

## ***Millo v. Delius* and Losses that Are “Not Otherwise Compensable”**

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**Abstract:** *The reference to losses that are “not otherwise compensable” in the decision of Millo v. Delius specifically rejected a methodology for measuring two loss categories for non-market services of a decedent that was developed by Frank D. Tinari. The plaintiff’s economist, Pershing Hill, used the Tinari method to provide dollar values for “loss of advice and counsel” and “loss of companionship” that a decedent husband and father would have provided to his wife and three adult daughters. In rejecting Hill’s analysis, Judge Sharon L. Gleason provided a clear statement about what types of testimony can be valued by an economic expert and what types of testimony cannot. The unique aspect of her rejection of Hill’s testimony was contained in her reference to those types of damages as precluded in an earlier decision (not involving economic testimony) as losses that are “not otherwise compensable.” The distinction Judge Gleason made in rejecting Hill’s testimony focused on the notion that economic losses are losses that can be replaced by market equivalents, while the losses described by Hill were losses that cannot be replaced for any price in the commercial marketplace. Judge Gleason did not reject such losses as losses to the survivors, but indicated that they are not economic losses in the meaning of Alaska law because they had no market-equivalent value in the commercial marketplace. The mere fact that some kind of “advice and counsel” can be purchased in the commercial marketplace does not mean that the price for that type of “advice and counsel” is an appropriate replacement value for the type of advice and counsel that a husband and father would have provided to the Millo survivors. There must be a close enough relationship between the loss element and a substitute in the commercial market for the loss element to be an “economic loss.” If not, that element is of the type of loss that is “not otherwise compensable.”*

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## I. Introduction

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The legal decision in *Millo v. Delius* in 2012 resulted from the wrongful death of Bret Millo, who was shot and killed by Dr. Ralph Delius in a hunting accident. Kristy Millo, the widow of Bret Millo brought an action for recovery of damages on behalf of herself and her three daughters. The case was brought in the U.S. District Court for the state of Alaska and was governed by Alaska law. The defense filed a motion for partial summary judgment regarding damages claimed by the plaintiffs. Federal District Court Judge Sharon L. Gleason granted partial summary judgment on several issues. Judge Gleason ruled that punitive damages did not apply in this case; that the adult daughters of Kristy and Bret Millo were not “dependents” within the meaning of Alaska law because they were not receiving financial support from their father; and that Bret Millo had been killed instantly so that pain and suffering damages were not available. Judge Gleason also reviewed existing Alaska law with respect to what constituted “economic” damages and what constituted “non-economic” damages in the state of Alaska. Dr. Pershing Hill, the economic expert for the plaintiff, had projected economic damages for “companion and advice-type services.” Specific dollar amounts projected by Dr. Hill were not mentioned in the decision, but Judge Gleason ruled that those services were “non-economic” services, rather than “economic” services. The significance of that determination is that the value of those services fell within the \$400,000 statutory limit on “non-economic” damages.

In arriving at her decision that “companion and advice-type services” are “non-economic” in nature, Judge Gleason reviewed prior decisions of the Alaska Supreme Court on similar issues and quoted *Schreiner v. Fruit* (1974) as follows:

A claim for relief for loss of consortium provides a means of recovery for an injury *not otherwise compensable*. It should be recognized as “compensating the injured party’s spouse for interference with the continuance of a healthy and happy marital life.” The interest to be protected is personal to the wife, for she suffers a loss of her own when the care, comfort, companionship, and solace of her spouse is denied her. (Italics added for emphasis.)

The primary focus of this paper is on the language “not otherwise compensable.” The ruling in *Millo v. Delius* was that “companion and advice-type services” are in the category of damages that are “non-economic” because services of that type are “not otherwise compensable.” The meaning is clearly not that compensation may not

be awarded for the losses in question because the issue being resolved is under what category of damages compensation for loss of “advice and counsel” and “companionship should be made,” not whether such compensation should be made. The appeal was focused on whether the damages for which compensation for “advice and counsel” and “companionship” should be treated as “economic” or “non economic” damages, given that “non-economic” damages are subject to a \$400,000 statutory limit in Alaska, whereas no such limit applied to “economic” damages.

The Alaska Supreme Court decision *Schreiner v. Fruit* (1974) did not involve a claim that “consortium” was an economic loss. In that case, the husband of Katherine Schreiner had already won an award in a previous action based on permanent injuries and total disability from future participation in the labor market. Katherine Schreiner brought her own action for her loss of consortium resulting from the injuries to her husband as a separate action. There is no indication in that decision that she had retained an economic expert or otherwise tried to establish a specific dollar value for her loss of consortium. The Court held that she had a right to bring that action and described her loss of consortium as the type of loss that is “otherwise not compensable.” The difference between *Millo* and *Schreiner* is that the plaintiff attempted to provide economic testimony for elements of loss that could be considered part of consortium in the *Millo* case, but not in the *Schreiner* case. In effect, Judge Gleason held that “advice and counsel” and “companionship” of a husband and father were a part of consortium and not a part of economic losses because those losses are “not otherwise compensable.”

## II. The Compensatory Purpose of Awards

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To the best of this author’s knowledge, no economic expert claims to be able to put reliable dollar values on “consortium” between a husband and wife or between a parent and child. One might try to define “compensation” as a money award made to compensate for the purpose of compensating for a loss, but that clearly cannot have been the meaning intended in *Schreiner* when that decision used the terms “not otherwise compensable.” If the definition of “compensable” is “a category for which compensation may be made,” any loss for which a money award can be made is, by definition, “compensable.” It must mean something else and that something else must be central to the difference between “economic” and “non-economic” losses. Awards can be made for both types of losses, but awards made for “non-economic” losses in Alaska are capped by the legislature at \$400,000,

while no such limit exists for “economic losses.” Regardless of cash amounts, however, how can one type of loss be “compensable” and the other type of loss be “not otherwise compensable?”

The distinction discussed in *Millo v. Delius* is a distinction that has been of concern to courts since long before economic experts were being hired in tort actions. It was discussed as early as 1862 in *Tilley v. The Hudson River Railroad Company* and elaborated by the U.S. Supreme Court in *Michigan Central Railroad v. Vreeland* in 1913. It has been variously phrased as “tangible” versus “intangible” damages, “pecuniary” versus “non-pecuniary” damages, and “economic” versus “non-economic” damages, but has often carried the meaning of “losses for which economic experts can provide damages calculations” versus “losses for which economic experts cannot provide damages calculations.” In the context of *Millo v. Delius* and *Screiner v. Fruit*, “compensable” versus “not otherwise compensable” appears to refer to the same distinction, but in a somewhat different way. If “compensable” means something different from “a loss for which compensation may be made,” what does “not otherwise compensable” mean? This paper will argue that “not otherwise compensable” means “not capable of being replaced by reasonable equivalents in the commercial market place.”

In general, what economic experts are permitted to calculate and testify to in most legal venues are losses that can be replaced in the commercial market place to a reasonable degree of similarity. When controversies exist in forensic economics, the fundamental focus of the difference is on whether or not what can be purchased in the commercial marketplace and thus used as a proxy value for a loss meets the standard of reasonable similarity. Compensable damages are damages for which alternatives with reasonable degrees of similarity exist. Damages that are “not otherwise compensable” are losses for which no reasonable equivalents exist in the commercial marketplace, but which are nevertheless easily recognized as significant losses to tort victims. Dollar sums are the only means for compensation within the tort system, but reliable dollar equivalents can only be assigned to some losses, not others. The underlying question is whether or not it is possible to find alternatives in the commercial market that would reasonably replace the specific losses of tort victims. What divides “tangible,” “pecuniary,” “economic” damages from “intangible,” “non-pecuniary,” “non-economic” damages is the availability of commercial market replacements what will allow (but not require) an award recipient to avoid at least part of the loss that will otherwise have been suffered as a result of the wrongful death act.

### III. Reasonable Substitution in the Commercial Marketplace

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There is general agreement among forensic economists that economic experts can provide reasonable valuations for lost earnings, lost financial support for survivors, lost job-related fringe benefits, future “ordinary” lost household services, and life care made necessary by an injury. Calculations by an economic expert for past lost earnings are simple and basic. An economist projects a sum of money equal to past money wages an individual would have received if not injured. Calculations by an economic expert for future lost financial support are based on projecting a stream of lost future income payments based on probabilities that those payments would have been made. Effectively, economic experts are pricing specific annuities for specified periods of time equal to the projected lost earnings period. If an award is made in an appropriate amount for lost earnings, there will be no loss of money income resulting from an injury or death. With job-related fringe benefits, the primary lost benefits are health insurance and contributions to an individual’s retirement benefits. The value of health insurance can be determined from costs to replace that insurance (with exceptions to be noted below). If purchased, the injured person or family of the decedent will not suffer that loss in the future. Similarly, contributions to a retirement plan can be estimated, projected, and reduced to present value based on the costs of similar benefits that can be purchased in the commercial marketplace. Ordinary household services can be replaced in the commercial market by persons hired to provide those services. A house can be just as clean if cleaned by a commercial provider as if cleaned by the injured person or decedent in a tort action. There are differences between self provision of household services and commercially provided household services in the need for advance scheduling and monitoring, but the services that can be purchased with an award are reasonably similar to the ordinary household services that were lost because of a personal injury or wrongful death. Life care plans project goods and services made necessary because of an injury and are direct projections of costs for providing those goods and services in the commercial marketplace.

What is common in each of these examples is that reasonable equivalents in the commercial marketplace exist and that these services have prices or price structures that allow an economist to project how much it would cost to prevent the loss from being experienced by the injured person or family of a decedent. With respect to those specific damage elements, the injured person or family of a decedent is being “made whole.” The overriding goal is to prevent the loss from being

experienced. The meaning of “compensable” in *Millo v. Delius* when applied to a loss is “capable of being prevented by appropriate expenditure.” The meaning of “not otherwise compensable” is “compensation that cannot prevent a loss from occurring because there are no reasonable equivalents that could be purchased in the commercial marketplace.”

It is important to note that *reasonable* substitution in the commercial marketplace does not mean *perfect* substitution in the commercial marketplace. Unless a loss is purely monetary in nature, monetary replacement will always be imperfect. Even with wage loss, an award that replaced all of lost wages is not perfect substitution. An injured person who has been forced to give up his occupation and the earnings he had in that occupation may not be “made whole” by being awarded an amount sufficient to avoid any financial loss based on the person’s loss of earnings. Working in a job can provide job satisfactions that are not monetary in nature. Some workers may enjoy not having to go to work and therefore enjoy freedom from a workplace schedule that comes about because of an injury, but other workers would much rather have been able to continue working than to now be forced into a less interesting job or forced to fill time staying home watching daytime television. The psychic or “utility” aspects of being employed can be significant in both positive and negative directions.

The same is true of household services. Some injured persons may appreciate not having to provide household services that are now being provided by commercial providers. Others may have enjoyed providing those household services. Enjoyment that might go along with providing one’s own household services cannot be replaced even if the household services themselves can be replaced. Further, replacing household services in the commercial marketplace comes with monitoring, scheduling and managing requirements that do not exist with self-provided household services. Nevertheless, a clean house, washed laundry, cooked meals, cut lawns and so forth can be purchased in the commercial marketplace and from that standpoint are “compensable” in the sense that they can be replaced, unlike the unique nature of the companionship that a husband and father would have provided.

Controversies can exist about how close a market substitution may need to be in order for the cost of the market substitute to provide a reasonable basis for an economic expert to project the value of a given loss. That was particularly the issue in *Millo v. Delius* with respect to loss of “advice and counsel” and “companion” services.

## IV. Loss of Companion and Advice-type Services

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In the *Millo v. Delius* case, Kristy and Bret Millo had three adult daughters, none of whom was dependent upon their parents for financial support. Minor children raise special issues that will not be considered in this paper, but both the *Millo v. Delius* (2012) and *Schreiner v. Fruit* (1974) decisions indicated a special exception for such “companion and advice-type services” when provided by a parent for a minor child in the form of “child care.” As a part of general living, spouses provide both advice and counsel to each other and companionship for each other. However, such services have a unique value based on the family relationship itself. The three adult daughters of Bret Millo and his wife Kristy presumably enjoyed the companionship of their father and husband in ways that could not be reasonably replaced by commercial market providers of companionship. Judge Gleason explained the difference in the *Millo* decision as follows:

Plaintiff’s expert Dr. Hill attempts to distinguish companionship from consortium by asserting that “people are able to hire paid ‘companions’ such as nurses and health aides.” He uses wage rates for those professions to value the loss of Mr. Millo’s services in that regard. However, the practical examples of companionship Dr. Hill describes in his report are activities such as bowling, sharing an evening meal, attending movies, and other social activities that do not resemble the duties of a paid nurse or health aide. Non-economic damages are, as the Alaska Supreme Court stated in *Schreiner*, a means of recovering “for an injury not otherwise compensable.” The implications of Dr. Hill’s argument—that a surviving spouse could pay a companion to provide the type of companionship the married couple formerly enjoyed—are not convincing. This court finds that the loss of companionship and advice that a surviving spouse experiences, while indisputably a loss, is not an economic loss under Alaska law (footnotes omitted).

While non-market services such as the performance of household chores and subsistence hunting and fishing can, under Alaska law, qualify as economic damages, the provision of companionship and advice from a loved one falls within the category of non-economic damages, and is therefore subject to the statutory cap on such damages. Accordingly, summary judgment is granted to Dr. Delius on this issue.

Based on the description provided in the *Millo* decision, Dr. Pershing Hill, the plaintiff's economic expert, valued companionship services using wage rates for paid companions "such as nurses and health aides." This is methodology suggested by Tinari (1998; 2004) and criticized by this author (Ireland 2006; 2007) for reasons including the reason cited by Judge Gleason. Kristy Millo would not benefit from having paid companions spend time with her in lieu of the time her husband would have spent with her. A husband's companionship is special because he was her husband in a way that cannot be replaced by a stranger. If the husband was providing the kinds of services provided by an attendant care provider, that portion of his lost companionship could be replaced. There is no indication that Kristy Millo needed that type of companion service. The special companionship of a spouse cannot be replaced in the commercial marketplace for any dollar wage. It is irreplaceable and the kind of paid companionship that can be purchased in the commercial marketplace is not a reasonable substitute for the companionship of a spouse. One can reasonably assume that neither Kristy Millo nor the three Millo daughters would have wanted to have the companionship of a paid companion of the health-aide variety. Since the method used by Dr. Hill to value hours of companionship with Bret Millo was to determine market wage rates for paid companionship, the market wage rates were supposedly the cost per hour for replacing the companionship of Bret Millo. However, since a paid companion could not replace the special type of companionship that Bret Millo would have provided, the calculation was meaningless. To be "compensable," a loss must be capable of being prevented by hiring market substitutes. Since market substitutes would not prevent the loss, any award that is given should be described as "not otherwise compensable."

While Dr. Hill's calculations for loss of "advice" are not discussed in this paper at the same length as companionship, his wage rates would be considerably higher for advice than for companionship if he followed the Tinari methodology. Paid advice providers in the commercial marketplace are paid much higher wages than paid companions of the health-aide variety. However, the same problem of reasonable substitution applies. The advice of a spouse or a father has special value because it is coming from a spouse or father. One has only one spouse or father with whom one has shared a lifetime of experiences, upon which special advice could be based. Under ordinary circumstances, no amount of education can make up for the personal knowledge that a spouse or father can provide. "Advice" is not a homogeneous service. Advice can be personal, psychological, financial, spiritual, regarding exercise, dietary, and so forth. Different types of advice cost different hourly prices in the commercial marketplace,



depending on the amount of expertise required to provide that advice. Replacing financial advice with counseling advice, for example, would make no sense. Thus, separate from other issues, treating “lost advice” as if it was a homogeneous category is itself in error.

There are circumstances in which the death of a close relative creates a need for psychological counseling. If so, if the need for psychological counseling is foundationally established, the cost of that psychological counseling would be a valid loss claim for a surviving wife or child of a decedent. However, in the *Millo* case the need being addressed was the loss of special advice and counsel Bret Millo was providing before his death, not a claim based on the need for a different type of counseling caused by his death. The impossibility of any reasonable replacement precludes an economist from projecting a reliable value based on commercial market equivalents for the simple reason that there are no commercial market equivalents. Any supposed equivalents offered by Dr. Hill were not reasonable equivalents and the wages he may have used to value projected hours of lost advice have no close relationship to values for the advice that has been lost because of the death of Bret Millo.

## V. Losses not Otherwise Compensable

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If a loss is “otherwise not compensable,” it means that an award cannot be spent trying to remediate the loss that is being addressed. An “intangible,” “non-pecuniary,” “non-economic” loss is a loss for which replacement is not possible by any reasonable equivalent that can be purchased in the commercial marketplace. Because equivalents do not exist, no market wage rate can be used to measure the loss in a reliable way. If Kristy Millo had received an award to replace her lost companionship with her husband, she would not have used that money to hire attendant care providers in the commercial market place to come to her home to provide companionship. If Kristy Millo had received an award to replace her loss of her husband’s special advice and counsel based on the years and experiences she shared with her husband, she would not have hired a professional psychological counselor in the commercial marketplace to replace her husband’s advice and counsel. Since it is not conceivable that the award would be used for such purposes, awards for those categories would be monetary values with no obvious relationship to the losses for which they were supposedly enabling Kristy Millo to purchase substitutes. The real problem is that there are no substitutes for the losses she has suffered. And since even partial replacement would not be accomplished, there is no apparent relationship between the loss Kristy Millo actually

suffered and money that would have been awarded based on those losses.

Kristy Millo and her three daughters suffered major losses when Bret Millo was wrongfully killed. Kristy Millo's loss of financial support coming from his earnings and fringe benefits in the commercial marketplace can be replaced by an amount of money that can be reasonably determined by an economic expert using reasonable equivalents from the commercial marketplace. Her loss of his ordinary household services in the form of cooking, cleaning, working on the lawn, managing family finances and so forth all constitute services for which replacements can be purchased in the commercial market, though with less precision than loss of financial support. Bret Millo's companionship is special and unique in a way that precludes even partial commercial replacement. Bret Millo's advice and counsel as a husband and father is also special and unique in a way that precludes even partial commercial replacement. The distinction made by Judge Gleason in the *Millo* case is not new, but it is specific. The legal system has long made a distinction between tangible and intangible losses, between economic and non-economic losses, and between pecuniary and non-pecuniary losses. Judge Gleason has added one more variation on the relevant distinction by focusing on the difference between losses that are "compensable" and losses that are "not otherwise compensable." What she has added by her decision is a thoughtful discussion regarding the effort of economic expert Pershing Hill's use of a methodology described in the literature of forensic economics by Frank Tinari to measure loss of "companionship" and loss of "advice and counsel" in a wrongful death action in the state of Alaska. Judge Gleason has provided a clear explanation for why the Tinari methodology is not reliable for measuring the losses involved. That reason is that the losses are losses that cannot be replaced, even in part, by commercial substitutes.

Judge Gleason's conclusion is not that awards cannot be made for losses for which there are no reasonable substitutes in the commercial marketplace. In her terms, taken from a previous decision, the companionship and advice and counsel losses suffered by Kristy Millo and her three daughters are losses that are "not otherwise compensable" and for which juries can provide awards that would fall into the intangible, non-economic or non-pecuniary category. In Judge Gleason's view, there is no role for an economic expert to calculate such losses because reasonable market equivalents to replace the losses do not exist.

## VI. Conclusion

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When reasonable substitutes in the commercial market do not exist for what has been lost, no calculation by an economic expert can have more than a vague relationship with a loss that has actually occurred. Some losses, like past and future lost earnings, past and future lost contributions to retirement plans, loss of future household services, loss of future medical insurance, cost of life care made necessary by an injury, costs of psychological assistance made necessary by an injury or death, and other replacements for which reasonable equivalents exist in the commercial marketplace all fall within the potential realm of economic science. Measurement may be difficult to do accurately, but at least there are relevant market equivalents upon which to base the measurement being attempted. Other losses exist for which no replacement is possible. Those are the losses that are “otherwise not compensable” in the terms of *Millo v. Delius*, and for which economists should not prepare calculations.

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