conditions even when the total offset rule was applied to earnings loss. One possible reason for this approach is that economic conditions may imply higher economic loss compared to using the total offset rule for certain medical cost categories. Other forensic economists use total offset for all loss categories. This is an area where the economist should consult with the hiring attorney.

G. Household Services

Like medical costs and fringe benefits, there is little written explicitly about loss related to household services. It has been the experience of the authors that the forensic economist faces few legal constraints in calculating this loss. As expected, the constraint relates to the relationship between the rate of increase in the value of household services and the discount rate. The usual practice in Kentucky is to utilize the total offset rule. Some defense attorneys have claimed that in a death case, household services should be excluded from consideration. The rationale proposed is that the Kentucky Wrongful Death Statute specifies that loss relates to the “power to labor and earn money.” Since household services are not sold in the labor market, they should be excluded. To the authors’ knowledge, there have been no legal opinions evaluating this specific interpretation.

H. Intangible Damages and Hedonic Damages

Pain and suffering can be an element of a personal injury action. It is compensation for both mental and physical past and future pain. No rigid formula
can be applied and the amount is a question for the jury. Only the roughest of guidelines are actually provided.

It is well settled in this State that there is no legal yardstick for measurement and no slide rule for computing compensation for pain and suffering to which a party may be subjected as the consequence of a wrong. There is only the broad and general rule of reasonableness, free from sentiment or fanciful standards, and, as well, free from imposition of punishment. (Noel v. Creary, 385 S.W.2d 951, 953, Ky. 1964)

Although other jurisdictions may separately award damages for loss of enjoyment of life, commonly referred to as hedonic damages, Kentucky has not done so. Rather, hedonic damages are considered only as part of pain and suffering. (Adams v. Miller, 908 S.W.2d 112, Ky. 1995)

Damages may also be recovered for loss of consortium by either spouse. “Those damages may include loss of domestic tranquility, attention, and performance of household duties. The claim for loss of consortium is independent of other claims.” (Eades, 2003, p. 342) For this claim to be valid, the parties must have been married at the time of the injury. Further, the claim is only valid while the other party is alive. If the spouse dies, the surviving spouse may only claim for a period until the other spouse died.

I. Collateral Source Payments

When an injury occurs and the individual receives some payment arising from the injury itself, a question is whether the defendant is entitled to such payments serving as an offset of the money received by the plaintiff. In a 1960 case, the Court ruled that the plaintiff could receive all medical expenses even though his insurance company ultimately reimbursed him. (Taylor v. Jennison, 335 S.W.2d 902, 903, Ky. 1960) This practice is also followed with reference to Medicare payments, free treatment at a military hospital, and disability payments.

In 1988, the Kentucky General Assembly passed legislation which muddied the waters with reference to collateral sources. The legislation allowed introduction of evidence of such payments.

The confusion, therefore, was that Kentucky had a substantive rule of tort law which allowed the plaintiff to recover all damages even when some were covered by a collateral source, but had an evidentiary rule which allowed introduction of proof of the collateral source of payment....The state constitution prohibits the General Assembly from limiting the recoveries for personal injury which were in existence at common law. If the courts determined that full recovery was a common law right, the statute would have violated the Kentucky Constitution. (Eades, 2003, p. 18)

In fact, in 1995 the Kentucky Supreme Court did declare the statute unconstitutional. (O’Bryan v. Hedgespeth, 892 S.W.2d 571, Ky. 1995)
J. Punitive Damages

The purpose of punitive awards seems to be two-fold. First, it is punishment for behavior that is considered unusually disdainful. Second, punitive damages may act as a deterrent with regards to potential future tortfeasors. To the authors’ knowledge, however, economists are not involved in the calculation of punitive damages in State court.4

IV. Sample Case Discussion: Death of an Employed Female

This is a description of a hypothetical case. The “facts” have been highly simplified. A 35 year-old female, Ms. Jones, had been employed as an upper-level manager for 10 years making $70,000 per year prior to her untimely death. There was sufficient historical data to determine that the rate of increase in earnings was 3% per year, and based upon information available this rate would likely continue into the future. The 3% figure is equivalent to an across-the-board raise and would not include any individual productivity raises. Such productivity raises were expected to average 1% per year until age 50 and thereafter equal 0%. Fringe benefits were obtained from her company and equaled 27.5% of earnings for a total compensation package equal to $89,250. Even though this is a death case, no consumption is deducted from estimated lost compensation.

Because Ms. Jones had received her MBA degree, worklife was estimated using published tables for females with a graduate degree. See, for example, Skoog and Ciecka, 2002. In addition, it is common practice to include an alternative estimate of worklife that is somewhat beyond that published in standard tables that reflects earning capacity as opposed to expected earnings. There are no guidelines for worklife related to earning capacity, but it is the experience of the authors that the two most common reference points are median years to retirement and the age when full Social Security benefits can be received.

4A brief discussion of punitive damages as calculated in the Commonwealth may be useful even though economists are not directly involved in their calculation. According to the more generally accepted doctrine, such damages are allowed not because of any special merit in the injured party’s case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to defendant and others, or even, it has been said as an expression of the indignation of the jury. (Bisset v. Goss, 481 S.W.2d 71, 74, Ky. 1972) Punitive damages are not a matter of right but an award given at the discretion of the jury. Further, the award need not have any relation to the amount of compensatory damages. Rather, the amount is related to the nature of the injury and its cause. The key question is, of course, what kind of behavior must be demonstrated before punitive damages apply? In Kentucky, the rulings have been fairly consistent. They apply when an act was done “maliciously, willfully, or with gross negligence or with such recklessness as to indicate a wanton disregard of the rights of another.” (Louisville Cemetery Ass’n v. Down, 241 Ky. 773, 45 S.W.2d 5, 1931) Such “gross negligence” requires that the defendant is aware of the danger involved in his or her actions. Further, courts have generally held that “in addition to gross negligence, the conduct must be shown to be willful, malicious, reckless, or wanton.” (Eades, 2003, p. 32) Kentucky courts have said that punitive damages need not be related to actual damages but are more closely related to the actual injury or cause of injury. The courts have also said that damages should not be so excessive as indicated by judgment that is prejudicial or biased.
An important assumption in any case concerns the net discount rate, which is equal to the interest rate minus the rate of increase in economic loss. As explained in the discussion of the Paducah Library case, it is difficult to know with certainty the legal parameters concerning the net discount rate. If total offset were chosen, then the economist would equate the across-the-board rate increase with the interest rate. This would imply that until age 50 the net discount rate would approximately equal –1% and after age 50 it would equal 0% based upon the previous discussion of individual productivity factors.

However, many forensic economists in the Commonwealth routinely calculate loss based upon current economic conditions as well. Assuming that the relevant interest rate is 5%, the net discount rate would approximately equal 1% until age 50 and 2% after age 50. Both sets of calculations would be provided, along with a clear explanation of the assumptions utilized.

Ms. Jones was married and had three children. Based upon a survey filled out by Mr. Jones and a follow-up personal phone conversation, it was assumed that Ms. Jones would have provided 22.5 hours of services per week until the youngest child turned 18 in the year 2015. Between that year and the expected year of retirement, 2031, household services are reduced to 17 hours per week. Between 2031 and 2043 when Ms. Jones would have turned 75, household services are increased to 27.5 hours per week. These figures are relatively close to studies of household services provided as a function of several variables including gender, age, and size of family. See Expectancy Data, 1999. The cost of services is increased 3% per year, the same as across-the-board earnings, and discounted both at interest rates equal to 3% and 5%. The former represents the rate required for the total offset rule and the latter represents the best estimate under current economic conditions.

To summarize this case, Ms. Jones's estimate of economic loss is fairly straightforward. There is no consideration of taxes, no deduction for consumption of the deceased, and at least one alternative assumes that the rate of increase in earnings equals the interest rate. Calculation of the value of fringe benefits and household services is not constrained by any legal parameters except, perhaps, the total offset rule. In most situations, economic loss as measured under rules in the Commonwealth of Kentucky will, ceteris paribus, result in a higher estimated loss than most other states.

V. Practical Items

The following are some practical issues that may be helpful to a forensic economist asked to testify in Kentucky.

1. Expert witness testimony is governed by the Kentucky Rules of Evidence, which follow very closely the Federal Rules of Evidence. Economists familiar with the latter should face few surprises when practicing in the Commonwealth of Kentucky. Further, to the authors' knowledge, there have been few motions in limine to limit or exclude economists' testimony in the Commonwealth.
2. When hired by the plaintiff’s side, it is virtually certain that the economist will write a report. The report will have to be well documented in terms of sources of information and assumptions. The opposing side is entitled to know what information will be presented in court in a timely manner. There are supposed to be no surprises. Further, it is common for depositions to be provided. This is true even if the economist is hired by the defense and has neither written a report or made calculations. If the economist is a named witness, he or she will almost always be requested to provide a deposition.

3. In the deposition, the opposing counsel will ask for everything the economist has relied upon. In the experience of the authors, most attorneys in the Commonwealth do not make unreasonable demands such as requiring the expert to produce personal tax records or copies of written reports in previous cases. A list of previous cases is sufficient. However, in a recent article, K. T. Williams (2004) wrote that it is permissible to ask detailed questions concerning the witness’s compensation. As stated in the article,

An expert witness’s credibility is no less of a concern than a lay witness’s credibility. Thus, the court noted that evidence reflecting upon an expert’s credibility “including evidence of bias, interest or prejudice” is relevant. (Williams, p. 18)

The case cited, Tuttle vs. Perry, occurred in 2002 and so would seem to signal a closer scrutiny of witnesses with reference to their impartiality. It has been the experience of the authors, however, that witnesses have always been closely questioned concerning whether they work only for the plaintiff or defense, how often a witness has been hired by a particular attorney, and their hourly rate of compensation. Thus, Tuttle vs. Perry seems more a codification of past practice rather than a significant change.

4. As outlined in the paper, there are numerous legal parameters imposed when calculating economic damages such as the total offset rule. Different experts will handle this potential problem differently. When the economist is hired by the plaintiff’s side, the attorney will generally request that the total offset rule be utilized. If the economist disagrees with the rule in terms of economic science, he or she may request that calculations using both the total offset rule and a positive net discount rate be employed. In the experience of the authors, calculating loss using both approaches has advantages. First, it is more consistent with past practice if the economist generally assumes a positive net discount rate in cases outside the Commonwealth. Second, as discussed earlier, the judge may rule that total offset is not appropriate.5 When the

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5It is still true that the majority of attorneys hired by the plaintiff will insist that only the total offset rule should be used as a matter of law. The economist can, of course, refuse to accept the case. If the economist does accept the case, a common strategy used by the attorney is to obtain a ruling from the judge barring any discussion of discounting at trial. Of course, that does not prevent such discussion during a deposition.
economist is hired by the defense, given the economist is asked to provide calculations, the attorney may request that the economist ignore the total offset rule. The danger here is that if the judge rules that only the total offset rule be considered, the economist’s testimony may be inadmissible. On the other hand, if the economist has calculated damages using the total offset rule, that calculation may not be significantly different than the estimate of the plaintiff’s economist.6

5. As true in most states, cases are often continued and dates for testimony frequently changed. However, attorneys are very accommodative in terms of working within the schedule of the expert. For example, in the experience of one of the authors, in 25 years of practice, he has never been asked to cancel a class due to obligations for testifying in court.

6. In general, it takes less sophistication to calculate economic losses in Kentucky than in other states. This is due to the legal parameters imposed such as the use of the total offset rule and ignoring consumption in death cases. These same factors imply that the Commonwealth will, ceteris paribus, produce larger awards than neighboring states. Thus, where possible attorneys will attempt to try a case in Kentucky or avoid that result—depending upon which side is viewing the case.

VI. Concluding Remarks

As stated in the previous section, the rules of Kentucky are very straightforward. A typical case in Kentucky requires far less time than those in other states or cases subject to federal law. Taxes are ignored, consumption of the deceased is ignored, and the total offset rule makes it unnecessary to compare the increase in loss and interest rates assuming the judge in the case rules that total offset must be used. All of these rules also have the effect of increasing the estimated economic loss. Although defense attorneys frequently question forensic economists during depositions concerning all of these issues, it has been the experience of the authors that judges have generally not allowed changes in these legal parameters. Changes in the law do not occur frequently in the Commonwealth. However, in the recent past there have been several proposals before the 2004 Kentucky Legislature related to tort law.7

6It is not uncommon for the economist to testify on behalf of the defense without providing any calculations. Their sole purpose is to criticize the assumptions of the plaintiff’s economist. Under these circumstances, the economist should be prepared for questions that ask why he or she did not make calculations and whether they are even capable of deriving the calculations.

7The most important proposed changes relate to medical malpractice suits. SB1 was a proposed constitutional amendment designed to limit non-economic damages when the defendant is a health-care provider. Specifically, such damages would not exceed $250,000. Further, punitive damages would likewise be limited to $250,000. Finally, there would be provision for a mandatory alternative dispute resolution system prior to trial by jury. These provisions would not apply if criminal charges were brought against the health-care provider. See www.lrc.state.ky.us/record/04rs/SB1.htm. SB12, another proposed amendment to the Constitution, also related to medical malpractice cases. See www.lrc.state.ky.us/record/04rs/SB12.htm. This proposed amendment required that medical malpractice cases be reviewed by a screening committee prior to filing and that the opinion of the committee be admissible in court. Finally, SB137,
Given the current governor is promoting tort reform, it is important that forensic economists realize that the “rules of the game” can change over time.

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Empire Metal Corp. v. Wohlwender, 445 S.W.2d 685 (Ky. 1969).

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proposed revision to the Kentucky Revised Statutes, attempted to limit the recovery of attorney fees. Specifically, the limits were 40% of the first $50,000 recovered, 33.33% of the next $50,000 recovered, 25% of the next $500,000 recovered, and 15% of any amount on which recovery exceeds $600,000. See www.lrc.state.ky.us/record/04rs/SB137.bil.dox. All three of the proposals related to medical malpractice cases and were motivated by the apparent medical malpractice crisis in the Commonwealth. None has been successfully passed into law. There is no doubt, however, that this issue will be revisited in the future.
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