

Assessing Damages in Personal Injury and Wrongful Death Litigation: The State of West Virginia

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I. Introduction¹

The federal/state legal system of the United States means that a forensic economist faces different legal rules and parameters in each state of his or her practice. It is the purpose of this article to provide an experienced forensic economist, entering a West Virginia case, with necessary information and guidance for appropriate testimony in personal injury and wrongful death cases. This is accomplished with complete citations to West Virginia Code and to relevant decisions of West Virginia courts. Our own experiences are also used to explain what is customary in procedures and in the legal parameters affecting damages calculations.

This article is organized as follows. First, an overview is provided of the West Virginia court system. Second, some basics of forensic economic practice in West Virginia—such as written reports and discovery rules—are described. Third, important issues and parameters of lost earning capacity calculations are described in detail, and the calculation of household services losses is also discussed. Several unusual features of West Virginia damages calculations are then discussed. These include special calculations in some workers' compensation cases, new calculation rules in medical malpractice cases, the calculation of medical monitoring damages, and the prohibition against lost-enjoyment-of-life testimony. Finally, jury factors for determining the amount of punitive damages, adopted by the West Virginia Supreme Court of Appeals, is explained as they fit within similar jury factors provided by the U.S. Supreme Court in recent decisions.

II. The West Virginia Court System and Some Procedural Basics

There are 31 judicial circuits and 65 circuit judges for the 55 counties of West Virginia. The most populous county has seven judges, and other circuits cover several rural counties. The West Virginia Supreme Court of Appeals is the only appellate court; an intermediate appellate court does not exist. The five Supreme Court justices serve 12-year terms. In 2002, 22% of the cases

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filed with the Supreme Court were civil cases. Another 52% were cases involving workers' compensation (*Annual Report of West Virginia Judicial System*, 2002).

When a forensic economist enters a case on the plaintiff side, it is customary that a written report of personal injury or wrongful death damages will be produced. However, a written report is not required. The West Virginia Supreme Court of Appeals has ruled that interrogatory answers by an economist may be sufficient (*State ex rel State Farm Fire Cas. Co. v. Madden*, 1994). It is less likely in practice that a defense economist will produce a written report, although defense-side reports are not unusual when a defense economist is likely to testify.

Similarly, discovery depositions are common in personal injury and wrongful death cases. Discovery depositions, like written reports, are authorized by West Virginia law (W.Va. Code, §57-4-1) but not always required (*State ex rel State Farm Fire Cas. Co. v. Madden*, 1994). Subpoenas may be issued to force an economist to turn over specific documents and information which will form a basis for testimony at trial (W. Va. Code, §57-5-3).

The West Virginia Supreme Court of Appeals elaborated its position on the admissibility of expert witness testimony (*Wilt v. Buracker*, 1993; *Gentry v. Mangum*, 1995; *Watson v. Inco Alloys, Inc.*, 2001). Consistent with the U.S. Supreme Court decision in *Daubert v. Merrill Dow Pharmaceutical, Inc.* (1993), either scientific or technical standards of admissibility can be applied. The scientific standard is applied where hypothesis formulation and testing can be used, and the circuit courts are to perform a gatekeeper function. Otherwise, a technical standard is to be applied, under which circuit judges do not apply a gatekeeper analysis. As long as the expert is knowledgeable in the relevant subject area and can assist the jury in making a decision, the testimony is to be allowed. The credentials and methodology of an expert are not a matter of admissibility, but rather a matter of the weight which a jury should give to the opinions of the expert (*Gentry v. Mangum*, 1995 and *Watson v. Inco Alloys, Inc.*, 2001).

Finally, West Virginia does have standard, or pattern, jury instructions relating to the calculation of economic damages (see *The Court's Charge and Instructions, Civil Cases*, 2004). The parties submit jury instructions on damages to the judge in each case, citing relevant West Virginia law and the judge decides on the instructions to present to the jury.

III. The Basics of Lost Earning Capacity to Survivors

Categorizations of the states, in terms of the basic parameters affecting forensic economists, have been previously developed and applied (Brookshire, 1987), and these basics for West Virginia are discussed in this section.

West Virginia Code provides for the recovery of losses to survivors in wrongful death and personal injury cases. These survivors include a spouse; children, including adopted children and stepchildren; brothers; sisters; parents; and any other persons who were financially dependent upon the alleged

victim at the time of death or injury. The categories of economic damages to be considered by a forensic economist are also made clear in West Virginia Code:

§55-7-6

By whom action for wrongful death to be brought; amount and distribution of damages; period of limitation (c) (1) (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care, and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death.

In determining the base for an estimate of economic losses in wages and fringe benefits, the economist must focus upon reasonably expected earnings, which have not been more specifically defined as either an “expected earnings” or an “earning capacity” standard. The standard may best be described as an “expected earning capacity” standard but the determination of how an economist meets the standard is left to the jury in weighing the credibility of the expert (*Ilosky v. Michelin Tire Corp.*, 1983).

Thus, the forensic economist has considerable discretion in choosing a (lost) wage base but is to be evaluated by a common sense standard of reasonableness. In minor child cases, for example, projections of earning capacity are provided and allowed based upon U.S. government data on average earnings for assumed education levels and other variables (*Andrews v. Reynolds Memorial Hospital, Inc.*, 1997). For adults, the history of the work activity and earnings of a person are considered, along with other, specific facts of the case.

In terms of earnings growth rates vis-à-vis interest rates used in discounting to present values, the forensic economist also has considerable discretion in West Virginia. No legal parameters affect the choice of a net discount rate in a particular case. The West Virginia Supreme Court of Appeals has recognized the necessity of discounting future, projected earnings to present values (*Morris v. Boppa, M.D.*, 1989). The exact rate of interest used in discounting is left to the individual economist (*Adkins v. Foster*, 1992). Even in a case where a plaintiff economist does not testify and the plaintiff attorney “blackboards” economic damages, the trial judge must instruct the jury about the need to discount future values to a present value.

On the related subject of prejudgment interest calculations, West Virginia Code §56-6-3 provides that pre-judgment interest on special or liquidated damages is recoverable as a matter of law and must be calculated and added to those damages by the trial court rather than by the jury. The trial judge adds simple interest at a 10% rate, beginning at the date of injury or death (*Hensley v. West Virginia*, 1998 and *Pauley v. Gilbert*, 1999). Such calculations by the trial judge have been specifically extended to lost wages in wrongful termination cases, beginning at the date of termination (*Gribben v. Kirk*, 1995). The economic expert has no role or involvement in these calculations.

With certain exceptions to be discussed, the collateral source rule governs lost earning capacity calculations in West Virginia. The Supreme Court of Appeals has noted:

The collateral source rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant. Part of the rationale for this rule is that the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own individual arrangements (*Ratlief v. Yokum*, 1981).

The forensic economist does not deduct federal Disability Insurance payments, private disability insurance payments, health care payments, or life insurance payments from the estimate of expected lost earning capacity. West Virginia Workers' Compensation payments are considered to be collateral source income, and not subtracted, if they were being received when the personal injury occurred (*Jones v. Laird*, 1973). Payments for unused sick or vacation leave time are also considered to be collateral source income (*Ellard v. Harvey*, 1976).

Neither federal nor state income taxes need be considered, and in practice are not considered, as forensic economists calculate the expected loss of earning capacity. The West Virginia Supreme Court of Appeals cited several reasons for not allowing consideration of this subject matter. One was that the effects of income taxes on contingent attorneys' fees and on interest earnings on the lump sum would also need to be analyzed (*Flannery v. United States*, 1982). Damages are not to be decreased because after-tax earnings are projected, and damages are not to be increased because income taxes must be paid on interest earnings.

West Virginia is rare among the states in that self-consumption of the decedent is not deducted from the expected loss of earning capacity in a wrongful death case. Prior to 1994, such personal consumption deductions were commonly made by economists. The West Virginia Supreme Court of Appeals said in 1994 that estimated personal living expenses need not be considered in calculating damages for the reasonably expected loss of income (*Wehner v. Weinstein*, 1994). Moreover, trial courts are not to allow evidence related to personal consumption or to allow the cross examination of a plaintiff economist on personal consumption deductions (*Mackey v. Irisari*, 1994).

IV. Some Other Issues of Expected Lost Earning Capacity and Household Services

Forensic economists are to calculate earning capacity losses over the plaintiff's worklife expectancy (*Gerver v. Benavides*, 1999). Otherwise, no guidance or parameters are given to economic experts in dealing with either life expectancy or worklife expectancy. Economists have wide discretion in choosing among methods and data sources for making worklife expectancy adjustments, and disagreements among economists are matters of credibility, not admissibility.

The necessary connection between economists and vocational experts, in assessing residual earning capacity in personal injury cases, is explicitly recognized in West Virginia. The Supreme Court of Appeals has stated:

Where a plaintiff wishes to quantify the loss of earning capacity by placing a monetary value on it, there must be established through expert testimony the existence of a permanent injury, its vocational effect on the plaintiff's work capacity, and an economic calculation of the monetary loss over the plaintiff's work-life expectancy reduced to a present day value (*Liston v. University of West Virginia Board of Trustees*, 1993).

The Supreme Court of Appeals has favored the opinion of a vocational expert over that of a medical doctor in the estimation of post-injury earning capacity, and, in the absence of a vocational expert, a physician can determine, with reasonable certainty, that earnings have been diminished due to disability (*Gerver v. Benavides*, 1999). However, no parameters or guidance have been provided on the nature of vocational input to a forensic economist on diminished earnings levels, worklife probabilities, or age-earnings returns to education that may result from permanent injury.

Forensic economists have wide discretion in other areas. Nothing in statutory or case law speaks to age-earnings adjustments in earnings projections, as an expected return for human capital investments. These adjustments have long been allowed, however, because U.S. government data on earnings by education level, gender, race, and age range are typically used in earning capacity estimates for minor children. These data embody an age-earnings profile to education, and they are not to be considered speculative if based upon reasonable assumptions in the particular case. Employer contributions to fringe benefits, likewise, are not specifically discussed in statute or case law but are assumed to be part of expected earning capacity. With both age-earnings adjustments and fringe benefit estimates, the forensic economist has only been limited by a reasonableness standard in choosing among alternative methods and data sources.

The economic damages category of lost household services is explicitly recognized in West Virginia Code §55-7-6, but no guidance has been given as to its calculation. While the calculation by economists typically involves a replacement cost theory, even the theory of household services losses is not prescribed. Nothing limits the economic expert in methods for determining lost hours or for valuing the replacement cost of such hours.

V. The Mandolidis Controversy

In West Virginia, forensic economists calculate expected lost earning capacity in cases of on-the-job injury or death. The West Virginia Supreme Court of Appeals interpreted West Virginia Code as follows:

Under W. Va. Code §23-4-2 an employer is subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in willful, wanton, and reckless misconduct (*Mandolidis v. Elkins Industries, Inc.*, 1978).

Thus, under certain circumstances, a worker (survivor) in West Virginia may collect Workers' Compensation benefits, as prescribed by law, and simultane-

ously pursue a tort claim for personal injury or wrongful death against the worker's employer.

These cases in West Virginia are called "deliberate intent" cases. These cases have been a center of controversy between employer and labor groups since the *Mandolidis* decision. Employers and employer groups contend that the *Mandolidis*-inspired cases are a significant exception to the no-fault system of workers' compensation and, as such, are a notable factor in retarding business growth in the state. The issue of whether such cases should be allowed to continue has been important in local and statewide political campaigns since 1978, including elections of justices of the West Virginia Supreme Court of Appeals.

The forensic economist calculates lost earning capacity as in any other personal injury case. Economic loss is the excess of lost earning capacity over workers' compensation payments already received or expected to be received. Said another way, the present value of expected workers' compensation payments must be subtracted from the present value of the expected loss of earning capacity; they are not collateral source income (*Powroznik v. C. & W. Coal Company*, 1994). Moreover, the defense (and the defense economist) has the burden of calculating the amount of the collateral source reduction (*Mooney v. Eastern Associated Coal Corp.*, 1984). Punitive damages cannot be awarded in these cases.

VI. Medical Care-Related Issues and Medical Monitoring Damages

Economic damages for medical and related care costs are calculated by forensic economists, based upon West Virginia Code §55-7-6, and present value calculations are typically based upon the report of a life care planner (*Adkins v. Foster*, 1992). The West Virginia Supreme Court of Appeals has stated:

To warrant a recovery for future medical expenses, the proper measure of damages is not simply the expenses or liability which shall or may be incurred in the future but it is, rather, the reasonable value of medical services as will probably be necessarily incurred by reason of the permanent effects of a party's injuries (*Jordan v. Bero*, 1974).

This is a basis for the work of physicians and life care planners in determining a necessary continuum of care. The "reasonable value" is determined by the economic expert, who has wide discretion in net discount rates and other calculation issues.

In its 2003 session, the West Virginia legislature enacted, and the governor signed, "tort reform" legislation dealing with medical malpractice lawsuits. A key provision affecting forensic economists is:

...the defendant may present evidence of future payments from collateral sources if the court determines that: (1) There is a pre-existing contractual or statutory obligation on the collateral source to pay the benefits; (2) the benefits, to a reasonable degree of certainty, will be

paid to the plaintiff for expenses the trier of fact has determined the plaintiff will incur in the future; and (3) the amount of the future expenses is readily reducible to a sum certain (West Virginia Code, §55-7B-9a).

These provisions apply to a hearing held by the trial judge after the trier of fact has rendered a verdict but before entry of judgment. The judge will make the calculation after also considering the subtraction of premiums paid by the defendant toward this collateral source income. The maximum amount recoverable as compensatory damages for non-economic losses, in a professional liability action brought against a health care provider, is capped at \$1,000,000. Other provisions affecting health care providers include the expedited resolution of such cases and majority verdicts by nine of 12 jurors in these cases.

In 1999, the West Virginia Supreme Court of Appeals allowed the recovery of medical monitoring expenses as an element of compensatory damages. In order to sustain a claim, the plaintiff (or class of plaintiffs) must prove that:

(1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortuous conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of exposure; and (6) monitoring procedures exist that make the early detection of a disease possible (*Bower v. Westinghouse*, 1999).

In elaborating on this criteria, the Supreme Court made clear that such claims can go forward even in the absence of a present physical harm. Moreover, successful treatments need not be available for those who learn of a disease through monitoring; it is enough that a plaintiff receives peace of mind, even if an irreversible and untreatable disease is detected. A particular monitoring event must be one that a qualified physician would prescribe based upon demonstrated exposure. The monitoring costs are those reasonably certain to be incurred. Finally, the monitoring events must be different from what would be prescribed in the absence of the exposure; thus, monitoring protocols must involve incremental costs (*Bower v. Westinghouse*, 1999).

Forensic economists have testified about medical monitoring damages using two models. The first is a life-care-plan model, in which a plaintiff automatically moves from one monitoring event to the next. Monitoring events are treated the same as treatment events in life care plans, in that they are costed with a 100% probability of occurrence. In effect, the results of each monitoring event do not matter. "Good" results do not delay or otherwise affect the monitoring path, and "bad" results do not lead either to treatment or to more extensive tests. No persons in a cohort moving through a medical monitoring protocol are assumed to leave the protocol for any reason.

Alternatively, forensic economists have used a Markov model or, more simply, a decision tree or expected value model. A branching occurs after each monitoring event. Depending upon the results of a first monitoring event, for

example, some members of a plaintiff class will move to treatment and automatically drop out of the group being monitored, some will move to more intensive testing, and some will simply wait to again move through the same monitoring event at the beginning of the next monitoring period. Some will also decide to quit the monitoring protocol. This may be because a series of good test results have made them complacent and/or because they fear a bad test result. These “leakages,” out of a monitoring cohort in each monitoring period, are also considered (Barrett and Brookshire, 2002).

Another feature of the *Bower v. Westinghouse* (1999) decision is that damages awards may be made either in lump sums to plaintiffs or through a court administered fund that pays for costs actually incurred over the monitoring period. It can be argued that, in the lump sum alternative, probabilities associated with every branching are very important, because a present value lump sum is to be awarded and divided up. There will be no adjustments later based upon the extent to which monitoring tests actually occurred. The defense has argued that many plaintiffs will use their award for recreation, for example, versus a series of medical tests. The court administered fund, by definition, involves protocol administration issues and costs. Since only the costs actually incurred are paid, however, the defense loses the argument that persons would divert the funds awarded from their intended purpose.

The *Bower v. Westinghouse* (1999) decision has generated fierce political debate in West Virginia. It is argued that this is another Supreme Court of Appeals decision which makes the state appear unfriendly to business. In its 2003 session, the legislature took no action but considered several alternatives for overturning this Court decision by statute. These alternatives will be considered again in 2004, and they are an important issue in a 2004 race for Justice of the Supreme Court of Appeals. Some legislative proposals would overturn the Supreme Court decision entirely, while others would require an actual injury for monitoring or eliminate the alternative of lump sum awards.

VII. Lost Enjoyment of Life Damages

In 1982, the West Virginia Supreme Court of Appeals stated:

We believe that the lost of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state that matter in a slightly different manner, the degree of a permanent injury is measured by ascertaining how the injury has deprived the plaintiff of his customary activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life (*Flannery v. United States*, 1982).

In 1989, West Virginia circuit courts began allowing economists to testify about present values of the lost enjoyment of life in personal injury cases. Methods differed, but economists generally based calculations on the willingness-to-pay (WTP) literature. The value of an average American life was derived, for example, from empirical studies of compensating wage differentials paid to workers where the risk of death on the job was high.

The West Virginia Supreme Court of Appeals later barred the testimony of economic experts on lost enjoyment of life damages (*Wilt v. Buracker*, 1993). Testimony was primarily excluded because it was based upon benchmark data for large samples of persons rather than to the loss to the particular person. The Court did not review WTP studies, which were not part of the record, but the Court directly attacked the economic theory of compensating wage differentials upon which WTP studies are based:

Moreover, the calculations are based on assumptions that appear to controvert logic and good sense. Anyone who is familiar with the wages of coal miners, policemen, and firefighters would scoff at the notion that these high risk jobs have any meaningful extra wage component for the risks undertaken by workers in those professions (*Wilt v. Buracker*, 1993).

While lost enjoyment of life damages may be awarded in West Virginia, a forensic economist cannot testify about them.

VIII. Punitive Damages

The West Virginia Supreme Court of Appeals has provided five factors to guide juries (and trial judges) in determining the amount of punitive damages:

- a. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
- b. The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, where/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
- c. If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
- d. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

- e. The financial position of the defendant is relevant (*Garnes v. Fleming*, 1991).

In reviewing jury decisions, trial courts were directed to consider these same factors, plus others. One of the others is any other civil actions against the same defendant for the same bad acts. This has been defined as “scaling,” or the reduction of punitive amounts being considered for likely, other lawsuits for the same bad act (Brookshire, 2004).

A 1993 decision of the Supreme Court of Appeals (*TXO v. Alliance*, 1992) applied the *Garnes* factors and made a distinction between defendants who did not intentionally or malevolently harm a plaintiff versus those who did. For the former, the outer limit was set at a 5:1 ratio of punitive damages to compensatory damages. For the latter, much higher ratios were not deemed as per se unconstitutional. Finally, in 1997, the Court of Appeals reaffirmed the five-factor model in *Garnes v. Fleming* (1991) and the 5:1 ratio “cap” in *TXO v. Alliance* (1992). The Court also disagreed with the defense contention that the *Garnes v. Fleming* (1991) jury factors were inconsistent with the three jury “guideposts” announced by the U.S. Supreme Court in 1996 (*Vandevender v. Sheetz, Inc.*, 1997 and *BMW v. Gore*, 1996).

In April 2003, the U.S. Supreme Court reaffirmed the federal guidelines of *BMW v. Gore* (1996) and focused upon multiples, or ratios, of punitive to compensatory damages which should prevent the amount of punitive damages from becoming impermissibly excessive (*State Farm v. Campbell*, 2003). The Court discussed such multiple “caps” as times one, times 3-4, and not beyond times 9 except in rare circumstances. The Court expressed concern about an emphasis on a defendant’s net worth as leading to excessive punitive awards, and accepted the notion of “apportionment.” In *BMW v. Gore* (1996), the Court complimented the Alabama Supreme Court for adjusting the punitive award downward to reflect BMW sales in Alabama versus BMW sales in the United States (*BMW v. Gore*, 1996). The West Virginia Supreme Court of Appeals has yet to consider the application of the *State Farm v. Campbell* (2003) decision to the application of the five jury factors in *Garnes*.

From the perspective of the forensic economist, considering the application of economic analyses to punitive damages in West Virginia, both the state and federal guidelines are compatible. Both the federal and the West Virginia guidelines address the deterrence purpose of punitive damages. The economic theory of optimal deterrence (Craswell, 1999; Polinsky and Shavell, 1998; Landes and Posner, 1987; Bentham, 1843) provides the basis for determining amounts of punitive damages as multiples of amounts of compensatory damages. The variable determining these multiples, or ratios, is the probability that if future “bad acts” occur, they will be detected and the defendant will pay the full amount of compensatory damages (Polinsky and Shavell, 1998). Both the West Virginia and federal guidelines express their “caps” on the maximum amount of punitive damages in terms of these multiples.

Moreover, both sets of guidelines recognize the possibility that potential damages could far exceed actual, compensatory damages. An example might be a case where a defendant was simply lucky that the amount of actual harm was very low. Any multiple of a low amount of actual damages is a relatively

low amount of punitive damages, so that the simple application of a multiplier may not sufficiently deter a defendant. This is the exception above a times 9 multiplier in *State Farm v. Campbell* (2003).

Both sets of guidelines also provide that the punishment purpose of punitive damages be addressed. The amount of punitive damages would increase as the reprehensibility of the defendant's conduct increases. It seems clear, however, that a punishment based decision on an amount of punitive damages must yield to an amount of punitive damages which is less than the cap on the punitive: compensatory damages ratio.

The West Virginia guidelines are consistent with the logic that national values of financial variables for a multi-state company might either be apportioned to West Virginia or scaled downward due to likely verdicts in other cases involving the same bad act. While plaintiff economists may be allowed to talk about national values of net worth, for example, defense economists are also likely to be able to discuss apportioned values.

One federal guidepost, the difference between the punitive amount and civil penalties authorized or imposed in comparable cases, is not mentioned in the key West Virginia decisions. Yet, the West Virginia guidelines do not preclude this factor as a consideration, and this factor was not of importance in either the *BMW v. Gore* (1996) or *State Farm v. Campbell* (2003) decisions. On the other side, one jury factor from the *Garnes v. Fleming* (1991) decision is the disgorgement of profits gained by the defendant from the bad act. While this factor is not specifically mentioned in the key federal decisions, its consideration is not specifically precluded.

In practice, testimony by plaintiff experts on amounts of punitive damages has not been common in West Virginia. Plaintiff economists have testified to net worth and other values of defendants, in the context of amounts of punitive damages which would punish—but not destroy—a defendant company. Other methods of suggesting punish-but-not-destroy amounts have included calculation of the amounts of punitive awards which would cause the bond rating of a defendant company to be lowered. To our knowledge, defense economists have not testified about appropriate amounts of punitive damages.

IX. Conclusion

The forensic economist working in West Virginia has significant discretion in many areas of the calculation of personal injury and wrongful death damages. The expert will be held to standards of reasonableness, and the forensic economic literature, itself, is a standard to be used in defending assumptions and methods used. Many of the legal parameters placed upon the calculation of economic damages are in the mainstream of the states. Income taxes are not considered in calculations, and household services losses are calculated, as examples.

However, the parameters affecting economic damages calculations in West Virginia have important differences with what is common among the states. In wrongful death cases, personal consumption deductions from the expected loss of earning capacity cannot be made or discussed. Earning capacity losses

are calculated in cases of on-the-job injury or death, with workers' compensation payments then becoming an exception to the collateral source rule when the employer is the defendant. Medical monitoring damages are a category of compensatory damages. Lost enjoyment of life damages are allowed, but economic experts cannot testify about them. Finally, specific guidelines exist to frame any economic calculations relevant to punitive damages.

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