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Household Services as Life Care: An Alternative View of Household Services in the Legal System

Introduction

Most of the literature concerning household services in forensic economics treats household services production as if that flow was equivalent to a flow of lost earnings. All of the papers covered in Ireland and Depperschmidt (1999) implicitly take that perspective. To the extent that there has been debate among forensic economists about the measurement of lost household services, the primary issues have been about whether one should use *replacement cost* or *opportunity cost* measures or about which time use survey was more reliable for determining replacement cost. There has also been debate whether and under what circumstances a forensic economist should rely on data specific to the loss of services by a given household versus relying on the kinds of general measures that can be

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obtained through time use surveys. This paper argues, however, that another level of this debate is warranted by legal decisions that treat household services as a type of life care needed after an injury, rather than as a loss of earning capacity, particularly in New York.

This paper will argue that there is a profound difference between the earning capacity approach used by most forensic economists and the life care approach used in New York and sometimes in other states. It will not argue that one method is better than the other but that the conceptual basis of each method is logically consistent in its own terms.

The Nonmarket Production Capacity View

The approach taken by most forensic economists starts with some assumed number of hours an individual has provided that can no longer be provided because of an injury or death. Those lost hours are then valued in terms of either the market replacement wage or the opportunity cost wage rate for the lost hours. The number of hours provided before and after the injury or death may come from a time use survey or from statements made by the injured plaintiff or survivors of a decedent in wrongful death circumstances (Martin 2003; Ireland and Depperschmidt 1999; Ireland, Homer, and Rodgers 2000). Disagreements exist among forensic economists about when replacement cost or opportunity cost are more accurate, whether it is better to rely on statements of injured plaintiffs or more general time use surveys, and which time use surveys to rely upon. However, the basic formula for a calculation of damages assumes some measure of the amount time previously spent providing household services times and some measure of the market value of that time.

It is seldom made explicit, but this general approach relies on an underlying notion of household service production as one of the uses of an individual's earning capacity. An individual has 168 hours in a week. If one assumes that sleep occupies 56 hours per week (at 8 hours per night), that labor market employment occupies 40 hours per week, that personal maintenance and transportation to and from labor market employment take up another 15 hours per week, about 57 hours of discretionary time remain. Much of this time will be used for leisure, but a part of it is used for producing household services. The logic of an opportunity cost approach is that this time could have been sold in the labor market for additional compensation. The logic of replacement cost is that it would cost that number of dollars to hire

someone else in the labor market to replace the number of hours of services previously provided by the injured plaintiff or decedent. Valuation in an opportunity cost analysis is based on what the individual himself or herself could have earned in the labor market. Valuation in a replacement cost analysis is based on what others would have to be paid to replace the hours that were lost. With both approaches, and with all of the other disagreements about how to measure both the amount of time and the value of that time, lost time is being valued by some measure of the market value of that time (or production) lost because of an injury or death.

At the bottom line, any variant of this approach to the measurement of lost household services treats that loss as a loss of productive capacity with a market value that must be imputed from the commercial marketplace. In that sense, this approach is consistent with a notion of human capital as producing more than one way to generate economic value. The capacity to produce household services is thus treated as a part of an individual's overall earning capacity. It is implicit in this view that compensation should be based on the value of what has not been produced because of the injury or death. This view is so consistent with the way most forensic economists have valued lost earnings and lost job-related fringe benefits that little question has been raised about whether this approach is what the legal system intended in allowing damage awards for lost household production. Whether it is consistent with legal thinking is another matter.

The Life Care Services View

The second view that could be taken for valuing loss of household services is a life care approach. With this approach, the question is not what productive value has been lost, but what pecuniary costs have been made necessary by the injury or death. Utility losses are not considered part of pecuniary losses. If an individual has been forced to function with fewer household services than before, but no additional costs have been generated, the loss of benefits is a utility loss, not a pecuniary loss. As a result, the utility loss is not compensable as an economic damage. (It may, however, be compensable as a part of general damages for reductions in the quality of life.) This is the view that was taken by the highest appellate court in the state of New York in *Schultz v. Harrison*

Radiator Division (1997). The only paper in the forensic economics literature to have explored that view was by the current authors in the 2003 issue of *The Earnings Analyst* (Ireland and Riccardi 2003).

This approach limits recovery to past pecuniary losses and future expected pecuniary losses. The meaning of "pecuniary" in this context is that the plaintiff was actually encumbered with these expenditures in the past and reasonably certain to be encumbered with them in the future. This approach is not based on the notion that a loss may not have occurred even if no expenditures were made, but that the loss is not financial in nature. If, for example, a family has done without household services in the past that an injured plaintiff would have provided, there is no pecuniary loss. There will have been a utility loss, but that loss must be considered as an intangible loss and not testified to by an economic expert as a pecuniary loss. This would be true even if the reason that replacement services were not purchased was that family lacked the financial means to do so. This could have a prejudicial impact in that a replaced loss by a wealthier family might be compensable, while the same loss that was not replaced by a poor family would not be compensable.

Assume, for example, that two families have lost the same flow of household services. The higher income family has purchased replacement services and is compensated for those expenditures. The lower income family has not purchased replacement services and has gone without those services in order to save money. The money expenditure of the higher income family can be replaced with the same number of dollars, restoring that family to the same financial status as before the injury or death. Thus, the higher income family has not been made better off by being compensated for past expenditures. That family has only been restored to its predeath or injury financial status.

For the lower income family, however, there was no past financial loss that can be replaced in the future. The family was worse off in the sense that it had to endure the loss of services and thus the family has suffered a past loss of utility. However, if that family is compensated in dollars for those utility losses, the family will better off financially in the future than would have been the case without the injury or death. The logic has to be that the family deserves to have a higher financial status in the future to replace the lower level of life enjoyment in the past. Money can be replaced on a dollar for dollar basis. Past service losses cannot be replaced because they have been permanently lost. The impact of compensation will be to make the

family better off financially in the future, not restored to their previous level of well being. The logic of *Schultz* is that pecuniary loss is about loss of dollars, not loss of utility in the past that is to be replaced by the enjoyment of more dinners and movies in the future.

When looking toward future losses, the focus is on the *reasonable certainty* that household services have been made necessary by the injury and that monies awarded for that purpose will be used for that purpose. As a general rule, reasonable certainty is established for the past if the family has purchased household services that it did not purchase before the death or injury. Such past expenditures also are very helpful in establishing that it is reasonably certain that an award for future household expenditures will be used to purchase future household services. There is no requirement of past expenditures to prove a requirement for future expenditures, but proof is required to establish reasonable certainty in order for a future award for household services to be made.

Here again, however, *Schultz* is not holding that such losses cannot be considered by the trier of facts in awarding intangible damages. Such consideration is allowed under *Schultz* standards. The consideration must be in the form of intangible damages considered by the jury. In this sense, lost household services become essentially indistinguishable from costs in a life care plan. The injury must encumber the family with expenditures that would not have been necessary without the injury if pecuniary damages are to be projected. Utility losses that may exist can be considered, but not as pecuniary damages. It is for that reason that life care planning experts are increasingly being called upon to testify in New York about the level of household services that have been made necessary by injuries. To the extent that general damages in other states are subject to a cap, however, such an approach will cut off compensation for such losses.

The household-services-as-life-care approach is as logically consistent as the loss-of-productive-capacity approach. It employs narrow standard for recovery of pecuniary damages. However, other utility losses may exist in addition to pecuniary damages that may be claimed as a part of general damages. In the life care approach, utility losses that are not matched with actual past expenditures or reasonably certain future expenditures made necessary by an injury must be treated as part of intangible damages. In the lost productive capacity approach, utility losses can be directly compensated as a part of pecuniary losses. With a trier of facts possessing perfect

information and acting with perfect objectivity, the total damage award would be the same, but parts of the damages for household services would be assigned to different categories in the damage award. However, since triers of fact are not perfect in the real world, there will be a difference that may often (but not always) favor defendants.

Ex Ante or Ex Post Survival Probabilities

One of the essential differences between the two views of lost household services can be illustrated by considering the consequences for an individual with a catastrophic injury that has reduced her annual survival probabilities. With the loss of productive capacity view, the relevant survival considerations are pre-injury survival considerations. With the life care view of lost household services, the loss would be based on the individual's survival probabilities after the injury (as long as there is no encumbrance to other family members, as will be discussed in the next section.) As an encumbrance, a need for household services must be based on the survival of the injured individual, not the volume of household services the individual could have produced without the injury. Thus, a calculation of household services loss under the loss of productive capacity view will be based on the individual's ex ante survival probabilities, while a calculation of household services loss under the life care view will be based on ex post survival probabilities.

The Necessary Expenditures Criterion

Another profound difference between the two views of lost household services, at least in New York, is the criterion that the loss of household services being claimed as a pecuniary loss must have been *made necessary* by the injury or death that has triggered the litigation. In a wrongful death circumstance, this is a significant requirement. The fact that a woman may have functioned as a primary homemaker, providing a variety of services to her family, does not constitute establishing that replacement of the services she was providing to the family was made necessary by her death. Her services may have been very valuable to the family without having been *made necessary* in the *Schultz* meaning of that term. In *Schultz*, household services are either made necessary or elective. If the family could do without the services the decedent mother would have

provided, her services were elective and pecuniary compensation cannot be made. (Again, however, the loss of elective household services can be considered as a part of intangible damages.)

How then could a service be made necessary by the mother's death? If the father must employ someone to provide child care for his minor children in order to be able to continue working in the labor market those services have been made necessary by the death. If the children require psychological treatment because of the death of their mother, those expenditures have been made necessary by the death. If the mother had been caring for a disabled adult child or parent and the family must purchase replacement services to continue that care, those expenditures have been made necessary by the death. It is with respect to this example that the mother's pre-injury survival probabilities could be relevant. Since the mother's care for the child was a needed service, her pre-injury life expectancy would be used to determine the period over which the mother's necessary services for the disabled child would have been provided.

Household Services as Life Care Elements under Schultz

Life care planning experts are often used to establish the need for household services in New York. Many forensic economists are accustomed to thinking of household services as like other goods and services that can be purchased in the commercial marketplace, with the sole exception that household services are produced within the family rather than purchased in the commercial labor market. However, just as an individual who has a need for life care must purchase certain goods and services, household services can be thought of as goods and services needed for ordinary life care. From that perspective, life care plans determine the additional goods and household services that are needed because of an injury. If a mother is injured in such a way that the family must purchase child care services for the mother's minor children, those purchases of child care services are a part of life care in all meaningful senses of that term. Similarly, many life care plans include lawn maintenance, laundry services and other services that would ordinarily be thought of as household services by an economist. Since these expenses are considered as part of life care plans when necessary, it is reasonable to use life care planning experts to prove necessity. The *Schultz*

standards can be thought of as being based on the same standards that would apply to expenditures in a life care plan.

From that standpoint, it is instructive that the *Schultz* decision cited a case concerning medical treatment as precedent, *Coyne v. Campbell* (1962). In *Coyne*, a physician had been injured and needed medical treatment. That treatment had been provided to the physician without charge by the physicians who worked with him. The *Coyne* court ruled that since he had not had to pay for those services, the value of the services that had been provided was not compensable as damages. In effect, because of the physician's friends, commercial medical services were not made necessary by his injury. Similarly, in *Schultz*, there was uncontested evidence that friends and neighbors had provided household services for the injured person. This meant that a damages award to pay for those services had not been "made necessary" by the injury. In this case, if she had been required to purchase those services in the labor market, she could have demonstrated that the services had, in fact, been "made necessary" by the injury.

The Life Care View in States Other than New York

This paper is intended to introduce the life care view of lost household services to forensic economists, many of whom will find this view unfamiliar and uncomfortable. This view has been sanctioned and required by the highest appellate court of New York. Even in New York, however, the interpretation being provided here is not universal. In *Mono v. Peter Pan Bus Lines, Inc.* (1998), a federal district judge interpreted *Schultz* strictly in terms of past damages, but held that the plaintiff was entitled to future loss of services independent of whether they would be likely to be purchased. However, even in other states, an absence of past expenditures on household services can be introduced to raise jury questions about the reasonableness of a projection of lost household services. In Missouri, John O. Ward reported a case in which he was asked, as an economist for the plaintiff, a number of questions about the fact that the plaintiff had not purchased household services after the injury. When Ward pointed out that the poverty of the plaintiff precluded such purchases, the judge allowed questions to be asked about collateral sources that might conceivably have been used to purchase those

services (Information obtained in e-mail correspondence from John Ward, dated 29 August 2004).

Thomas R. Ireland and Anthony H. Riccardi: *Household Services as Life Care: An Alternative View of Household Services in the Legal System*

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Comment: The Valuation of the Loss of Future Pension Income

Introduction

In a recent article in this journal, Barry Ben-Zion (2001-02) argues that the method generally used by forensic economists to estimate the value of lost pension benefits results in an overstatement of the value of these benefits. In addition, he perceptively points out that the official life tables frequently used in the estimation process inappropriately fail to incorporate anticipated changes in survival probabilities into the analysis. However, his only illustrative numerical example contains no comparison between the results obtained with the questionable method and data base to those derived with the *proper* method and a more appropriate data base.

The primary purpose of this comment is to demonstrate that when simultaneous changes in methodology and data base are considered over an expanded set of illustrative examples, the *proper* method combined with a more appropriate data base very often results in

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