

What Household Services Loss?

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I. Introduction

Household services loss calculations are a standard component of damages in economic loss reports prepared by forensic economists. A good definition of household services loss is contained in the article entitled "Market Value of Household Production."¹ As noted in this article, "Household production consists of those goods and services produced by a household for its own use, which alternatively are available for purchase in the marketplace. The courts have long held that the value of household production constitutes a compensable loss in personal injury and wrongful death cases."²

As noted in one treatise, "Today the value of household services is a part of most analysis [sic] addressing economic loss (p. 150)."³ While the proper methodology to use in these types of evaluations has been the subject of numerous studies and articles,⁴ economists frequently perform household services loss evaluations without any consideration of the legal rationale allowing consideration of these types of losses.

A recent decision by the New York State Court of Appeals, however, has forced economists to reconsider the foundation for their household services loss analyses. In Schultz v. Harrison Radiator Division General Motors Corporation, 90 N.Y.2d 311, 660 N.Y.S. 2d 685, 683 N.E.2d 307 (1997), the court excluded economic testimony concerning an individual's loss of ability to perform household services because "...the value of such services did not serve a compensatory function."⁵ While this case involved an unmarried individual with no dependents, defense attorneys have made the argument that there can be no testimony concerning household services loss in any case unless the plaintiff has actually incurred costs to replace the lost ability to perform household services.

Especially in light of the Schultz decision, then, it is useful for the forensic economist to have a working knowledge of the legal basis for projecting household services loss under varying circumstances. In particular, the spouse's claim for compensation for lost household services under loss of consortium statutes should be examined and compared with an individual's claim for impairment of the ability to perform household services for his or her own benefit. An examination of the legal basis for performing household services loss evaluations must also include a review of Statutory law and Caselaw from various jurisdictions in order to determine whether courts favor specific types of household services loss analyses under specific

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¹ R. Dulaney, J. Fitzgerald, M. Swenson and J. Wicks, Market Value of Household Production, 5 *Journal of Forensic Economics* No. 2, p. 115 (1992)

² Id.

³ W. Baker & M. Seck, Determining Economic Loss in Injury and Death Cases, Second edition, p. 150 (1993).

⁴ For a partial listing of such studies, see Id. at §§9.01-9.05.

⁵ Schultz v. Harrison Radiator Division General Motors Corporation, 90 N.Y.2d 311 at 320, 660 N.Y.S. 2d 685 at 689 (1997).

circumstances. It is hoped that this paper will provide the forensic economist with insight into the legal basis for the household services loss analysis, allowing him or her to perform an accurate analysis that fits the legal circumstances of the case.

II. The Basis of the Claim for Loss of Household Services

Civil law suits provide compensation to individuals who have suffered losses as a result of the actions of another. Economic damages in civil suits are awarded for the purpose of providing the monetary equivalent of the loss that has been incurred.⁶ In general, economic damages are divided into monetary items of loss, such as lost wages, and nonmonetary items, such as loss of services. In the case of household services, the legal question is who was the beneficiary of the services that can no longer be provided.

From an economic perspective, all household services are the same. That is, whether an individual has lost the benefit of household services that were provided by his or her spouse, or whether an individual has lost the ability to perform a specific set of household services for his or her own benefit, the dollar value of the loss incurred should be the same. From a legal perspective, however, there is a significant difference between the loss of services that the individual was provided by his or her spouse and an individual's loss of ability to perform services for his or her own benefit. The legal distinction is thus whether the claimed household services loss falls under the category of loss of consortium or under some other theory of economic loss.

A. Loss of Consortium

Loss of consortium is generally defined as an impairment of the marital relationship.⁷ The New York State Court of Appeals has defined consortium to be "...the marital partners' interest in the continuance of the marital relationship as it existed at its inception..."⁸ By definition, then, a claim for loss of consortium requires the parties to be married.⁹ In most jurisdictions, consortium consists not only of the emotional or non-economic components of the marriage relationship, but also of the services provided by each spouse to the other.¹⁰ As with any legal rule, however, there are exceptions.¹¹ In Arkansas, Georgia, and Iowa, then, the economist cannot make an evaluation of the household services loss suffered by the spouse of an individual who is injured.

1. Loss of Consortium in Wrongful Death Cases

There is a legal distinction between loss of consortium in personal injury actions and loss of consortium in wrongful death cases. While loss of consortium in a personal injury action arises

⁶ See 3 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, *Damages in Tort Actions* §22.02[1][a][i] (1991) [hereinafter cited as Minzer, Nates].

⁷ L. Frumer & M. Friedman, *Personal Injury Actions Defenses Damages* §1.02[1][a] (1991).

⁸ *Anderson v. Eli Lilly*, 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991).

⁹ L. Frumer & M. Friedman, *Personal Injury Actions Defenses Damages* §1.02[1][b][iii][A].
¹⁰ *Id.* at §1.02[1][a].

¹¹ The Frumer and Friedman treatise lists Arkansas, Georgia, and Iowa as jurisdictions where the loss of consortium claim does not include loss of services.

out of English common law, causes of action for wrongful death did not exist under the common law.¹² There is no right to sue for the wrongful death of an individual, then, absent a specific state statute granting such a right. Thus, the determination of damages under a specific state's wrongful death act is governed by the enabling statute.

Most states define economic loss in wrongful death actions in terms of loss to beneficiaries.¹³ In a loss to beneficiary jurisdiction, loss of consortium occurs where the beneficiary who has incurred a loss as a result of an individual's death is the decedent's spouse. The economist must thus rely upon the foundation testimony provided by the surviving spouse to determine what types of household services were provided by the deceased spouse, and then evaluate these services using standardized studies. If the surviving spouse does not provide the proper foundation to establish that he or she benefited from the decedent's services prior to death, a number of courts have held that the damages incurred are minimal, regardless of the economist's testimony.¹⁴

Loss to estate statutes do not require that specific individuals show that they have incurred a loss as a result of an individual's death. Rather, under this statutory scheme, damages are paid to the estate in general, and divided among the survivors pursuant to a statutory formula. Only eight states follow the minority rule "loss to estate" wrongful death procedure.¹⁵ In loss to estate jurisdictions, the estate is only allowed to recover for the types of damages specified by the enabling statute. Of the eight states following this procedure, only two, Connecticut and Iowa, allow the estate to recover for the loss of services provided by the decedent.¹⁶ Thus, in a loss to estate jurisdiction other than Connecticut and Iowa, there is no claim for household services loss in a wrongful death action.

2. Loss of Consortium in Personal Injury Cases

In a personal injury case, the economic theory behind a claim for lost household services in an action for loss of consortium is that the injured spouse can no longer provide the same services to his or her spouse as were provided prior to injury.¹⁷ Once again, foundation testimony is required to establish that the injured spouse provided such services, and that his or her injuries prevent the provision of household services in the future. Lost services that are not identified cannot be evaluated. Thus, in jurisdictions where a claim for loss of consortium includes the loss of services provided by one spouse to another, the economist's evaluation of household services loss must address the specific services that are no longer provided. An economist who fails to consider the manner in which the marital relationship has been impaired and who conducts his or her household services loss analysis based entirely upon a theoretical "typical" relationship

¹² 22A Am. Jur. 2d Death §1 (1988).

¹³ Minzer, Nates supra note 6 at §22.02[2][a].

¹⁴ See Malmay v. Sizemore, 474 So.2d 1358 (La App 2d Cir 1985), *aff'd*, 493 So.2d 620, Rodriguez v. Columbus Hospital, 38 App. Div. 2d 517, 326 NYS 2d 439 (1st Dept. 1971).

¹⁵ Minzer, Nates supra note 6 at § 22.01. Loss to estate statutes are found in Connecticut, Delaware, Georgia, Iowa, Kentucky, New Hampshire, Rhode Island, and Tennessee.

¹⁶ Minzer, Nates supra note 6 at § 23.14.

¹⁷ See Anderson v. Eli Lilly, 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991).

detailed in standardized household services loss studies risks having his or her testimony stricken from the record.

There a number of methods used to evaluate household services loss resulting from a spouse's injury. If a housekeeper is hired to replace lost household services, the damages incurred can be based upon the housekeeper's cost.¹⁸ In the alternative, even if no one is hired to replace the injured household member's services, replacement cost is commonly used to evaluate household services loss. Other approaches can also be used, based upon generally-accepted economic studies. Regardless of the methodology used, the economist's testimony is often a necessary link in establishing the value of the household services loss incurred.¹⁹

3. Summary of Household Services Evaluations Under Loss of Consortium

In general, economic evaluations of lost household services arise under the legal claim for loss of consortium. As noted above, loss of consortium claims are an element of both wrongful death and personal injury actions in most jurisdictions in the United States. From an economist's perspective, the key to an acceptable evaluation of lost household services under a loss of consortium claim is foundation testimony by the spouse claiming such a loss.²⁰ Given the proper foundation, loss of a spouse's household services can be readily calculated using the methodology specified by any one of the generally-accepted studies. However, if the spouse who has been injured or killed traveled extensively or provided minimal household services, the economist who values these services based upon national averages risks severe damage to his or her credibility upon cross-examination. Thus, the key to a successful economic evaluation of the services that were provided under the category of loss of consortium is foundation testimony from the spouse who has incurred such losses.

B. Household Services Losses Incurred by Spouses In Addition to Loss of Consortium

While the legal concept of loss of consortium covers most forms of losses incurred as a result of a spouse's injury, there is another category of services that the economist should consider. That is, an individual who is injured often requires nursing services and care. If these services are provided in the injured individual's home, they are often performed by the spouse or by other family members. While there is no question that these services have an economic value, they are not recognized as a legally-compensable element of damages in all jurisdictions.

Most jurisdictions allow recovery for the reasonable value of nursing services or care provided to an injured spouse.²¹ A clear statement of the legal rationale allowing recovery for the value of a spouse's nursing services and care is given in a Wisconsin case from 1899. Thus, as

¹⁸ Minzer, Nates supra note 6 at §10.32[2], footnote 30.

¹⁹ In Fitzpatrick v. United States, 754 F. Supp. 1023 (D. Del. 1991), the court held that lack of economic testimony concerning the value of the household services that were provided by an individual who was injured prevented her spouse from recovering for loss of household services.

²⁰ Minzer, Nates supra note 6 at §10.32[2], footnote 29.

²¹ See 90 ALR2d 1330 (1963), 90 ALR2d Later Case Service 139 (1993).

noted by the court in Crouse v. Chicago & N.W. R. Co.,²² "[t]he defendant should not be allowed to profit by reason of the loving care of the [plaintiff's] wife." These services are generally valued at the cost of hiring an unrelated individual to provide nursing services, rather than as the loss of wages forgone in order to provide such services.²³

While a majority of jurisdictions allow recovery for the reasonable value of nursing services or care provided to an injured spouse, a significant number of jurisdictions do not allow spouses to recover these types of damages. The legal rationale for denying these types of damages is generally based upon two arguments. The most common reason for denying an individual a right to recover the value of nursing services or care provided by them to an injured spouse is that these services are gratuitously given, and thus have no monetary value.²⁴ In the alternative, some courts have indicated that spouses have a duty to provide such services to each other, and thus should not be compensated for fulfilling an existing duty.²⁵ Thus, before the economist attempts to value the nursing services provided to an injured spouse, he or she must know whether these types of damages are allowed in their jurisdiction.

C. Loss of Ability to Perform Household Services for One's Own Benefit

From an economic perspective, there is no question that an individual who is unable to perform household services for his or her own benefit as a result of an injury has incurred an economic loss. From a legal perspective, however, the issue is more complex. As noted earlier, the purpose of a civil lawsuit is to provide compensation for losses incurred as a result of another's actions. If the courts in a particular jurisdiction apply a strict interpretation of this definition, an individual cannot be compensated for a particular type of damages unless an actual monetary loss has been incurred. Thus, there is a limited right to recover for loss of ability to perform household services for one's own benefit.

1. Jurisdictions Allowing Recovery for Lost Ability to Perform Household Services

Very few jurisdictions allow an individual to recover for the impairment of ability to perform household services for his or her own benefit absent a showing that costs have been or will be incurred to replace such services. The legal theory allowing these types of recoveries is that loss of ability to perform household services for one's own benefit is included in the category of loss of ability to perform work.²⁶ Recovery for loss of ability to perform household services for one's own benefit is allowed in Iowa, Texas, and Utah, as well as in personal injury actions under the Federal Tort Claims Act.

²² 102 Wis. 196, 78 N.W. 446 (1899).

²³ L. Frumer & M. Friedman, Personal Injury Actions Defenses Damages §1.02[2] footnote 6 (1991).

²⁴ For example, see Daniels v. Celeste, 303 Mass 148, 21 N.E.2d 1 (1939), Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 35 A. 191 (1896).

²⁵ For example, see James v. State ex. rel. Board of Administrators of Charity Hospital, 154 So.2d 497 (La. App.).

²⁶ Minzer, Nates supra note 6 at §10.32[2], p. 10-150.

The most liberal application of the legal theory allowing an individual to recover for his or her own lost ability to perform household services is found in Texas. Thus, in C.E. Duke's Wrecker Service, Inc. v. Oakley,²⁷ the court held that a recovery could be made for impairment of ability to provide even those household services that were not performed by the plaintiff prior to her injury. The more typical application of this standard requires a showing that there has been an impairment of ability to provide household services that were actually performed prior to injury.²⁸

In summary, few jurisdictions allow an individual to recover for impairment of ability to perform household services for his or her own benefit. Even where recovery is allowed for these types of damages, foundation testimony is generally required to specifically identify what services have been lost. Once the types of services have been identified, the economist can place a dollar value on the individual's impaired ability to perform household services.

2. Jurisdictions Allowing Recovery for Services Gratuitously Provided by Others

While an injured individual has a limited right to recover for loss of ability to perform household services, a majority of jurisdictions allow recovery for the value of nursing care and services provided gratuitously. While these services do not necessarily fall within a narrow definition of household services, the types of care provided can include the performance of routine household tasks for the benefit of the injured individual. Thus, gratuitous nursing care and services can be included in a claim for damages in some jurisdictions, and evaluated by the forensic economist.

The legal rationale that allows an injured individual to recover for services that others have provided to him or her at no cost considers the fact that obtaining these services normally requires payment by the injured individual. Thus, even though these services are supplied to the injured individual at no cost, the fact that these services are free should not accrue to the benefit of the defendant.²⁹ A number of jurisdictions, then, adopt this approach, allowing recovery for services that are provided to the injured individual at no cost.³⁰

Where an individual is allowed a recovery for nursing care and services that are required as a result of an injury and that are provided to him or her at no cost, the forensic economist's task is to provide a value for such services. The first step is for the plaintiff to establish a proper foundation, showing that nursing care and services are required as a result of the injuries that have been sustained, and that such services will continue to be required in the future.³¹ The economist's task is then to project the actual replacement cost of nursing care and services, in consideration of both the number of hours of services required and the hourly cost for such services.³²

3. Jurisdictions Requiring a Showing of Pecuniary Loss

In a number of jurisdictions, an injured individual cannot recover damages unless he or she has incurred an actual pecuniary loss. In these jurisdictions, there is no recovery for the cost of

²⁷ 526 S.W.2d 228 (Tex. Civ. App. 1975).

²⁸ See Corbridge v. M. Morrin & Son, Inc., 19 Utah 2d 409, 432 P.2d 41 (1967).

²⁹ 90 ALR2d 1324 §2.

³⁰ Id. at 1325 §3[a].

³¹ See Carpenter v. Hartford Fire Insurance Co., 537 So.2d 1283 (La App 2d Cir. 1989).

³² See Pressey v. Patterson, 898 F.2d 1018, 16 FR 3d 972 (5th Cir., 1990).

nursing care or services that have been provided to an injured individual at no cost.³³ Further, in these jurisdictions, there is no right to recover for lost ability to perform household services unless costs have been incurred and are likely to be incurred in the future for the replacement of such services.³⁴ Thus, in these jurisdictions, unless an injured individual can afford to pay for nursing care or household services prior to trial, he or she cannot recover for the value of such services.

The legal theory requiring an actual showing of pecuniary loss is that damages in civil suits serve a compensatory function. In these jurisdictions, as noted by the New York State Court of Appeals, "[a] moral obligation, without more, will not support a claim for legal damages."³⁵ Any damages in a strict pecuniary loss jurisdiction, then, must rely on a foundation showing that the injured person has incurred an obligation to pay for all services that have been or will be provided as a result of his or her injuries.

While the Schultz decision has caused some concern in the forensic economics community in New York state, it does not preclude a plaintiff from recovering for impaired ability to perform household services for his or her own benefit. The most straightforward approach to proving these types of damages in a strict pecuniary loss jurisdiction is to rely upon receipts obtained by the plaintiff that show that expenditures have been incurred to replace the lost ability to perform household services. If the plaintiff cannot afford to pay for these services, such services could possibly be provided pursuant to a written contract requiring payment at some future date. Thus, while the Schultz decision makes the economist's job somewhat more complicated, it does not preclude recovery for loss of ability to perform household services for one's own benefit.

III. Conclusion

While household services loss calculations are included in most economic loss analyses, the economist should be aware of the legal basis for making these calculations. An economist who assumes that projections of household services loss are a part of all economic loss projections may receive an unpleasant result at trial. The economist can also be unpleasantly surprised at trial by making an evaluation that does not consider the actual services that were provided by an individual prior to his or her injury or death. Knowledge of the legal basis for the evaluation of household services, then, helps the economist to make an accurate projection of potential economic loss.

³³ 90 ALR2d 1327 §3.

³⁴ See Schultz v. Harrison Radiator Division General Motors Corporation, 90 N.Y.2d 311 at 320, 321, 660 N.Y.S. 2d 685 at 689 (1997).

³⁵ Coyne v. Campbell, 11 N.Y.2d 372, 375 (1962).

References

- American Jurisprudence 2d*, Number 22A, *Death* §§1-443, Rochester, New York, Lawyer's Cooperative Publishing Company (1988).
- American Law Reports 2d*, Vol. 90, Rochester, New York, Lawyer's Cooperative Publishing Company (1963).
- American Law Reports 2d Later Case Service*, Vol. 90, Rochester, New York, Lawyer's Cooperative Publishing Company (1993).
- Anderson v. Eli Lilly, 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991).
- W. Baker & M. Seck, *Determining Economic Loss in Injury and Death Cases*, Colorado Springs, Colorado: McGraw-Hill, 1993.
- Carpenter v. Hartford Fire Insurance Co., 537 So.2d 1283 (La App 2d Cir. 1989).
- C.E. Duke's Wrecker Service, Inc. v. Oakley, 526 S.W.2d 228 (Tex. Civ. App. 1975).
- Corbridge v. M. Morrin & Son, Inc., 19 Utah 2d 409, 432 P.2d 41 (1967).
- Coyne v. Campbell, 11 N.Y.2d 372, 375 (1962).
- Crouse v. Chicago & N.W. R. Co., 102 Wis. 196, 78 N.W. 446 (1899).
- Daniels v. Celeste, 303 Mass 148, 21 N.E.2d 1 (1939).
- Ronald A. Dulaney, John H. Fitzgerald, Matthew S. Swenson and John H. Wicks, "Market Value of Household Production, *Journal of Forensic Economics* No.2, Spring/Summer 1992, p. 115-126.
- Fitzpatrick v. United States, 754 F. Supp. 1023 (D. Del. 1991)
- Louis R. Frumer & Melvin I. Friedman, *Personal Injury Actions Defenses Damages*, New York, New York, Matthew Bender & Co. (1991).
- Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 35 A. 191 (1896)
- James v. State ex. rel. Board of Administrators of Charity Hospital, 154 So.2d 497 (La. App.).
- Malmay v. Sizemore, 474 So.2d 1358 (La App 2d Cir 1985), *aff'd*, 493 So.2d 620.
- M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, *Damages in Tort Actions*, 1991.
- Pressey v. Patterson, 898 F.2d 1018, 16 FR 3d 972 (5th Cir., 1990).
- Rodriguez v. Columbus Hospital, 38 App. Div. 2d 517, 326 NYS 2d 439 (1st Dept. 1971).
- Shultz v. Harrison Radiator Division General Motors Corporation, 90 N.Y.2d 311 at 320, 660 N.Y.S. 2d 685 at 689 (1997).