

Economic Damages in the Death of a Minor Child in Missouri:

The Debate over the 2006 Revision of §537.090

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**Abstract**

In 2006, the Missouri legislature modified the Missouri Wrongful Death Act by adding language to §537.090 specifying how economic damages were to be calculated if the wrongfully killed person was under the age of 18. The new language in the act immediately created uncertainty about the meaning of the new language that has continued from that enactment to the present. No appellate decisions have ever been reached that has provided clarity about the meaning of that language. Economic experts have taken two broadly defined positions that have endured for the past sixteen years. Over that period there have been four decisions covered by LEXIS that have indicated that the four courts making those decisions have been unwilling to interpret the meaning of the statutory revisions, allowing the debate over the meaning of the new statutory

language to continue. The courts have effectively said that they will allow testimony based on both interpretations to continue. This paper describes the two positions taken by the plaintiff and defense bars and the four legal decisions interpreting the new 2006 language that are available on LEXIS.

## Economic Damages in the Death of a Minor Child in Missouri:

### The Debate over the 2006 Revision of §537.090

#### **I. Introduction**

Section §537.090 of Missouri Revised Statutes is the damages section of the Missouri Wrongful Damages Act. It sets forth the damages survivors of a decedent can claim if liability is proved under the Missouri Wrongful Death Act. In 2006, the Missouri legislature modified that act by adding the language shown in italics.

*537.090.* In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to 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 of which those on whose behalf suit may be brought have been deprived by reason of such death and 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. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the

trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250, RSMo. *If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.*

This revision of Section §537.090 was enacted as House Bill 393, two papers were written by economists that assessed the impact of the new language, one by Ireland and Tucek (2006) and one by Krueger and Ward (2005). The two papers had different interpretations of the meaning of the new language. No legal decisions were reached (to this author's knowledge) regarding whether the Ireland-Tucek interpretation or the Krueger-Ward interpretation was correct until the decision in *Coterel v. Dorel Juvenile Grp., Inc* in 2015. From 2015 to 2022, four decisions including *Coterel* have been reported by LEXIS that involved judicial rulings regarding conflicts between plaintiffs and defendants about the meaning of this new language.

This paper describes the differences between Ireland-Tucek and Krueger-Ward and then discusses the rulings in the four legal decisions that have been reported by LEXIS. As a general conclusion, courts have ruled that testimony based on either interpretation will be allowed.

## **Forensic Economic Issues in the Added Language in Section §537.090**

The basic question posed by the new language is whether the intent of the language was to create a special method for calculation the pecuniary loss of parents when a child is wrongfully killed or to specify how a child's earnings should be calculated for purposes of determining the child's ability to provide financial support for the child's parents. Put another way, was the intent of the new language to create an exception to the rest of Section §537.090 that is to be calculated by a new formula as a "special loss" to parents of a decedent minor child? Or was the existing language in Section §537.090 "modified only" for purposes of determining how a child's future earnings potential should be calculated. That is the primary issue addressed in the four legal decisions described in this paper.

The second issue is the lack of clarity in how to apply the formula for determining the future earnings of the child. The formula sounds deceptively simple. A child should be projected to have earnings equal to the average of the incomes of the parents if both parents have incomes, and on the income of the only parent with an income if only one parent has an income. However, an economic expert is not guided with respect to the following questions:

(1) What should be done if a parent is absent, may or may not be alive, and nothing is known about his or her income? This is, for example, an issue in single mother cases when the identity of the father is not known, or the father's whereabouts, including his lost earnings, are not known.

(2) When should losses be projected to begin? The simplest form of the "special loss" interpretation is that parental losses based on the average earnings formula should either begin at the child's death or when a decision about liability is reached. If the new language is not conditioned by other language in the statute, the expected actual earnings of the child are not

relevant. If the child is at age 5, the parental loss calculated as the average of the two parents, or the earnings of one parent if the other parent does not have earnings, is a simple numerical value. If neither parent has earnings, the average is \$0, and there is no loss. This could be the case if both parents were unemployed, or a single parent was living on welfare and had no earnings. The “special loss formula” does not indicate whether losses include annual benefits from the date of the child’s death to the date when liability is legally established. Under the “special loss formula” interpretation, however, the date at which the child would have begun having earnings is not relevant. Parents would begin to receive benefits after the trial and not when the child reached an age at which earnings were likely. Under the comprehensive interpretation, parental loss of support from the child would not begin until the child was expected to have income that could have been used to provide support for the parents bringing the action. Often that would be at age 18 if the child was assumed to have achieved a high school education or age 22 if the child was assumed to have achieved a bachelor’s degree at a college or university.

(3) Should increases in the annual award amount and present value discounting of future awards be considered? With the “modified only” approach, increases in earnings and present value discounting should be applied under existing case law. Under the “special loss” interpretation, there is no guidance regarding whether increases should be projected, or future losses should be reduced to present value. The added language could be interpreted as requiring only that a constant amount equal to the average earnings of the parents, or one parent alone, should be paid throughout the loss period. There is no indication in the added language that this special annual award to the parents ever needs to change in nominal dollars, nor is there an indication of a requirement that future values be discounted to present values. It can be argued that these adjustments should be made, but the “special loss” interpretation suggests a completely

new way to calculate pecuniary losses of the parents, with no indication beyond the formula itself how this should be done.

(4) When should the projected period of loss end? Under the “modified only” interpretation, the loss period extends to the end of the longest life expectancy between the parents, or the life expectancy of a single parent if only one parent remains alive. It is not clear whether the life expectancy of a parent with no income is relevant. Under the “special loss” formula, the amount should remain constant until the end of the life expectancy of both parents.

(5) Are siblings precluded from bringing a loss claim? Under the previously existing version of the statute, siblings of a decedent would have had standing to bring an action. If so, how should claimed losses of siblings be calculated? Section §537.080, cited at the outset of Section §537.090, identified three classes of plaintiffs who are entitled to bring an action for damages under the Missouri Wrongful Death Act, as follows:

- (1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
- (2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;
- (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem.

The possibility exists that a minor child might die after the death of both parents and be cared for by an older sibling or a guardian ad litem appointed to handle the decedent child’s affairs. This possibility is not considered in the added language of Section §537.090. Under the

“modified only” interpretation of the new language, the child’s future earnings would be calculated based on the average earnings of the parents, or a sole parent only, but there would be no major change otherwise. An economic expert would still have to make assumptions that the child would have used part of the child’s lost earnings to provide financial support to siblings instead of parents. Under the “special loss” interpretation, some separate procedure for calculating amounts to be awarded the child’s siblings would have to be devised.

### **Krueger-Ward and Ireland-Tucek Papers**

The Krueger-Ward paper was written in 2005 before the changes based on House Bill 393 of the Missouri legislature was finalized and took effect as of August 28, 2006. The Ireland-Tucek paper was also published before House Bill 393 took effect but was based on the final version of the language in the changes. House Bill 393 made several changes to Missouri statutes and both Krueger-Ward and Ireland-Tucek addressed a number of those changes. The change to Section §537.090 was only one change in the bill and the portions of the two papers devoted to the two sentences added to Section §537.090 was only a small part of each paper. In Krueger-Ward, pages 9 and 10 and the top of page 11 from a 15-page paper were devoted to “Death of Minor.” In Ireland-Tucek, Sections III and IV on pages 216 and 217 of an eight-page paper were devoted to “Valuing the Damages Resulting from the Death of Minor” and “The ‘Rebuttable Presumption’ Ethical Conundrum.”

Both papers recognized the possibility of two interpretations of the two sentences that were added to Section §537.090. Krueger-Ward (2005) described those interpretations as follows:

On the face value of the language [added to Section §537.090] annual pecuniary loss to



the parents is simply based on their income. If the parents had one income of \$100,000 per year, the annual pecuniary loss due to the death of their minor child is \$100,000, presumably for their parents' remaining life expectancy. Any allowable non-pecuniary losses would be added by the jury to the lifetime amount. A second interpretation of the language . . . could be that the jury, when calculating annual pecuniary loss, should presume that the earnings of the child would equal the earnings of the parent. . . and the jury should determine the probability of pecuniary benefit from . . . their child's expected earnings.

Krueger-Ward rejected the "modified only" interpretation in favor of the "special loss" interpretation of the new language, saying:

Because the process of determining the likely earnings of children has been thoroughly reviewed by the Missouri courts, it is unclear why the Missouri legislature chose to defer to the earnings of parents if its intent was to pattern damages under this interpretation of the damages due to the death of a child – which leads back to the first offered interpretation that all pecuniary loss is equal to the parents' income for the remainder of their lifetime.

Ireland-Tucek (2006) proposed three questions about the new language in Section §537.090:

- (1) Are the statute's scheduled damages the amount of the loss, or are they an estimate of what the child might have earned, or are they (an unspecified) something else?
- (2) When does the loss period start and for how long will the loss be maintained?
- (3) How much of the statute's scheduled damages represents a loss to the plaintiffs?

Ireland-Tucek said with respect to (1):

[I]t is difficult to defend the proposition that the statute's scheduled damages equal the annual loss to the plaintiffs. Consider two minors who happen to live next door to each other and are killed in the same auto accident. If the mother of the first child earned \$100,000 per year and the father was not employed, the scheduled damages specified by the statute would be \$100,000. If both parents of the second minor child earned \$50,000 per year, the scheduled damages would be \$50,000. . . . Consequently, other than prescribing a presumed estimate of what the child would earn, HB 393's new provision brings little to such cases that is new.

Ireland-Tucek also focused on the term "rebuttable presumption" in the new language. They interpreted the new language as implying that if there was nothing else to rely upon, an economic expert should use the average income of the two parents, or sole parent with income as the basis for projecting the child's earnings from which some portion might be used to provide financial support for the child's parents. Since that formula was a "rebuttable presumption," however, other possible methods for projecting the child's earnings could be used.

Thus, Krueger-Ward and Ireland-Tucek reached very different conclusions about the meaning of the new language in Section §537.090. The two papers started with the same questions about the language but came to opposite conclusions about the probable meaning of that language. Those same difference have continued to the present. No reported (including LEXIS and Westlaw) decisions were reached about this basic difference until the *Cotere* decision in 2015. The next section provides descriptions for each of the four decisions that have thus far been reached. The decisions have not favored one interpretation or the other. The final section of the paper argues that courts in Missouri have decided that an economic expert can

assume either interpretation base calculations on the interpretation selected.

### **Legal Decisions Interpreting the New Section §537.090**

(1) *Coterel v. Dorel Juvenile Grp., Inc.*, 2015 U.S. Dist. LEXIS 185451 (W.D. MO 2015).

The defense had moved to exclude the testimony of Dr. Kurt V. Krueger. The decision did not describe the methods used by Krueger to arrive at his calculation of \$1,752,332 in pecuniary damages, but the size of the damages amount indicates that Krueger was using the “special loss” interpretation of the new language in § 537.090. The “modified only” interpretation would have resulted in a negligible economic loss. Judge Steven R. Bough denied the motion to exclude Krueger, saying:

In reading the 2005 changes to R.S.Mo. § 537.090 liberally, broadly and with an intent to harmonize all provisions, this Court holds that the phrase "If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents" is simply an instruction of how the pecuniary loss is calculated for a minor child. All other elements of the wrongful death damages - "funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority" - are still relevant and subject to argument by counsel. . . The 2005 amendments simply aid in the calculation of pecuniary loss for a minor child.

Judge Bough added:

The jury is used to hearing two opposing views of the damages and the calculation of

wrongful death damages "must be left to the common sense of the jury." Cobb, 576 S.W.2d at 739. This case will be no different. Plaintiff's expert will opine the pecuniary loss of \$1,752,332.00; defendant's expert will apparently opine there are no pecuniary losses. The jury will have to decide - as they do in every case - what the damages will be.

(2) *Mansil v. Midwest Emergency Medical Services, P.C.*, 554 S.W.3d 471 (MO App. 2018). Dr. Kurt V. Krueger had been permitted to testify regarding losses suffered by Shelly Mansil, the mother of a decedent child. Krueger's testimony was described as follows:

Dr. Krueger understood the plain language of section 537.090 to mean "[t]hat the annual pecuniary loss suffered by the reason of a death of a minor child is equal to the annual income of the deceased['s] parent[]." He thus applied the statutory provision by "tak[ing] what the parent is earning with what their income is and I project that as a pecuniary loss starting upon the date of death through the life expectancy of the parent." Dr. Krueger then explained that he discounted this figure to arrive at his present valuation of these economic losses. For this measure of pecuniary losses, Dr. Krueger reached figures of \$49,132 in past economic losses and \$294,856 in future annual pecuniary losses, for a combined total of \$343,988. Dr. Krueger then went on to testify that he believed the section 537.090 presumed pecuniary loss amount was low and did not appropriately account for other household consumption items. Conversely, counsel for Midwest and Dr. Niedens cross-examined Dr. Krueger and pointed out that the section 537.090 presumed pecuniary loss figure calculated by Dr. Krueger should be decreased since it assumed wage earning by an infant, which was unrealistic. Thus, both sides were permitted to rebut the section 537.090 presumed pecuniary loss calculation at trial. The jury's itemized verdict as to Ms. Hughes's wrongful death claim awarded her \$25,000 for

past economic damages and \$100,000 for future economic damages, for a combined total of \$125,000 in economic damages, a figure much less than the section 537.090 presumed pecuniary loss calculation presented by Dr. Krueger.

The defendant appealed, arguing that Krueger's testimony involved a misreading of the statute's new language. Judge Mark D. Pfeiffer rejected that appeal, saying:

Dr. Krueger's calculation based on Ms. Hughes's income was of sufficient weight to assist the jury in determining an appropriate amount of pecuniary losses authorized under section 537.090. Likewise, his methodology in reaching his estimate was reasonable within the statute's plain language. Given the nature of Dr. Krueger's challenged testimony as establishing a rebuttable presumption under the statute, Midwest and Dr. Niedens had the opportunity to challenge Dr. Krueger's testimony, to point out any weakness and aid the jury in determining the appropriate weight to give his opinion. . . . In point of fact, Midwest and Dr. Niedens did successfully challenge the evidence through cross-examination of Dr. Krueger as the jury's award of pecuniary losses was much less than the section 537.090 presumed pecuniary loss calculation arrived at by Dr. Krueger.

(3) *Flowers v. United States*, 2020 U.S. Dist. LEXIS 40285, 2020 WL 1131145 (W.D. MO 2020). Plaintiffs challenged the admissibility of the testimony of Eric C. Frye on that basis that: (1) Frye's damage calculations were not based on the annual income of Kente's parents; (2) his calculations were based on a "net loss" model rather than the "annual pecuniary losses suffered" model required by the statute; (3) Frye improperly classified damages as support to the parents, rather than standalone pecuniary damages; and (4) Frye's use of a flat-line 90% personal consumption by Kente during his lifetime is unreliable and illogical. The defendant argued that

Plaintiffs' arguments go to the weight of the evidence and not to admissibility. Judge Lajuana M.

Counts held that:

Plaintiffs' arguments miss the mark with regard to the Missouri wrongful death damages statute. Essentially, Plaintiffs fail to fully understand the rebuttable nature of the presumption. The statute requires that the fact finder "base the pecuniary loss upon the annual income of the deceased minor's parent or parents," but provides an "opportunity to rebut that number in an upward or downward manner with rebuttal evidence and argument." *Mansil v. Midwest Emergency Med. Servs., P.C.*, 554 S.W.3d 471, 477 (Mo. Ct. App. 2018), rehearing and/or transfer denied (July 3, 2018), transfer denied (Sept. 25, 2018). Frye both recognized and addressed the distinction between mandating a pecuniary loss model and utilizing a base model that could then be rebutted based on the facts of the case. Because the statute is only a rebuttable presumption, and Frye adequately discussed the reasons for the upward and/or downward departures from the base, this Court rejects Plaintiffs' argument that the opinion is unreliable. Additionally, as the Court in *Mansil* found, Missouri law permits reductions based on consumption. *Mansil*, 554 S.W.3d at 577-78. Simply stated, the presumption in Missouri law can be rebutted. Frye's opinions are not at odds with the Missouri wrongful death damages statute and therefore, this Court rejects Plaintiffs' argument that Frye's opinions are unreliable. Furthermore, this Court notes that Plaintiffs' arguments are really about the credibility and weight of the opinion evidence, not the admissibility of the evidence.

In their brief, Plaintiffs argue that "[p]ecuniary damages under Section 537.90 are not tied to the survivors, but are valued by Kente's life standing alone." The Government suggests

that Plaintiffs "seem to indicate that their pecuniary loss is equal to what Kente Summers would have earned had he lived." Plaintiffs' brief does not fully develop this issue, yet the Government has fully developed the issue. Because the issue is not fully developed this Court declines to comment on whether Missouri law permits pecuniary damages based on a decedent's projected lifetime earnings.

(4) *Eagen v. United States*, 2022 U.S. Dist. LEXIS 40172; 2022 WL 683121 (E.D. MO 2022). Plaintiffs had retained Dr. Kurt V. Krueger as their expert in this wrongful death claim for the wrongful death of a minor child. The defense retained Dr. Rebecca Summary. The defense did not challenge the admissibility of Krueger's testimony, but plaintiffs challenged the admissibility of the testimony of Summary. Krueger's proposed testimony was not described. Summary's proposed testimony was described as follows:

Defendant's expert economist, Dr. Summary, has offered an opinion regarding the pecuniary damages Plaintiffs have suffered in this case. Dr. Summary begins by stating, "Pecuniary loss to parents implies that monetary support will flow from child to parent." Report of Dr. Summary, Doc. 62-1, at 1. Dr. Summary then discusses studies showing that the vast majority of children provide no monetary support or unpaid care to their parents. *Id.* at 2-3. Dr. Summary also provides three different approaches to calculating possible pecuniary losses in this case. In the first approach, she reduces L.L.'s parents' average income to \$ 25,106 based on their work life expectancy (the number of years they would be expected to remain in the workforce), assumes L.L would have started earning that amount at age 18, states that a single individual earning \$ 20,000 to \$ 29,999 consumes 123% of his or her income, and finds that there would be zero dollars remaining for L.L. to provide support to his parents. *Id.* at 3. In the second approach, she

does not reduce the average income based on work life expectancy (and thus finds the annual income is \$ 30,708), states that a person making \$ 30,000 to \$ 39,999 consumes 89.5% of his or her income, assumes the remaining \$ 3,224 annually from L.L.'s age 18 to Plaintiff Shelby Eagan's life expectancy of 82 would be available as support, and calculates the present value of that amount as \$ 64,605. Id. at 3-4. In the third approach, she relies on studies showing the average financial support given by children to their parents annually by those who provide such support and studies showing the average value of unpaid care and helping to parents. She calculates the present value of the support L.L. would have provided under those assumptions as \$ 127,373.

In her conclusion, she states:

Based upon the well-founded economics literature, it is not possible to state with economic certainty that this deceased child would have provided any pecuniary support to his parents and thus I conclude that there is no pecuniary loss suffered by the parents as a result of the death of their child. If one were to assume that the decedent was one of the very few American children who would provide any pecuniary support to his/her parents, then I can calculate the range of support and that information is shown in [a table showing the calculations ranging from \$ 0 to \$ 127,373 under the three approaches.]

Plaintiffs claimed that Summary's testimony should not be admitted because the plain language of the statute creates a separate way to calculate damages for pecuniary losses to parents resulting from the death of child under the age of 18. The defendant disagreed. Judge Shirley Padmore Mensah held that:



The Court finds Defendant's position persuasive. As Defendant points out, the United States District Court for the Western District of Missouri considered a very similar issue in *Flowers v. United States*, Case No. 17-01028-CV-W-LMC, 2020 U.S. Dist. LEXIS 40285, 2020 WL 1131145 (W.D. Mo. March 9, 2020), another minor death case. In *Flowers*, the plaintiffs sought to exclude the opinions of the defendant's expert regarding pecuniary damages, arguing that his methodology contradicted Missouri law and was therefore unreliable.

...

Like the court in *Flowers*, this Court finds that the opinions at issue here are not at odds with the Missouri wrongful death damages statute. The statute expressly states that the "presumption that the annual pecuniary losses suffered by reason of the [minor's] death shall be calculated based on the annual income of the deceased's parents" is "rebuttable." Mo. Rev. Stat. § 537.090. That plain language does not, in any way, limit the evidence either party may use to attempt to rebut the presumption, either in an upward or downward manner. Dr. Summary has provided in her report several reasons, based in data and the economic literature, both for her opinion that there is no pecuniary loss in this case and for her alternative calculations based on various adjustments to parental income. There is nothing in the statute to preclude Defendant from attempting to rebut the statutory presumption through either approach. The Court also notes that, contrary to Plaintiff's suggestion that under Dr. Summary's approach, the remedy of pecuniary damages in a minor death case "would never exist," even Dr. Summary's own calculations suggest that pecuniary damages could exist, and increase, with increases in the minor's parents' average incomes. Dr. Summary's opinions are sufficiently reliable to

be admissible, and it will be up to the factfinder—here, the Court—to decide how much weight to give to her testimony.

### **Conclusion**

Courts in the four decisions that have been reported by LEXIS and Westlaw thus far have avoided taking a position regarding the meaning of the new language that has been added to Section §537.090. In two of the decisions, defense attorneys attempted to exclude the plaintiff economic expert (Kurt Krueger) for producing loss projections that did not comply with the statute. In the other two decisions, plaintiff attorneys attempted to exclude the defense economic expert (Eric Frye and Rebecca Summary) for producing loss estimates that did not comply with the statute. In all four cases, judges held that the experts who were targets of motions to exclude were basing their calculations on a reasonable interpretation of the statute. The judges themselves avoided taking a position regarding what the new working of the statute mean. It is this author's opinion that this is likely to continue unless this issue is appealed to the Missouri Supreme Court, or the Missouri legislature clarifies the meaning of Section §537.090.

### **References**

Ireland, Thomas R., and David G. Tucek. 2006. "Evaluating Economic Damages Under House Bill 393," *Journal of the Missouri Bar*, July-August 2006, pages 214-221.

Krueger, Kurt V., and John O. Ward. 2005. "Evaluating Damages Under HB 393," unpublished, pages 1-15.

Missouri Statute, §537.090.

Missouri Statute, §537.080.

### **Legal Decisions**

*Coterel v. Dorel Juvenile Grp., Inc.*, 2015 U.S. Dist. LEXIS 185451 (W.D. MO 2015).

*Mansil v. Midwest Emergency Medical Services, P.C.*, 554 S.W.3d 471 (MO App. 2018).

*Flowers v. United States*, 2020 U.S. Dist. LEXIS 40285, 2020 WL 1131145 (W.D. MO 2020).

*Eagen v. United States*, 2022 U.S. Dist. LEXIS 40172; 2022 WL 683121 (E.D. MO 2022).