

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

Mark McKinnon\*

### Abstract

This article provides a framework for calculating economic damages in personal injury and wrongful death litigation in Arizona by providing the information necessary to produce opinions and testimony that conform to Arizona laws, rules, regulations, and practice.

### I. Introduction<sup>1</sup>

This article is intended to help economic damages experts develop opinions, produce reports, and provide testimony consistent with Arizona statutes, court regulations, case law, and practice. Section II provides a brief overview of the Arizona court system where personal injury (PI) and wrongful death (WD) cases may be litigated. Section III contains the sources for the legal guidance pertaining to the expert's role and duties. Section IV provides an in-depth discussion of the rules of procedure and evidence that govern expert opinions and related discovery. Section V focuses on PI damages. Section VI explains WD damages and practice. Section VII discusses survival actions. Section VIII deals with medical malpractice cases and the unique exceptions related to them. Section IX contains concluding remarks.

### II. The Arizona Court System

Most injury cases fall within the jurisdiction of the state court system. The primary court for filings and hearings is the Superior Court of Arizona. Each of the 15 counties in Arizona has one or more Superior Court facilities (and judges), depending on the population of the county. The Court of Appeals has jurisdiction

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<sup>1</sup>These 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.

to review trials and decisions by the Superior Courts. Appeals of decisions by the Arizona Court of Appeals are made to the Arizona Supreme Court.

### III. Sources of Legal Guidance

The rules that govern tort litigation in Arizona are based on the following legal sources: 1) the Arizona Revised Statutes (ARS, 2018); 2) Rules of Civil Procedure (RCP, 2017); 3) Rules of Evidence (RE, 2012); 4) Civil Revised Arizona Jury Instructions (RAJI, 2018), 6<sup>th</sup>; and 5) Arizona case law. The RCP and RE are contained within the ARS. These sources provide the rules and information regarding damages, discovery, and expert opinions.

The jury instructions are of particular importance to the expert when assessing economic damages. There are separate instructions for personal injury cases, wrongful death cases, and medical negligence cases that are prepared by the Civil Jury Instruction Committee of the State Bar of Arizona. Also of importance for the valuation of economic damages, are pertinent opinions expressed by Arizona's Court of Appeals and Supreme Court. Jury instructions and court opinions related to economic damages are discussed in later sections of the article.

### IV. Expert Opinion and Related Discovery

In an ongoing effort to make state rules more consistent with their federal counterpart rules, Arizona made significant changes to its Rules of Evidence in 2012 and its Rules of Civil Procedure in 2017. One of the notable outcomes of this effort is that Arizona is considered to be a "Daubert Standard" state. In *State v. Benson* (2013), the Arizona Supreme Court acknowledged this, stating, "In 2010, the legislature enacted A.R.S. § 12-2203, which replaced the Frye standard for admitting expert testimony with the Daubert standard." (p. 27)

#### A. Expert Testimony

An examination of ARS 12-2203 and Rule 702 shows the necessary requirements for admitting expert testimony.

1. ARS 12-2203, Admissibility of Expert Opinion Testimony (ARS, 2018)
  - a. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical, or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
    - i. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training, or education.
    - ii. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
    - iii. The opinion is based on sufficient facts and data.
    - iv. The opinion is the product of reliable principles and methods.
    - v. The witness reliably applies the principles and methods to the facts of the case.

- b. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:
  - i. Whether the expert opinion and its basis have been or can be tested.
  - ii. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
  - iii. The known or potential rate of error of the expert opinion and its basis.
  - iv. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

The purpose of this statute is to embody the Daubert Standard in a succinct, enumerative way. Once it has been determined that the expert satisfies the Daubert requirements, the expert's testimony can be admitted as evidence in accordance with the Arizona Rules of Evidence, Rule 702.

## 2. Rule 702, Testimony by Expert Opinion (RE, 2012)

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b. The testimony is based on sufficient facts or data;
- c. The testimony is the product of reliable principles and methods; and
- d. The expert has reliably applied the principles and methods to the facts of the case.

In the Rule 702 "Comment to the 2012 Amendment," it is noted that even though an expert's testimony may be found reliable, this does not prevent the admissibility of a competing (and sometimes contradictory) expert opinion. Ultimately, it is up to the jury to decide the weight to give each testimony.

## B. Basis for Opinion

The basis for the expert's opinion is governed by Rule 703 (RE, 2018), which states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

## C. Disclosure

Expert witnesses in Arizona are usually required to provide written reports containing their opinions. Unless otherwise stipulated, ARS Rule 26.1(d)

(Disclosure of Information) indicates that the expert witness must submit a written report containing his/her opinions. ARS Rule 26.1(d)(2) (Form of Expert Disclosures) states: “Unless the parties stipulate or the court orders otherwise, each party in an action assigned to Tier 3<sup>2</sup> must provide an expert report complying with Rule 26.1(d)(4).”

As noted above, the expert’s report must conform to Rule 26.1(d)(4) (Expert Witnesses Who Must Provide a Written Report), which states:

Expert Witnesses Who Must Provide a Written Report. If an expert is required to provide a signed written report, the report must contain:

1. The expert’s name, address, and qualifications, including a list of all publications authored in the previous 10 years;
2. A complete statement of all opinions the expert will express and the basis and reasons for them;
3. The facts or data considered by the expert in forming them;
4. Any exhibits that will be used to summarize or support them;
5. Identification of any publication within the scope of Arizona Rule of Evidence 803(18) on which the expert intends to rely for any opinion;
6. A statement of the compensation to be paid for the expert’s work and testimony in the case; and
7. A list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

In the rare event that a written report is not required, the disclosure requirements are given by Rule 26.1(d)(3) (Expert Witnesses Who Do Not Provide a Written Report) as follows:

Expert Witnesses Who Do Not Provide a Written Report. If an expert witness is not required to provide a written report, the disclosure must state:

1. The expert’s name, address, and qualifications;
2. The subject matter on which the expert is expected to testify;
3. The substance of the facts and opinions to which the expert is expected to testify;
4. A summary of the grounds for each opinion;
5. A statement of the compensation to be paid for the expert’s work and testimony in the case; and
6. A list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

Of particular importance to the expert is Rule 26 (General Provisions Governing Discovery) that became effective January 1, 2020. Rule 26(b)(4) (Expert Discovery) protects draft versions of reports and disclosures from being discoverable. In addition, communications between the expert and the party’s attorney are also protected, with the exception of communications

<sup>2</sup>Each case in Arizona is assigned to one of three tiers, based on the characteristics of the case. The amount of discovery that may take place, as well as the length of the discovery period, is determined by the tier to which the case is assigned.

relating to the following: 1) the expert's compensation for his/her study or testimony, 2) facts or data provided by the party's attorney that are considered by the expert, and 3) assumptions provided by the party's attorney that are relied upon by the expert.

#### D. Depositions

Opposing counsel may depose an expert witness either by oral examination or by written questions. The most common practice is oral examination, and the rules pertaining to this come from Rule 30 Depositions by Oral Examination (RE, 2018). Rule 30 has not been included in this article, but the potential deponent is encouraged to familiarize him/herself with the substance of this rule. A deposition is usually preceded by a *subpoena duces tecum*.

#### E. Trials

If the damages expert is to appear at trial, he or she should be aware of the Arizona Court of Appeal's reminder in *Benkendorf v. Advanced Cardiac Specialists Chartered* (2012) that:

...the requirements of the Arizona Rules of Evidence governing the admission of expert testimony, and our cases interpreting those rules, must still be satisfied. “[T]he evidence must be relevant, the witness must be qualified, and the evidence must be the kind that will assist the jury.” (p. 708)

### V. Personal Injury

Before discussion begins, it should be noted that there are many more similarities between the damages to be considered in personal injury cases and wrongful death cases than there are differences. In this section, the elements and measure of damages are discussed in detail; any differences that may arise in wrongful death cases will be discussed in Section VI. Wrongful Death.

#### A. Elements of Damages

An award for damages in a negligence case is primarily intended to “reasonably and fairly compensate” (RAJI, 2018) the plaintiff for losses caused by the defendant, as indicated in the jury instructions. The damages to be considered in a PI case are identified in the RAJI, 6<sup>th</sup>, Personal Injury Damages 1, Measure of Damages (RAJI, 2018):

1. The nature, extent, and duration of the injury.
2. The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
3. Reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.

4. Lost earnings to date, and any decrease in earning power or capacity in the future.
5. Loss of love, care, affection, companionship, and other pleasures of the [marital] [parent-child] relationship.
6. Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the injury.

The *economic* damages among the listed damages are: a) the earnings loss to the date of trial, b) the decrease in future earning capacity, and c) past and future medical care expenses. In addition to the jury instructions, the damages expert should be aware of opinions regarding economic damages that have been rendered by the higher courts in Arizona. Each of the elements of economic damages is discussed in more detail below.

#### B. Lost Earnings to Date

The loss of earnings to date, as pointed out in *Mandelbaum v. Knutson* (1970), is considered a “special damage and must be specifically pleaded and proved.” (p. 149) The measure of this loss should take into account both the plaintiff's rate of pay, as well as the amount of time away from work.

#### C. Loss of (or Decrease in) Earning Capacity

There are several factors that need to be considered when calculating the loss of earning capacity. An understanding of the term “earning capacity” itself, as well as its components, is critical to the expert.

##### 1. The Measure of Damages

The loss of earning capacity, as indicated in *Mandelbaum v. Knutson* (1970), is considered a type of general damages. There has been much debate over the term “earning capacity.” While it has not been defined wholly and completely, the Arizona Supreme Court, in *City of Phoenix v. Mubarek* (1951), stated: “The measure of damages for loss of earning capacity is the difference between what an injured person was capable of earning before the accident and injury and what he/she is capable of earning after the injury. (p. 6) In *Rollette v. Myers* (1970), the Arizona Court of Appeals added the following caution:

...the formula for arriving at damages for loss of earning capacity is not necessarily the difference between plaintiff's earnings before the injuries and those after, but rather the loss of earning capacity itself which, under some circumstances, might decrease, although actual earnings increase. (p. 75)

##### 2. Pre-Injury Earning Capacity

In *Mandelbaum v. Knutson* (1970), the Arizona Court of Appeals commented on the issue of earning capacity, indicating the factors to be taken into consideration when determining earning capacity. The court stated earning

capacity is to be: “Based upon such factors as plaintiff’s age, life expectancy, health, habits, occupation, talents, skills, experience, training and industry.” (pp. 149-150)

It is typical for an economic damages expert to base an injured person’s pre-injury earning capacity on prior earnings as shown on W-2 forms, year-end pay stubs, tax returns, etc. However, it is important to note that prior earnings are not a requirement. In *Mandelbaum v. Knutson* (1970), the Arizona Appeals Court further added: “There are also numerous other classes of people for whom there could be no proof as to the actual dollars’ worth of their capacity. College students, children, retirees, those working without wages in a family business, all have a capacity to earn; none could state its value.” (p. 151)

By extension, women or men who are not employed outside the home (perhaps to help rear their children), or voluntarily not in the workforce and not seeking employment, are also considered to have an earning capacity.

In cases where the injured person is a minor, it has been the author’s experience that Arizona damages experts will often base pre-injury earning capacity on age-earnings data by one or more levels of educational attainment, as shown in the U.S. Census Bureau’s Personal Income tables (PINC-04) or Expectancy Data’s “Full-time Earnings in the United States” (2019). When the injured person is self-employed, the topic of lost profits often arises. This is discussed in greater detail later in this section.

### 3. Post-Injury Earning Capacity

Vocational experts are often relied upon to establish an injured person’s post-injury earning capacity. In other cases, the expert may rely only on medical opinions to establish a person’s future employability. If such experts have not been retained, it may be necessary to base the post-injury earning capacity on the testimony of the injured person.

#### D. Employment Benefits

Although not specifically identified in the jury instructions, Arizona courts recognize the valuation of the loss of employment benefits, including health care and retirement benefits, where applicable. In *J.H. Welsh & Son Contracting Co. v. Arizona State Tax Commission* (1967), the Arizona Court of Appeals commented on the issue of such benefits, referring to them as “fringe benefits.” The court stated that payments to employees: “. . .include, first, payments made directly to the employees...and second, payments made for the benefit of the employees...such as health and...pension payments, or others.” (p. 401)

The issue for the damages expert is how to properly determine the value of such benefits. Because there is no case law pertaining to the appropriate measure of employment benefits, it is up to the expert to decide which method to use. The damages expert may rely on information from the U.S. Bureau of Labor Statistics’ “Employment Cost Index,” as well as use different methods for determining medical benefits such as replacement cost, percentage of income, and employer contributions.

## E. Medical Care

As indicated in the jury instructions, past and future medical care are elements of damages. The damages expert will not typically calculate the value of the past medical expenses; instead, the retaining attorney will usually present receipts or records showing such care. Future medical care requirements and costs are usually provided by a life care planner or, occasionally, by a health care provider. The costs are projected over the period of time indicated by the life care plan or the health care provider.

## F. Other Considerations

In personal injury and wrongful death cases there are several additional factors that the expert should be aware of and take into consideration. These factors are identified and briefly discussed below.

### 1. Household Services

Household services are mentioned in Section 3 of the jury instructions (“Wrongful Death”), but can also be included in personal injury cases, when such a loss has occurred. In *City of Tucson v. Holliday* (1966), the Arizona Court of Appeals said: “We approve the view allowing the recovery for the reasonable value of nursing care or services. . . .” ( p. 21)

The loss of the injured person’s household services is often shown by the damages expert as a percentage reduction in household services performed. The valuation of household services is discussed in greater detail in Section VI.

### 2. Pre-existing Conditions

The jury instructions indicate that pre-existing conditions should be considered when measuring damages. The “Pre-Existing Condition, Unusually Susceptible Plaintiff” (Section 2 of the RAJI) states the plaintiff:

...is not entitled to compensation for any physical or emotional condition that pre-existed the fault of...[the defendant, but]...if [the plaintiff] had any preexisting physical or emotional condition that was aggravated or made worse by [the defendant]’s fault, you must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for that aggravation or worsening...even if [the plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

### 3. Taxes

It is important to note that taxes are not to be considered when calculating lost earnings and future earning capacity. In *Mitchell v. Emblade* (1956), the Arizona Supreme Court ruled: “. . .we are of the view. . .that. . .case[s] be tried on

the issues and presented to the jury with a correct measure of damages, of which the incident of income tax has no part.” (p. 405)

There had been much debate as to whether this referred only to the instructions given to the jury, or whether the idea of taxes should be included in the basis of the damages expert’s calculation of damages. To give clarity on the matter, in *Seely v. McEvers* (1977), the Arizona Court of Appeals stated: “We adopt the majority rule and hold that gross pay and not net or ‘take home’ pay is the proper basis for computing loss of future earnings, and that evidence of income taxes or deductions should not be allowed for the purpose of reducing the amount of damages.” (p. 174)

#### 4. Collateral Sources

Collateral sources are not to be considered in the reduction of damages in either personal injury or wrongful death matters. In *Michael v. Cole* (1979), the Arizona Supreme Court said the following:

Under the collateral source rule, when an injured plaintiff has been compensated for his injuries from a source other than the defendant, the latter cannot benefit from the recovery. The collateral source rule is well established in Arizona tort law. The rule is designed to avoid a windfall to the tortfeasor if a choice must be made between him and the injured party. (p. 452)

The exception to this rule applies only to medical malpractice cases and is discussed in Section VIII. Medical Malpractice.

#### 5. Lost Profits

The topic of lost profits often arises in cases in which the plaintiff is either self-employed or plays a major role in the performance of a partnership or other corporation. In *Rollette v. Myers* (1970), the Arizona Appeals Court opined on this, saying: “Thus, to make the loss of the profits of a business material to the issue of earning capacity, it must be shown that these profits are so allied to the personal efforts of the injured party that profits are a reflection or a near reflection of that party’s earning capacity.” (p. 76) The court also said:

The general rule, vis-a-vis corporate profits and individual earning capacity, is that if the injured plaintiff makes a substantial showing that his own services, efforts and initiative, rather than capital invested, or labors of others, is the predominant factor producing the profits of the business, then loss of these profits can be shown, but only as an aid in determining the pecuniary value of plaintiff’s services in the business. (p. 76)

#### 6. Present Value Calculations

In *Southern Pacific Co. v. Gastelum* (1931), the Arizona Supreme Court indicated it is necessary: “. . .to prove the present worth of future pecuniary

earnings on the basis set forth by the Supreme Court of the United States. . . ” (p. 134)

The two basic components of present worth (present value) being 1) future damages (including associated growth rates) and 2) an “appropriate discount rate, reflecting the safest available investment.” (*Jones Laughlin Steel Corp. v. Pfeifer*, 1983, pp. 537-538) Arizona courts have not required specific growth rates or discount rates; it is, therefore, up to the damages expert to use his/her judgment as to the most appropriate rates to use.

#### 7. Duration of Loss

While there has been much discussion on the definition of earning capacity, Arizona courts have not made any rulings as to an appropriate retirement age. Some damages experts use work-life expectancy data, while other experts use alternate retirement ages, such as a person’s normal Social Security retirement age. The injured person’s own testimony may also provide a reasonable estimate of an acceptable retirement age. Because Arizona courts have indicated that retired people still have an earning capacity, it may be reasonable to extend the loss of an injured person’s earning capacity beyond a “normal retirement age,” whatever that may be, if deemed appropriate to do so. While the damages expert can offer an opinion of an appropriate retirement age, it is ultimately up to a jury to determine what is reasonable.

#### 8. Life Expectancy Tables

The valuation of the economic damages expert in personal injury cases, as well as wrongful death cases, must take into consideration the remaining life expectancies of the relevant individuals in the case. When evidence indicates a “normal” life expectancy for a specific person, the courts and damages experts ordinarily rely on the current “United States Life Tables” in the National Vital Statistics Reports published by the U.S. Department of Health and Human Services, National Center for Health Statistics. This is indicated in RAJI Personal Injury Damages 5. When medical testimony indicates a specific remaining life expectancy for an individual, the expert may rely on that testimony.

#### 9. Hedonic Damages

The issue of hedonic damages—the loss of enjoyment of life—often arises in personal injury cases in the state of Arizona. These damages fall outside the scope of the expert, and, consequently, he/she is not allowed to testify about them. It is important to note, however, that these damages are to be treated separately from the damages for pain and suffering, as noted in *Ogden v. J.M. Steel Erecting* (2001) Arizona Appeals Court, Division 1: “We...conclude that hedonic damages can be a component of a general damages claim, distinguishable from, and not duplicative of, damages for pain and suffering.” (p. 38)

## VI. Wrongful Death

Arizona Revised Statutes 12-611, 12-612 and 12-613 provide the statutory foundation for a wrongful death claim. Two different claims may be filed as a result of the death of the decedent. One claim, referred to as a “Wrongful Death” claim, may be brought only by the surviving spouse, children,<sup>3</sup> or parents of the decedent or, alternatively, by the personal representative of the surviving spouse, children, or parents. If none of these family members survive (and sometimes even when there are survivors), a “Survival” claim may be brought by the personal representative of the decedent’s estate (discussed in Section VII. Survival Actions).

### A. Elements of Damages

The damages to be considered in a WD case are identified in the RAJI, 6<sup>th</sup>, Personal Injury Damages 3, Damages for Wrongful Death of Spouse, Parent, or Child (RAJI, 2018):

1. The loss of love, affection, companionship, care, protection, and guidance since the death and in the future.
2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future.
3. The income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future.
4. The reasonable expenses of funeral and burial.
5. The reasonable expenses of necessary medical care and services for the injury that resulted in the death.

### B. Past Income

This is very similar to Lost Earnings to Date discussed in Section V. As indicated in the jury instructions, the main difference arises from the fact that this is a loss to the survivors, not merely a loss of past earnings. Because only a portion of the decedent’s income would have gone to benefit the survivors, the portion the decedent would have spent on him/herself (personal consumption) must be deducted from the calculations.

### C. Future Income

Much like past income, this is very similar to Loss of (or Decrease in) Earning Capacity discussed in Section V. As with past income, the jury instructions indicate that the loss of future income differs from the loss of earning capacity because this is a loss to the survivors. These damages are to be calculated according to the same methods used for calculating future earning capacity, as explained in Section 6B above. The damages expert must also

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<sup>3</sup>This applies to natural and adoptive children only.

deduct the decedent's personal consumption, as indicated in the previous subsection (B. Past Income).

#### D. Household Services

There is no case law pertaining to the appropriate measure of determining the value of household services. It is, therefore, up to the damages expert to choose a proper method. It has been the author's experience that experts will often determine the number of hours spent performing services by interviewing the survivors and other relevant individuals. When such information is unavailable, the damages expert may rely on various publications regarding the average time spent, as well as the average value of, performing household services.

When estimating the duration of the damages, the expert will project the losses to either the decedent's life expectancy or the spouse's life expectancy, whichever is shorter.<sup>4</sup> When estimating the value of services to minor children, it is customary to stop the calculations when the youngest child reaches age 18, the age of majority.

#### E. Tax Considerations

Unlike personal injury cases, it is unclear whether taxes are to be considered in wrongful death matters. A brief history of the evolution of the issue is discussed below.

Several federal district courts have opined on this topic. One such opinion, as indicated in *United States v. Becker* (1967), was given by the Ninth Circuit Federal Court of Appeals: "Under the Federal Tort Claims Act, the measure of damages is determined by the law of the place where the claim arises.... The indications are that, under the law of Arizona, the incident of income tax has no part in arriving at a damage award." (p. 324)

As was the issue with personal injury matters, it was unclear whether the court intended this to apply only to jury instructions, or also to the basis of the expert's calculations and opinions. Five years later, in *McCauley v. United States* (1972), the appeals court again faced this issue, and responded with the following: "We decline to impose upon the district courts a dogmatic rule with reference to taxes, important as they may be, in calculating what is reasonable." (p. 165)

Not wanting to make a determination regarding taxes, the court essentially declined to weigh in. In an effort to finally clarify the issue, the N.D. Ill. Circuit Federal Court of Appeals, in *Lux v. McDonnell Douglas Corp.* (1984), declared:

... this Court predicts that the Arizona Supreme Court, if faced with the issue, would extend the Seely 'gross pay' measure of damages to

<sup>4</sup>Based on the current life expectancy tables.

pecuniary damage awards in wrongful death cases. In fact, federal courts construing the Arizona Wrongful Death Act have applied the Seely 'gross pay' measure of damages for a considerable time. (p. 104)

However, in *In Re Air Crash Disaster Near Chicago* (1986), the 7<sup>th</sup> Circuit Federal Court of Appeals stated:

Given the absence of any Arizona authority to the contrary, we believe that the Arizona Supreme Court would follow the Restatement rule by taking the decedent's income taxes, as well as his personal consumption expenses, into consideration when calculating the survivors' pecuniary damages in a wrongful death action. (p. 311)

Of note is that many of the rulings have come from federal courts, not state courts. And in these rulings, as indicated in *Felder v. United States* (1976): "The law of Arizona on the incidence of income taxes in tort damage awards is not as clear as it might be." (p. 666)

Although there has not been subsequent case law, especially at the state level, that provides additional clarity on the issue, the majority of calculations made by damages experts in Arizona wrongful death cases are based on the decedent's gross income. Ultimately, it is up to a jury as to the proper determination of an award for damages.

## VII. Survival Actions

The ARS provide the statutory foundation for a survival claim.<sup>5</sup> Separate from a "Wrongful Death" claim, a "Survival" claim does not consider the loss to the surviving beneficiaries. Instead, this claim focuses on the loss to the decedent's estate. In *Gartin v. St. Joseph's Hospital and Medical Center* (1988), the Arizona Appeals court opined on the preservation of claims of the injured party after his/her death: "Since the statute provides that every cause of action except those listed survives a person's death, it is clear that a cause of action for negligence would survive with the express exception that damages for pain and suffering of the decedent would not be allowed." (p. 36)

Prior to the "Survival Statute," Arizona enacted the "Wrongful Death Statute" in 1887. This law gave survival rights to the surviving beneficiaries only. Because of this, the law was changed in 1956 to allow for a decedent's representative to have the same rights of survival as the beneficiaries (ARS 14-3110 the "Survival Statute"). Since then, many debates have arisen concerning an award to the surviving beneficiaries (spouse, children, or parents) versus an award to the decedent's estate. In *In Re Estate of Milliman* (1966), the Arizona Supreme Court clarified this issue by stating: "The amendment of 1956 makes plain the action is only for the benefit of decedent's estate when there are no 'surviving husband or wife, children, or parents.'" (p. 61)

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<sup>5</sup>The survival statute is ARS 14-3110.

In *Barragan v. Superior Court* (1970), however, the Arizona Court of Appeals indicated that two distinct claims could be filed for the same wrongful act:

...the [survival statute] permits recovery for the wrong to the injured person and is confined to his personal loss while the [wrongful death statute] is for the wrong to the beneficiaries. ... The [wrongful death statute] begins where the [survival statute] ends and recovery on both is not a double recovery for a single wrong but rather separate recoveries for different wrongs. (p. 405)

There are not separate jury instructions for survival claims. It is typical for the damages expert to use the same methods for calculating economic damages as he/she would for wrongful death cases. There are questions, however, regarding the handling of personal expenses. Whether the proper measure of the loss to the estate should consider only the decedent's personal maintenance expenses, as opposed to personal consumption (as in PI and WD cases), has not been decided by the Arizona courts. In addition, no rulings have been made as to the appropriateness of a loss to the estate versus the loss of net accumulations to the estate, assuming the decedent's contributions to his/her estate would have caused it to increase in value.

### VIII. Medical Malpractice

Arizona recognizes the exception to the rules for medical malpractice cases regarding the treatment of collateral benefits. ARS 12-565 (partially shown below) deals with medical malpractice cases, and, specifically, collateral benefits as they relate to economic damages:

1. In any medical malpractice action against a licensed health care provider, the defendant may introduce evidence of any amount or other benefit which is or will be payable as a benefit to the plaintiff as a result of the injury or death. ... Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any such benefits. ...
2. Evidence introduced pursuant to this section shall be admissible for the purpose of considering the damages claimed by the plaintiff and shall be accorded such weight as the trier of the facts chooses to give it.

While Part 1. discusses the types of collateral benefits to be considered, there is still much debate as to the admissibility of mandatory contribution sources (such as workers' compensation) versus voluntary contributions (such as life insurance). While experts should be aware of the above mentioned statute, admissibility of a collateral source is still a legal issue to be determined by the court.

In addition, the Arizona Supreme Court, in *Eastin v. Broomfield* (1977), indicated that the jury will ultimately decide whether or not to consider these

collateral benefits: "...admission into evidence of plaintiffs' collateral benefits in no way guarantees any reduction in the damages awarded by the trier of fact. The jury may still choose to ignore the collateral benefits in making its decision as to the damages sustained by the plaintiffs." (p. 585)

## IX. Conclusion

This article provides an overview of assessing economic damages and providing testimony in personal injury and wrongful death cases in Arizona. While it is not intended to be an all-inclusive guide to computing economic damages, this article does inform the damages expert of the rules of disclosures and discovery to which he/she must adhere. It also addresses the damages to be considered in these types of cases (as well as the elements of damages not to be considered). The jury instructions for earning capacity and income losses are broadly worded, often resulting in different interpretations by economic damages experts, as well as subsequent appeals of issues to the higher courts. As noted in this article, decisions by the courts over the years have provided some parameters and direction for the expert when valuing economic damages. Even so, there are often substantial differences between valuations calculated by different economic damages experts. Ultimately, it is up to the trier of fact to determine what is fair and equitable.

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