

Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: the State of Missouri

Kurt V. Krueger and John O. Ward*

I. Introduction

The purpose of this article is to present the statutes, rules, and case law that govern the practice of forensic economics for personal injury (PI) and wrongful death (WD) in the state courts of Missouri.¹ Following the format of previous articles in this *JFE* series, Section II provides a listing of the controlling statutes, pattern jury instructions, and general case law pertaining to economic damages in PI and WD. Section III discusses the concept of earning capacity which appears throughout PI and WD case law in Missouri. Section IV discusses discounting to present value. Fringe benefits are discussed in Section V, while Section VI discusses the treatment of income taxes in PI cases. Services are discussed in Section VII, and the personal consumption deduction is discussed in Section VIII. Section IX discusses the handling of medical expenses, and Section X covers hedonic damages. Section XI addresses special issues in WD. Section XII presents concluding summary remarks including guidance on the admissibility of forensic economic testimony in the State of Missouri.

II. Controlling Statutes, Case Law, Court Rules and Pattern Jury Instructions

Damages in Missouri for WD and improper medical care actions are specified by statute while PI tort damages are specified by case law. Missouri case law also gives procedural guidance to WD damage issues. In this section, we present the pattern jury instructions, Missouri statutes, and general case law related to PI and WD economic damages. In later sections of the paper, we provide specific case law on topics in PI and WD economic damages.

A. PI Jury Instruction

The Missouri Supreme Court approves Missouri's pattern jury instructions which are titled *Missouri Approved Instructions* or MAI.² PI jury instructions

*John Ward Economics, Prairie Village, KS.

¹These papers are part of a series being prepared on economic damages in personal injury and wrongful death cases by state. A description of this series appeared as Robert A. Male and James D. Rodgers, "Introduction," *Journal of Forensic Economics*, Vol. 15, No. 3, Fall, 2002, pp. 317-18. Prospective authors of a paper for the series should consult that introduction and contact Male and Rodgers for information about the sequence of steps in the development and submission process, and also about papers already being developed or reviewed.

²*Missouri Approved Instructions, Civil*, 6th Edition, West Publishing, 2002.

are “short, simple, and easily understood. Since no particular items of damage are set out, there is no risk of the jury being improperly instructed on damages not supported by the record.”³ The following are the controlling MAI for common PI cases:

MAI 4.01 Damages Personal and Property

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence. [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number [], in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.]

MAI 8.02 Damages-Federal Employer Liability Act-Injury to Employee

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number [] in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure.] [If you find plaintiff contributorily negligent as submitted in Instruction Number [] then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.]

MAI 21.04 Damages-Actions against Health Care Providers-Comparative Fault

If you assess a percentage of fault to [any] defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence. You must state such total amount of plaintiff's damages in your verdict, and you must itemize those total damages by the categories set forth in [the] verdict form.

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form.

The phrase “past economic damages” means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services and for past lost earnings and for past lost earning capacity.

³Report/Bulletin: Supreme Court Rule Changes, 57 J. Mo. B. 318 at 320.

The phrase “past non-economic damages” means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase “future medical damages” means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services.

The phrase “future economic damages” means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase “future non-economic damages” means those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

B. WD Jury Instruction

Incorporating damages limiting language from the Missouri WD statute, the following are the MAI for common WD cases:

MAI 5.01 Damages-Wrongful Death

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff [and decedent] sustained [and plaintiff is reasonably certain to sustain in the future] as a direct result of the fatal injury to (*insert name of decedent*). You must not consider grief or bereavement suffered by reason of the death.

MAI 8.01 Damages-Death of Employee under Federal Employer Liability Act

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate (*here identify the beneficiaries*) for any damages you believe (*he, she, they*) [and decedent] sustained [and (*here identify the beneficiaries*) are reasonably certain to sustain in the future] as a direct result of the fatal injury to (*name of decedent*). Any award of future pecuniary damages must be included at present value. [Any award you may make is not subject to income tax.] [If you find decedent contributorily negligent as submitted in Instruction Number [], then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to decedent.]

You must not consider grief or bereavement suffered by reason of the death.

C. WD Statutes

Missouri Statute⁴ (Mo. Stat.) §537.080 gives primacy of WD damages to the surviving spouse or children of the deceased or the surviving lineal descen-

⁴Missouri Statutes can be found at <http://www.moga.state.mo.us/statutes/statutes.htm>.

dants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive. If there are no persons in the primary survivor group entitled to bring the action, then the secondary group of survivors is the brother or sister of the deceased, or their descendants, who can establish a right to damages because of the death. For example, the secondary group of survivors would have to show financial or service dependence upon the decedent.

Mo. Stat. §537.090 specifies the WD damages to be determined by the jury and the factors to be considered when determining damages. Damages must be “fair and just for the death and loss” having regard to the (a) pecuniary losses that the survivors have suffered by reason of the death, (b) funeral expenses, and (c) the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support that the decedent provided to his survivors. Damages for the survivors’ grief and bereavement by reason of the death are not recoverable and “mitigating or aggravating circumstances” attending the death may give rise to a claim for punitive damages.

D. Improper Medical Care Statute

While there are no statutory limits on damages under §537.090 for WD (nor are there statutory damage limits for PI torts absent improper medical care), Mo. Stat. §538.210 imposes a limitation on non-economic damages in PI or WD cases arising out of improper medical care. Mo. Stat. §538.205 and Mo. Stat. §538.215 require that (1) damages in all improper medical care cases be itemized into the elements contained in MAI 21.04 (above), and (2) that all future damages shall be expressed by the trier of fact at present value.

In any improper medical care case, Mo. Stat. §538.220 requires that past damages be paid in a lump sum. At the request of the plaintiff or defendant in an improper medical care case, the court (post-trial) shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds \$100,000.⁵

E. Prejudgment Interest Statute

According to Mo. Stat. §538.300, prejudgment interest cannot be claimed in improper medical care cases and Mo. Stat. §408.040.2 specifies how and when prejudgment interest is allowed in other PI and WD torts—only when a claimant has made a demand for payment or an offer of settlement of a claim and the eventual amount of the judgment or order exceeds the demand for payment or offer of settlement. Only in those cases, prejudgment interest at the simple rate of 9% per annum can be calculated from a date 60 days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Interest is allowed on all money due upon any judgment or order of any court from the day of rendering the claim or offer

⁵See 57 J. Mo. B. 172, “Structured Judgments and Periodic Payments in Missouri: Uncertainty on the Meaning of Tort Reform,” Thomas R. Ireland, July/August, 2001.

to settle the claim until satisfaction be made by payment. Missouri Courts have ruled that a literal reading of Mo. Rev. Stat. §408.040.2 prevents an award of prejudgment interest in tort cases except where a fiduciary relationship exists between plaintiff and defendant (*Ritter Landscaping v. Meeks*, 1997). The result of Mo. Rev. Stat. §408.040.2 and case law is that past interest calculations should not be offered as damages by the forensic economic expert arising from the PI or WD act and all prejudgment interest calculations, if warranted, are made post-trial by the court (*Emery v. Wal-Mart Stores, Inc.*, 1998; *Chambers ex rel. Abel v. Rice*, 1993).⁶

F. Make Whole and Collateral Source

Under Missouri case law, compensatory damages for PI and WD are framed within the “make whole” theory—the object of tort damages is to restore the tort victim as nearly as possible to the position he would have been in had the injury not occurred.⁷ Missouri courts also apply a collateral source rule:

a well-established rule in the law of damages, a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him, or, stated more succinctly, the wrongdoer may not be benefited by collateral payments made to the person he has wronged.⁸

Missouri’s legal support for the collateral source rule lies within the plaintiff’s right to realize the “benefit of their bargain.”⁹ For example, the plaintiff paid for insurance benefits in the form of premiums, committing their own financial resources which could have been put to a different use. In Missouri, defendants are not allowed to benefit by the plaintiff’s own contractual private¹⁰ agreements or right to public¹¹ benefits.

⁶Also see the worklife expectancy section below which provides citation that the present value of lost future earning capacity is computed from the time of trial, not the date of injury. If present value was calculated at the time of injury, the economic goal of equity would require prejudgment interest; however, prejudgment interest is not an allowable category of trier of fact determined damages in PI and WD cases in Missouri.

⁷See *Firestone v. Crown Center Redevelopment Corp.* (1985), *Bernhardt v. Perry* (1919), and, *Schnuck Markets, Inc. v. Transamerica Ins. Co.* (1983). While the “make whole” theory is a goal, procedural rules and basic realities do not guarantee that the plaintiff will be “made whole” with their award. For example, (1) prejudgment interest is not always available to compensate for foregone consumption or investment; (2) in PI, income taxes are not to be considered that the plaintiff would have likely paid; and, (3) realities such as attorney fees and case expenses, which are not compensable, prevent the plaintiff from being returned to whole.

⁸*Collier v. Roth*; also see *Kickham v. Carter*.

⁹*Washington v. Barnes Hosp.* (1995) addressing *Kickham v. Carter* (1960). The collateral source rule applies only to plaintiff collateral income or monies secured from an expense, obligation, or liability (*Duckett v. Troester*, 1999).

¹⁰These collateral sources include both those paid by the plaintiff and those received as a benefit of employment. See *Douthet v. State Farm Mut. Auto Ins. Co.* (1977) which addresses workers’ compensation benefits; *Leake v. Burlington Northern R. Co.* (1995), *Giddens v. Kansas City S. Ry. Co.* (2000), *Adams v. Burlington N. R.R.* (1993), and *Ramsey v. B.N.S.F. Railway Co.* (2004) all ad-

There are case law exceptions to the Missouri collateral source rule. The Missouri Supreme Court in *Moore v. Missouri Pac. R.R. Co.* (1992) decided evidence of collateral source payments may be offered “if the plaintiff voluntarily injects the issue [of poverty] into the lawsuit.”¹² In this case, plaintiff *Moore* volunteered statements that he could not continue his medical care because “I didn’t have any money.” By making this statement, the Missouri court ruled that he opened the door for proof he received money from an otherwise collateral source to disprove that he had no money. Related to this case law, Missouri defendants might use a strategy of attempting to induce a “poverty” comment from the plaintiff’s forensic economist with questions of why the plaintiff did not purchase alternative past health insurance or why the plaintiff did not hire some of their past lost household services.

A second type of exception to the collateral source rule in Missouri is when the mitigation evidence offered is a free governmental benefit, available to everyone without condition. In *Washington v. Barnes Hospital* (1995), the Missouri Supreme Court decided that since special education benefits were free of any condition for receipt in the public school system, the availability of free-of-cost education could be introduced as non-collateral evidence when the plaintiff presents expenses required for special schooling.

A third exception area in Missouri has been whether the collateral source rule applies to evidence of gratuitous services rendered to a plaintiff (where the person offering the services was without a contract to provide services or a promise for repayment or that the person is not a plaintiff in the case seeking recovery under a consortium-related claim). The case *Kaiser v. St. Louis Transit Co.* (1904) held that a plaintiff was entitled to damages, even though he was nursed gratuitously by his wife and daughter; however, in *Gibney v. St. Louis Transit Co.* (1907) the court held that an injured mother could not collect damages for her daughters’ gratuitous nursing services.¹³ Also, in *Morris v. Grand Ave. Ry. Co.* (1898)¹⁴ the court held that a plaintiff was not permitted to recover the value of medical services because the physician did not charge the

dressing railroad disability pension benefits as collateral source; *Beck v. Edison Bros. Stores, Inc.* (1983) discussing employer’s medical plan and sick pay; and, *Siemes v. Englehart* (1961) discussing sick leave.

¹¹These collateral sources include governmental benefits contingent upon plaintiff’s financial need or status (Medicare and Medicaid) and those contingent upon plaintiff’s former service or payments (Veterans’ benefits, Social Security, worker’s compensation, or unemployment compensation). See *Cornelius v. Gipe* (1981) where, in dicta, the court found Social Security, Medicare and Medicaid to be collateral sources; *Hood v. Heppler* (1973) Veterans’ benefits; *Sampson v. Mo. Pac. R.R. Co.* (1978) disallowing a reduction in damages by plaintiff’s receipt of worker’s compensation; and, *Burens v. Wolfe Wear-U-Well Corp.* (1942) addressing unemployment compensation.

¹²The collateral source door is also open if a damages expert comments on the “poverty” of the plaintiff. In *Washington v. Barnes Hospital*, during both direct examination and cross-examination, one of plaintiff’s damage experts repeatedly referred to Ms. Washington’s financial need. He implied that Ms. Washington could afford neither a car nor a wheelchair. He volunteered that she had moved for financial reasons, and that medical insurance was very difficult for persons with disabilities to obtain.

¹³Also see *Scanlon v. Kansas City* (1935) where a father with an independent right of recovery was allowed to recover the value of his services in nursing his injured son.

¹⁴Also see *Baldwin v. Kansas City Railways Co.* (1920) where nursing services by family members are held as gratuitous and non-recoverable absent an express contract by the claimant to pay family members for them.

plaintiff for his services. These last two exceptions in collateral source often present in life care plans when the recommended medical services are provided without cost (e.g., charitable or government organizations providing free services).

G. Nature of Damages

The forensic economist in Missouri will confront the terminologies of general damages and special damages. General damages are those that flow as the natural, necessary, and logical consequences of a wrongful act (e.g., pain and suffering in a PI claim); in contrast, special damages result from the defendant's act by reason of the special circumstances of the case (*Brown v. Hannibal & S. J. R. Co.*, 1889). Medical and hospital expenses (*Heibel v. Robison*, 1958), as well as loss of earnings and diminished capacity to work (*Fleddermann v. St. Louis Transit Co.*, 1908), are regarded as special damages because they are damages which are the natural but not the necessary and inevitable result of the wrongful act and injury of which the complaint is made (*Devine v. Kroger Grocery & Baking Co.*, 1942; *Boehm v. St. Louis Public Service Co.*, 1963).

H. Burden of Proof of Damages

In Missouri, the plaintiff has the burden of proof as to his damage claims in order to make a submissible case where the cause of action has damages as one of its elements (*Fondren v. Redwine*, 1995). It is incumbent upon the plaintiff to present the "best evidence available" to prove damages (*Gasser v. John Knox Village*, 1988; *Weindel v. DeSoto Rural Fire Protection Ass'n, Inc.*, 1989).

I. Future Damages and Life Expectancy

To justify a recovery for future damages, in Missouri there must be reasonable certainty of their occurring as a result of the original injury as supported by competent medical findings—the unsupported subjective statements of the injured party are not sufficient proof as to the existence of future damages (*Zoeller v. Terminal R. Association*, 1966). The forensic economist in Missouri should be aware of the medical testimony that supports the requirement for the existence of future damages because Missouri's general standard for recovering for future damages requires evidence of such a degree of probability of those future events occurring in addressing reasonable certainty (*Seabaugh v. Milde Farms, Inc.*, 1991).

Life expectancy tables to support a future damage calculation may be introduced in a PI case only if there is evidence that there is permanent injury (*Moore v. Ready Mixed Concrete Co.*, 1959). Reporting the accepted case law regarding the interpretation of life expectancy tables in PI and WD cases, in *Dorsey v. Muilenburg* (1961) the Missouri Supreme Court stated that

Mortality tables are admissible in evidence in a wrongful death case to show the life expectancy of the deceased. The tables are also ad-

missible to show the life expectancy of the one entitled to recover for the wrongful death. It is generally not essential to the admissibility of mortality tables to show that the person whose expectancy of life is under consideration conforms to the standards of health and vigor adopted in compiling such tables. In most jurisdictions, standard mortality tables are admissible in evidence notwithstanding the person whose life expectancy is the subject of inquiry is in poor health, afflicted with disease, or addicted to dissipated habits. Mortality tables are only guides or suggestions to the matters they set out, and cannot be rejected because of sharp variances in the hazards of life among various persons. Such matters are generally considered as going to the probative effect of the evidence, and not to its admissibility. The probative value of the mortality tables may be weakened, and even, perhaps, in some cases, destroyed by evidence of ill-health or disease of the person whose life expectancy is in issue; such matters may properly be considered by the jury in weighing the testimony, but they do not render it incompetent.

If offering the idea that a plaintiff's life expectancy is not represented by standard mortality tables, the plaintiff or defendant must provide medical expert witness testimony to that regard because "the calculus of disability and life expectancy into which factors of severity and physical condition must be incorporated is a matter which is of technical medical knowledge beyond the ken of the average juror" (*Sampson v. Missouri P. R. Co.*, 1978).

In all WD cases (and in some PI cases), the issue of joint life expectancy is addressed when two or more plaintiffs exist in the cause of action. "In all cases of this character it must be the expectation of that one who would sooner die which should control" (*Stevens v. Kansas City Light & Power Co.*, 1919 and *Dougherty v. Smith*, 1972).

J. Punitive Damages

In Missouri, punitive damages are awarded for the purpose of inflicting punishment for wrongdoing, and as an example and deterrent to similar conduct (*Lewis v. Envirotech Corp.*, 1984). There is no fixed relation between the amount of actual damages and the amount of punitive damages that may be awarded, and no fixed standard by which they can be measured (*Beggs v. Universal C. I. T. Credit Corp.*, 1966). When determining the amount of punitive damages to be awarded, the worth or financial condition of the tortfeasor is a relevant consideration, and any evidence of a defendant's financial status—not just his net worth—is relevant and admissible (*Collins v. Hertenstein*, 2002).

K. Mitigation of Damages

Mitigation is the minimization of damages by the reasonable efforts of the plaintiff. In Missouri, the one who suffers an injury is bound to exercise reasonable care in seeking and accepting medical aid (*Stipp v. Tsutomu Karasawa*, 1958) and following the medical restrictions imposed on him (*Stone v. Duffy Distributors, Inc.*, 1990). This concept in the law is related to the plaintiff's

post-injury medical restrictions that control possible alternative employment and ability to perform household services. Missouri law requires that the burden of proof of mitigation of damages is on the defendant who must show the opportunity to mitigate and the reasonable certainty of earnings in alternative work (*Smith v. Miner*, 1988; *Moore v. Ready Mixed Concrete Co.*, 1958).¹⁵ For example, the employee may recover only the difference between what he was able to earn before the injury and what he earned or could have earned thereafter. An injured employee has a duty to mitigate their damages by returning to gainful employment as soon as reasonably possible. Loss of wages as a consequence of the failure to return to gainful employment is the employee's choice, rather than a proximate result of the defendant's conduct (*Kauzlarich v. Atchison, T. & S.F. Ry.*, 1995). If a plaintiff received compensation from his or her employer post-injury and that compensation was for services currently rendered, then the defendant is entitled to a reduction in post-injury earnings loss. However, if the continued pay was gratuitous or was compensation for sick leave or annual leave, the defendant is not entitled to mitigation by the amount of post-injury earnings received (*Aaron v. Johnston*, 1990).

L. Consortium

The loss of consortium is a claim of damages made by the spouse of an injured person that is separate and distinct from the damage claim of the party's spouse that suffered the PI. In Missouri, the spouse seeking compensation for loss of consortium must show that he or she suffered damages arising out of the wife's or husband's injuries; it does not follow automatically from one spouse's injuries that the other spouse suffered loss of services (*Lear v. Norfolk & W. R. Co.*, 1991). Consortium losses by the spouse of the injured person historically have included the loss of services, society, companionship, support, protection, assistance with household chores, care, love, felicity, sexual intercourse, comfort, aid, affection, and conjugal rights (*Novak v. Kansas City Transit, Inc.*, 1963). Losses of consortium claims include the required nursing care provided by the spouse to his or her injured wife or husband (*Cline v. Carthage Crushed Limestone Co.*, 1974).

M. Federal Employers Liability Act

The actions created by the Federal Employers Liability Act, 45 U.S.C.A. §51-60, (FELA) are not Missouri causes of action, but are often brought in Missouri state court in preference to being in federal court; therefore, usual Missouri case law does not apply to FELA cases in every aspect of damages computation.¹⁶ However, when working in Missouri courts, the forensic economic ex-

¹⁵Also see *Chaussard v. The Kansas City Southern Railway Co.* (1976) where the defendant's offer that the plaintiff was capable of obtaining gainful employment after completing an educational program was not held as reasonably certain.

¹⁶In considering FELA cases, we are governed by the decisions of the Supreme Court of the United States." *Heppner v. The Atchison, Topeka and Santa Fe Railway Company* (1956); "As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *Kauzlarich v. A.T. S.F. Railway Co.* (1995). The

pert should be aware of specific Missouri case law relating to FELA damages computation.

In *Ramsey v. B.N.S.F. Railway* (2004), a Missouri appellate court summarized several Missouri rulings on FELA economic loss calculations. First, the *Ramsey* court clarified that when a plaintiff is not seeking lost railroad retirement benefits, railroad retirement taxes, which represent his contribution toward those benefits, should not be deducted from earnings. The court also noted here that when a FELA plaintiff seeks lost retirement benefits, then railroad retirement taxes are admissible and deductible from earnings.¹⁷ Second, the *Ramsey* court clarified that railroad disability payments under the Railroad Retirement Act are inadmissible to offset or mitigate damages except in situations in which the plaintiff raises his financial condition and implies poverty or alludes to financial distress. Third, the *Ramsey* court also stated that when retirement benefits are claimed as a loss, the inclusion of the retirement tax information in a damages computation is not analogous to the introduction of financial hardship evidence and does not open the door to admission of railroad disability payments. Fourth, the *Ramsey* court upheld the refusal of the following non-MAI instruction “[t]he measure of plaintiff’s wage loss must be calculated from his after tax income.” The *Ramsey* court stated that although the U.S. Supreme Court case *Norfolk & Western R. Co. v. Liepelt* (1980) held that income taxes were relevant and admissible for purposes of figuring plaintiff’s future wage loss, it said nothing about instructing the jury about deducting income taxes from wage loss calculations. Fifth, the *Ramsey* court clarified that when the plaintiff claims medical expenses, the FELA defendant is entitled to an offset for the medical expenses it has paid under its health and welfare benefit plan (e.g., medical treatment, salary continuation, health care insurance premiums, etc.).¹⁸

Federal and Missouri case law requires that FELA future losses are to be discounted to present value (*Dickerson v. St. Louis S. R. Co.*, 1985); however, Missouri holds that expert testimony of present value is not required since jurors can apply a discount rate based upon their own experience (*Anglim v. Mo. P. R. Co.*, 1992).

With regards to mitigation duties under FELA, Missouri courts state that the plaintiff is obliged to mitigate damages by (1) promptly seeking medical treatment, (2) participating in vocational rehabilitation, (3) returning to work subject to restrictions, and (4) obtaining alternative employment (*Duren v. Union Pac. R.R.*, 1988; *Holley v. Missouri Pac. R.R.*, 1993).

N. Per Diem

The “per diem” argument reduces the calculation of general non-economic damages down to a mathematical formula based on time units and a dollar

Kauzlarich case points out that the U.S. Supreme Court doesn’t give “precise rules” on every aspect of FELA litigation, therefore, absent “substantive” guidance by the U.S. Supreme Court, states procedures are followed.

¹⁷See *Adams v. Burlington N. R. Co.* (1993) for recommended procedures for calculating lost railroad retirement benefits.

¹⁸Also see *Anglim v. Mo. P. R. Co.* (1992) and *Melton v. Illinois C. G. R. Co.* (1988).

value of each time unit. The dollar value of each time unit is multiplied by the total number of time units offered (e.g., time units in remaining life expectancy) which gives a total value of damages. Missouri rejects per diem calculations of damages in PI and WD (*Graeff v. Baptist Temple of Springfield*, 1978).

III. Earning Capacity

In Missouri PI and WD cases, the valuation of pecuniary losses includes the evaluation of the plaintiff's earning capacity. For example, "it has consistently been held that in determining pecuniary loss in a wrongful death case it is proper for the jury to take into account the deceased's earning capacity" (*Martin v. Sloan*, 1964); and, in determining whether plaintiff's are reasonably compensated for their injuries, consideration may be given to the nature and extent of the injuries sustained, diminished earning capacity, economic conditions, and plaintiff's age (*Alcorn v. Union Pac. R.R. Co.*, 2001).

A. Missouri Definition of Earning Capacity

The Supreme Court of Missouri defined earning capacity in the case *Wolfe v. Kansas City* (1934). In *Wolfe*, the Missouri Supreme Court said that the

capacity to labor (physically or mentally) includes the capacity to earn money, and more. Our law is that recovery may be had for an impairment of the capacity to labor, although there may be in fact no actual loss of earnings, and to be deprived of the power to work is a source of injury, independent of the pecuniary benefits that such labor may confer.

The Court went further in the *Wolfe* case by saying that

there is a distinction between the power or capacity to work and earn money and loss of time or money that one probably will lose in the future on account of physical or mental disability. Loss of time, or what one may reasonably be expected to earn in the future, comes under the head of the amount of loss of time or earnings, or the fruits or gains from the power or capability to work and earn money. The authorities have not always made this distinction plain but, without stopping to analyze the matter, many courts have dealt with the two as the same thing. . . . However, the loss of the power to earn money or, earning capacity, has another meaning and that is the present power or ability to earn a living or earn money, which is inherent in every individual, although that power has never been exercised and there is no present intention to exercise it, because not necessary. The capacity to earn money in this sense is included in the term 'capacity to work.'

B. Establishing Lost Earning Capacity

The negligence of the defendant must be shown to be the proximate cause of the plaintiff's lost earning capacity as opposed to some other factor (*Rogers v. Thompson*, 1954). The foundational materials for establishing lost earning ca-

capacity include evidence of what the plaintiffs earnings were before the injury (*McDonald v. Missouri-Kansas-Texas Railroad Company*, 1966) as demonstrated by physical evidence such as income tax records (*Taylor v. Atchison-Topeka and Santa Fe Railway Company*, 1962), awards and honors (*Haley v. Byers Transportation Company*, 1967), and school records and degrees earned (*Kenton v. Hyatt Hotels Corp.*, 1985). In WD, proof of earning capacity is not necessarily limited to earnings at the time of death (*Shepard v. Harris*, 1959). In PI, loss in earning capacity can be evidenced with the testimony of treating physicians and/or employment counselors directed at (a) the ability of the plaintiff to perform labor, (b) the plaintiff's work limitations, (c) the necessity of the plaintiff to change occupations, and (d) the availability of jobs within the physical and mental capacities of the plaintiff (see *Duncan v. St. Louis-San Francisco Railway Co.*, 1973 and *Chrisler v. Holiday Valley, Inc.*, 1979). Lastly, Missouri courts have held that mortality tables and statistical compilations from government agencies can be useful in establishing the value of the plaintiff's impaired earning capacity.¹⁹

Loss in earning capacity can exist even though (1) the plaintiff's place of work had ceased to exist (*Fairbanks v. Byers*, 1986), (2) historical earnings were widely variable (*Dugger v. United States*, 1996), or (3) the plaintiff was planning on returning to previous higher paying work but was not doing so at the time of injury (*Meyers v. Southern Builders, Inc.*, 1999). In the first situation, the case law suggests earning capacity can be established by showing historical earnings in the job that would have been lost notwithstanding the injury. In the second situation, case law suggests earning capacity can be based on historical average earnings preceding the injury. In the third situation, future anticipated earning capacity based upon a return to work at \$41,000 was admissible even though the plaintiff was earning \$8.00 per hour at the time of injury.

C. Earning Capacity of Minors

In the case of injury to an adult, proof of past earnings must be made from which the extent of the pecuniary loss may be estimated with reasonable certainty. However, in the case of an infant or child (which Missouri describes as persons under the age of 18), whose earning capacity is wholly untried, it is held that the question of his damage for the loss of future earning capacity is necessarily to be left to the sound judgment, experience, and conscience of the jury (*Newman v. St. Louis-San Francisco Ry. Co.*, 1963).

In *Vincent v. Johnson* (1992), the Missouri Supreme Court provides an analysis of earning capacity damages for a child. The court stated that plaintiffs' economic expert testified regarding some assumptions in his calculation of earning capacity.

¹⁹See *Coffman v. St. Louis-San Francisco Railway Company* (1964); *Prince v. Kansas City Southern Ry. Co.* (1950); *Breland v. Gulf, Mobile and Ohio Railroad Company* (1959); and, *Jackson v. Cherokee Drug Co.* (1968).

Economists are familiar with terms like present value, with explaining such terms, and with presenting historical trends. Projections by economists that any economic trends will continue in the future are not entitled to automatic acceptance by the jury even when not contradicted. A jury may disbelieve parts of an expert's testimony; and, when the expert gives an opinion on a matter of general experience, the jury may weigh that testimony against their general experience.

In this case, the witness testified that, over the past several decades, there has been no difference between interest rates and wage increases. The witness chose in making his estimates to give greater weight to the past several years, which produces a difference equaling a present discount rate of 1.5%. The witness also calculated the salary amount based on a retirement age of 67 despite the general prohibition on mandatory retirement. While, as always, it is unclear exactly what the jury believed or disbelieved of this witness' testimony, the jury was entitled to believe both that the long-term trend more accurately stated the discount rate, and to calculate lost wages on the assumption that a healthy Rita M. Vincent would have worked past age 67. Either of these permissible findings supports the verdict given. Last, the testimony of plaintiffs' expert used "average female" wages rather than average wages. This Court will not consider it error for a jury to refuse to minimize an award of lost minimum wages for an infant female on the assumption that the average wage for women in the future will still be only two-thirds of the average wage for men.

In *Coffman v. St. Louis-San Francisco Railway Company* (1964), the Missouri Supreme Court gave a thorough account of the determining the reasonable estimate of the lost earning capacity of a minor based upon the "school-mindedness" of the plaintiff's family, the intentions of the parents to send the plaintiff to college, the educational attainment of siblings and parents, and the average earnings of persons by level of education attained.

D. Earning Capacity of the Self-Employed

Missouri courts have consistently realized that self-employed persons can have a diminished earning capacity even though they continue to operate their business. For example, in *Breeding v. Dodson Trailer Repair, Inc.* (1984) a 47-year-old, self-employed tow truck operator had to curtail his daily activities, reducing his work day to four or five hours—he previously worked "on-call," 24 hours a day—and had to engage in less strenuous types of jobs. In this case, the Missouri Supreme Court stated that "it is apparent, therefore, that the character of the plaintiff's injuries has affected his earning capacity." Evidence that an injured farmer is unable to plant acreage to the extent that he was able to before his injury is sufficient to establish a loss in earning capacity (see *Beckett v. Kiepe*, 1963; *Myers v. Karchmer*, 1958). When substantial capital is invested in a business or the business employs many people, the return on capital invested or from the supervision of employees must be separated from the labor efforts of the business owner when establishing lost earning capacity

of the business owner (*Seymour v. House*, 1957). If the business owned by the injured plaintiff was unprofitable at the time of injury, loss of earning capacity can be established by clear evidence of the plaintiff's ability to be employed at some type of work (*Patrick v. Alphin*, 1992).²⁰

In the case where a self-employed mechanic and painter offered damages related to the cost to employ other mechanics at his garage to assist him in performing repairs on automobiles and painting automobiles, the Missouri Supreme Court held that "under these circumstances, it can be said without contradiction that the injuries are substantial and permanent, and that plaintiff's earning capacity has been diminished" (*Helming v. Dulle*, 1969). The cost to injured self-employed persons to hire workers to perform some of the work they once were able to do before injury is sufficient evidence to show a basis for loss of earning capacity (see *Fishang v. Eyermann Contracting, Co.*, 1933; *Liles v. Associated Transports, Inc.*, 1949).

E. Worklife Expectancy

In *Coffman v. St. Louis-San Francisco Ry. Co.* (1964), the Missouri Supreme Court presented a view of worklife expectancy where future lost earning capacity occurs as the

extent of future harm to the earning capacity of the injured person is measured by the difference viewed as of the time of trial between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm. This difference is the resultant derived from reducing to present value the anticipated losses of earnings during the period of the prospective life the plaintiff would have had but for the defendant's act.

The Missouri Supreme Court in *Sampson v. Missouri Pacific Railroad Company* (1978) stated that while it may be valid that disease and disability would affect life and work expectancy, "a labor economist, was not the expert who was qualified to opine on the effect of disease upon work expectancy." Absent qualified evidence regarding the effect of disease and disability on the plaintiff's life and work expectancy, the economist in *Sampson* was allowed to present an estimate of the worklife expectancy of all males in all occupations.

When an injury will likely lead to a shortened life or worklife expectancy, the Missouri Supreme Court has fully endorsed that the loss of earning capacity based on the probable life expectancy of the plaintiff if he had not received the injury (*Coffman v. St. Louis-San Francisco Railway Company*, 1964).²¹ The effect of a pre-existing condition on the plaintiff's earning capacity or worklife expectancy, if any, must be separated from the effect on earning capacity asso-

²⁰In this case it was demonstrated that the plaintiff had a history of consistent employment and was young enough to have continued working at some type of employment but for his disability.

²¹Also from *Coffman*, future medical costs are limited to the probable shortened life expectancy of the injured plaintiff.

ciated with the injury (*Belisle v. Wilson*, 1958).²² If a plaintiff dies from causes unrelated to the tort issue at hand, damages for impaired earning capacity are confined to the time up to the death and are not to be based on the plaintiff's life expectancy at the time of injury (*Rogers v. Thompson*, 1954).

IV. Discounting to Present Value

In all cases except FELA and improper medical care, (1) a jury instruction that damages be expressed at their present value is not allowed (*Cole v. Good-year Tire & Rubber Co.*, 1998), and (2) the plaintiff need not present evidence of the present value of future losses; however, the defendant may offer that evidence (*Nesselrode v. Executive Beechcraft, Inc.*, 1986). But the Missouri Supreme Court in *Nesselrode* rejected the defendant's simple offering of a set of present value tables for the jury's consideration because there was no evidence given by the defendant to explain to the jury the applicability of the tables to the case. Therefore, economic testimony is predicted as a necessary condition of presenting the jury the mathematical calculations and the basis thereof for reducing future PI and WD damages to their present value.

The Missouri Supreme Court case *Anglim v. Mo. P. R. Co.* (1992) succinctly presents the general concept of present value in PI and WD cases. The Missouri Supreme Court found that when a present value instruction is required, evidence of the manner of computing present value is an essential element of a plaintiff's burden of proof. The court stated that Missouri follows the rule "the fact that a dollar today is not the same thing as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony." The Missouri Supreme Court ruled in this case that no single method for determining present value is mandated and either plaintiff or defendant may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument. In the *Anglim v. Mo. P. R. Co.* case, the court noted that the jury returned a general verdict, as is required under Missouri procedure Rule 71.02, and the sum included within the general verdict as compensation for future loss of wages is a matter forever relegated to the bosom of the jury. The court concluded that in the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss. In *Firestone v. Crown Center Development Corporation* (1985), the Missouri Supreme Court acknowledged the wide variation of present value calculations between the plaintiff and defendant economists, but said that the jury could evaluate the conflicting opinions of the two economists.

Missouri courts consistently recognize

that there is a degree of speculation to the determination of a fairly approximated present value award compensating plaintiff for what

²²Missouri courts have also consistently ruled that aggravation of pre-existing conditions may lead to a recovery of lost earning capacity due to the aggravating injury (*Schide v. Gottschick*, 1931; *Walker v. St. Louis Pub. Serv. Co.*, 1951).

he would have earned but for his injury, but we do not find such speculation, when based upon the use of facts in reasonable calculations, to be so purely conjectural as to improperly influence the jury's verdict as to damages. The expert's calculation of damages based on a correlation between interest rates and earnings (growth rates) is a projection; nevertheless, it is a prediction based upon reasonable certainty (*Anderson v. Burlington N. R. Co.*, 1985).

The Missouri Supreme Court has recognized that changing economic conditions²³ leads to increases in earnings due to productivity²⁴ and "continuing inflation"²⁵ as a part of the process of discounting to present value. For example, in *Coffman v. St. Louis-San Francisco Ry. Co.* (1964), "we approved the use of reasonably expected salary increases from which to determine a fairly approximated present-value award compensating plaintiff for what he would have earned, but for his injury."

V. Fringe Benefits

The Missouri courts have had little to say regarding fringe benefits other than to associate them with earning capacity and economic loss (e.g., *Firestone v. Crown Center Redevelopment Corp.*, 1985 and, *Barnett v. Turbomeca Engine Corp.*, 1997). In *Adams v. Burlington N. R. Co.* (1993), a Missouri appellate court offered a methodology of computing the FELA plaintiff's lost retirement benefits as applying the retirement annuity formula in order to arrive at two numbers: (1) the amount plaintiff would have been entitled to if he had continued to work until age 66, and (2) the amount plaintiff will actually be entitled to. The plaintiff's lost benefit, according to the court, would be the difference between the two amounts, discounted to present value.

VI. Income taxes in PI Cases

In all non-FELA PI cases within the State of Missouri, the courts have held that giving a jury instruction that any award was not subject to federal or state income taxes would constitute presumptive prejudicial error which may have tended to influence the amount of the verdict (*Tennis v. General Motors Corp.*, 1981). In *Kenton v. Hyatt Hotels Corp.* (1985), the Missouri Supreme Court noted that FELA cases are the only PI cases in Missouri where jury instructions concerning income taxes are relevant. In *Cole v. Goodyear Tire & Rubber Co.* (1998), a Missouri appellate court strongly stated that the "argument that personal injury cases should be treated like FELA cases has been argued before and rejected." In PI cases being tried in federal court based on substantive law of Missouri, the 8th Circuit in *Gander v. FMC Corp.* (1990) stated that cross-examination concerning the tax liability of an award or the effect of income taxes on lost income is impermissible under Missouri law.

²³*Braun v. Roux Distributing Co. Inc.* (1958).

²⁴*Sampson v. Missouri P. R. Co.* (1978).

²⁵*Fann v. Farmer* (1956).

VII. Services

Missouri courts have consistently associated services with pecuniary damages in PI and WD (for example, see *Williams v. Daus*, 2003; *Letz v. Turbomeca Engine Corp.*, 1997; *Barnett v. Turbomeca Engine Corp.*, 1997; *Braun v. Roux Distributing Co., Inc.*, 1958). In *Gardner v. Reynolds* (1989), a Missouri Appellate Court presents a considerable listing of recognizable household service loss in a WD case. The Missouri WD statute §537.090 specifies the damages to be determined by jury and the factors to be considered when determining damages as including “the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support.” In the *Letz* case, the Missouri appellate court recognized as evidence of WD compensatory damages the economic expert’s determination of the value of household services and the value of guidance and counseling. In the *Letz* companion *Barnett* case, the court stated that “[t]he purely economic damages attributable to Barnett’s death are undisputed, both sides agree that \$649,080.00 represents the lost past and future earnings, benefits and household services related to James Barnett’s death.”

VIII. Personal Consumption

While the terminology of personal consumption is absent from the Missouri WD statute, Missouri case law consistently implies the statutory implication of personal consumption as the difference between earning capacity and “support of dependents” or “potential financial aid.” For example, “(i)n a death claim it is proper to show conditions such as health, earning capacity, age, and habits of the deceased in determining his earning capacity and contribution to support of his dependents” (*Grothe v. St. Louis-San Francisco Ry. Co.*, 1970); and,

In case of a death claim it is proper to permit plaintiff to prove her age and state of health, as well as the age, condition of health, earning capacity and personal expense of deceased ... The general habits and personal expense of the deceased could be considered by the jury in determining his earning capacity and contribution to his wife’s support. (*Morton v. Southwestern Telegraph & Telephone Company*, 1920).

Also, “(a) factor to be considered in evaluating damages under the Wrongful Death Act is potential financial aid by the decedent, which can be shown through evidence of the decedent’s health, character, talents, earning capacity, life expectancy, age, and habits” (*Kilmer v. Browning*, 1991). Furthermore, according to the Missouri Supreme Court:

The test of the right of recovery under our death statutes is the reasonable probability of pecuniary benefit from the continued life of the deceased, or a pecuniary injury from the death, and not that of strict legal dependency. We know of no Missouri authority barring such a claim as this because of the nonexistence of a legal dependency, and the contention is disallowed (*Domijan v. Harp*, 1960).

In *Heppner v. The Atchison, Topeka and Santa Fe Railway Company* (1956), the Missouri Supreme Court stated that an actuary's testimony which was limited to the amount of decedent's take-home pay and the length of decedent's normal life expectancy was proper evidence to be received by the jury but incomplete of the necessary information needed by the jury to determine pecuniary loss to the plaintiff widow. According to the court,

all that the actuary did, in producing the testimony complained of, was to multiply one of these items by the other (thus obtaining the total expected take-home earnings) and to reduce the amount so obtained to its present value. Since that figure did not represent the ultimate measure of damages the computation was, at least, incomplete.

In *Heppner*, the court went on to say that

“(a)s the courts have frequently said, the amount of damages to be awarded in this class of cases is necessarily speculative to a large extent and many elements and contingencies enter into the calculation, if indeed it can be called a mathematical calculation. Certain general rules may be given for the jury's guidance, as was done here, and certain basic facts, such as the approximate net earning power of money and the life expectancy of the deceased, his earning capacity at the time of his death, and all the contributions he was then and had been making to plaintiff or the beneficiary, are properly put in evidence, together with certain inclusions and exclusions, but these are mere guides and matters for the jury to consider in exercising a sound judgment.” *Goyette v. St. Louis-San Francisco Ry. Co.*, 37 S.W.2d 552 (Mo., 1931). If the jury desired to use the figure stated by the actuary and deduct there from the amount of decedent's personal expenses, it likely could (along with the use of other elements and contingencies) have arrived at a fairly accurate sum as the amount of the present cash value of the total future pecuniary benefit of which the widow was deprived.

The Missouri Supreme Court's language in *Heppner* predicts an acceptance of the plaintiff's pecuniary loss in a WD case as either (a) evidence of the amount of decedent's earnings (labeled in *Heppner* as “take-home pay”) accruing to the survivors' benefit, or (b) deduct from decedent's earnings the amount of his “personal expenses,” as such would not have been a pecuniary benefit to his survivors.

Insurance, survivor pensions, and Social Security benefits received by the survivors as a result of the deceased's death are not admissible to reduce damages in WD (*Farr v. Schoeneman*, 1985).

IX. Medical Expenses

An injured plaintiff in Missouri may recover the reasonable value of necessary medical and hospital insurance incurred as a result of defendant's negligence, whether paid or unpaid (*Schaeffer v. Craden*, 1990). Before the forensic

economist discounts future medical cost damages to present value, the plaintiff must present medical testimony regarding the reasonably certain future expected medical condition of the plaintiff (*Hobbs v. Harken*, 1998). In the *Hobbs* case, the forensic economist's estimates of future life care damages, based upon a life care plan, were found in error because of the lack of supporting medical testimony on the need for such future life care.

Future medical expenses are only allowed to be calculated for the remaining expected lifetime of the plaintiff as given by medical testimony (*Long v. Missouri Delta Med. Ctr.*, 2000; *Coffman v. St. Louis-San Francisco Railway Company*, 1964). Therefore, when the plaintiff has a shortened life expectancy, future medical expenses can only be calculated during that the shortened life expectancy.

In *Adams v. Children's Mercy Hosp.* (1993), the appellate court upheld the trial court's exclusion of an annuitant's testimony because the proposed expert was not an economist, but was actually a salesperson and not qualified to give an opinion on the present value of future required medical needs. The measure of future medical expenses can properly include projected cost increases due to inflation or other factors supported by the evidence (*Pretre v. United States*, 1981).

X. Hedonic Damages

The admissibility of hedonic damages has not been endorsed in the Missouri Supreme Court nor in any Missouri appellate court. The issue of hedonic damages was raised in an appellate court in *Schumann v. Missouri Highway and Transp. Comm'n* (1995) and treated in such an unfavorable manner that hedonic damage testimony in Missouri is scarce, if not non-existent. While not specifically prohibited, the *Schumann* decision suggests that such testimony would be barred if presented to the Missouri Supreme Court.

XI. Special Issues in WD

Since 1855, all tort actions for WD in Missouri exist by statute instead of case law. Missouri applies the "Lord Campbell" or survivor theory of damages in the event of WD—nothing extends the cause of action to the decedent's estate such as the loss of future earnings and deprivation of the pleasures of life (*Powell v. American Motors Corp.*, 1992).

The controlling WD statutes are §537.080, 537.085, and 537.090. According to these statutes, (1) WD actions do not belong to the deceased, and (2) the purpose of WD tort damages is to compensate specific survivors for the loss of the decedent's companionship, comfort, instruction, guidance, counsel, and support (*Sullivan v. Carlisle*, 1993).

In a WD case, according to statute the jury has extraordinarily wide discretion in awarding damages (*Letz v. Turbomeca Engine Corp.*, 1997). However, guidelines for reasonable recovery of WD damages have been supplied in Missouri case law. "The test of the right of recovery ... is the reasonable probability of pecuniary benefit from the continued life of the deceased ... That Janice (a daughter) had no legal obligation to contribute to the support of or provide

services to her parents at the time of her death does not bar their claim” (*Weast v. Festus Flying Service*, 1984). “In case of a death claim it is proper to permit plaintiff to prove her age and state of health, as well as the age, condition of health, earning capacity and personal expense of deceased ... The general habits and personal expense of the deceased could be considered by the jury in determining his earning capacity and contribution to his wife’s support.” (*Morton v. Southwestern Telegraph & Telephone Company*, 1920). Evidence of a plaintiff’s remarriage is not relevant to the question of damages on loss of support and services (*Glick v. Allstate Ins. Co.*, 1968; *Elmahdi v. Ethridge*, 1999). However, evidence regarding the stability of a marriage before the death is admissible and relevant to the question of damages (*Spengel v. Kantor*, 1987).

When parents bring a WD action for their minor child’s death and seek pecuniary damages,

The measure of damages and the amount of the verdict in an action for wrongful death of a minor inherently involves some element of speculation and intangibles. An award is not based on direct, positive evidence but upon probabilities which the jury must reasonably find. The jury has an extraordinarily wide discretion in determining the amount of recovery in such wrongful death cases. The probabilities depend upon the child’s age, condition, health, mentality, personality and the parent’s ages and circumstances. In cases of this kind the award of damages can rest only on considerations of the most general character and much must be left to the common sense of the jury (*Cobb v. State Sec. Ins. Co.*, 1979).

In computing the loss of consortium for the loss of a parent for a child, or the loss of a child for a parent, factors such as the physical, emotional, and psychological relationship between the parent and child must be considered (*Lopez v. Three Rivers Elec. Coop.*, 2002). The pecuniary loss for which damages may be recovered by a parent for the WD of an adult child is not in all cases limited to the money which would have been contributed to the parent by the child had the child lived. The loss may consist of the various elements of pecuniary value that enter into the domestic relation of parent and child, living in one family, or otherwise. In such cases, the aim of the law is to repair in a pecuniary way the loss sustained by the parent (*Hertz v. McDowell*, 1948). In *Hallberg v. Brasher* (1982), the court held that a child’s past help to his parents around the house and the relationship after he moved out of his parent’s house exhibited by telephone calls and mail were sufficient to show the basis for future damages.

XII. Summary

While this paper has not focused on specific admissibility issues for expert testimony,²⁶ it does provide the framework for predicting the admissibility of

²⁶A 2003 opinion by the Missouri Supreme Court rejects both the *Frye* and *Daubert* standards in favor of the clear language of Missouri Statute §490.065 regarding the standards for admissibility and use of expert testimony. See *State Board of Registration for the Healing Arts v. McDonagh*, No. 85275 (Mo. banc, December 23, 2003). Missouri Statute §490.065, in its entirety, provides: (1) In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to

economic expert testimony in the State of Missouri. As contained in the case law presented in this article, Missouri courts give considerable leeway in the presentation of economic damages in PI and WD with the recognition that there is a “degree of speculation to the determination of a fairly approximated present value award compensating plaintiff” for his or her economic loss (*Anderson v. Burlington N. R. Co.*, 1985). In Missouri, forensic economic testimony is relevant and admissible when it is (1) based on the clear evidence presented in the case, and (2) it utilizes reasonable calculations and methods of calculating economic damages. For example, even though the plaintiff’s economist’s testimony was severely criticized by a defendant, a Missouri appellate court stated that the economist’s theories were subject to extensive cross-examination and it could not conclude, as a matter of law, that the economist’s calculations of economic damages were incorrect. In that case, the appellate court stated that the jury, as the trier-of-fact, could decide whether the economist’s testimony was credible and the weight to be given to it (*Long v. Missouri Delta*, 2000).

List of Cases

Aaron v. Johnston, 794 S.W. 2d 724 (Mo. App. 1990)
 Adams v. Burlington N. R.R., 865 S.W.2d 748 (Mo. App. 1993)
 Adams v. Children's Mercy Hosp., 848 S.W.2d 535 (Mo. App. 1993)
 Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226 (Mo. 2001)
 Anderson v. Burlington N. R. Co., 700 S.W.2d 469 (Mo. App. 1985)
 Anglim v. Mo. P. R. Co., 832 S.W.2d 298 (Mo. 1992)
 Baldwin v. Kansas City Railways Co., 218 S.W.2d 955 (Mo. App. 1920)
 Barnett v. Turbomeca Engine Corp., 963 S.W.2d 639 (Mo. App. 1997)
 Beck v. Edison Bros. Stores, Inc., 657 S.W.2d 326 (Mo. App. 1983)
 Beckett v. Kiepe, 369 S.W.2d 258 (Mo. App. 1963)
 Beggs v. Universal C. I. T. Credit Corp., 409 S.W.2d 719 (Mo. 1966)
 Belisle v. Wilson, 313 S.W.2d 11 (Mo. 1958)
 Bernhardt v. Perry, 276 Mo. 612 (Mo. 1919)
 Boehm v. St. Louis Public Service Co., 368 S.W.2d 361 (Mo. 1963)
 Braun v. Roux Distributing Co. Inc., 312 S.W.2d 758 (Mo. 1958)
 Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281 (Mo. 1984)
 Breland v. Gulf, Mobile and Ohio Railroad Company, 325 S.W.2d 9 (Mo. 1959)
 Brown v. Hannibal & S. J. R. Co., 99 Mo. 310 (Mo. 1889)
 Burens v. Wolfe Wear-U-Well Corp., 158 S.W.2d 175 (Mo. App. 1942)
 Chambers ex rel. Abel v. Rice, 858 S.W.2d 230 (Mo. App. 1993)

understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. (2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (3) The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable. (4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

- Chaussard v. The Kansas City Southern Railway Co., 536 S.W.2d 822 (Mo. App. 1976)
Chrisler v. Holiday Valley, Inc., 580 S.W.2d 309 (Mo. App. 1979)
Cline v. Carthage Crushed Limestone Co., 504 S.W.2d 118 (Mo. 1974)
Cobb v. State Sec. Ins. Co., 576 S.W.2d 726 (Mo. 1979)
Coffman v. St. Louis-San Francisco Railway Company, 378 S.W.2d 583 (Mo. 1964)
Cole v. Goodyear Tire & Rubber Co., 967 S.W.2d 176 (Mo. App. 1998)
Collier v. Roth, 434 S.W.2d 502 (Mo. 1968)
Collins v. Hertenstein, 90 S.W.3d 87 (Mo. App. 2002)
Cornelius v. Gipe, 625 S.W.2d 880 (Mo. App. 1981)
Devine v. Kroger Grocery & Baking Co., 162 S.W.2d 813 (Mo. 1942)
Dickerson v. St. Louis S. R. Co., 697 S.W.2d 210 (Mo. App. 1985)
Domijan v. Harp, 340 S.W.2d 728 (Mo. 1960)
Dorsey v. Muilenburg, 345 S.W.2d 134 (Mo. 1961)
Dougherty v. Smith, 480 S.W.2d 519 (Mo. App. 1972)
Douthet v. State Farm Mut. Auto Ins. Co., 546 S.W.2d 156 (Mo. banc 1977)
Duckett v. Troester, 996 S.W.2d 641 (Mo. App. 1999).
Dugger v. United States, 936 F.Supp. 662 (8th Cir. E.D. Mo. 1996)
Duncan v. St. Louis-San Francisco Railway Co., 480 F.2d 79 (8th Cir. 1973)
Duren v. Union Pac. R.R., 980 S.W.2d 77 (Mo. App. 1998)
Elmahdi v. Ethridge, 987 S.W.2d 366 (Mo. App. 1999)
Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. banc 1998)
Fairbanks v. Byers, 705 S.W.2d 230 (Mo. App. 1986)
Farr v. Schoeneman, 702 S.W.2d 512 (Mo. App. 1985)
Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985)
Fishang v. Eyermann Contracting, Co., 63 S.W.2d 30 (Mo. 1933)
Fleddermann v. St. Louis Transit Co., 113 S.W. 1143 (Mo. App. 1908)
Fondren v. Redwine, 905 S.W.2d 156 (Mo. App. 1995)
Gander v. FMC Corp., 892 F.2d 1373 (8th Cir. 1990)
Gardner v. Reynolds, 775 S.W.2d 173 (Mo. App. 1989)
Gasser v. John Knox Village, 761 S.W.2d. 728 (Mo. App. 1988)
Gibney v. St. Louis Transit Co. 204 Mo. 704 (Mo. 1907)
Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813 (Mo. 2000)
Glick v. Allstate Ins. Co., 435 S.W.2d 17 (Mo. App. 1968)
Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291 (Mo. 1978)
Grothe v. St. Louis-San Francisco Ry. Co., 460 S.W.2d 711 (Mo. 1970)
Haley v. Byers Transportation Company, 414 S.W.2d 777 (Mo. 1967)
Hallberg v. Brasher, 679 F.2d 751 (8th Cir. 1982)
Heibel v. Robison, Mo. App. 316 S.W.2d 238 (Mo. App. 1958)
Helming v. Dulle, 441 S.W.2d 350 (Mo. 1969)
Heppner v. The A.T.S.F. Railway Co., 297 S.W.2d 497 (Mo. 1956)
Hertz v. McDowell, 358 Mo. 383 (Mo. 1948)
Hobbs v. Harken, 969 S.W.2d 318 (Mo. App. 1998)
Holley v. Missouri Pac. R.R., 867 S.W.2d 610 (Mo. App. 1993)
Hood v. Heppler, 503 S.W.2d 452 (Mo. App. 1973)
Jackson v. Cherokee Drug Co., 434 S.W.2d 251 (Mo. App. 1968).
Kaiser v. St. Louis Transit Co., 84 S.W. 199 (Mo. App. 1904)
Kauzlarich v. A.T. S.F. Railway Co., 910 S.W.2d 254 (Mo. 1995)
Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83 (Mo. 1985)
Kickham v. Carter, 335 S.W.2d 83 (Mo. 1960)
Kilmer v. Browning, 806 S.W.2d 75 (Mo. App. 1991)
Leake v. Burlington Northern R. Co., 892 S.W.2d 359 (Mo. App. 1995)
Lear v. Norfolk & W. R. Co., 815 S.W.2d 12 (Mo. App. 1991)
Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. 1997)

Lewis v. Envirotech Corp., 674 S.W.2d 105 (Mo. App. 1984)
 Liles v. Associated Transports, Inc., 220 S.W.2d 36 (Mo. 1949)
 Long v. Missouri Delta Med. Ctr., 33 S.W.3d 629 (Mo. App. 2000)
 Lopez v. Three Rivers Elec. Coop., 92 S.W.3d 165 (Mo. App. 2002)
 Martin v. Sloan, 377 S.W.2d 252 (Mo. 1964)
 McDonald v. Missouri-Kansas-Texas Railroad Company, 401 S.W.2d 465 (Mo. 1966)
 Melton v. Illinois C. G. R. Co., 763 S.W.2d 321 (Mo. App. 1988).
 Meyers v. Southern Builders, Inc., 7 S.W.3d 507 (Mo. App. 1999)
 Moore v. Missouri Pac. R.R. Co., 825 S.W.2d 839 (Mo. banc 1992)
 Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14 (Mo. 1959)
 Morris v. Grand Ave. Ry. Co. 46 S.W. 170 (Mo. 1898)
 Morton v. Southwestern Telegraph & Telephone Company, 217 S.W. 831 (Mo. 1920)
 Myers v. Karchmer, 313 S.W.2d 597 (Mo., 1958)
 Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986)
 Newman v. St. Louis-San Francisco Ry. Co., 369 S.W.2d 583 (Mo. 1963)
 Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490 (U.S. 1980)
 Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963)
 Patrick v. Alphin, 825 S.W.2d 11 (Mo. App. E.D. 1992)
 Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. 1992)
 Pretre v. United States, 531 F.Supp. 931(8th Cir. E.D. Mo. 1981)
 Prince v. Kansas City Southern Ry. Co., 229 S.W.2d 568 (Mo., 1950)
 Ramsey v. B.N.S.F. Railway Co., 130 S.W.3d 646 (Mo. App. 2004)
 Ritter Landscaping v. Meeks, 950 S.W.2d 495, (Mo. App. 1997)
 Rogers v. Thompson, 265 S.W.2d 282 (Mo. banc 1954)
 Sampson v. Missouri P. R. Co., 560 S.W.2d 573 (Mo. 1978)
 Scanlon v. Kansas City, 81 S.W.2d 939 (Mo. Banc 1935)
 Schaeffer v. Craden, 800 S.W. 2d 166 (Mo. App. 1990)
 Schide v. Gottschick, 43 S.W.2d 777 (Mo. 1931)
 Schnuck Markets, Inc. v. Transamerica Ins. Co., 652 S.W.2d 206 (Mo. App. 1983)
 Schumann v. Missouri Highway and Transp. Comm'n, 912 S.W.2d 548 (Mo. App. 1995)
 Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. 1991)
 Seymour v. House, 305 S.W.2d 1 (Mo., 1957)
 Shepard v. Harris, 329 S.W.2d 1 (Mo. banc 1959)
 Siemes v. Englehart, 346 S.W.2d 560 (Mo. App. 1961)
 Smith v. Miner, 761 S.W.2d 259 (Mo. App. 1988)
 Spengel v. Kantor, 736 S.W.2d 51 (Mo. App. 1987)
 State Board of Registration for the Healing Arts v. McDonagh, No. 85275 (Mo. banc 2003)
 Stevens v. Kansas City Light & Power Co., 200 Mo. App. 651 (Mo. App. 1919)
 Stipp v. Tsutomu Karasawa, 318 S.W.2d 172 (Mo. 1958)
 Stone v. Duffy Distributors, Inc., 785 S.W.2d 671 (Mo. App.1990)
 Sullivan v. Carlisle, 851 S.W.2d 510 (Mo. 1993)
 Taylor v. A.T.S.F. Railway Co., 7 Fed. R. Serv. 2d 651 (U.S. W.D. MO. 1962)
 Tennis v. General Motors Corp., 625 S.W.2d 218 (Mo. App. 1981)
 Vincent v. Johnson, 833 S.W.2d 859 (Mo. 1992)
 Walker v. St. Louis Pub. Serv. Co., 243 S.W.2d 92 (Mo. 1951)
 Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. 1995)
 Weast v. Festus Flying Service, Inc., 680 S.W.2d 262 (Mo. App. 1984)
 Weindel v. DeSoto Rural Fire Protection Ass'n, Inc., 765 S.W.2d 712 (Mo. App. 1989)
 Williams v. Daus, 114 S.W.3d 351 (Mo. App. 2003)
 Wolfe v. Kansas City, 334 Mo. 796 (Mo. 1934)
 Zoeller v. Terminal R. Assoc., 407 S.W.2d 73 (Mo. App. 1966)