The Computation of Damages Under the New Florida Wrongful Death Act

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THE COMPUTATION OF DAMAGES UNDER THE NEW FLORIDA WRONGFUL DEATH ACT

DR. JOHN P. WILCOX* AND HAROLD G. MELVILLE**

I. INTRODUCTION ............................................................ 737
A. Statutory Construction ................................................ 737
    B. Types of Damages Available ....................................... 739
II. COMPUTATION OF THE TANGIBLE DAMAGE ELEMENTS IN A WRONGFUL DEATH ACTION 741
A. In General ........................................................... 741
    B. The Economic Basis for Expert Testimony ....................... 742
III. SUMMARY .............................................................. 751

I. INTRODUCTION

A. Statutory Construction

In March, 1972, the Florida Legislature completely revised the state’s wrongful death statutes by repealing all the old sections and enacting completely new ones. This massive revision is the first major change in Florida’s wrongful death statutes since they were enacted in 1883. The original Florida statutes were patterned after Lord Cambell’s Act, the landmark English statute, which is still the law in England. Unfortunately, the previous Florida statutes left a great deal to be desired and, especially in recent years, they came under heavy attack from both the courts and from legal writers. The two major criticisms of the former statutes were: (1) that the rigid hierarchy of those entitled to bring suit left many individuals without a remedy, and (2) that the former statutes fostered an inefficient and troublesome multiplicity of suits.

Under Florida Statutes section 768.02 (1971), the former general wrongful death statute, there existed a listing of categories based upon relationship to the deceased: surviving spouse, minor children, persons dependent upon the deceased for support, and finally, the administrator.

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1. Fla. Laws 1972, ch. 72-35 created FLA. STAT. §§ 768.16-.27 (Supp. 1972) [hereinafter cited as the “Florida Wrongful Death Act”] and repealed all of the prior wrongful death statutes, FLA. STAT. §§ 768.01-.03 (1971). The new sections, whose short title is the “Florida wrongful death act,” did not, however, go into effect until July 1, 1972, and do not apply to deaths occurring before that date.
2. Fla. Laws 1883, ch. 3439.
4. 23 Halsbury’s Statutes of England 780 (1970). Ironically, the recent Florida legislative revision has made the Florida wrongful death statute closer to Lord Cambell’s Act than they were when first enacted.
5. The Supreme Court of Florida noted the harshness and inequity of the then-current statutes and requested legislative reform on several occasions. Garner v. Ward, 251 So.2d 252 (Fla. 1971); Ellis v. Brown, 77 So.2d 845 (Fla. 1955).
or executor of the deceased's estate. The right to bring the wrongful death action accrued only to the individual or individuals in the highest category. If these individuals were not the ones actually dependent upon the deceased, or if these individuals chose not to bring suit, those in the lower categories still had no right of action. Additionally, the ones bringing suit could recover only for their own loss of support, and not even an indirect recovery on behalf of others was permitted. Thus, for example, an elderly parent totally dependent upon a son for support could recover nothing for the son's wrongful death if he left a surviving spouse or minor child.

The other major criticism of the former statutes, that they fostered a multiplicity of suits, was as well-founded as the first criticism. In most cases, two separate suits could be maintained—one action under the general wrongful death statute, section 768.02, for loss of support, services, prospective estate, etc. and another action under the survival statute, section 46.021, for medical expenses, funeral expenses, and the deceased's pain and suffering prior to death. The worst example of this multiplicity of suits occurred in cases involving the death of a minor child. In such a case, three separate actions could have been maintained. Since these actions were generally not joined, the resulting multiplicity of suits created a gross waste of court time and litigation expenses.

The new Florida Wrongful Death Act eliminates these two major criticisms by allowing only one right of action. This right of action is vested in the personal representative of the deceased, who brings the action for the mutual benefit of the decedent's survivors and the decedent's estate. The decedent's survivors are defined in the statute to include the decedent's spouse, minor children, parents and, when dependent upon the deceased for support, various other relatives. Under section 768.21 of the new act (entitled "Damages"), each survivor is allowed to recover the value of lost support and services to himself. Thus, by virtue of allowing the personal representative to bring the action for

8. W.B. Horberson Lumber Co. v. Anderson, 102 Fla. 731, 136 So. 557 (1931). The only exception to this rule was that the jury could consider the existence and number of minor children when awarding damages to a widow. Slaughter v. Cook, 195 So.2d 6 (Fla. 2d Dist. 1967).
9. FLA. STAT. § 768.02 (1971).
10. FLA. STAT. § 46.021 (1971).
11. One action could have been maintained under Florida Statutes section 768.03 (1971) (wrongful death of minors), one under Florida Statutes section 768.02 (1971) (loss of prospective estate), and one under Florida Statutes section 46.021 (1971) (the survival statute).
12. These actions were generally not joined because a larger sum award could be obtained if the actions were brought separately.
14. Id. § 768.18(1).
15. Id. § 768.21.
the benefit of all the survivors and the estate, the inequities of the former statutory hierarchy of classes has been eliminated.

The multiplicity of suits has also been eliminated, since the new Florida Wrongful Death Act has specific provisions for the death of a minor child and since the act specifically eliminates any right to a survival action for the deceased's medical expenses or pain and suffering prior to death. These elements of compensation are now listed among the various elements of damages in section 768.21 of the new act. Thus, in no case will there ever be a need for more than one action, or will more than one action ever be allowed.

B. Types of Damages Available

The measure of damages under Florida's former wrongful death statutes was extremely vague. The general wrongful death statute commanded merely that the plaintiffs were entitled to "such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed." The guidelines for determining the amount of the damage award were, therefore, left to the courts' imaginations. The new Florida Wrongful Death Act, on the other hand, is quite specific on the question of damages, and it appears that the legislature has attempted to incorporate much of the state's case law into the statute. The only major deviations in the new act from existing case law appear to be as follows:

(1) Since the survival action was expressly eliminated, medical and funeral expenses of the decedent prior to death are compensable under the new statute.
(2) Both the surviving spouse and surviving children may now recover for their mental pain and suffering.
(3) Evidence of remarriage of the decedent's surviving spouse is now admissible.
(4) Loss of net accumulations is allowed only when the deceased left a surviving spouse or lineal descendants.
(5) Taxes must be considered when computing net salary or business income.

Under the new statute, as under the prior case law, there are basically

18. Id. § 768.20. Such action was formerly proper under Fla. Stat. § 46.021 (1971).
20. Fla. Stat. § 768.02 (1971). The former statute which covered the wrongful death of minor children was slightly more specific, and allowed for the loss of services during minority and for the parents' mental pain and suffering. Id. § 768.03 (1971).
22. Id. §§ 768.21(5) and (6)(b).
23. Id. §§ 768.21(2)-(3).
24. Id. § 768.21(6)(c).
25. Id. § 768.21(6)(a).
26. Id. § 768.18(5).
two types of damages—tangible, those damages which can be estimated on a mathematical basis, and intangible, those damages based upon purely emotional and speculative considerations. The tangible damages listed under the new Florida Wrongful Death Act are loss of financial support, loss of services, loss of medical and funeral expenses, and loss of net accumulations. The intangible damages are loss of companionship, loss of protection, loss of parental guidance and instruction, and mental pain and suffering. Obviously, the intangible damages are incapable of any form of mathematical calculation. These elements of the damage award are peculiarly within the discretion of the jury and will be set aside only when they "shock the conscience of the court." The tangible elements of the damage award, however, are capable of estimation through the use of competent evidence and the testimony of an expert witness.

The unique ability of an expert witness to express his professional opinion is of great value in assisting the jury to arrive at a proper monetary figure. This does not mean, however, that the expert witness determines the actual amount of the award. The jury is instructed that the assistance given to them through the expert witness in the form of life expectancy tables, employment and earning statistics, and actuarial calculations of the present worth of future income, is merely to aid them in their decision making process. Such evidence should not be taken as controlling or restricting their ultimate decision.

While the importance of both the testimony and the report of the consulting economist should not be minimized, it should be kept in mind that the tangible damages are only some of the items in the sum total of damages awarded for wrongful death. Since the elements determining this amount are made on the basis of records and statistical data available to either party, the results of the appraisal should be the same whether prepared for the plaintiff or the defendant. In some cases, however, there may be legitimate differences of opinion between equally able experts regarding the interpretation of statistical data and in the determination of projections which involve the application of various assumptions. A reputable economist-statistician will neither maximize damages for the plaintiff nor minimize them for the defense. Thus, in many instances, the economist's report becomes the minimum basis for the negotiation of an out-of-court settlement.

The term "minimum basis" should not be a misleading one. It is limited by the nature of the material, training, and expertise of the economist to a monetary figure representing only a portion—and often only a minor portion—of the total award. Few, if any, economists will attempt

27. Id. § 768.21.
28. Id.
30. See, e.g., SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS, FLORIDA STANDARD JURY INSTRUCTIONS 6.9 (1970); City of Hialeah v. Revels, 123 So.2d 400 (Fla. 3d Dist. 1960).
to place a monetary value on the damages associated with consortium, the benefits a son or daughter would receive from the guidance and companionship of a natural parent, or the damages that accrue to a family from the tragic loss of one of its members. These are important elements in the actual determination of an award. They are, however, matters in which an economist cannot be considered as an authority whose opinion should be given greater weight than that of any other layman. The areas in which an economist-statistician can claim competency are limited to areas which have objective and measurable valuations. The monetary values for suffering, pain, and sorrow are subjective ones and are not found in the statistical data upon which an economist must base his computations.

II. COMPUTATION OF THE TANGIBLE DAMAGE ELEMENTS IN A WRONGFUL DEATH ACTION

A. In General

As previously stated, the tangible elements of the damage award include loss of support, loss of services, loss of net accumulations, and medical and funeral expenses. The computation of this last element, medical and funeral expenses, is quite easy and involves merely presenting into evidence the actual charges. These expenses may be recovered by either a survivor of the decedent who has already paid for them, or by the personal representative for the estate if the bills are unpaid and may be charged against the estate. Thus, unless the reasonableness of these charges is contested, there is no need for expert testimony within this area. Computation of the other tangible damage elements is, however, quite a bit more difficult.

The new act follows the same basic "loss to survivors" theory, with regard to damages, as did the former statutes. Under the former statutes, however, the Florida courts allowed recovery for the family unit as a whole. The amount of the damage award was given in one lump sum and not divided among the survivors. The new Florida Wrongful Death Act may change this practice.

Theoretically, under the new act, each survivor is entitled to the amount of lost support and services that the decedent contributed to him personally, and, under section 768.22 of the act, the jury is required

33. Id. § 768.21(6)(b).
34. See, e.g., Slaughter v. Cook, 195 So.2d 6 (Fla. 2d Dist.), cert. denied, 201 So.2d 549 (Fla. 1967), in which it was held that a mother, suing as a widow, could recover the sum total of both the loss of financial support to her minor children and her own loss of financial support.
35. Fla. Stat. § 768.21(1) (Supp. 1972). In deciding upon this amount the jury is to consider, among other things, the survivor's relationship to the decedent, the period of minority in the case of a healthy minor child, and the joint life expectancies of the survivor and the deceased.
to state separately the amounts awarded to each survivor and to the estate. As one may easily imagine, making separate calculations for each survivor would be a tedious and time-consuming project. Additionally, there is the problem of determining how much of the support accrued to each member of a family unit. It is submitted, therefore, that since most cases will involve the loss of the decedent from a family unit, the same total "loss to survivors" will be computed and then arbitrarily divided among the family members by the jury. Even in cases which do not involve a family unit, this same computation will most likely be used, since it gives the jury a reasonable monetary figure from which to work.\(^7\)

Another problem raised under the new act concerns the concepts of "loss of estate" and "net accumulations." Under the former statutes, the loss of the decedent's estate, assuming he lived to his normal life expectancy, was a recoverable item.\(^8\) In practice, however, the courts avoided this rather vague concept by allowing, in cases dealing with family units, recovery of the entire "loss to survivors." This method yielded basically the same results, because the lost estate was included in the total loss to survivors. In cases not involving a family unit, such as the wrongful death of a minor child, the courts did allow for the separate "loss of estate" computation.\(^9\)

Under the new act, the "loss of estate" concept is termed "loss of net accumulations," and it appears that the ground rules have been changed. Evidently a separate calculation will have to be made for loss of net accumulations because: (1) this sum is to be recovered by the estate and not by the survivors;\(^40\) and (2) this sum has been defined to include only the accumulation of savings and pension benefits.\(^41\)

Another problem created by the new act is the inclusion of taxes in the loss of support computation. As before, loss of support includes both cash and non-cash (health benefits, etc.) items. Under the new act, however, the decedent's gross income must be reduced by the amount of taxes incurred.\(^42\) Since the decedent's tax bracket will vary over the projected future years, this additional factor will make net income projections much more complex.

\section*{B. The Economic Basis for Expert Testimony}

The economist, prior to his testimony as an expert witness, must prepare an adequate foundation for the admission of his opinions. It is incumbent upon the attorney to provide his economist with the primary

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36. \textit{Id.} § 768.22.
37. This is true since the figure represents the maximum amount that the decedent could have contributed to the plaintiff in the form of support and services.
41. \textit{Id.} § 768.18(5). When the total "loss to survivors" concept was used, a certain portion of non-cash items (i.e., loss of services) was included in this figure.
42. \textit{Id.}
facts to form the basis for these opinions, because as an expert witness the economist can only evaluate such items as he is instructed to consider. Since the economist's opinion is equally available to both the plaintiff and the defendant, either of whom can ask his opinion of monetary damages, it is imperative that he be prepared to present and justify all of his conclusions.

In order to prepare his testimony the legal counsel should provide the economist with the following:

1. Personal data of the deceased.
   A.—Date of birth.
   B.—Date of death.
   C.—Date of accident if different from date of death.
   D.—Age, sex and number of dependents.

2. Educational background.
   A.—Academic accomplishments.
   B.—Technical or Apprentice Training programs.

3. Employment history.
   A.—Names, places, and dates of employment.
   B.—Fringe benefits of last employer.
   C.—Copies of previous income tax statements.

The economist utilizes this data as the basis for his testimony as an expert witness. In order to estimate the monetary loss to the family or estate he will produce a document which should consist of the following:

1.—The decedent's actuarial life expectancy at the time of his death.
2.—The decedent's work-life expectancy.
3.—The decedent's past and future prospective cash earning ability and the value of present and future non-wage benefits.
4.—The value of the loss of services of the decedent by his family.
5.—The estimated cost of self-maintenance that the decedent would have incurred had he enjoyed his normal expected life span.
6.—The rate of interest which would have been earned had the lost earnings—i.e., between the time of incapacity to work and the date of the trial—been deposited in a commercial bank in an interest bearing account.
7.—The rate of discount appropriate to reduce the income and future costs to a present value.

With the proper data from each of these categories, the economist should be able to predict the present value of the decedent's earnings,
services, self-maintenance and net accumulations. Each category of information should also be documented so that it may be offered as evidence if necessary. The following discussions of these categories of data are not to be considered completely definitive, but are offered at their face value as a discussion of sources of information and a proposed methodology.

1. LIFE EXPECTANCY

Life expectancy or expectation of life, as used in actuarial tables, means the average length of life after any given age. It is based on death dates shown either in mortality tables or from reports of vital statistics. The first reported case wherein the estimated life expectancy of a decedent was permitted to go to a jury in order to arrive at a value of damages was *Sauter v. N.Y.C. & H.R. Railroad Co.*43 Since that time, the adoption of this rule has been universal. Undoubtedly, an 1886 United States Supreme Court ruling set the precedent:

In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence.44

For many years the standard reference for life expectancy was the "Human Mortality and Expectancy" tables of the National Association of Insurance Commissioners, which were approved in 1958 and became effective on January 1, 1964. This is the standard reference reproduced in most volumes of state statutes.45 It has, however, a number of errors and omissions. Since space limitations prohibit their discussion in detail, the errors are merely listed as follows:

1.—The tables are based upon obsolete statistics.
2.—The tables provide only a national average of all persons.
   They do not provide or consider:
   A.—Differences in sex.
   B.—Differences in race.
   C.—Differences in residence.

The latest data available for the determination of life expectancy is the "State Life Tables: 1959-61" published by the U.S. Department of Health, Education and Welfare.46 This set of tables provides separate data for male and female, white and nonwhite, and by state of residence.

45. This is the table reproduced on page 67 in volume 3 of the 1971 Florida Statutes.
The differences in life expectancy, for example, of a man and woman residing in several states by both the new and old tables is given below:

<table>
<thead>
<tr>
<th>State</th>
<th>White Male</th>
<th>White Female</th>
<th>Nonwhite Male</th>
<th>Nonwhite Female</th>
<th>All Persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>24.99</td>
<td>30.66</td>
<td>21.37</td>
<td>24.83</td>
<td>23.67</td>
</tr>
<tr>
<td>Maine</td>
<td>22.92</td>
<td>28.67</td>
<td>N.G.</td>
<td>N.G.</td>
<td>23.67</td>
</tr>
<tr>
<td>Mississippi</td>
<td>24.45</td>
<td>29.82</td>
<td>23.14</td>
<td>27.72</td>
<td>23.67</td>
</tr>
</tbody>
</table>

2. WORK LIFE EXPECTANCY

Work life expectancy tables have been developed as an adjunct of the life expectancy tables. The latter consist only of a projection of life expectancy at a given age, and do not consider the sociological changes which have taken place over the past several decades. The life expectancy for North Americans has risen over the years. Moreover, the average individual is exposed to a longer academic life and tends to retire earlier. Consequently, a smaller proportion of their lives will be spent in the labor force and a larger proportion in retirement. Periodically, the Department of Labor Statistics publishes articles and tables on this subject. 47

The use of these tables is somewhat of a moot question in the problem of computing damages in cases of lost earning capacity. The almost universal coverage of the Social Security Act of almost all types of workers, other than self-employed, has made the use of projected work life expectancy a thing of the past. In all but a few instances of the self-employed and some municipal workers, an economist is on safe ground when he assumes that the average person will continue to be a member of the labor force until he reaches the age which will allow him to draw social security benefits or until retirement is compulsory.

There is no problem involved in determining the worklife of the average non-professional male. The problem does arise, however, in presenting to a jury the expected worklife of a non-professional female, because her worklife is generally dependent upon the individual family needs. Therefore, in such a case the economist should provide the factual basis upon which he has based his opinion. 48

The actuarial work life expectancy figure is merely a basis for the economist’s opinion and is used to strengthen his testimony before a jury.


There is no definite need to show that a particular decedent *would* have worked during this period. All that is required is proof that the decedent could have earned an income. This point has been universally accepted and is generally construed by the courts to mean that the measure of damages for the impairment of earning capacity is not what the plaintiff would have earned, but what he could have earned had he not been injured.\textsuperscript{49}

3. PAST EARNINGS

The record of past earnings has a dual purpose: First, to determine the actual money loss of wages, salary, or income from the time of injury to the date of the trial; and second, to give some basis for the projection of future income. The actual determination of damages caused by loss of past earnings is a relatively simple matter, since this computation is based upon past personal income tax returns and W-2 forms which show the actual reported wages. In general, this is one area not open to dispute. The statistician should, however, provide an exhibit to be presented to the court showing the present value of the past earnings lost. Such an exhibit should show the final value of the lost earnings based upon the assumption that they were deposited at the end of the periodic pay periods—weekly or monthly—in an interest-bearing account. The rate of compound interest, either weekly, monthly or quarterly, will depend upon the rates established by either the Federal Reserve System or the competitive rates of local commercial banks.

4. LOST FUTURE EARNINGS

The value of the lost future earnings is a combination of two factors. The first is the estimated money earnings. This includes all items of cash remuneration such as salary, overtime pay, bonuses, and commissions. The second consists of "fringe benefits" or services provided by the employer in addition to the actual cash salary. This includes health and welfare plans, pension plans, stock options or participation options, educational benefits, and, in the case of the military reserve, the loss of military benefits.

It should be noted that estimated projections of future income are expressions of an opinion; no economist can definitively predict what an individual's actual earnings would have been. In his testimony, therefore, the economist should not attempt to predict what any particular individual would earn, but should base his opinion on an assumption that past trends are most likely to continue. Using his professional judgment, he can evaluate relevant statistics about the labor market and make projections of established and impartial data according to trends which are reasonable within the circumstances of an individual case.

Cases involving highly organized union workers or employees of

\textsuperscript{49} See United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962).
well-established employers are much less complicated than those involving professional self-employed workers, or workers who have little or no past employment history. In the first case, the basis for opinion is relatively definite. A statement can be introduced from the employer showing the wage structure of the past years, the classification of the decedent's work skills, and the history of promotion for workers of similar classifications and abilities. The same source can provide a detailed list of non-wage or fringe benefits. In such cases, the economist merely projects these past earnings into the future. His analysis of basic data is almost totally unnecessary with the exception of a prediction of future increases in wages. In this area the economist has two acceptable choices. He may simply project the increase in wages that have been experienced over the past years into the future, or he may assume that future wages will rise at approximately the same rate as increases in productivity. The simplest and yet one of the most effective methods of presenting, as evidence, the basis for projecting increases in future wages is to show the correlation between output per man-hour and increases in wages over the past several decades.50

When the decedent is either too young to have been gainfully employed or has no specific training because of a limited education, the economist must establish some basis for his opinion of how the decedent would have, in all probability, fit into the labor market. If the family history of the deceased shows a predominance of college graduates whose job classifications are professional or managerial, he may assume that the decedent, if a minor, would have continued in the family tradition. In the same vein, it is a safe assumption that the sons of non-skilled workers will become non-skilled workers, while sons of skilled workers tend to become skilled workers, and sons of professional and managerial workers tend to become professional and managerial workers.51

If it is conceivable that the decedent would have earned his living in a semi-skilled or skilled occupation, the present wage rate for a number of broad categories of labor skills can be established. The United States Bureau of Labor Statistics provides an annual occupation wage survey in eighty-six standard metropolitan statistical areas.52 In their publication, the mean, median, and middle range of weekly earnings of specific

50. This may be accomplished simply by reproducing pages 70 and 71 of the Federal Reserve System, Historical Chartbook (1971). The first chart contained there shows the growth of output per man hour, and the second shows the trend of wage and salary disbursements.


classifications of labor are given. If an area wage survey is not available, or if the potential position of the decedent in the labor force is not available, as in the case of a young college student who has made no definite plans for the future or for a high school drop-out, reference can be made to the study “Present Value of Estimated Lifetime Earnings.”

TECHNICAL PAPER No. 16 provides the estimated lifetime earnings of ten broad classifications of workers. These are:

1.—Professional, Technical and Kindred Workers.
2.—Farmers and Farm Managers.
3.—Clerks and Kindred Workers.
4.—Managers, Officials and Proprietors, Except Farm.
5.—Sales Workers.
6.—Craftsmen, Foremen and Kindred Workers.
7.—Operatives and Kindred Workers.
8.—Service Workers, Including Household.
9.—Farm Workers.
10.—Laborers, Except Farm and Mine.

This study not only provides the expected lifetime earnings for males from 18 to 64 years of age (for the year 1959), but also demonstrates the importance of increases in the wage rate due to increased productivity and the effect of a slight variation in the proposed or projected rate of increase in productivity. For example, the expected lifetime earnings of a 20 year old male in the sales category at different rates of increased productivity are as follows:

<table>
<thead>
<tr>
<th>Annual Increase</th>
<th>Earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>$ 414,000</td>
</tr>
<tr>
<td>2%</td>
<td>697,000</td>
</tr>
<tr>
<td>3%</td>
<td>917,000</td>
</tr>
<tr>
<td>4%</td>
<td>1,216,000</td>
</tr>
</tbody>
</table>

The determination of the money value of supplementary fringe benefits is, of course, an individual problem. In many instances, it will consist of only social security benefits and company contributions to various types of insurance. A simple and expedient method is to obtain from the employer of the deceased his estimated cost of fringe benefits expressed as a percentage of his direct labor cost. This percentage rate can then be applied to the actual lost cash earnings.

5. LOSS OF SERVICES

The loss of services normally rendered by the deceased, whether husband, wife, or child, is often an important element in establishing

53. U.S. BUREAU OF THE CENSUS, TECHNICAL PAPER No. 16, PRESENT VALUE OF ESTIMATED LIFETIME EARNINGS (1967) [hereinafter cited as "TECHNICAL PAPER No. 16"]: 
damages. In the case of a husband, the estimated loss can be given as an approximate value based upon current costs, such as lawn maintenance and estimates of painter's charges for exterior and interior painting of the home at normal intervals, etc. The cash value of the loss of services of a minor child is for the most part almost negligible, and will be a very small fraction of the total damages.

The value of the loss of services rendered to the home by a mother and housewife is more difficult to establish, since her services are so complicated and often do not have an established market price. Two approaches to this problem are available. The first is to assume that the homemaker can be replaced by a full time housekeeper. The current rate of pay for such services on both a per diem or weekly wage can be obtained from the local office of the State Employment Bureau. A second approach is to determine the average number of hours spent by homemakers on work within the home. This method is especially attractive when the wife has been gainfully employed.\footnote{64}

6. COST OF SELF-MAINTENANCE

In determining the monetary loss from the death of a gainfully employed person, it is necessary to deduct from the projected income an amount equal to the reasonable expenditures expected for the decedent's personal maintenance. There are two bases upon which the cost of maintenance can be calculated. The first involves an analysis and computation of the actual expenditures prior to death, followed by statistical projections of future expenditures. This would necessitate a record of family expenditures far more complete and precise than can be expected of an average family. The second basis for calculation consists of using available studies of budgetary expenditures. This is the better method, and studies make the necessary data available.\footnote{65}

Once the personal consumption expenditures have been established, they should be treated in the same manner as the projected lost income.

\footnote{54. A study of average hours per day spent on household tasks by 1,296 homemakers (by number of children, age of youngest child, and hours per week of paid employment) in Syracuse, N.Y. is available for introduction as evidence of the basis of the economist's estimate. U.S. DEP'T OF AGRICULTURE, Time Used by Husbands for Household Work, FAMILY ECON. REV. 9 (June 1970).

55. The most reliable statistical data on income, expenditure and savings are published by the Bureau of Labor Statistics, U.S. Dept. of Labor. This data is provided in the "City Worker's Family Budget," which provides a breakdown of the expenditures for items considered sufficient in amount to provide "a modest but adequate level of living" for a four-person family. U.S. DEP'T OF LABOR, CITY WORKER'S FAMILY BUDGET. This study is published monthly, and is better known as the cost of living index. The study may be found in numerous publications, one of which is the "Monthly Labor Review" published by the U.S. Dept. of Labor.

In addition to the foregoing budget, and out of recognition of its limitations, the Consumer and Food Economics Research Division of the U.S. Dept. of Agriculture has been conducting studies into the matter of actual expenditure patterns of American families. The latest available publication of a summary of this research, to date, will be found in U.S. DEP'T OF AGRICULTURE, FAMILY ECON. REV. (Dec. 1970).}
If one assumes that wages will increase in proportion to increases in productivity, one must also consider that other prices will increase in approximately the same rate of increase. Thus, to be consistent, future consumption expenditures should be increased at the same compounded interest rate as was used in the computation of lost future income.

7. CONSUMPTION EXPENDITURES FOR MINOR CHILDREN

The personal consumption expenditures of children differ so greatly from those of adults that they must be considered separately. The actual dollar amount will vary depending upon where the child lives, whether urban or rural, farm or non-farm. There is universal agreement among home economists that costs for various categories of goods and services in the family budget do not rise at the same rate over the life span of a child. The costs of raising a child generally increase as he grows even without taking into account the effect of price changes over a lifetime. However, no data is available on the shares of housing, transportation, and miscellaneous goods and services used by each family member. Therefore, it is possible only to assign a child his per capita share of these categories.

A report of John L. Pennock of the Agricultural Research Service, U.S. Dept. of Agriculture, has been published in the Family Economics Review. This report provides estimates, based upon 1969 prices, for raising children from under one year to 18 years of age by farm, non-farm and urban areas in the North Central, South, and Northeast regions of the United States. The cost of college expenses incurred before age 18 are not included in these estimates. However, the cost of a college education can be easily estimated by consulting the catalogues of a representative number of colleges and universities and using their estimated costs of tuition, living expenses, books, and incidentals.

When the consumption costs of a minor child are computed, they are added to that individual’s self-maintenance costs for the remaining years. They should be treated in the same manner as all future expenditures and compounded for an anticipated increase in the price level.

8. RATE OF INTEREST TO BE APPLIED TO PAST LOST INCOME

Because of the lapse of time between the date of an accident and the date of the trial, there is a loss of past earnings. Had these earnings been deposited in an interest-bearing account, their present value would be greater than the sum of the periodic payments. The interest rate paid by local banking institutions should be based upon the time interval allowed and applied at a compound rate.

9. RATE OF DISCOUNT TO BE APPLIED TO FUTURE INCOME

The final and one of the most important steps in the economist’s presentation is the reduction of the lost future income to a present net value.

The philosophy for this procedure is based upon the generally accepted view that the loss of future earnings is not an immediate loss of a lump sum, but rather it is the loss of a future income stream. An adjustment must therefore be made to allow for the fact that a dollar one expects to receive in the future is not worth a dollar today. Most states have made discounting of future income mandatory. The Florida courts have required reduction to present value, and this requirement has been written into the new Florida Wrongful Death Act. The importance of even a slight increase or decrease in the discount rate is frequently overlooked by those unfamiliar with "present value" concepts.

The following chart illustrates the importance of this concept and the importance of whether the discount is to be compounded quarterly, semi-annually, or annually.

<table>
<thead>
<tr>
<th>Present Value of $100,000 Received Over a Twenty-Year Period at Selected Rates of Interest*</th>
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</thead>
<tbody>
<tr>
<td>Quarterly</td>
</tr>
<tr>
<td>----------</td>
</tr>
<tr>
<td>3%*</td>
</tr>
<tr>
<td>4%</td>
</tr>
<tr>
<td>5%</td>
</tr>
<tr>
<td>6%</td>
</tr>
<tr>
<td>7%</td>
</tr>
</tbody>
</table>

* 3% compounded annually produces the same present value as 6% compounded semi-annually, 12% compounded quarterly, or 36% compounded monthly. Compounding on a quarterly basis is preferable, because it more closely approximates the manner in which the deceased would have received his income.

As one can easily see, a change in the discount rate, especially when applied over a long period of time, makes a distinct difference in the present value of the damage award. The applicable discount rate is a matter of expert opinion, but the generally accepted standard is the return that an inexperienced investor could make without incurring any risk. Thus, the applicable discount rate is normally the interest rate on savings certificates issued by local savings and loan associations, or the interest rate on guaranteed government bonds. When the damage award is large and the time period lengthy, even the slight difference between the interest rates on savings certificates and government bonds can become a hotly-contested issue.

III. SUMMARY

The implications inherent in Florida's revised wrongful death statutes have not been fully explored by economists. A preliminary appraisal is

59. FLA. STAT. § 768.21(1) (Supp. 1972).
60. For a discussion of interest and interest rates see Trichwell, Selection of Capitalization Rates, in SELECTED READINGS IN REAL ESTATE APPRAISAL 991 (1953).
that a "pandora's box" has been opened, and that a number of complex problems will have to be resolved before the intent of the law can become a reality. The most significant revisions from the point of view of an economist are:

1.—The amounts awarded to each survivor and to the estate will be stated separately instead of being given in one lump sum.
2.—The traditional hypothetical questions formerly used as the basis for establishing the opinion of an expert will be supplanted by the particular facts of each case.
3.—The loss to the estate, now defined as loss of "net accumulations," will be of far greater significance and will be computed separately from the loss to survivors.

In the past, a single sum was awarded in a wrongful death action, and this was assumed to equal the sum of the damages to each individual survivor and the loss of the decedent's prospective estate. Under the revised statute, each individual part of the award must be stated separately. To comply with this requirement, the expert witness will be required to provide, by his testimony and opinion, a basis which the jury may consider in rendering a verdict. The implication for an economist is that he can no longer merely deduct the decedent's personal expenditures from gross income, but must now provide the value of the loss of support and services to each individual survivor.

In the determination of the damages from loss of services to each individual survivor and to the estate, the Florida Wrongful Death Act expressly states that the particular facts of each case are to be considered.61 This is a decided improvement over the old statute. Under the former law, the economist prepared his estimation of the amount of damages for a specific case, but was not allowed to refer to either the deceased or the survivors by name during his testimony. His opinion reached the jury via a series of questions and answers between the attorney and himself. Often, an attorney would initiate the pertinent testimony by asking the question, "Have you considered a hypothetical case having these facts at your disposal?" This method allowed the economist to substitute data based upon national averages and regional norms of consumption expenditures for the actual consumption expenditures (which are often not available) of the deceased. Since most studies in this area confine their results to "average per capita expenditures," the question facing the courts is whether or not to continue accepting estimates based on averages, or to insist on a detailed and verified list of actual expenditures in their determination of lost support and services.

Purely from an economist's point of view, the most significant change in the law effected by the new Florida Wrongful Death Act is the impor-

61. FLA. STAT. § 768.18(4) (Supp. 1972).
tance of the estate in determining damages under the act. The decedent’s personal representative may now recover, on behalf of the decedent’s estate, the difference between the loss of earnings of the deceased less the support to survivors from the date of injury to the date of death. If the survivors include a spouse or lineal descendants, loss of net accumulations beyond death may also be recovered. In the past, most economists have tacitly ignored the loss of the estate, in assessing wrongful death damages, in all but exceptional circumstances. The rationale for this omission was based on the “lump sum” concept. Once the lost income of the decedent was established and the personal expenses were deducted from the total award, the damages to the estate were included, as were all other damages, in the residue which was awarded in a single payment, or “lump sum.”

Damages to the estate, under the new law, may in many cases be greater than the total loss of support to all of the survivors. Such a situation would occur where the decedent is a mother who had been working part time. In such a case the father provides all, or at least the major portion of support. The mother’s income is not specifically allocated to any particular area of consumption, but is used for a higher level of living than would have been possible under the father’s income alone. Since the mother’s earnings would not be considered “support,” and since the difference between lost earnings and loss of support to the survivors is considered savings, the largest share of an award in such a case will be for damages to the estate.

A further complication in the actual computation of damages to the estate is the legislative definition of “net accumulations.”62 This term, as defined by the legislature, means that part of the decedent’s expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived to his normal life expectancy.63 Net business or salary income is that part of the decedent’s probable gross income after taxes (excluding income from investments continuing beyond death) that remains after deducting the decedent’s personal expenses and support of survivors (excluding contributions in kind).64

The crux of the economist’s dilemma with the new Wrongful Death Act is going to center upon the words “after taxes.” Questions which must be answered are: (1) What will be the tax base? (2) How will the tax bracket be determined? (3) How will the joint income and joint taxes of a husband and wife be determined? (4) Will the tax rate be based upon the current tax rate, or will it be projected upon the trend over the past fifty years?

In summary, the new statute is going to require an immense amount

62. “If the decedent’s survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.” Id. § 768.21(6)(a) (emphasis added).
63. Id. § 768.18(5).
64. Id.
of research, study, and thought before it becomes an instrument of justice rather than a mere revision of the law. It is, however, superior to the former statutes in that it provides a framework upon which the damages to each survivor and to the decedent's estate can be determined. The new act has additional merit in that it eliminates some of the potential injustice inherent in the old law, by requiring that the award be discounted to present value rather than leaving the jury instructions concerning discounting to the discretion of the trial judge.

The intent of the new act has been clearly established. The legislature has attempted to bring order to an important section of the law which had degenerated almost into chaos. No legislative body can perform miracles—it can only determine the best public policy. It is the duty of the courts to apply this policy to specific cases. All that can be hoped is that economists and attorneys, working together to solve their mutual problems, will follow the basic philosophy of the legislature in its statement of "Legislative intent" that "sections 768.16—768.27 are remedial and shall be liberally construed."