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The Case for "Sole Dependency" in Wrongful Death Analysis

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Question #13 in the 2017 NAFE survey paper (JFE, 2018, 27(1):35-2) asked survey participants whether, when calculating the personal consumption of a spousal decedent in a two wage-earner family, they would take into account the personal consumption of the decedent from income earned by the surviving spouse (cross dependency) or only the personal consumption of the decedent from income earned by the decedent (sole dependency). Of the 189 NAFE members taking the survey, 37.9% indicated that they would subtract only the decedent's consumption from income earned by the decedent, while 62.1% indicated that they would subtract the decedent's consumption from all of the income of the two spouses. I am among the 37.9% minority who would calculate the decedent's consumption from only the decedent's own income. Here are my reasons why.

(1) Underlying all of forensic economic analysis is the "make whole" standard that a plaintiff should be made whole for the plaintiff's losses caused by the negligence or other malfeasance of the defendant. Offsets that come from a source other than the defendant are considered "collateral sources" and are generally not taken into account. To the extent that offsets from earnings of surviving spouses that were used to pay for consumption of a decedent spouse are taken into account, the reduction in damages is being funded by the surviving spouse's income as a collateral source.

(2) Unless a surviving spouse wanted a marriage to end, the logic of the cross-dependency position suggests that the surviving spouse has been made better off by retaining parts of his/her own income that would have been spent on the decedent spouse. If a defendant wrongfully killed my wife, I would not be made better off by not having to spend a portion of my income on my wife. Assume that a plaintiff spent a lot of his/her income on golfing before losing an arm. After losing the arm, the plaintiff is no longer able to engage in that sport and thus no longer spends any portion of income on golf. By analogy, the defense should receive an offset for income the plaintiff previously spent on golfing activity. I do not think any cross-dependency advocate would make this argument.

(3) The death of a spouse will cause major changes in the life of the surviving spouse. The injury suffered by a surviving spouse is very much like losing an arm or leg. Separate from the grief and bereavement that would be involved, counseling may be needed for the spouse or children. Child care that was not needed previously will now be needed, with corresponding expenditures. The surviving spouse may eat more meals away from home. The surviving spouse may eventually spend more income on efforts to find a new partner. New hobbies may be more expensive than old hobbies. Replacement consumption activities need to be considered.

(4) It is usually taken for granted in discussions of sole dependency versus cross dependency that the death of a spouse will have no impact on the earnings of the surviving spouse. At least in the immediate aftermath of the death through the funeral (or equivalent), it is likely that the surviving spouse will have a loss of income. In the longer run, the death may either cause an increase in income as the surviving spouse works longer hours or a reduction in income because of increased need for care for children or pets. A surviving spouse may become more focused on work activity or find focusing on work activity more difficult. Using the logic of cross dependency, any gain in income by the surviving spouse would represent an additional offset for the defendant. Any reduction would need to be made up by the defendant.

I do significantly more than fifty percent of my work for defendants. In wrongful death cases involving dual spouse wage earners, I explain to an attorney at the start of the case both the cross dependency and sole dependency positions. I indicate that it is a matter of law which of those positions is correct, and that every economist can make both calculations. I also indicate that most legal venues do not have specific case law on this point. No defense attorney has ever asked me to use the cross-dependency approach after hearing my explanation.

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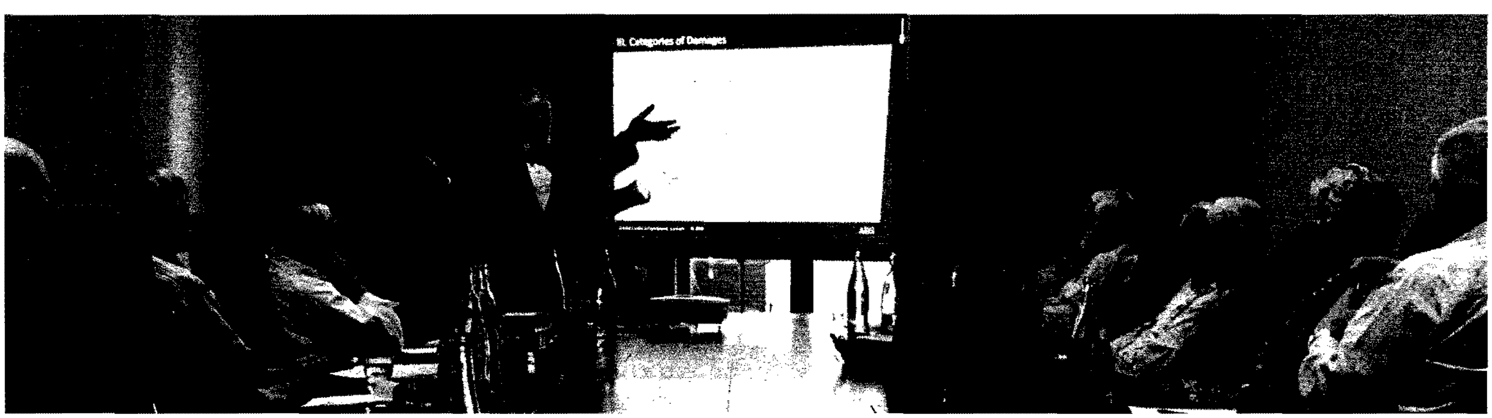

Photo: Session from the International Meeting in Evian-les-Bains, France.