The Earning Analyst, 2007, Vol 9: 35-61

Valuing Advice, Counsel and Companionship between Parents and Adult Children

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Abstract

This paper addresses efforts to provide pecuniary values for the services provided by adult children to their parents and parents to their adult children. It reviews the currently existing literature in forensic economics with respect to the dollar valuation of losses of such services. It considers the meaning of "pecuniary damages," as that term is used in legal decisions. It considers at some length the decisions of the U.S. Supreme Court in *Michigan Central Railroad v. Vreeland* (1913) and the New Jersey Supreme Court in *Green v. Bittner* (1980). It discusses the methods used by Frank Tinari and Stan Smith to project such damages and argues that such calculations, in most instances, are too speculative to be meaningful. It also provides an extended appendix consisting of descriptions of legal decisions that have bearing on the question of how forensic economists might value relational losses affecting parents and adult children.

Introduction

In many states and under some federal legislative acts, there are rights to recover damages for loss of the services of parents to adult children and adult children to parents. Under the Missouri Wrongful Death Act, § 537.090, recovery may be made for "the 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 (that would have been provided by the decedent) . . . without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss (italics provided)." This language suggests that adult children in states like Missouri can recover pecuniary damages for the loss a variety of broadly defined

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services that would have been provided by a parent and that a parent can recover pecuniary damages for the loss of broadly defined services that would have been provided by an adult child. It has long been understood that parental child care for minor children could entail companionship, comfort, instruction, guidance, counsel and training, but it has been less well understood that these same services are potentially recoverable when the children of a deceased parent are adults or when adult children lose a parent. (This right of recovery may also extend to siblings of a decedent, but this paper will be limited to damages suffered by parents or children of decedents.)

The fact that pecuniary damages can be recovered in wrongful death litigation for this list of relational loss categories on the basis of adult child-parent relationships does not, however, indicate how an economist might go about providing reliable values for such categories. The literature on such questions has been, to date, quite limited. This paper considers: (1) the limited existing forensic economics literature in the area of adult child to parent relational services; (2) the meaning of "pecuniary" as a concept in damages valuation; (3) differences between child care to a minor and adult-to-adult parent-child advice and counsel; (4) the special implications of *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980) in the state of New Jersey; (5) how this issue has been addressed in reports and testimony in litigations; and (6) case law in states other than New Jersey that affects whether and how such calculations might be made.

The Forensic Economics Literature Relating to Adult Child-Parent Relational Services

In the limited literature that exists for relational services provided within adult children-parent relationships, there are two strands. This paper is part of the second strand.

The first strand has proposed using proxy measures to put dollar values on relational services as a single composite set of services, sometimes referred to as "loss of society" with a decedent. This approach was taken in a series of papers published in the *New Hedonics Primer* (1996) by Stan Smith, Thomas Havrilesky, and Gerald Olsen, all of which were criticized by Rodgers in that volume. Smith's method was to assume that some percentage of a survivor's annual value for the enjoyment of life was lost because of the death of a decedent. (Smith's approach will be discussed further below.) Havrilesky's approach was to base values for a decedent's "society" on the ransom value of a decedent, if kidnapped and still alive. In this approach, the relevant

question was how much survivors of a decedent would have been willing and able to pay to ransom the decedent if the decedent was still alive and being held for ransom. To this author's knowledge, Havrilesky's method was never used in litigation.

Olson's method was to use proxy value for his "value of emotional services" equal to the average earnings of teachers, social workers, psychologists and counselors, which Olson reported as of 1994 as $31,941 per year. This was based on an important Kansas decision in *Wentling v. Medical Anesthesia Services*, 237 Kan. 503 (KS 1985). However, Olson's method was found not to be admissible in Kansas in *Cochrane v. Schneider National Carriers, Inc*, 980 F.Supp. 374 (D.Kan 1997). (Brief discussions of these decisions will be provided in the appendix to this paper.)

The second strand in the forensic economic literature concerning services in adult child-parent relationships focused on valuing the pecuniary elements involved in relational services in a way that separated between non pecuniary and pecuniary elements of those services. This paper is part of that second strand. Papers by Ireland (1997) and Tinari (1998) considered expansions of the traditionally narrow definitions of household services used by forensic economists in calculating wrongful death damages. Ireland's paper was largely based on the 1913 U.S. Supreme Court decision in *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59 (1913), while Tinari's paper was largely based on the New Jersey Supreme Court decision in *Green v. Bittner*, 81 N.J. 1; 424 A.2d 210 (N.J. 1980) in the state of New Jersey.

The Ireland and Tinari papers, however, were based on valuing pecuniary aspects of the broadened definitions of household services and not on attempts to convert non pecuniary losses into pecuniary losses. In 2005, Ireland presented an unpublished paper reconsidering Tinari's view of companionship as a type of lost services at the meetings of the Western Economic Association (Ireland 2005). Ireland argued that Tinari had misunderstood the meaning of "companionship" in the *Green v. Bittner* decision. Tinari responded to Ireland's paper in a note officially published in 2004 (but actually published in 2005), arguing against Ireland's interpretation of "companionship" (Tinari 2004). Ireland produced a response to Tinari's note in 2006 that is available at Ireland's web site, but has not been published (Ireland 2006). This paper includes the points made in Ireland's response to Tinari's note.

The Meaning of "Pecuniary" Damages

The 1913 U.S. Supreme Court decision in *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59 (1913) defined the nature of a wrongful death action under the Federal Employers Liability Act (FELA). The *Vreeland* court made it clear that it was the loss to survivors that was compensable under the FELA, not losses to the decedent, and that action "can only be brought if there is any person answering the description of the widow, parent or child, who under such circumstances suffers a pecuniary loss." The decision emphasizes that the loss must be "pecuniary" to be compensable. "Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings." The *Vreeland* Court specified that:

> A pecuniary loss or damage must be one that can be measured by some standard. It is a term applied judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which 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." Patterson, Railway Accident Law, § 401.

The *Vreeland* court went on to say:

> Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance," for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the value of such "care and advice from their own experiences as men." These experiences which were to be the standard would, of course, be as various as their tastes, habits and

> opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

The meaning of "some standard" is not made clear in the *Vreeland* decision, but the most obvious "standard" that could be applied is the market value of the service that was lost, estimated in such a manner such that another economic expert could replicate the calculation. The special relationship between a husband and wife or between a parent and child is not amenable to market valuation, but "care and advice" might have been allowed as a recoverable service if there had been evidence of the market cost of "care and advice."

Adult Care and Child Care for a Minor in Vreeland

The *Vreeland* decision also provides a distinction between a minor child and an adult child:

> A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother of minor children is that of nature, and of intellectual, moral and physical training, such as when obtained from others must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and the child has been actually deprived of such advantages.

Green v. Bittner in New Jersey

Green v. Bittner, 81 N.J. 1; 424 A.2d 210 (N.J. 1980) involved the death of a student in her senior year in high school. The jury had found that Donna Bittner's parents and brothers and sisters had suffered no pecuniary loss and the New Jersey Supreme Court reversed that decision, saying:

> We hold that when parents sue for the wrongful death of their child, damages should not be limited to the well-known elements of pecuniary loss such as the loss of the child's

> anticipated help with household chores, or the loss of anticipated direct financial contributions by the child after he or she becomes a wage earner. We hold that in addition, the jury should be allowed, under appropriate circumstances, to award damages for the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it. As noted later, these other losses will be confined to their pecuniary value, excluding emotional loss.

The *Green v. Bittner* decision went on to emphasize the distinction between emotional loss based on the loss of a loved one and services of the sort that adult children might provide to aging parents:

> What services, what activities, could a daughter or son reasonably have been expected to engage in but for their death and to what extent could any of them have monetary value? Just as the law recognizes that a child might continue performing services after age 18, and that monetary contributions may also be received by the parents thereafter when the child becomes productive, it should similarly recognize that the child may, as many do, provide valuable companionship and care as the parents get older. . .[O]ur courts have not hesitated to recognize the need of children for physical help and care. Parents facing age or deteriorating health have the same need, and it is usually their children who satisfy that need. Indeed the loss of companionship and advice which a parent suffers when a child is killed will sometimes be as great as the loss of counsel and guidance which a child suffers when a parent is the victim.
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> Companionship and advice in this context must be limited strictly to their pecuniary element. The command of the statute is too clear to allow compensation, directly or indirectly, for emotional loss. . .
>
> 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 or the 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, it's most beneficial aspect. The loss of added emotional satisfaction that would have been derived from the child's companionship is fundamentally similar to the emotional suffering occasioned by the death. Both are emotional rather than "pecuniary injuries," one expressed in terms of actual emotional loss, the other in terms of prospective emotional satisfaction.

This New Jersey decision effectively called upon economic experts to make calculations of the loss of advice and companionship that parents lost with the death of an adult child. This decision was the basis upon which Frank Tinari's 1998 paper was written. In that paper, Tinari explained how he calculated the value of lost advice and lost companionship that an adult child might have provided to his or her parents.

The Special Issue of Companionship

It should be noted that the *Vreeland* and *Green v. Bittner* decisions were very different with respect to the valuation of lost companionship, but were not as different with respect to lost advice. In the *Vreeland* decision, it was suggested that "care and advice" might be measured according to some standard and thus be treated as pecuniary losses in spousal loss (and presumably parental loss by adult children) circumstances, but "society and companionship" were "inestimable." In *Green v. Bittner*, companionship was one of the two pecuniary elements that should be considered in the death of an adult child, whereas there was still strong emphasis on the fact that only pecuniary elements could be considered. However, while *Vreeland* and *Green v. Bittner* share a common framework for valuation, they differ with respect to the meaning of companionship. *Vreeland* views companionship in the sense of special time shared together by persons who love each other, which is not amenable to pecuniary valuation, whereas *Green v. Bittner* views companionship as follows:

> Companionship and advice in this context must be limited strictly to their pecuniary element. The command of the statute is too clear to allow compensation, directly or indirectly, for emotional loss. . .

> Companionship, lost by death, to be compensable must be that which would have provided services substantially equivalent to those provided by the "companions" often hired today by the aged and infirm, or substantially equivalent to 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. This loss of added emotional satisfaction that would have been deprived from the child's companionship is fundamentally similar to the emotional suffering occasioned by the death. Both are emotional rather than "pecuniary injuries," one expressed in terms of actual emotional loss, the other in terms of prospective emotional satisfaction. In another sense, the loss of the prospective emotional satisfaction of the companionship of a child when one is older is but one example of the innumerable similar prospective losses occasioned by the child's death – all of which, plus much more, is included in the emotional suffering caused by the death.

There is a footnote to this passage in the *Green v. Bittner* decision, which described the specific functions the Court had in mind with reference to hired "companions."

> Hired companions today perform a variety of services, primarily, however, simply keeping the employer company and administering to basic needs. They may prepare and serve meals, do grocery shopping, perform other errands, keep the home tidy, given medicine, make telephone calls, and generally make themselves useful – including making it possible for the employer to be outdoors. Care given by children to aging and infirm parents is often indistinguishable from those services. Children also provide many of the services ordinarily rendered by practical nurses, such as bathing the bedridden, changing bandages, moving an immobilized parent, administering medication, spoon-feeding invalids, preparing special meals, keeping a sickroom tidy even removing visitors if they tire the invalid. Companionship, in this sense, however, will not include true

nursing services unless the decedent had or was likely to have special training.

Ireland versus Tinari Re Companionship

Ireland (2005 and 2006) argued that Tinari had incorrectly interpreted *Green v. Bittner* to imply companionship in the sense assumed by the *Vreeland* decision rather than in the much narrower sense implied by the *Green v. Bittner decision*, as reported above, as the kind of service that might be needed because of future infirmity, due to illness or aging. Tinari's 2004 "Note" argued that Ireland (2005) had not taken into account other decisions following *Green v. Bittner* that subsequently also spoke to the meaning of "companionship" as it should be interpreted in New Jersey. Tinari cited five other cases in support of his broader interpretation of the meaning of companionship as a pecuniary damage in New Jersey: *Carey v. Lovett* (1993); *Gangemi v National Health* (1996); *Goss v. American Cyanamid* (1994); *Hudgins v. Serrano* (1982) and *Schiavo v. Owens-Corning Figerglas*, 1995. Ireland's 2006 unpublished note pointed out that each of those decisions relied upon the narrow definition of "companionship" as the type of services needed by someone who was an invalid being cared for by a paid companion. Ireland strongly rejected the notion that New Jersey allowed recovery for time a child and parent might spend together in social activities, based on the decisions Tinari had identified in his note.

Relational Damage Calculations by Plaintiff Economic Experts

This author is only aware of two forensic economic experts who are currently separating projections for loss of advice and counsel and for loss of companionship in adult child-parent or spouse-spouse loss contexts: Stan Smith and Frank Tinari. Ireland (1997) argued for a broader definition of lost services than is often used and that services provided by adult children to parents and parents to adult children are compensable in many venues, but did not argue for separate calculations for advice and counsel or any of the other categories listed in damages sections of wrongful death statutes. Tinari's methodology is presented in his 1998 paper. It involves making three separate and distinct valuations for family services: ordinary household services; advice and counsel; and companionship. Tinari uses a different market wage rate for each of those categories, but only discusses how he calculates the last two categories in his 1998 paper.

To obtain replacement values for advice and counsel services, Tinari used "Hourly Median Wages of Advice-Related Occupations, 1996" from the

Bureau of Labor Statistics increased by 3.0 percent per year for two years to obtain a 1998 hourly value of $16.55 for advice hours. He made a similar calculation based on "Hourly Median Wages of Companion-Related Occupations, 1996," increased by 3.0 percent for two years to obtain a 1998 hourly value of $8.87 for companionship hours. He then estimated the amounts of time per week that would have been spent in providing advice and companion services for spouse to a spouse, a mother to a dependent child, a father to a dependent child, a mother or father to an emancipated child, and a child for an elderly parent in each category. For example, he estimated that a spouse in a spouse to spouse relationship would provide 1 hour per week of advice and counsel and 20 hours per week in companionship, with a 1998 annual total value of $10,106 per year. The corresponding value for a mother of a dependant child was $12,667 per year. For a child to an elderly parent, it was $891 per year. He did not specify at what age an elderly parent became "elderly."

Stan Smith cites Tinari's paper as authority for Smith's own calculations of loss of advice and counsel and loss of "accompaniment services." Tinari's paper was limited to losses in wrongful death circumstances, but Smith uses the same method in personal injury circumstances with surviving plaintiffs. In a report written in 2006, Smith used a figure of $18.97 per hour for advice and counsel services and a figure of $11.76 per hour for "accompaniment services." These hourly rates were increased 50 percent "for agency provision" to $28.46 per hour for advice and counsel services and $17.64 per hour for "accompaniment services." Smith's estimates for hours provided are significantly greater than the estimates used by Tinari, but otherwise his methodology is similar to Tinari's.

There are many problems with this methodology. A decedent is not likely to have had the training implied by the occupations used to derive replacement wage rates and thus the services provided by the decedent would not have a market value as those used to value the alleged lost services. That is particularly the case with Smith's 50 percent add-on "for agency provision," which is an arbitrary addition used only by Smith. There is also a problem with explaining why an individual would provide some services would not provide only advice and counsel if hours spent in that way are worth double hours spent providing companion services. However, the biggest problems lie in the misunderstanding of companion services, discussed in the previous section, and the lack of any foundation in the "estimates" of time spent providing advice and counsel in various relational categories. Based on *Green v. Bittner*, companionship does not mean time spent fishing or at family gatherings, but aid an adult child or parent *might* provide in the event of serious illness or disability. Having a home health care aide come to a family

gathering in the absence of a father, mother or child who has died would do nothing else by provide a glaring reminder of the death of the decedent whose absence the home health care aide was supposed to replace.

Clearly, services of a home health care aide might conceivably be needed and, equally clearly, adult children can be very important in assisting elderly parents in end of life circumstances. However, the chances that such services will be needed are probably less than 50 percent and the age at which the need for such services would begin cannot be projected on any other basis than pure speculation. "Estimates," "benchmarks," and "illustrations" do not create reliable calculations of damages. Similarly, adult children and parents *may* provide advice, comfort, instruction, guidance, counsel, and training to each other of a sort that could be replaced by market equivalents. However, the question is how many services would be provided and under what circumstances. Guesses are not helpful in damages calculations.

Is It Possible to Avoid Speculation in Projecting the Relational Losses?

Unless there is a solid foundation showing the provision of valuable advice and needed companionship services before the death of the decedent, it is hard to see how any reliable projection of damages can be made. Frank Tinari might think one hour per week would be a reasonable average amount of time for the decedent to have spent providing advice to a spouse, while Stan Smith may think three hours a week is a reasonable amount of time for that purpose. However, unless a foundation is established by persons with expertise in this area, these time amounts are just guesses. Clearly, the educational quality of the advice services implied by the wage rates used by Smith and Tinari is considerably greater than the educational quality of the average decedent. This creates another problem. No one would pay a man with a 9th grade education for his advice. There is no commercial advice market for the services of men with 9th grade educations. However, there are circumstances in which it is possible to avoid speculation in projecting the dollar value of relational losses between adult children and their parents.

If parents have been caring for a disabled adult or an adult child has been caring for a disabled and perhaps elderly parent, the death of the care giver will create pecuniary damage that can be projected in a non speculative way. The cost of replacing the services that were lost can be determined in the commercial marketplace and projected for the remainder of the life expectancy of the disabled person. This is done conventionally by all forensic economists when a solid foundation exists for making the calculation. If there

are reasons for supposing that valid claimant in a wrongful death action will need such services in the foreseeable future, those reasons can establish a solid foundation for a projection of pecuniary damages. Again, this is done conventionally by all forensic economists when a solid foundation exists for making the calculation.

It would also be worthwhile for every forensic economist to carefully read Judge Willenz's decision in *Green v. Bittner*. Even though it would be speculative for a forensic economist to prepare specific calculations based on guesses about the quality of advice and possible future companion services that adult family members might provide to each other, there may be future pecuniary losses in this area. To the extent that doing so is supported by the facts in a particular family circumstance, reasonable projections can be made in some circumstances. This is an area of specialization for family experts. The potential for the pecuniary value of such services to have been lost may be at least qualitatively described in even more circumstances.

Explanation of the Appendix

This author has developed a web page containing descriptions of hundreds of legal decisions that may be of interest to forensic economists. In the appendix to this paper, I have provided descriptions of legal decisions that might bear on the topic of relational services between adult children and their parents. The descriptions were not specifically written for this paper, but may provide useful background for forensic economists wishing to explore the subject matter.

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Schiavo v. Owens-Corning Fiberglass, 282 N.J. Super. 362. (N.J. Super. 1995)

Wentling v. Medical Anesthesia Services, 237 Kan. 503 (Kan. 1985)

Appendix: Legal Decisions Relevant to Loss of Relational Services Between Adult Children and Parents.

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." This case also contains very interesting commentary about testimony by economists about annuities.

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. Backer 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." Suggested by Kurt Krueger.

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.

The Atchison, Topeka & Santa Fe Railway Company v. Fajardo, 74 Kan.314 (1906). "No questions of greater difficulty are presented than those involving the pecuniary loss which next of kin suffer in the death of a child. No precise measure has ever been found, nor is it easy to state the quantum of proof that will give a basis of recovery. It is said that it must be left largely to the discretion of the jury; but it is also ruled that damages cannot be rested on the conjecture of jurors, but must be supported by proof tending to show pecuniary benefits already realized or in reasonable expectation from the continuance of the life. . . Where the deceased was a minor child and lived with his parents, who would have been entitled to his services if he had lived, there is an implication of pecuniary loss, but a substantial amount cannot be recovered unless the circumstances proved, as to age, intelligence, conduct and relationship, furnish a basis of reasonable expectation of pecuniary benefit. It is not essential to a recovery in the case of a child that there should be proof of valuable services already rendered, nor direct evidence of the exact value of the services which would have been rendered had it lived, nor yet a fixed amount of pecuniary loss sustained in its death. This is not practicable." Suggested by Kurt Krueger.

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.

Edmonds v. Murphy, 83 Md. App. 133; 573 A.2d 853 (Md. App. 1990). Household services can be introduced as a separate element of economic damages and thus is not part of the cap on non economic damages in Maryland. The court said: "It was obviously the goal of the legislature to place a limit or cap upon the non pecuniary components of loss of consortium such as affection, society, companionship, and sexual relations, and these services might not be rendered by hired help. . . But . . . we hold that compensation for the damages proved under the joint claim [of the spouses] for services which can, but need not necessarily, be performed by hired help, was not includable within the cap."

Monias v. Endal, 330 Md. 274, 623 A.2d 656 (Md. App. 1993). The Maryland Court of Appeals held that: "[I]n tort actions where a family member is injured, the marital entity has a claim for damages for loss of a spouse's consortium, but parents and children do not have a claim for loss of each other's consortium. Parents have a limited common law claim for loss of an injured child's services, but children have no reciprocal claim for loss of an injured parent's services. A tort victim's loss of earnings damages are based on pre-tort life expectancy, but a tort victim's loss-of-services are based on actual post-tort life expectancy. The court also argued that a child's "loss of household services" is similar to a child's claim for "loss of consortium."

United States v. Searle, 322 Md. 1; 584 A.2d 1263 (Md. App. 1991). In answering the question whether, in Maryland, household services are encompassed within the term "solatium," the court said: The element of damages referred to as household services can have both pecuniary and nonpecuniary aspects. Where a claim is made for the nonpecuniary aspect of household services, the award may overlap the claim for solatium damages. But where an award for household services is compensation for the loss of domestic services and is based on the market value of those lost services, the award is pecuniary and is not duplicative of the solatium damages. These are services that can be performed by domestic workers and their replacement value is measured by prevailing wage rates for such services."

Michigan

Breckon v. Franklin Fuel Company, 383 Mich 251 (Mich. 1970). The Michigan Supreme Court ruled that references in *Wycko v. Gnodtke* to recover for loss of companionship were dicta and that the Michigan Wrongful

Death Act did not provide for damages for loss of companionship. This case provides a review of cases from *Wycko* until 1970.

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.

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. Supper. 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.'" Suggested by Frank Tinari.

Green v. Bittner, 85 NJ 1 (1980). Defines broad standard for what will be considered lost household services in New Jersey, including guidance, counsel and comfort.

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."

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 peniary 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 Cloe'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 that 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). "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 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, 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." (Submitted by David Jones.)

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. Everet 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 count. 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). "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.