

How Courts Assess Marital Contributions When Wrongful Death Occurs: An Interface of Legal Issues and Family Theory in the Courtroom

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ABSTRACT. This paper considers the narrow question of whether, in a wrongful death context, the right of survivors to recover damages should be based on gross family income and household production or be limited to the income and household production of a decedent. It focuses on the interface between forensic economics and the literature of family economics. It suggests that the family bargaining literature could address measurement questions that are important to forensic economics. (J2, K4)

I. Introduction

This paper considers a rather narrow issue involved in how forensic economists make calculations of damages in wrongful death actions. The issue itself will require some explanation for those without a background in forensic economics. However, economists without forensic backgrounds will find that this narrow issue will give insight generally into the interface between economic theory and issues that the court system must resolve in litigation. In particular, this paper will show that issues in family economics are also issues for forensic economists in wrongful death actions.

II. Explanation of Wrongful Death Actions

In wrongful death actions, a decedent has been “wrongfully killed” in a manner that creates tort liability for the death. The survivors of the decedent have brought legal action to recover money. In this context, the term “tort” simply means that a harm has been committed for which a civil lawsuit can be filed for the recovery of damages. Those survivors have filed a court action to recover their own economic damages. There is another type of legal action that can result from a wrongful death. In some states, the legal representative for the estate of the decedent files an action for recovery of damages to the estate instead of the survivors. Legal actions of that type are called “survival actions” because the action

has survived the death of the decedent. In general survival actions apply only to the period from an injury that causes death to the death itself, but some states apply the survival action to the remainder of an individual's natural life expectancy. This paper will only consider only wrongful death actions, but because of survival actions conclusions reached in this paper would not apply to states like Kentucky, Tennessee, West Virginia, Pennsylvania and other states that have survival actions extending over natural life expectancy. This paper will apply in Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Kansas, Arkansas, Texas, Oklahoma, Minnesota, Nebraska, Montana and most other states.

Wrongful death recoveries are typically limited to family members, spouses and children of the decedent first, parents of the decedent second, and possibly siblings or other close relatives of the decedent if the decedent left no spouse, children or parents. State laws often spell out who, and in what order, can file wrongful death actions. This can be important in situations where persons are living together as families but not legally married since a long term relationship, even when children are involved, does not create a right to sue for wrongful death damages, whereas marriage does do so. If an unmarried couple are raising a child together, the child can sue for damages, but not the surviving adult member of the couple, for example. This is also a consideration in why gay couples want the right of marriage. Without special legislation, a gay partner who has been supported for years by a decedent has no right to recover damages.

Different states allow recovery for different elements of loss, but most states with wrongful death acts allow recovery for lost financial support and lost household services that the decedent would have provided to the appropriate survivors. Damages of this type are typically called "pecuniary," "tangible," or "economic" damages to distinguish them from relationally based damages such as "loss of society of the survivors with the decedent," "loss of love and affection," "grief and bereavement," or the "pain and suffering" of the decedent in the process of dying. These latter elements are typically referred to as "non pecuniary," "intangible," or "non economic" damages, which economic experts are normally not asked to try to value. In this paper, the only damages being considered are the economic damages mentioned above: (1) Lost financial support the decedent would have provided to other family members; (2) the lost value of job-related fringe benefits of the

decedent that may also been lost to survivors; and (3) the lost reasonable monetary value of nonmarket goods and services the decedent would have provided to the family.

Job-related fringe benefits involve complexities related to Social Security, Medicare, pension plans, health plans and other insurance programs that may have been provided along with the decedent's employment and will not be considered in this paper. However, the general framework that this paper will apply to lost financial support and lost household services would apply to job related fringe benefits. Some part of the income earned by the decedent and some part of the nonmarket goods and services produced by the decedent would have been used in ways that would not have involved direct benefits to survivors. The whole family loss includes all of lost earnings and all of lost nonmarket production, but only the losses of the survivors are legally relevant in most states. Thus some reduction must be made for losses that were suffered by the decedent, but not by the decedent's survivors. Since many wrongful death situations involve an adult parent with a spouse and family, lost financial support is calculated by forensic economists by subtracting what is misleadingly called "personal consumption and maintenance" (PCM)² from the projected lost past and future earnings of the decedent. What is misleading about the term is that expenditures on collective family goods such as housing and utilities, which are a part of the personal consumption or the personal maintenance of the decedent, are not included in the PCM that is subtracted from lost earnings. What is actually subtracted are personal consumption and/or personal maintenance expenditures that do not provide benefits to survivors. Nevertheless, the term PCM will be used in this paper.

III. Measurement Issues of Focus in this Paper

The need to subtract PCM from estimated total losses to assess survivor loss has a number of implications and poses the two theoretical questions which are the focus of this paper: (1) Should the reduction for personal consumption of the decedent be applied to family income and output of household production or only the personal income and output of the decedent?; (2) Depending on the answer to (1), how should the personal consumption of the decedent be measured? The discussion of of both questions is organized around examining a 1994 court decision, *Howard v Crystal Cruises, Inc.*, (1994), which ruled that the income and

nonmarket service production basis for person consumption reductions was total family income, not the income of the decedent.

IV. A Description of *Howard v. Crystal Cruises, Inc.*

Howard v Crystal Cruises, Inc. (1994), was a decision of the United States Court of Appeals for the 9th Circuit. The *Howard* Court ruled specifically that the trial court was not in error in allowing a personal consumption deduction of 30 percent to be applied to all of family income rather than exclusively the income of a decedent husband.³

The surviving plaintiff wife had made a “collateral source” argument that the PCM reduction should be applied only to the income of the decedent husband and should not be applied to her own earnings and nonmarket service production. In law, the “collateral source” issue typically revolves around insurance one has purchased prior to an injury. For example, it is normally not permissible for a defendant to introduce information that insurance policies had been purchased and have made payments to injured parties. There are several reasons for this rule. One is a desire that the tort system force potential injurers to bear the full costs of injuries that they cause to induce efficient precautionary behavior. A second is that insurance policies are sometimes subrogated in such a way that insurance companies parts of a damages award may be repaid to insurance companies.⁴ The third factor is that it is generally thought to be socially valuable for individuals to purchase insurance. A system that penalized individuals who purchased insurance by reducing damages they could collect from injurers would constitute a negative incentive to purchase insurance [Posner, 1998]

The collateral source rule, however, is not limited to insurance contexts and extends to a variety of family contexts as well. In many states, the fact that a surviving spouse has remarried is not admissible in a wrongful death action. Provision of replacement services by the new spouse are considered under such circumstances as collateral source issues. Thus, in some states, remarriage cannot be mentioned to juries for the same reason that insurance policies cannot be mentioned.⁵ The intent is that juries not take into account payments that may have offset some of the damages actually suffered, but which came from sources other than the defendant. In the context of the surviving wife in *Howard v Crystal Cruises, Inc.*, the plaintiff wife was effectively arguing that to the extent

husband. She has lost income to which she would have had access if he were still alive, but at some savings in terms of reductions in her own expenditures on his behalf. The collateral source argument raised by Mrs. Howard is an argument that her ability to self finance some of her financial losses can be considered in determining damages. In a strictly financial sense, this is probably correct. Trout (1999) accepts that logic and argues on a more practical level that all consumption studies from which any PCM measure could be derived use a family income measure rather than an individual's own income measure.

However, one can also argue that Mrs. Howard's ability to spend money on her husband may have been a benefit in itself, rather than a cost. Her expenditures on her husband may well have been her highest utility use of her own income and thus her loss of the ability to make such expenditures represents a utility loss rather than a financial savings. This argument is made by Gilbert (1991) and Ward (1999) and is supported by this author (1999). The parallel argument with respect to another type of consumer expenditure is highly persuasive. If, as a result of a personal injury, Mrs. Howard had lost her ability to play golf, the defendant would not be allowed to introduce Mrs. Howard's reduction in expenditures on golf as an offset to the economic losses resulting from her injury. Courts would immediately accept the argument that the defendant should not enjoy smaller damages because the defendant had destroyed Mrs. Howard's ability to play golf. Instead, her loss of the ability to play golf would be introduced as an intangible loss. Indeed, an economist might be permitted to testify that the lost value of Mrs. Howard's ability to play golf must be greater than her willingness to pay whatever amount she paid to play golf.

Gilbert (1991) had identified the approaches that might be taken to the personal consumption deduction as the family income approach and the "welfare" approach. The family income approach was the method used by the *Howard* Court. Gilbert defined the "welfare" approach as putting the surviving parts of the family back on the same indifference curve as before the decedent's death. Aside from the peculiarities of supposing that such an indifference curve makes any sense in this context, Gilbert argued that this meant applying the personal consumption deduction only to the decedent's own income.

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Bruce (1997) argued that Gilbert's welfare approach is warranted in cases of an "idealized marriage" in which there is a great deal of

consumer interdependency between spouses in the form of love. Bruce then argued that in a “marriage of convenience” or “a marital partnership,” the family income approach is appropriate since the relationship depends on convenience in joint production activities. With a “idealized marriage,” when utility functions are perfectly meshed, an expenditure by one spouse on the other is not an expense, but a utility maximizing expenditure on the part of the spouse making the expenditure. Thus, the welfare approach applies. In Bruce’s “marriage of convenience” or “trading marriage,” the spouses are operating according to completely separable utility functions to efficiently minimize costs of goods and services. Thus, the family income approach is appropriate since the surviving spouse is being restored to flow of goods and services that has a value equivalent to the flow before the decedent spouse’s death.

The essential issue in these conceptions of marriage is the strength of the perceived utility of a spouse in the utility function of a marital partner. In an “idealized marriage,” the utility of a spouse is equal to own utility. In a “marriage of convenience” or a “trading marriage,” utility of a spouse is only an incidental consideration. The family bargaining theory assumes a concept of marriage that lies somewhere between these two polar cases (Lundberg and Pollak, 1996; Lundberg, Pollak and Wales, 1996). In that literature, marriage is not idealized to the point that an expenditure by one spouse on the other spouse is always equivalent to an expenditure on himself or herself. When a husband makes expenditures on his wife, he does gain utility for himself and he does have losses when his opportunity to spend money on his wife is lost because of her death. However, his expenditures on his wife may also represent efforts to have strategic bargaining influences on both how family income is generated and how the benefits of family income are distributed. Loving family members do have interdependent utility functions, but not perfectly interdependent utility functions.

A wife who loves her husband may very much enjoy giving him a gift, but also know that having done so will help her persuade him to go to a particular event she knows he might prefer to avoid. Her act of giving the gift has both utility in itself and utility in terms of possible influences the gift may create. This more mixed circumstance is probably typical of most marriages, suggesting that there is some validity to both the family income and the “welfare” approaches, but probably that the

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normally have the same meanings as “economic” or “tangible” as compared with “nonpecuniary,” “noneconomic,” or “intangible.” In *Michigan Central Railroad v. Vreeland* (1913), a case specific to the meaning of “household services,” the United States Supreme Court defined the term “pecuniary” contextually as follows:

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, “not only to express the character of the loss of the beneficial plaintiff which is the foundation of recovery, but also to discriminate between a material loss that is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative, upon which, in the nature of things, it is not possible to set a pecuniary valuation.”

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, of child, and, when the beneficiary is a child, for the loss of the care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

This definition and other uses appear to imply what economists would describe as a market test: Does the good or service being judged as pecuniary have an equivalent that can be purchased for a known price from an unknown person hired in the commercial marketplace? If the answer is “yes,” forensic valuation can proceed from the market value to the specific services lost by the survivors of the decedent. If the answer is “no” because the good or service would only have value if provided by the decedent, the good or service cannot be valued as “pecuniary” and should be classified as “nonpecuniary,” “noneconomic” and “intangible.” The *Howard* court implicitly to the market test standard when it says: “...and second, she (the surviving plaintiff wife) argues that no reduction should have been taken against the valuation of Howard’s services, because those services (e.g., painting the house and maintaining the car) were indivisible” (first parentheses added, second parentheses in original).

In PCM discussions by forensic economists, the term “family goods”

has a meaning of “public goods to the family” and thus goods and services that are non rival and consumption and, technically, the costs of exclusion of non contributors toward provision is high. The court’s examples of painting the house and maintaining the car are good examples. If the house is painted, the benefits accrue to all persons living in the home. Likewise, since family automobiles are used to the benefit of all family members, the subtraction of uses by the decedent husband does not generally change the needs of the surviving family members.

In the literature of forensic economics, family goods more obviously include housing, home repair services, lawn services, public utilities such as electric, water, sewage, garbage and fire protection services (if provided by private purchase) are all family goods and “indivisible” in the terms of the Howard court. Mrs. Howard would need almost as many of those services with her husband absent as with him present. The same would be true of such entertainment and communication goods as televisions, computers, music players, family pets, and so forth. This is the reason that no study finds a PCM for an adult family member leaving survivors in the household of more than 40 percent. Most find 30 percent or less (Ireland and Depperschmidt, 1999). Much of family income is spent on indivisible family goods and thus irrelevant to a PCM reduction when trying to calculate pecuniary losses to survivors.

With definitions of “pecuniary” and “family goods” as background, the question of whether the PCM ratio for money income should be the same as the PCM assessed against value of lost production of nonmarket goods and services can be refined into a narrower question: Are family goods a larger proportion of the value of lost production of nonmarket services than of money income. Painting the house is a family service, whether provided through a commercial market or on a non market basis. Maintaining a single family automobile is also a family service. The *Howard* court did not specifically rule that the argument made by the plaintiff wife on this issue was incorrect, but only that the trial court made no reversible error by ruling that way. Given that the plaintiff wife had brought in an economic expert who provided the Cheit 30 percent for lost earnings, that percentage was used by the judge for household services in the absence of another percentage to use. For that reason, no great significance should be placed on the decision of the *Howard* Court not to reverse the trial court’s application of the 30 percent Cheit ratio to lost services. The *Howard* Court should be understood to have ruled that

some PCM reduction from the value of nonmarket goods and services should have been made and that it should have been made on the basis of some foundation in evidence stronger than passing observations by the plaintiff wife.

Nonmarket good and services usually include “household services” and “relational services” and material goods produced by those services. Household services normally include preparing meals at home, laundering clothes (including taking clothes to the dry cleaners or commercial laundries), cleaning homes, maintaining family records for investment and tax purposes, paying bills, preparing taxes or seeing tax preparers, making investments and seeing investment advisors, gardening (to the extent not a hobby), home repairs, appliance repairs, shopping for needed family and private goods for family members, chauffeuring children to activities, home decoration, and so forth.

Relational services include the guidance and counsel that individuals provide to each other, to the extent that the advice and counsel is equivalent to services of those types that are available in the commercial marketplace. Care and comfort, to the extent equivalent to nursing care or paid attendant care during illness, is another relational service. Even companionship, to the extent replaceable by paid companions from security or escort services, can be a pecuniary relational service. Also included are a variety of types of parenting services provided to children, again to the extent replaceable by commercial equivalents. The courts are somewhat equivocal in this area in that, as in the *Vreeland* passage quoted above, relational services provided to minor children are more unquestionably accepted as pecuniary losses to children than relational services provided by adults to each other. (*Vreeland*, however, goes on to raise the possibility that companionship services provided by adults to other adults might be allowable as losses if measured by “some standard.”)

By their nature, lost relational services should not be subject to PCM reductions unless, as might be argued by implication, the total value of nonmarket production within families should be calculated before and after the death of the decedent. In *Howard*, this would imply calculating the value of the husband’s relational services to the wife and the value of the wife’s relational services to the husband since no other family members were involved. If the value of the wife’s relational services to the husband were greater than the value of the husband’s relational

services to the wife, there would be no loss. If the value of the husband's services were greater, the loss would be equal to the differential between the value of the husband's services to the wife and the wife's services to the husband. With respect to lost household nonmarket services, the family good argument becomes much stronger. Almost all such goods and services would appear to have high levels of indivisibility, such that the plaintiff wife's argument is almost surely correct.

VII. Issues if the "Decedent's Contributions Only" are Considered

If the court had decided that only the decedent's income should be considered, a number of theoretical and empirical problems would have been created. The first set of questions revolve around whether the decedent's income should be considered the base family income or the secondary family income. Assume, as in an earlier example, that family income was \$120,000 per year. The husband has earned \$100,000 of that amount and the wife, who is also a secondary homemaker, earned \$20,000 of that amount. The family would have large fixed family expenditures such that the first \$20,000 of family income would pay for family fixed costs, while a significant part large part of the last \$20,000 of family income would be saved or used for lower priority expenditures. Thus, it matters whether the \$20,000 was the first or last \$20,000 in the \$120,000 family income. A PCM for the first \$20,000 would be much lower than the PCM for the last \$20,000 if there were some way to measure this accurately. There is nothing in law that would point to how this should be determined. Likewise, nothing in economic theory provides any clear answer.

The second set of questions revolve around true family bargaining issues. If Lundberg and Pollak (1996) and Lundberg, Pollak and Wales (1996) are correct, it should make a difference in consumption patterns which of the two spouses earned which parts of the \$100,000 in family income. A family in which both spouses earned \$50,000 per year would not have the same consumption patterns as the family above, where the husband earns \$70,000 and the wife earned \$30,000. The focus of these studies is not on the percentage of total family income used by each marital partner, but on the types of items that would be purchased. LPW

4. It would be very helpful to know how much the variance there is among families in expenditure patterns and in the production of nonmarket services.
5. Identifying types of factors that produce variance among families in expenditure patterns. At the present time, what is being relied upon is average data for families with specific numbers of members. With few exceptions that data is not specific as to income level, sex of the decedent, the ages of surviving minor children, which adult earns what share of the family income and so forth. Most data currently available also do not consider the impact of the existence of children from prior marriages, which would have an effect that is legally relevant.

Endnotes

1. Department of Economics, University of Missouri-St. Louis, Missouri.
2. In a few states (including Pennsylvania and Tennessee), the relevant standard is "personal maintenance," not personal consumption *and* maintenance. A personal consumption and maintenance standard is conceptually based on the notion that survivors should recover for their own losses. A "personal maintenance" standard is conceptually based on the notion that the part of an individual's expenditures that were required to maintain that individual in the labor market are really a cost of providing earnings, but survivors should be allowed to recover for personal expenditures of the decedent that are in excess of what would have been required to maintain earning power. A few states (Connecticut, Georgia and to some extent, Mississippi), use a survival action approach of not deducting either personal consumption or personal maintenance. Most states, however, use a personal consumption and maintenance standard, which will be assumed in this paper.
3. This 30 percent figure is taken from Table 3.5 in a 1961 book by Earl F. Cheit. The Cheit tables have been used for many years by many forensic economists simply because they appear reasonable on the surface. The sources cited in the table provide no explanation for the percentages offered in the table. Cheit apparently asked a graduate student to compile this table as an illustration for his early book in forensic economics. Because this became relevant in litigation, Cheit was subpoenaed a number of times and reportedly testified that he did not know how the numbers were compiled and that he did not use them himself when he was involved as a consultant in a few legal cases. Cheit is still living and apparently has a strong preference to stay far away from anything having to do with forensic economics.
4. "Subrogation" is a legal device in which an insurance provider can make a payment to an injured party that must be repaid if the injured party wins a tort action that includes payment for the injury for which the original payment was made. In other words, the insurance covers only losses that are not compensated by ultimate tort action, but payments can be made in advance of that action on condition that they will be repaid if the tort action succeeds.

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5. As of 1979, the New Jersey, Illinois and Michigan Supreme Courts had all addressed the very narrow issue of whether the requirement not to mention remarriage carried so far that a remarried widow could require that she be addressed in court by her previous married name instead of her current married name. In all three instances, the courts ruled that if she had changed her legal name upon remarriage she could not insist on being called by her previous married name. This is discussed in the decision of the Michigan Supreme Court in *Wood v. The Detroit Edison Company*, 409 Mich. 279 (1979).

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