

## Personal Consumption and Single Persons: A Comment

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### Abstract

Kurt Krueger's paper on "Personal Consumption and Single Persons" (2011) identifies five approaches for determining the amount that should be subtracted from the income of wrongfully killed single persons living in single person households to account for the personal expenses of those single persons when calculating economic damages in wrongful death circumstances. However, none of Krueger's methods are useful in the large majority of states with conventional Wrongful Death Acts. The reason is not flaws in Krueger's calculations, but flaws in Krueger's understanding of what is required in Wrongful Death Actions.

### I. Introduction

Kurt Krueger's paper on "Personal Consumption and Single Persons" (2011) identifies five approaches for determining the amount that should be subtracted from the income of wrongfully killed single persons living in single person households to account for the personal expenses of those single persons when calculating economic damages in wrongful death circumstances. However, none of Krueger's methods are useful in the large majority of states with conventional Wrongful Death Acts. The reason is not flaws in Krueger's calculations, but flaws in Krueger's understanding of what is required in Wrongful Death Actions.

Krueger makes a distinction between "reasonably expected pecuniary loss" and "contingent pecuniary loss" on page 145 of his paper. That distinction only applies to single persons living alone with no dependents. If a man was living with his wife and two minor children, the normal approach for calculating damages would be to rely on the Patton-Nelson tables (Ruble, Patton and Nelson, 2009) or some other set of tables (see Ireland and Depperschmidt, 1999) to determine the "personal consumption" of the decedent. As the children reached adulthood and left the household, the tables would show larger reductions for personal consumption. There would be differences between forensic economists about which tables should be used and about whether the income of the spouse should be considered or ignored, but the goal of the calculation would be to develop a proxy measure for the amount of financial support the decedent would have been expected to provide for statutory plaintiffs bringing the wrongful death action. This would be a calculation of "reasonably expected pecuniary

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loss" not "contingent pecuniary loss."

Ideally, "loss of financial support" would be calculated directly. The calculation would begin with a calculation of total amounts of money that the decedent was either transferring to statutory survivors or providing to survivors in in-kind services and goods. With a household including multiple statutory survivors (e.g., spouse and children), this calculation would include expenditures on family goods such as housing, utilities and a portion of transportation. With a single person living alone, family goods would not exist, but the decedent might have been allowing survivors to use other residential property or vehicles owned by the decedent. In most instances, sufficient information does not exist to develop direct estimates of financial support on this basis. As a result, most calculations of lost support require use as a proxy measure a decedent's income minus estimates of the personal consumption of the decedent, net of expenditures on family goods. This indirect proxy measure is imperfect, but produces what are regarded to be reasonable results when applied to survivors who lived with the decedent and depended on the decedent for financial support. The estimates arrived at by use of this proxy is a measure of the "reasonably expected pecuniary loss" for statutory survivors who lived with the decedent.

It is only when Krueger calculates damages in cases involving single persons living alone with no dependents that this proxy measure becomes "contingent pecuniary loss." The important distinction to be made is between "probable expenditures" and "conceivably possible expenditures." When applied to dependent statutory survivors who were living with the decedent, the proxy measure of the decedent's income minus the personal consumption of the decedent is a measure of the "reasonably expected pecuniary loss" of the statutory survivors. When applied to a single decedent who was living alone, that proxy measure is only a measure of "contingent pecuniary loss." However, in such a circumstance, it should be reasonably easy to prepare a direct calculation of loss of financial support. If a decedent was providing financial payments to adult children, parents of the decedent, or the decedent's spouse living apart, evidence of the amounts of the direct payments should be available. If one or more of the statutory survivors were living in a residence owned by the decedent or using a vehicle for transportation that was owned by the decedent, evidence would exist and values for the use of those properties could be reasonably estimated.

## II. Statutory Survivors in Traditional Wrongful Death Acts

In a traditional Wrongful Death Act as (such acts exist in the majority of states), statutory survivors of a decedent bring their own claims for pecuniary loss stemming from the decedent's death. Damage sections, preferred jury instructions or applicable case law identify a list of losses for which awards may be made to statutory survivors. Statutory survivors normally include the spouse, children, and parents of the decedent, usually as a "first class" that can bring an action for losses based on the wrongful death. If there are no survivors in that class, rights to bring an action may extend to siblings of the dece-

dent, or may go further to "next of kin." It is important to keep in mind that not everyone who has losses resulting from the death of a decedent has the right to recover for those losses. In a traditional Wrongful Death Act, the right to recover damages resulting from the death is limited to amounts of financial support that a decedent would have provided to survivors.

The term "personal consumption" does not typically even appear in damage sections of Wrongful Death Acts. What appears is "loss of financial support" or just "loss of support." The notion that loss of support equals income minus personal consumption is only inferred because direct measures of financial support do not exist. It is clear, however, that a decedent would have spent some portion of income in ways that would not have resulted in support for statutory survivors. There are many different types of expenses that a decedent might have made that would not have resulted in any type of financial support for "statutory survivors." Any amounts that a decedent would have spent on girlfriends or boyfriends, household children of current spouses who have not been legally adopted, or charitable donations represent amounts that would not have been used to provide financial support for statutory survivors and therefore are implicitly part of the subtraction that must be made from a decedent's projected income in order to calculate the amount of financial support that a decedent would have provided to statutory survivors. When the decedent lives with a spouse and/or the decedent's children, money the decedent would have spent on housing, utilities, and part of transportation represent financial support for those living with the decedent. When a decedent lives alone and there is no pattern of direct cash contributions to statutory survivors, the amount of financial support for statutory survivors that can be recovered approaches zero.

For example, a co-habiting sexual partner is not entitled, in most states, to recover for loss of financial support that the decedent may have been providing. Similarly, if the household of the decedent included children who have not been legally adopted by the decedent but were being supported by the decedent, those children usually do not have standing to bring a wrongful death action for their losses of support. In a case involving an unmarried man and woman living and their child living in a household, the death of either spouse creates a right of the child to bring an action for loss of support, but the surviving parent does not have that right. The right to be considered a statutory survivor in a wrongful death act has been one of the demands of gay couples and has been partial motivation in the demand for gay marriage. With heterosexual couples (other than close relatives), the decision not to marry is optional, but has very important consequences under wrongful death statutes.

Statutory survivors in traditional wrongful death states can bring an action for a list of pecuniary losses that may vary somewhat from state-to-state. Since Krueger has relied upon Missouri, it will be useful to look at the list provided in §537.090 of Missouri Revised Statutes. The list includes:

pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of those on whose behalf suit may be brought.

It is notable that the list in the statute does not say "the potential" or "the hypothetical" value of items listed. In all interpretations of this list that I have seen from any economic expert other than Krueger, the role of an economic expert has been to provide reasonable estimates of the amounts of the services (usually interpreted as "household services") and actual financial support that a decedent would have been reasonably likely to provide to statutory survivors.

With single persons living alone with no dependents, there are normally no losses of household services and no losses of financial support. The result is that actions to recover for merely potential losses of household services and financial support are not filed or, if filed, the focus is on "consortium, companionship, comfort, instruction, guidance, counsel, and training," that economic experts normally do not try to project. Since the goal of traditional wrongful death acts is to allow statutory survivors to recover their own losses and the statutory survivors have not lost either household services or demonstrated financial support in cases involving single persons living alone with no dependents, this is not surprising. Under most circumstances, if a single decedent who was living alone and not supporting dependents is wrongfully killed, there is no loss of financial support by any of the statutory survivors. There is no need to hire an economic expert to say that the value of lost financial support is zero, but zero is often the correct value for loss of financial support.

Krueger attempts to justify using a "contingent" approach by referring to language in the decision in *Cobb v. State Sec. Ins. Co.* (1979), referring to what a jury must decide in a wrongful death action. The passage that Krueger cites reads as follows:

... inherently involves some element of speculation and intangibles. An award is not based on direct, positive evidence but upon probabilities which the jury must reasonably find. The jury has an extraordinarily wide discretion in determining the amount of recovery in such wrongful death cases. . . (p. 739 in the decision, p. 146 in Krueger, italics added for emphasis).

The *Cobb* decision related to a claim by Robert Cobb and Norma Jean House for \$7,500 in damages in the death of their daughter Rhonda Lynn House. Robert Cobb had never been married to Norma Jean House and this decision of the Missouri Supreme Court established the right of a father of an "illegitimate" child to sue for damages resulting from the death of that child. Recovery was from an insurance company based on the fact that the child had been killed by an uninsured motorist. Robert Cobb and Norma Jean House were living together and had other children who were also living with them at the time of Rhonda Lynn's death. Nothing in this decision suggests that an economic expert should calculate the future potential support that Rhonda Lynn Cobb would have provided to Robert Cobb and Norma Jean House. The quotation itself refers to "probabilities which the jury must reasonably find." It does not refer to "possibilities" that could conceivably have existed but which were highly unlikely.

Krueger also cites the Missouri decision in *Weast v. Festus Flying Service, Inc.* (1984) to support his argument that an economic expert can calculate the

potential support a decedent might have theoretically provided. The *Weast* decision quotes the Missouri decision in *Domijan v. Harp* (1960) as follows:

The test of the right of recovery . . . is the reasonable probability of pecuniary benefit from the continued life of the deceased, or a pecuniary injury from the death – and not that of strict legal dependency. (p. 734 in decision, p. 265 in *Weast v. Festus Flying Service*)

The *Weast* decision, as noted in Krueger's paper, indicated that the parents of Janice Dodson had received the financial benefits of having been able to stay in her home in Florida and that Janice Dodson had made a direct financial contribution to her father of \$450 during the month before her death. The case involved the death of both Janice Dodson and her husband in an airplane accident. The essence of the *Weast* decision is that a legal obligation to provide services or financial support was not required to recover damages if there was evidence that such services and financial support were being provided at the time of death. Again, one finds no reference to what might have been possible if Janice Dodson had chosen to maximize the amount of financial support she could have provided to her parents, as would be implied by Krueger's standard of "contingent pecuniary loss." *Weast* held that a jury had wide discretion to determine a reasonable amount of loss based on the evidence provided in the case, but based on the standard of "reasonably expected pecuniary loss."

### III. Special Circumstances with Survivor Loss in Wrongful Death States

Traditional wrongful death actions do not usually prohibit awards for loss of financial support and services to survivors of single persons living alone with no dependents. As in the *Weast* case, wrongful death actions require evidence that such support and services were being provided or were reasonably likely to be provided in the foreseeable future. The *Weast* decision emphasized the value to the *Weast* parents of being able to stay with their daughter and son-in-law when the parents visited Florida. The *Weast* decision also emphasized that there were instances of financial transfers from the decedent daughter to her parents who had brought the action. In the *Weast* case, the plaintiffs did not use an economic expert to project the present value of the future flow of such services and support, but evidence of services and support was an important component of the decision.

When a single person who lives alone and has no dependents nevertheless has a pattern of contributing either financial support or services to statutory survivors, a claim can be made for future losses based on that pattern. An economic expert can rely on evidence in existence at the time of a wrongful death to argue that the past pattern would continue into the future. If the pattern was one of increasing financial support over a period of time, the rate of increase from the past could be used to project a rate of increase for the future. What matters is the pattern itself, not what might conceivably have been possible. If a father regularly provided \$10,000 per year, increasing over the years, to his two adult children, that pattern can be projected into the future without

knowing that the father's income or the fact that the father also was contributing \$15,000 per year to support his girlfriend and another \$5,000 per year to his favorite charity. If evidence exists that would allow a projection of the pattern of support provision or service provision, an economic expert can project values for future losses based on the available evidence.

Another special circumstance arises with a single parent with minor children as dependents. It would be presumptive that the single parent was providing financial support for the minor children, but that the period of support for each child would probably be to adulthood and not thereafter. In such cases, this author typically projects loss of financial support as equal to income minus projected personal consumption until the minor children reach the age of majority, typically either age 18 or age 22 depending on college expectations for the children. Losses of financial support are not projected beyond the age of majority even though it is possible (and evidenced in the author's own experience) that the period during which financial support for the statutory plaintiffs would continue long after the age of majority.

#### **IV. Damages in States with Loss to the Estate Standards**

While most states have traditional wrongful death actions under which statutory survivors can bring their own actions, a minority of states base their wrongful death actions in whole or in part on losses to the estate of the decedent. Some of those states, including Kentucky, West Virginia, and Georgia allow recovery for the loss to the estate of the decedent's future earnings resulting from the death of the decedent. Others of those states, including Connecticut, Hawaii, Pennsylvania, Tennessee, New Mexico, and probably Mississippi require subtraction for what are usually called "personal maintenance expenses." The logic of the subtraction is that the estate has not lost all of the earnings of the decedent because some portion of those earnings would have needed to be spent to maintain the decedent in the labor market. The term "personal maintenance" means expenses necessary to "maintain" the decedent in the commercial labor market so that the decedent could have provided the services for which future lost income would have been paid. The five definitions of "personal consumption" in the Krueger paper may be relevant to the concept of personal expenses for maintaining the decedent in the commercial labor market, when applied to a single person living alone with no dependents.

#### **V. Concluding Observation**

This author's concern with the Krueger paper is that a reader might develop the impression that it is conventional practice among forensic economists to project the amounts of lost support that a decedent could conceivably have provided to statutory plaintiffs, not the amount the decedent would actually have provided to statutory plaintiffs. If a single person living alone has no living children or parents, the right to sue for damages can pass to siblings. In such circumstances, the methods discussed in Krueger's paper would imply calculating the amount of support one sibling could have provided to the other,

regardless of the fact that both siblings were in their 40's and had never provided any support to each other. If there was evidence that the decedent sibling was supporting or would have been likely to support surviving siblings, it might be reasonable to project loss of support, but not otherwise. The proxy method used by most forensic economists to calculate dollar values for loss of support for decedents who were living in the same household as statutory survivors bringing the action is reasonable for that circumstance. A proxy method, however, is a proxy method. It is invalid to apply the same proxy to circumstances in which the proxy method of subtracting "personal consumption" from the lost earnings of a decedent no longer meets the standard of common sense.

### References

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### Cases

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