

Valuation of Advice and Counsel in Personal Injury and Wrongful Death Litigation

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I. Introduction

This paper examines dollar valued calculations for both advice and counsel “services” and companionship “services” provided by adult children to parents, by parents to adult children, from one spouse to the other, or between adult siblings. When provided to minor children by parents, both advice and counsel and companionship services are typically lumped together as “child care,” which will not be considered in this paper. The meaning of companionship services has been an important issue in previous papers (Tinari 1998 and 2004, Ireland 2006 and 2007). That issue will be reviewed in this paper only in terms of explaining differences in the issues involved in valuing advice and counseling services as compared with valuing companionship services. The paper will conclude that with respect to advice and counseling services between adults with standing to sue for damages in personal injury or wrongful death (parents, children, and potentially siblings), pecuniary damages may exist, but that any dollar valued calculations prepared by an economic expert are in the majority of circumstances based on a foundation of potential facts that are too speculative to make such testimony based on such calculations admissible. Cases brought under New Jersey law are probably an exception based on the 1980 decision of the New Jersey Supreme Court in *Green v. Bittner*, and subsequent decisions interpreting *Green v. Bittner*. The paper will also examine specific methods and problems with those methods that the author has seen in his consulting practice in reports or papers by Frank Tinari (1998 and 2004), Stan V. Smith (2005), and John O. Ward (2007), and has used in his own reports. An appendix of legal decisions that have addressed questions regarding advice and counsel has also been provided.

This is a narrow topic in that this author is not aware of economic experts other than Tinari, Smith, Ward, and one other expert who uses Ward’s method who provide separate values for loss of advice and counsel services provided by adult children to their parents or parents to adult

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children. Ireland has treated advice and counsel as part of ordinary household services when provided with a foundation provided by a family expert.

II. The Nature of Advice and Counseling Services between Related Adults

Often, adult individuals greatly value their relationships with other adult individuals based on both intangible emotional ties that exist and tangible services that are exchanged back and forth within those relationships. When an individual is wrongfully killed or personally injured, some of the persons with whom the decedent or injured victim has important relationships have the legal right to sue for their own damages resulting from the death or injury to the person with whom they have a relationship. Persons with their own rights to sue are parents, spouses, children and siblings of the decedent or injured victim. Most states limit this right to parents, spouses and children but not siblings. This limitation is important. Persons living together without the benefit of marriage or a corresponding civil union with similar rights may suffer great damages as a result of a death or injury but still lack standing to bring a law suit for their own damages.

The term “intangible damage” is typically understood to mean a loss that is unique and personal to the person suffering the loss and that cannot be replaced by someone employed in the commercial labor market. A “tangible damage” is typically understood to mean that the loss is of a sort that could be replaced by a person hired in the commercial labor market. Since mind states like love and affection cannot be provided commercially, love and affection losses resulting from an injury or death are typically not subject to expert economic testimony. Advice and counseling services provided within adult relationships often have components that are both intangible and tangible. A family member may, for example, have had specialized knowledge about other family members and thus be able to provide specialized advice and counsel with respect to those other family members that no counseling professional from the commercial marketplace could replace. Financial advice that one family member received from another family member, however, is advice that could be replaced by a professional financial counselor. Thus the first type of advice would be intangible and could not be reliably measured by an economic expert and the second type would be tangible and could be reliably measured by an economic expert, at least in theory.

The problem of disentangling tangible and intangible components of advice and counseling services, however, is not unique to advice and counseling services. A decedent mother’s home cooked dinners for her

husband and children on Sundays have a value that is also both intangible and tangible. The emotional aspects involved in the decedent mother's love and affection that was exhibited during the Sunday dinners cannot be replaced in the commercial market, but the meal itself can be replaced by any restaurant surviving family members chose. From this point forward, therefore, the term "advice and counsel" will refer only to the tangible aspects of advice and counsel that have, or at least theoretically could have, replacements from the commercial marketplace.

For clarity, one more distinction needs to be made. The death of or serious injury to a family member can cause significant emotional harm to other family members. As a consequence of the death or injury, other family members may require advice or counseling services that were not needed before the death or injury. Such services can be viewed as mini-life care plans for other family members that were made necessary by the injury or death. Typically, such services will only be needed for periods of time, but legal systems typically treat such needs as damages caused by the injury or death. Values of needed advice and counseling services of this variety are also not a central topic in this paper, but the existence of such needs can increase the difficulty of arriving at reasonable measures for the value of advice and counsel of the variety that was being provided before the injury or death. However, the fact that counseling services were needed and paid for by family members other than the injury victim or decedent does not create foundation for a long term estimate of loss based on the loss of advice and counseling services that the injury victim or decedent had been providing before the injury or death. The focus in this paper is advice and counseling services that were provided or were reasonably certain to be provided by an injury victim or decedent to other family members before the injury or death and that could, at least theoretically, be replaced in the commercial marketplace.

III. Problems of Foundation for Calculating Losses of Adult Advice and Counsel

There are two problems involved in calculating the value of advice and counseling services between adult family members. The first is the problem of establishing the specific types of advice and counsel that were being provided before the death or injury and the amounts of time spent providing each specific type of advice and counseling service. Different types of counselors provide financial advice as compared with psychological advice. Some family members provide one type but not other types of advice. Any reliable calculation of damages for the special category of advice and counsel requires reliable information about both the types and amounts of advice and counsel, presumably measured in

amounts of time, that were being provided before the injury or death, or that would have been likely to have been provided in the future. Families do not keep records of time amounts spent on advising and counseling between different members of those families. Simply assuming that a given injury victim or decedent would have provided one hour of such services per week or one hour of such services per day or some other made-up time amount services is speculation at its worst. Describing made-up amounts of time as “benchmarks” or “illustrations” does not change the fact that the results of such calculations constitute nothing more than pure speculation, even if there was a reliable foundation for the values placed on such time amounts, which is almost never the case.

The second foundational problem involves determining the quality with which the services were being provided. A plaintiff has the right to recover the cost of replacing services of a quality equal to the quality provided by the injury victim or decedent before the injury or death. This, however, raises the following question: What if the injury victim or decedent had no special skills in providing advice and counseling services in any of the areas in which such services were being provided? Does it follow, as assumed by some forensic economists, that family members are entitled to recover an amount necessary to replace the lowest quality of advice and counseling services available in the commercial marketplace? Assume, for example, that a given decedent father had less than a high school education. The lowest level of advice and counseling services available in the commercial marketplace would require at least a master’s degree. Does that mean that family members of the decedent father should be able to recover the cost of hiring counseling services from a person in the commercial marketplace with a master’s degree?

This author has argued that the pecuniary value of advice and counseling services of a decedent father with less than a high school degree are \$0. The decedent father with less than a high school degree could not have sold his advice and counseling services in the commercial marketplace for any amount of money. The decedent father’s advice and counseling services may have a value greater than \$0 because of the family relationship and the father’s family-specific knowledge, but family-specific knowledge cannot be replaced by a person without that knowledge who has a master’s degree and sells advice and counseling services in the commercial market. In other words, the *intangible* value of the decedent father’s advice and counseling services may be much greater than \$0, but the tangible, pecuniary value of those services is \$0.

IV. Differences in Concept between Advice/Counseling and Companionship

In the past, this author has exchanged comments with Frank Tinari about the issue of companionship (Tinari 1998 and 2004; Ireland 2006 and 2007). These two authors have different understandings of the meaning of companionship as explained in the *Green v. Bittner* (1980) decision and in subsequent New Jersey decisions interpreting *Green v. Bittner*. Essentially, Tinari argues that “companionship” refers to the time individual family members spend with each other, while this author has interpreted “companionship” as the type of service provided by attendant care providers in life care plans if and when surviving family members might have needed those services because of serious injury or illness or in terminal stages of life. If, for example, a father was providing services to his disabled son that now needs to be replaced after the father’s death, Tinari and Ireland would agree that the cost of providing such attendant care would qualify as a pecuniary loss under *Green v. Bittner* and progeny decisions in New Jersey. If, however, time that would have been spent together was simply a preferred use of social time, Tinari and Ireland disagree about whether that time represents compensable services within the meaning of *Green v. Bittner* and progeny. Tinari would project a loss of companionship in the form of valuing what it would cost to have attendant care provided both in the first circumstance where attendant care was needed and in the second circumstance where family members simply chose to spend time together. Ireland would project damages only in the first circumstance.

This difference is of great importance in that it is more likely than not that a decedent would have spent time with surviving family members. However, unless surviving family members were already disabled and receiving attendant care type services from the decedent, it is less likely than not that no such provision would ever have been provided by the decedent. Very few people become attendant care providers to family members until late in life. With elderly parents, it sometimes happens that children of those parents take turns sharing care provision for their parents in later stages of life, but not all children participate in such care provision. Further, if the spouse and children of a decedent are alive and healthy at the time of a decedent’s death, there is no reliable way to predict whether any of the survivors would ever have needed attendant care provision or when such care would have been needed. Tinari is correct that the value of future attendant care, if needed, has a pecuniary value. An attendant care provider could replace the future needed attendant care that the decedent would have provided. The problem is that one must speculate about whether such care ever would be needed and, if so, when the need would begin.

The same is not true of advice and counsel between family members. Some amount of both providing and receiving advice and counsel is probably a normal part of the relationships among adult family members. Further, to the extent that advice and counsel is relied upon by those family members, much of it is probably replaceable by strangers in the commercial marketplace. If, for example, a wife shows her husband how to use his cell phone more effectively, his benefit is not a component of intangible consortium, but the development of a skill that someone other than his wife could assist him in developing. If a husband discusses his thoughts about how the couple's finances should be handled with his wife in a given situation, he is providing a service that she could hire someone in the commercial marketplace to provide. If a man has a bad cold and his wife suggests a specific cough medicine, she is providing advice and counsel that can be replaced by a pharmacist at my local drug store. This may not be an ideal example because the pharmacist at the local drug store will probably not charge for his advice, but a medical doctor would presumably be willing to do so at a high cost, both in money and in time setting up an appointment. Family members who associate regularly also regularly provide various types of advice and counsel to each other and the advice and counsel they provide to each other can be replaced by strangers hired in the commercial marketplace by persons who have the same credentials for providing those services as were possessed by the decedent. Questions relate to the specific value of the advice and counsel and how much of it would have been provided, but it can be reasonably assumed that some amount of such services would have been provided on an ongoing basis.

V. Frank Tinari

Frank Tinari explained his overall approach in his 1998 paper, and he has subsequently defended that approach in panels at professional meetings. Tinari's approach involves providing three types of household services: ordinary household services of the type considered in the reports of most forensic economic experts in all states; advice and counseling services; and companionship services. In his 1998 paper, Tinari provided an example of how his calculations would have been made. His value per hour for advice and counsel was based on an average for a variety of counseling occupations at \$15.60 in 1996 dollars. His average value per hour for companionship services was \$8.36 per hour. While not clearly covered in his paper, it appears that his hourly value for ordinary household services was reasonably close to the \$8.36 per hour for companionship services. Tinari also explained how he arrived at quantities used in his calculations. His figures for advice and counsel were 1.0 hour

per week for spouses, 0.25 hours per week for an emancipated child, 0.50 hours per week for an elderly parent. His figures for companionship were 20 hours per week for spouses, 1 hour per week for an emancipated child, and one hour per week for an elderly parent. (Tinari also provided figures for provision of advice and counsel by mothers and fathers of dependent children, which are not relevant to the current paper.) Presumably, those figures in 2011 dollars are approximately double their value in 1998. Tinari would then sum values for loss of ordinary household services, advice and counsel, and companionship to arrive at a “comprehensive” measure of lost household services. Tinari has argued that this methodology is relevant to a wrongful death action, but not a personal injury action.

VI. Stan Smith

Stan Smith uses an expanded version of the method used by Frank Tinari. Smith has not published his approach in a journal, but he has produced a handout for a presentation to plaintiff attorneys at an Association for Justice (formerly American Trial Lawyers Association) conference containing a sample report dated January 1, 2005, showing the following losses to the husband and son of Mrs. Jane Doe: “Loss of housekeeping and household management services;” “loss of the advice counsel, guidance, instruction and training services sustained by Mrs. Doe’s family;” and “loss of accompaniment services sustained by Mrs. Doe’s family.” In his sample report, Smith assumed that Jane Doe was 35 years old at the time of her injury, was not employed in the commercial labor market, and had lost 50 percent of her ability to provide household services to her husband and son. Smith assumed that if the injury had not occurred, Jane Doe would have spent between 5 and 7 hours per day on ordinary household services based on a study by Gauger and Walker (1980). Smith assumed 1 hour per day of advice and counseling for Mrs. Doe’s husband and 1 hour per day for Mrs. Doe’s son until age 22 and 0.5 per day thereafter. Finally, Smith assumed that Mrs. Doe would have provided 3.0 hours per day of companionship to her husband, 2.0 hours per day to her son to age 22 and 1.0 hour per day thereafter. Smith’s hourly wage value was \$6.68 as of 1991 for ordinary household services, \$17.54 as of 2002 for advice and counsel services, and \$12.35 per hour as of 2002 for companionship provided by attendant care providers. (These were the figures Smith (2005) used, but Smith indicated increasing those values to 2005 values without providing specific 2005 equivalents.) Smith also added 50% for agency provision to 2005 equivalents for those wage rates. Unlike Tinari, Smith made no effort to justify time amounts for advice and counsel services or companionship services. In more recent

reports, Smith has used *Dollar Value of a Day* (annual editions; henceforth *DVD*) for time amounts spent on ordinary household production.

VII. John O. Ward, Kurt Krueger, and DVD

John O. Ward (2007) provided an example of how he developed alternative calculations for categories of household services other than ordinary household services based on information provided in annual editions of *Dollar Value of a Day* (*DVD*). In his 2007 paper, Ward included examples from the 2007 edition of *DVD*. Ward's paper was intended to suggest use of this approach as an alternative to hedonic damages calculations based on the Value of Statistical Life (VSL) literature, but the essence of Ward's approach was to place dollar values on elements of time use included in *DVD*. As it relates to provision of advice and counsel services between spouses and adult children and their parents, the key category in *DVD* is "Caring and Helping." For a simple example, Ward might look at Table 27 of *DVD09* for "Married females that work full-time, husband works, no children under age 18." An average woman in that category spends 2.29 hours per week "Caring and Helping," of which 1.82 hours is "With Family." There is no direct translation from "Caring and Helping" to "Advice, counsel, guidance and training," but advice and counsel services would presumably be part of the services that would be provided in this category. "With Family" also raises the question of whether the family members involved are valid plaintiffs in the current legal action. "Family" is category most people would consider as including siblings, aunts, uncles, nephews, nieces, cousins, grandchildren and grandparents, as well as in-laws of all of those persons, most of whom would not be valid plaintiffs in most states. Nevertheless, at least some of the services provided in that category would constitute "advice and counsel" services. Further, the hourly wage value provided in *DVD* Table 27 for "Caring and Helping" are \$13.15 per hour, which is not significantly higher than the hourly value of \$12.47 per hour listed for "Household Production." This approach provides for specific quantification for a category that would include advice and counsel services, an advantage not found in the approach taken by Smith, and only partially found in the approach taken by Tinari.

VIII. Thomas Ireland

This author's 1997 paper (Ireland 1997) was the first published paper that specifically addressed the question of whether advice and counsel services provided between adults should be considered. That

paper was prompted by a presentation Tinari had made at a panel at the NAFE sessions at the Western Economic Association a year or two earlier. As a part of a panel on the valuation of household services, Tinari presented calculations based on what was to become Tinari's 1998 paper. Ireland agreed that important services that do not fall into the meaning of ordinary household services represent pecuniary losses that could be considered to the degree that a reliable foundation is provided. Ireland (1997) differed significantly from Tinari, but not necessarily Ward, in that Ireland did not use different replacement costs for different types of pecuniary services that could be provided by a given decedent. Subsequently, Pauline Boss (1999) provided a paper that demonstrated how a family expert could establish a reliable foundation for total contributions of non market services (both ordinary household services and advice and counsel services) for specific decedents. See also Caragonne (1999). In all circumstances in which Ireland has considered "advice and counsel" services as part of non market damages, a family expert has been involved. Ireland argued that only with such a foundation could advice and counsel services be considered in a reliable fashion. Ireland argued that the best method for valuation of time amounts provided by a given decedent and measured by a family expert was the net wage rate of a decedent who was employed in the commercial marketplace. Thus, while a husband/father with a high school degree could not sell his "advice and counseling" services in the commercial marketplace, the true value of his advice and counseling services was measured on the margin by comparison with the net wage an individual could earn in the labor market and the implicit net wage for the individual's use of time to produce ordinary household services.

IX. The Special Role of *Green v. Bittner* (1980) in New Jersey Cases

The 1980 decision in *Green v. Bittner* (1980) creates a unique environment for forensic economic experts in New Jersey that does not exist in any other state. The New Jersey Wrongful Death Act parallels the Wrongful Death Acts that exist in most states in that damages are to be assessed in terms of losses of survivors, not the estate of the decedent. *Green v. Bittner* was unusual in that it involved the death of a high school senior who was a special child. Judge Wilenz prefaced his decision by saying that the trial court judge and the jury had followed existing state law in New Jersey by making a \$0 award for loss of pecuniary damages. Judge Wilenz went on to say that existing law had produced a result that was very unjust so that this decision was going to define new standards for the future. Under that rubric, Judge Willenz described the pecuniary value

of the advice and counsel the young woman would have provided to her parents and the potential of attendant care that the young woman might have provided to her parents in circumstances of illness or at life's end. Judge Willenz, however, emphasized that only pecuniary values could be considered, which he described as services that would be provided by someone with no personal connection to the family of the decedent. Effectively, however, this decision created a basis for speculation about whether advice and counsel (and companionship) services would have been provided and about the proper dollar values to be used in measuring the dollar value of time amounts that could not be established from ordinary data sources considered by forensic economists. It is this author's opinion that calculations for advice and counsel between adult family members that would be accepted as admissible in New Jersey would be rejected as speculative in most other states. This would apply to the methods used by Tinari and Smith, but not necessarily those used by Ward, Krueger, and Ireland (relying in the case of Ward and Krueger on DVD and in Ireland's case on the testimony of qualified family experts).

Appendix (Legal Decisions Relevant to Loss of Advice and Counseling Services between Adult Children, Parents and Siblings.)

Indiana

Southlake Limousine and Coach, Inc. v Brock, 578 N.E.2d 677 (1991). Indiana's 3rd District Court of Appeals ruled that the trial court decision to admit hedonic damage testimony by Stan V. Smith was improper and should not be allowed in a retrial. The court said:

Expert testimony on the value of life should not have been admissible in a wrongful death case. It could not provide a measure of the loss of love and affection to the surviving spouse nor of the loss of parental guidance and training to the surviving children. Professor Smith even testified to that effect. The most Professor Smith could do was place a value on the life of the decedent. His testimony regarding the loss felt by survivors was inadmissible speculation.

Kansas

Cerretti v. Flint Hills Rural Electric Cooperative Association, 251 Kan. 347 (1992). This case involved the death of a wife and mother. The defense argued that the only pecuniary loss due to the death of the wife was \$11,687 spent to hire a substitute bookkeeper, housekeeping services, and a baby sitter since the wife had not yet returned to work and contended that the report of the plaintiff's economist, Dr. Gary Baker, "relied exclusively on hypothetical, speculative, hearsay assumptions as to the possible future economic benefits." The court held that Dr. Baker's testimony was sufficiently reliable to support the jury's verdict, saying:

There can be no doubt that Cerretti and his children actually suffered losses, and there can be no serious contention that the care, guidance, and services of a spouse and parent lack monetary value. The reports and the testimony of Dr. Baker and the testimony of Randall Cerretti support the verdict. Under the applicable standard of appellate review, the verdict as to pecuniary damages will not be disturbed.

Cochrane v. Schneider National Carriers, Inc., 980 F.Supp. 374 (D.Kan 1997), Dr. Gerald Olson was permitted to testify about all normal pecuniary losses, but not permitted to advance a projection of the value of lost "emotional services" the decedent would have provided to his family. Dr. Olson had calculated an average of the salaries of teachers, social

workers, psychologists and counselors as being in the range of \$25,000 to \$30,000 per year. He had then projected that the decedent father had provided “emotional services” in this range. The court ruled that such services by a high school graduate could not be valued by amounts paid to persons with more advanced degrees. The court also rejected this testimony because Dr. Olson provided no specific times during which these services were being provided.

Wentling v. Medical Anesthesia Services, 237 Kan. 503 (Kan. 1985). This is the key case in Kansas concerning household services. Lloyd Durham was the economist for the plaintiff. He testified about what elements of loss were not included in his figure for lost household services, including “moral training, social training, educational assistance (particularly with a handicapped child), a mother’s role as nurturer and counselor, companionship, services to her husband, and more.” The court held that the jury could award damages in these areas even if the plaintiff did not provide a precise estimate of damages.

Maryland

Carolina Freight Carriers Corporation v. Keane, 311 Md. 335; 534 A.2d 1337 (Md. App. 1988). This decision focuses on whether the language “21 years or younger” for recovery of solatium by parents with a child applies to someone who was 21 years and some months in age. The Maryland statute allows recovery of solatium for parental loss in the death of an unmarried child with whom parents had a close relationship if the child is “21 years or younger” or the parents provided more than 50 percent of the support of the child. The court ruled that the parents could recover solatium with respect to their decedent son who was 21 years and some months of age.

Minnesota

Fussner v. Andert, 261 Minn. 347 (Minn. 1962). This decision expanded the concept of “pecuniary loss” to include the loss of advice, comfort, assistance, and protection of the decedent, even if a minor child.

Gravley v. Sea Gull Marine, Inc., 269 N.W.2d 896 (Minn.1978). The Minnesota Supreme Court reaffirmed that to include the loss of advice, comfort, assistance and protection of a decedent is a part of pecuniary damages, but specifically rejected the theory that parental investment in raising a child measures that pecuniary value, saying: “A child, however, is not a monetary investment, and we do not find the analogy persuasive.”

Youngquist v. Western Nat'l Mut. Ins. Co., 716 N.W.2d 383 (Minn. App. 2006). The Minnesota Court of Appeals affirmed the trial court decision that loss of future aid, advice, comfort, and companionship should be reduced to present value in contrast to damages for future pain, future disability and future emotional distress, which are not reduced to present value. The district court had reasoned that future aid, advice, comfort and companionship were “services” within the meaning of the Minnesota Wrongful Death Act and not like future pain, future disability and future emotional distress in that regard.

Missouri

Adkins v. Hontz, 2011 Mo. App. LEXIS 316 (Mo. App. 2011). This decision affirmed the trial court in a cross appeal of a wrongful death verdict in a case involving the death Malorie Adkins, a 13 year old girl. Among other issues upheld on appeal, the trial court had refused to admit the testimony of Ina K. Zimmerman, an expert witness in caregiving for the elderly, on the sum of economic damages resulting from services the decedent child could have provided to the plaintiff parents of the decedent child. The Court of Appeals pointed out that Zimmerman was not an economist and that the plaintiff had also provided the testimony of economist John O. Ward “who extensively testified to the loss of earnings available to her survivors had Malorie had some college education, if she had earned a college degree, and if she had a master’s degree.” The Court added:

Dr. Ward also testified as to the value of the loss of services, attention, filial care, and protection suffered by the plaintiffs because of Malorie’s death. Dr. Ward’s testimony extensively addressed the subject matter of Zimmerman’s excluded testimony.

The jury awarded \$100,000 for past non-economic damages; \$375,000 for future non-economic damages; \$17,771.16 for past economic loss; \$0 for future economic loss. In a combined survival action, the jury also awarded \$50,000 to the estate of Malorie Adkins for conscious pain and suffering in the process of dying.

New Jersey

Carey v. Lovett, 132 N.J. 44; 622 A.2d 1279 (N.J. 1993). “Damages for the wrongful death of an infant, like wrongful-death damages generally, are limited to economic matters. When parents sue for the wrongful death of a child, their damages may include the pecuniary value of the child’s help with household services, the pecuniary value of the child’s anticipated financial contributions, *and the pecuniary value of the child’s*

companionship, including his or her advice and guidance, as the parents grow older (italics added for emphasis).”

Gangemi v. National Health Laboratories, 291 N. J. Super. 559; 677 A.2d. 1163 (N.J. Super 1996). Citing *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980), the Gangemi Court said:

The damages encompass ‘the loss of guidance, advice and counsel,’ and companionship. The Court warned, however, that the evaluation of such benefits ‘in this context must be limited strictly to their pecuniary element.’ . . . The estimation may not include any consideration of emotional loss relating to either decedent’s death or plaintiff’s pleasure in having her next of kin, rather than a stranger, perform the services. The type of advice and companionship compensable under the [Wrongful Death] Act is the kind which may be purchased. . . In the context of the parent/child relationship, the Court gave the example of hired companions who may provide assistance to aged parents with shopping, nursing care and household management. . .The recovered ‘value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services.’

Goss v. American Cyanamid, 278 N.J. Super. 227; 650 A.2d 1001 (N.J. Super. 1994). Citing *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980), the Goss Court said: “Loss of companionship, guidance and counsel must be confined to their pecuniary element and their value ‘must be confined to what the marketplace would pay a stranger with similar qualifications performing such services.’”

Green v. Bittner, 85 NJ 1 (1980). This decision provides for the recovery as pecuniary damages in a New Jersey wrongful death action the future advice and counsel and the possible future companionship of an adult child to her parents. Donna Green, the decedent, was a high school senior at the time of her death and was a model daughter according to the decision. The trial court had awarded no pecuniary damages to her parents based on the existing New Jersey standard that recovery should be limited to lost future household services and lost future financial support for her parents. Judge Wilenz held for a unanimous court that the jury should have considered the value of the advice and counsel that Donna Green would have provided as an adult to her parents and the companionship services she might have provided to them in old age. The court defined lost companionship as follows:

Companionship, lost by death, to be compensable must be that which would have provided services substantially equivalent to those provided by 'companions' often hired today by the aged and infirm, or substantially equivalent to services provided by nurses or practical nurses. And its value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services. No pecuniary value may be attributed to the emotional pleasure that a parent gets when it is his or her child doing the caretaking rather than a stranger, although such pleasure will often be the primary value of the child's service, indeed, in reality, its most beneficial aspect.

The court defined loss of guidance, advice and counsel as follows:

The loss of guidance, advice and counsel is similarly confined to its pecuniary element. It is not the loss simply of exchange of views, no matter how perceptive, when a child and parent are together; it is certainly not the pleasure that accompanies such an exchange. Rather it is the loss of that kind of guidance, advice and counsel which all of us need from time to time in particular situations, for specific purposes, perhaps as an aid in making a business decision, or a decision affecting our lives generally, or even advice and guidance needed to relieve us from unremitting depression. It must be the kind of advice, guidance or counsel that could be purchased from a business advisor, a therapist, or a trained counselor, for instance. That some of us obtain the same benefit without charge from spouses, friends or children does not strip it of its pecuniary value.

The Court acknowledged the speculation involved in such calculations, but argued that other kinds of damages are awarded on a similarly speculative basis, saying:

Given the normal parent-child relationship, a jury could very well find it is sufficiently probable, had the child lived, that at some point he or she would have rendered that kind of companionship services mentioned herein and, although perhaps even more conjectural, the kind of advice, guidance and counsel we have described. It will be up to the jury to decide what services would have been rendered, and what their value is, subject to no more and no less control, direction, and

guidance from the court than occurs in other wrongful death cases.

The decision also provides useful review of how parental loss in the death of a child is handled in states other than New Jersey.

Hudgins v. Serrano, 186 N.J. Super. 465; 453 A.2d 218 (N.J. Super. 1982). Citing *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980), the Hudgins Court said:

The intent of the [wrongful death] statute is to provide those entitled with that which they could have reasonably expected had the decedent survived. Where those expectations anticipated something to be provided by the person of the decedent other than that which could be furnished with the coin of the realm, the entitlement is to money sufficient to provide a substitute to the extent it can be provided. Its value must be confined to what the market place would pay a stranger with qualifications as similar to those of decedent as possible under the circumstances for performing such services. Significantly, no pecuniary value may be attributed to emotional pleasures or satisfaction now lost.

Johnson v. Dobrosky, 187 N.J. 594; 902 A.2d 238 (N.J. 2006). This decision describes in some detail the application of *Green v. Bittner*, 85 N.J.1; 424 A.2d 210 (1980) in reversing a decision of the New Jersey Court of Appeals allowing testimony about the fact that the decedent had been convicted of welfare fraud. This testimony had been admitted as relevant to the quality of the advice and counsel the decedent would have provided. The New Jersey Supreme Court held that there was no direct connection between the quality of advice and counsel the decedent would have provided to her spouse and children and that a new trial was warranted. The Court held that the market value for the services of a business adviser, a therapist, or a trained counselor would measure the loss of advice and counsel. The Court repeated statements in *Green v. Bittner* to the effect that loss of “companionship” was defined as “the loss of a type of household services provided by in-home nurses or those employed to care for the infirm,” but appeared to be saying that such services were not relevant in the current case, though relevant in cases involving the death of a child.

Nodzak v. Giehill, 2008 U.S. Dist. LEXIS 97819 (D.N.J. 2008). This order interpreted New Jersey law and involved the wrongful death of partially disabled adult child. The plaintiff father claimed loss of the pecuniary

value of the companionship and advice of the decedent child under *Green v. Bittner*, 85 N.J. 1 (1980), but did not provide expert testimony about the value of those loss categories. The Court held that expert testimony is not required but is helpful to a jury in determining the value of lost advice, counsel and support. The Court further noted that a claim for pecuniary damages in a wrongful death case always involves some speculation and estimation of damages based on uncertainties and that such damages resulting from the death of a child are “somewhat more conjectural” than in other wrongful death cases. The court, however, added that: “[T]he determination of damages under the Wrongful Death Act is troublesome due to a lack of expert testimony. As such the Court continues to eye with circumspection the quantum of damages reasonably recoverable in this case.”

Schiavo v. Owens-Corning Fiberglass, 282 N.J. Super. 362. (N.J. Super. 1995). “The jury determined that \$150,000 would reasonably compensate [Dona Schiavo, defendant’s widow] for her pecuniary losses, including those permitted by *Green v. Bittner*.” Damages allowed under *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980) include advice, counsel, guidance and companionship of the sort provided by attendant care providers. This decision provided no discussion of how the \$150,000 figure was arrived at.

North Dakota

Schaaf v. Caterpillar, Inc., 264 F. Supp. 2d 882 (D.N.D. 2003). Applying *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988), the U.S. District Court held that parents may recover for the loss of society and companionship of an adult child in North Dakota.

Tennessee

Jordan v. Baptist Three Rivers Hospital, 984 S.W.2d 592 (Tenn. 1999). Allows recovery for the pecuniary value for loss of consortium. The issue of whether an expert can testify about the value of loss of consortium was not addressed.

Texas

Celotex Corporation v. Tate, 797 S.W.2d 197 (Tex. App. 1990). This decision found that the trial court had erred in admitting the testimony about the value of guidance and counsel of economist Dr. Everett Dillman. Dillman had offered present value testimony without specific numbers with respect to love and affection, which the court found permissible. However, Dillman’s guidance and counsel testimony was based on the hourly rate paid to teachers, which the court said was not commensurate. Thus the court concluded that Dillman possessed no special knowledge

which the jurors did not possess. The court noted that: “Problems regarding Dr. Dillman’s testimony are familiar to this court,” citing *Seale v. Winn Exploration Co., Inc.*, 732 S.W.2d 667 (Tex. App. 1987). However, the court concluded: “[W]e are persuaded that the admission of the testimony probably did not have a discernable effect upon the jury’s assessment of the entire case.” On that basis, the error in admitting Dr. Dillman’s guidance and counsel testimony did not constitute grounds for reversal.

Hyundai Motor Company v. Chloe, 882 S.W.2d 606 (Tex. App. 1994).

Dr. Everett Dillman, an economist, evaluated the damages in this case. He testified that Chloe’s mental anguish and emotional pain and suffering would amount to \$912,477; that Pele could have contributed \$564,777 to Chloe over Clloe’s lifetime; that past and future loss of companionship would amount to approximately \$912,477; and that the value of life lost, based on the majority of studies, would range from \$2 million to \$2.5 million.

The decision does not indicate whether or not the admissibility of Dr. Dillman’s testimony was challenged and the Texas Court of Appeals found that all of the evidence taken together was sufficient to justify the trial court’s award of \$661,876.

Lopez v. City Towing Associates, 754 S.W.2d 254 (Tex. App. 1988). Testimony by an economist regarding the value of lost guidance, counseling, love, affection, companionship and society suffered by plaintiffs was excluded by the trial court.

[T]he economist calculated average earnings of the ‘the helping professions’ – the clergy, psychologists, social workers and counselors – the professions that attempt to provide the same kinds of benefits provided by a mother. He arrived at a figure of approximately \$10 per hour.

The appeals court upheld the trial court in excluding testimony by the economist.

Moore v. Lillebo, 722 S.W.2d 683 (TX 1986). The court said:

Pecuniary loss for the parent of an adult child is defined as the care, maintenance, support, services, advice, counsel and reasonable contributions of a pecuniary value that the parents

would, in reasonable probability, have received from their child had the child lived. . . The definition used will vary according to the class of beneficiary and decedent, e. g. spouse, parent, adult child or minor child.

The court thus distinguished pecuniary damages as thus defined from mental anguish and loss of society and companionship, which were apparently not pecuniary damages.

Roberts v. Williamson, 2003 Tex. LEXIS 110 (Tex. 2003). Texas does not recognize a common law cause of action for a parent's loss of consortium resulting from a non-fatal injury to a child. A sharp distinction was drawn between the right of child to recover for the loss of consortium with its parent and the right of a parent to recover for the loss of consortium with a child. The Texas Supreme Court cited similar decisions by the Massachusetts, Michigan, Wyoming, Vermont and Wisconsin courts, quoting *Norman v. Mass. Bay Transp. Auth.*, 403 Mass 303, 529 N.E.2d 139 (Mass. 1988) as follows:

Although parents customarily enjoy the consortium of their children, in the ordinary course of events a parent does not depend on a child's companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult depends on his or her parent.

Seale v. Winn Exploration Company, Inc., 732 S.W.2d 667 (Tex. App.1987). The Texas Court of Appeals upheld the trial court decision to preclude the testimony of economist Dr. Everett Dillman about the present value of appellant's loss of society and comfort based on a \$9.50 hourly average income of a psychiatrist, multiplied times one hour per day over the life expectancy of appellant. The court said:

The trial court properly excluded Dillman's testimony. The average hourly income of a psychiatrist is not relevant to the ultimate issue to be determined by the jury; the value of the loss, love, affection, companionship and society as between the son and his mother. Therefore, Dillman's testimony, based on the hourly average income of a psychiatrist, possessed no traces of special knowledge which jurors do not possess in deciding this issue. Further, the trial court allowed Dillman, the economist, to testify generally with regard to computing present value without basing it upon a specific element of damages.

Traylor Brothers, Inc., v. Garcia, 1999 Tex. App. LEXIS 158 (Tex. App. 1999). The decision of the trial court to admit testimony by Dr. Everett Dillman with respect to how a jury could value the children's loss of the decedent's love and affection, guidance and companionship. "Dillman suggested the jury could calculate the amount of these damages based on per diem amounts of \$100 and \$150 per day." The appeals court held that Dillman's testimony was based on speculative numbers and that "Dillman's giving opinions on the topic amounts to an abuse of his position as an expert." The court went on to say:

Because Dillman's testimony was not shown to be scientifically reliable . . . the trial court abused its discretion in admitting such testimony. . . Second, we believe Dillman's testimony is harmful as a matter of public policy. We believe it essentially displaces the good sense of the jury when evaluating damages which are peculiarly within the province of the jury.

Utah

Van Cleave v. Lynch, 109 Utah 149 (Ut. 1946). The Utah Supreme Court upheld the trial court that the jury could compensate for the decedent boy's "comfort, society and companionship," quoting an earlier Washington decision in *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, to the effect that: "In any action for the death of a bright, healthy child, eight years of age, the jury may estimate and award substantial damages without direct evidence of the probable value of his services had he lived to majority."

Vermont

Dubaniewicz v. Houman, 2006 VT 99 (Vermont 2006). The Vermont Supreme Court held that a surviving sibling could seek pecuniary damages for the loss of companionship caused by the death of his sibling, reversing a lower court holding to the contrary, saying:

In *Mobbs v. Central Vermont Railway*, 150 Vt. 311, 315, 553 A.2d 1092, 1095 (1988), we held that because the term 'next of kin' in the wrongful death act should carry the same meaning as it does in the laws of descent, brothers and sisters of a decedent can be next of kin entitled to recover damages under the act.

The Dubaniewicz Court also said:

This Court has held that damages for loss of companionship are available under § 1492(b), plaintiff may obtain such damages to the extent that he can prove them by submitting evidence of the physical, emotional and psychological relationship between himself and the decedent.

This was a 3 to 2 decision, with an extensive dissent.

Clymer v. Webster, 156 Vt. 614 (Vt. 1991). Parents of an adult child, as well as a minor child, can recover damages in Vermont for loss of companionship resulting from the death of the child. Juries should consider the physical, emotional and psychological relationship between the parents and the child, and should examine the living arrangements of the parties, the harmony of family relations, and the commonality of interests and activities.

Wisconsin

Czapinski vs. St. Francis Hospital, 2000 WI 80; 236 Wis. 2d 316 (WI 2000). The Wisconsin Supreme Court held that Section 893.55(4)(f), which sets forth the damages for loss of society and companionship recoverable for a wrongful death resulting from medical malpractice does not allow such damages for adult children of the decedent. Such damages are apparently allowed in other types of wrongful death actions in Wisconsin. The Court also held that the disparate treatment between different categories of wrongful death actions does not violate the equal protection clause of the Wisconsin constitution.

U. S. Supreme Court

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974). The U.S. Supreme Court “embraced a broad range of mutual benefits each family member receives from the others’ continued existence, including love, affection, care, attention, companionship, comfort and protection,” as recoverable under the Jones Act. There had been an earlier recovery by the injured seaman in a personal injury action. He had subsequently died and his widow brought a wrongful death action. The court held that lost financial support that would have come from lost wages that had already been awarded could not be claimed again in the wrongful death action, but that the widow’s loss of services and society with her husband could be recovered. This decision explicitly affirmed that the right to recover lost earnings was based “on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury (*italics in original*)” In evaluating

damages for loss of society, the Court said, “insisting on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience.” The court also indicated that recovery was permitted:

...for the monetary value of services the decedent provided and would have provided but for his (the decedent’s) wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.

This decision also contains a discussion of the meaning of “pecuniary damages,” but arrives at no definite interpretation of that term.

Michigan Central Railroad Company v. Vreeland, 227 U.S. 59 (1913). This U.S. Supreme Court decision is a very early decision under the Federal Employers Liability Act (FELA), holding that a broad interpretation of household services is in order in FELA actions when calculating damages. The court indicates that:

It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of customary service from him [above and beyond support and maintenance], capable of being measured by some pecuniary standard, and that in some degree that service might include as elements ‘care and advice.’

The extended discussion of the meaning of the word “pecuniary” as “measurable by some standard” is thoughtful and extensive.

U.S. Courts of Appeals

Williams v. Dowling, 318 F.2d 642 (3rd Cir. 1963). The 3rd Circuit reversed the decision of a Virgin Islands trial court to award \$5,000 to the plaintiff mother of a decedent minor child for losses arising from the death of her minor son. The reasoning of the 3rd Circuit is based on the fact that the Virgin Islands Wrongful Death Act was modeled after the California Wrongful Death Act, so that California rules and decisions were applicable to the case at hand. The 3rd Circuit said, “a careful reading of the record in this case fails to disclose any evidence whatever bearing upon the pecuniary damage which the plaintiff claims to have sustained or might be expected to sustain as a result of her son’s death, or which would furnish support for a finding of such damages.”

Transco Leasing Corporation v. United States, 896 F.2d 1435 (5th Cir. 1990). This decision holds that an FTCA action being tried under Louisiana law was not bound to follow the 5th Circuit rule requiring use of a “below market” discount rate as set forth in *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983). There is extended analysis of why Louisiana law rather than Texas law should apply in this matter. The decision also provides an extended comment about valuing the loss of love, affection and guidance. The 5th Circuit said:

‘The loss of a loved one is not measurable in money. Human life is, indeed priceless. Yet the very purpose of the lawsuit for wrongful death is to fix damages in money for what cannot be measured in money’s worth.’ *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983). When we discuss the loss of love in terms of money, we feel more than a little ghoulish in engaging in such surreal exercises. This fiction of reducing love to a monetary figure is a difficult and distasteful task for a court.

Robertson v. Hecksel, 2005 U.S. App. LEXIS 17201 (11th Cir. 2005). The mother of a 30 year old adult decedent brought an action for her own loss of support, loss of companionship, and pain and suffering resulting from the death of her son in a 42 U.S.C. § 1983 action on the basis of a deprivation of her Fourteenth Amendment right to a relationship with her adult son. This claim was dismissed by the trial court. The dismissal was affirmed by the 11th Circuit on the grounds that there is no constitutionally-protected liberty interest in a continued relationship with an adult child. The 11th Circuit pointedly did not minimize the value of the loss of such a relationship, but said: “[I]t is the province of the Florida legislature to decide when a parent can recover for the loss of an adult child. We will not circumvent its authority through an unsupported reading of the Fourteenth Amendment.”

Tucker v. Fearn, 2003 U.S. App. LEXIS 11536 (11th Cir. 2003). This decision holds specifically that loss of society damages resulting from the death of a minor child cannot be recovered by a parent under general maritime law. The implication, however, is that loss of society damages are not allowable under any circumstances in maritime law. The decision reviews the different maritime acts that authorize wrongful death litigation and the decisions that have previously been reached to preclude loss of society damages under those acts. In 1978, the U.S. Supreme Court disallowed loss of society damages under the Jones Act in *Mobil Oil Corp.*

v. Higginbotham, 436 U.S. 618 (1978) and under the Death on the High Seas Act (DOHSA) in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

U.S. District Courts

Davis v. Rocor International, 226 F.Supp.2d 839 (S.D.Miss. 2002). A Daubert standard was applied to the proffered expert testimony of Dr. Stan Smith in several areas. The hedonic damages testimony of Stan Smith was rejected on the grounds of not assisting the trier of fact to understand or determine an issue in this case. The loss of society testimony of Stan Smith was rejected on the basis of lack of evidence showing loss of society based on percentages in this personal injury action and on the basis that Smith, as an economist, has not been shown to be qualified as an expert with respect to relationship values. The loss of household services testimony of Stan Smith, projected on the basis of 40 percent, was rejected because there was no showing that Smith, as an economist, is independently qualified to make that determination and that Plaintiffs had not shown that Smith's opinion would assist the trier of fact in understanding the evidence presented at trial.

Johnson v. Inland Steel Company, 140 F.R.D. 367 (N.D.Ill. 1992). Interpreting both Indiana and federal standards for wrongful death damages by a two magistrate judge panel, the court said:

We find that any evidence relating to loss sustained by survivors such as 'hedonic damages,' going beyond pecuniary loss are appropriate matters for inclusion in this law suit. Since these matters are appropriate, expert testimony by qualified individuals would certainly be allowed into evidence. Moreover, taking into account that hedonic value of human life is difficult to measure, expert testimony becomes exceedingly important and may be of particular use to the trier of fact in this case. *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987). Accordingly Inland's motions seeking to bar expert testimony as to damages for decedent's loss of quality of life, and for the value of decedent's services are, DENIED.

Wanke v. Lynn's Transportation Company, 836 F.Supp. 587 (N.D.Ind 1993). The court ruled that the defendant had not shown that the hurdles to preventing the hedonic damage testimony by Dr. James Bernard were insurmountable. The decision went on to say, however, that the hurdles the plaintiff had to showing that Dr. Bernard was an expert in the area of the economic value of love and affection were "unlikely" to be overcome. The court also made the memorable remark earlier: "That Dr. Bernard is an

economist does not entitle him to state an opinion on every conceivable issue of economics.”

Garay v. Missouri Pacific Railroad Company, 60 F.Supp.2d 1168 (D. Kan. 1999). The federal district court of Kansas granted a motion in limine to exclude the expert testimony of economist Gary Baker on the lost earnings and the specific value of lost guidance and counsel of a Mexican national who was illegally in the United States when wrongfully killed in Kansas. Baker’s testimony about lost earnings assumed that the decedent would have remained in the United States and Baker admitted knowing very little about earnings in Mexico. Baker’s projection of lost guidance and counsel was rejected on the basis that Baker had no knowledge of the specific amounts of such services the decedent was providing. Baker was permitted to testify as to the unit value (per hour) of such services.

Hernandez v. Flor, 2003 U.S. Dist. LEXIS 1732 (D.Minn. 2003). The court said:

Champion and Central Turf challenge Trevino’s testimony because they contend that Trevino, an economist, is not qualified to testify as to the dollar value of emotional services that Cruz provided and would have provided to his family. . . . The Court notes that determining damages amounts in a wrongful death case frequently requires a valuation in dollars of the loss of relationship or companionship. . . . In many respects, every attempt to calculate damages in a wrongful death suit hinges upon great speculative leaps and assumptions. The Court denies Defendants’ Motions to exclude Trevino’s testimony in its entirety and will determine at trial whether his testimony lacks the requisite foundation or is admissible.

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