

Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of Texas

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I. Introduction¹

This paper reviews the basic law and practice of determining economic damages in courts in the State of Texas, and has been written primarily for the use of forensic economists. After briefly describing the Texas State Court System, the paper discusses the Framework for Expert Testimony in Texas, including the Texas Rules of Evidence, important case law concerning scientific and technical evidence, and Texas Pattern Jury Charges. Texas is a “Daubert state,” with rules of evidence that follow the Federal rules, and case law that reflects the relatively strict approach adopted by the Texas appellate system. The paper then discusses common practices, such as the production of expert reports and the payment of expert fees. The next two sections discuss Economic Damages in Personal Injury and Wrongful Death cases, pointing out that Texas is an “earning capacity state” in personal injury cases, and a “loss of support to survivors’ state” in wrongful death cases. It is noted that recent tort reform requires that after-tax economic losses be presented to the trier of fact. Special rules for economic losses in medical malpractice cases are briefly covered. A list of important cases completes the final section.

II. State Court System

The primary trial courts in Texas are District Courts and County Courts at Law. District Courts have geographic jurisdiction over one or more counties, while County Courts at Law have geographic jurisdiction over only one county. District Court juries have 12 members, and County Court at Law juries have six members. Historically, District Courts considered civil suits with greater amounts at stake, with County Courts at Law hearing smaller claims. Now, many County Courts at Law are free of a maximum amount-in-controversy limitation, practically resulting in concurrent jurisdiction with District Courts

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to hear civil suits. As of the preparation of this paper, there were over 400 District Courts and over 200 County Courts at Law. Judges in these courts are elected in partisan elections to serve four-year terms.

Appeals from District Court and County Court at Law judgments are usually heard by one of the state's 14 Courts of Appeals. Generally, a case is heard by the Court of Appeals whose district includes the county in which the trial court judgment was rendered. The Supreme Court of Texas, with 9 justices, has final appellate jurisdiction in civil cases. As with the U.S. Supreme Court, review by the Supreme Court of Texas is discretionary and denied far more often than granted. Texas has a separate "high court" for criminal cases, the Court of Criminal Appeals. The justices of Texas appellate courts are elected in partisan elections to six-year terms. For more information, see Texas Courts online at <http://www.courts.state.tx.us/>.

III. Framework for Expert Testimony

Experts play a role in Texas litigation that is similar to that played in other states. Economic experts are allowed to testify under much the same rules as will be found in other jurisdictions. In fact, the Texas Rules of Evidence regarding expert witnesses are numbered similarly, but not identically, to the Federal Rules of Evidence:

- A. Texas Rules of Evidence (Effective March 1, 1998, the Texas Rules of Evidence replaced the former Texas Rules of Civil Evidence.)

Rule 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

Admissibility of Opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

B. Case Law: Discovery, Deposition and Trial

From *Celotex v. Tate*, 797 S.W.2d 197, 204 (Tex. App.—Corpus Christi 1990, no writ):

A witness who, by his knowledge, skill, experience, training or education, has specialized knowledge that will assist the trier of fact in understanding the evidence or in determining a fact in issue may express an opinion about the matter. *Trailways, Inc. v. Clark*, 794 S.W.2d 479 (Tex. App.—Corpus Christi, 1990, n.w.h); *DeLeon v. Louder*, 743 S.W.2d 357, 359 (Tex. App.—Amarillo 1987), writ denied, 754 S.W.2d 148 (Tex. 1988); Tex. R. Civ. Evid. 702. There are, however, no definitive guidelines for determining the knowledge, skill or experience required of a particular witness when testifying as an expert; it is within the trial court's discretion, and the court's determination will not be disturbed absent a clear abuse of that discretion. *Trailways*, slip op. at 5; *DeLeon*, 743 S.W.2d at 359.

Admissibility of Scientific & Technical Evidence

Texas case law indicates a full commitment to the “Daubert standards” that are found at the Federal level. Motions to exclude expert witnesses have become reflexive on the part of both plaintiff and defense attorneys, with one side often triggering retaliatory motions by the other. The motions may address well-accepted practice among forensic economics, as well as more contro-

versial practices. Some judges encourage live presentations of expert testimony and cross-examination by opposing counsel at “Daubert hearings” or “Robinson hearings.” Some judges prefer that all arguments are conducted on paper, with experts presenting affidavits setting forth the bases for their specialized knowledge and their opinions.

Excerpts from the two most-cited cases, as well as references to a third important case, are provided below.

“Robinson” (*E.I. du Pont de Nemours & Co v. Robinson* 923 S.W.2d 549, 557 (Tex. 1996)):

Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702.

There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

the extent to which the theory has been or can be tested;

the extent to which the technique relies upon the subjective interpretation of the expert;

whether the theory has been subjected to peer review and/or publication;

the technique's potential rate of error;

whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

the non-judicial uses which have been made of the theory or technique.

If the trial judge determines that the proffered testimony is relevant and reliable, he or she must then determine whether to exclude the evidence because its probative value is outweighed by the “danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Tex.R.Civ.Evid. 403

“Havner” (*Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, (Tex. 1997)):

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the in-

ferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.

“Gammill” (*Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998)):

In Gammill, at 726-27, the Texas Supreme Court points out that the trial court's gatekeeper responsibility is not limited to scientific expert testimony. Furthermore, the Robinson factors need not apply to the specific testimony. The impact of the Gammill decision may be seen in a subsequent appellate decision, *Taylor v. American Fabritech, Inc.*, 132 S.W.3d613 (Tex.App.—Houston [14th Dist.], 2004, pet. denied) at 619:

In Gammill, however, the court explained that although trial courts must assess the reliability of all expert testimony, the Robinson factors will not always be relevant to the inquiry, particularly when the proffered testimony is based not on scientific research or theories but on the expert's experience and knowledge in his or her field.

In Taylor, an economist was challenged, along with experts from other fields:

Taylor's experts in the present case were not offering testimony of a scientific nature. Analyzing whether safety measures could have prevented an accident, calculating the costs of medical care, lost earnings, and living assistance, and explaining the severity of a person's injuries are not scientific inquiries under the Robinson/Gammill framework. In forming their opinions, these experts relied not on specific scientific research or studies but on their own experience, education, and review of the literature in their fields. Hence, the trial court was required to consider whether the testimony was based on a reliable foundation and whether it was relevant to issues in the case, but the court was not required to analyze all of the specific factors noted in Robinson.[at 619]

Therefore, several of appellees' arguments premised on the Robinson factors are not relevant to our analysis. For example, appellees argue that each of the expert's opinions (1) were prepared exclusively for Taylor's case, (2) were not subjected to peer review, and (3) were subjective in nature, and that (4) the experts acknowledged two different experts in their particular field might come to different conclusions given the same data or scenario. Regarding these complaints: (1) it does not matter overly that the experts prepared their opinions for this case because the foundation of their testimony (their experience, education, and knowledge of their fields) was not so prepared; (2) there is no requirement the particular non-scientific opinion in a given case be peer reviewed, so long as the foundation for the opinion is reliable; (3) the application of knowledge to a particular set of facts is inherently subjective; and (4) experts frequently disagree; if the potential for disagreement was a basis for refusing expert testimony such testimony would be admitted only very rarely. It is the expert's underlying reasoning or methodology that a trial court must assess for reliability, not

the expert's ultimate opinion or conclusion in a given case. [Ibid, Footnote 10]

Another Limitation

It is not enough that an expert have sufficient knowledge and training, and that the expert's opinions are consistent with sound reasoning and generally-accepted practice within the field. It is also necessary that the expert's opinion is helpful. This argument has frequently been cited to the author, as the reasoning behind decisions to bar expert witness testimony on intangible losses. Although the case does not involve economic expertise, *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357 (Tex. 06/29/2000) is instructive:

That a witness has knowledge, skill, expertise, or training does not necessarily mean that the witness can assist the trier-of-fact. See *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). Expert testimony assists the trier-of-fact when the expert's knowledge and experience on a relevant issue are beyond that of the average juror and the testimony helps the trier-of-fact understand the evidence or determine a fact issue. See \$18,800 in *U.S. Currency v. State*, 961 S.W.2d 257, 265 (Tex. App.-Houston [1st Dist.] 1997, no writ); *Glasscock v. Income Property Servs. Inc.*, 888 S.W.2d 176, 180 (Tex. App.-Houston [1st Dist.] 1994, writ dism'd by agr.). When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. *Glasscock*, 888 S.W.2d at 180. Thus, "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986).

C. Texas Pattern Jury Charges

Pattern Jury Instructions are published in four volumes by the State Bar of Texas, and are intended to provide standardized questions, consistent with current statutory and case law, to be answered by the trier of fact. The most relevant to this paper is the volume, Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts. The volumes are available for purchase individually from the State Bar of Texas, at <http://www.texasbarcle.com/CLE/home.asp>. (Specifics of the Pattern Jury Charges, 2006 edition, regarding damages in personal injury and wrongful death actions are discussed in the respective sections below.)

D. Practice

Experts are classified as testifying or consulting experts. Expert reports are generally required at the time of designation, with deadlines being set by Scheduling Orders (or "Docket Control Orders"). However, even when an expert report is not required, a party must provide a summary of the material opinions of an expert as part of the party's routine disclosures. (See Texas Rules of Civil Procedure 194.2). A court could conceivably strike an economic

expert from the trial witness list if the only description of the likely testimony is “will testify about Plaintiff’s damages.” Often, Defense experts are disclosed 30 days after plaintiff’s experts. Generally, consulting experts are not disclosed unless a testifying expert will rely on them. See Texas Rules of Civil Procedure, 192.3(e). Disclosed experts may be deposed by the opposing parties. It has become increasingly common for a plaintiff’s economic expert to be countered by another expert hired by the defense. The defense experts may or may not be disclosed. It is not uncommon for opposing experts to be present at depositions or at trial. Many depositions are videotaped.

Reports

Supplementation of Reports, from *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 52 (Tex.App. San Antonio 2006, no pet.),

The general rule in Texas is that a party must make a full and complete response to proper discovery requests, and this obligation includes the duty to timely supplement discovery. Tex. R. Civ. P. 193.5. This duty to supplement applies to information concerning expert witnesses, and the trial court must exclude the testimony of an expert witness when the duty to supplement has been violated, absent a showing of good cause or no unfair surprise. Tex. R. Civ. P. 193.6, 195.6; *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). To the extent a party’s retained testifying expert changes or modifies his opinion, the party must amend or supplement the expert’s deposition testimony or written report with regard to his mental impressions or opinions and their basis. Tex. R. Civ. P. 195.6; *Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993) (duty to supplement requires that opposing party have sufficient information about expert’s opinion to prepare cross-examination and rebuttal with own experts, and that opposing party be promptly and fully advised when past information has been rendered incorrect or misleading).

An expert may, however, modify his testimony based on refinements in his calculations and perfections in his reports through the time of trial without invoking the need to supplement. *Exxon*, 868 S.W.2d at 304; *Foust v. Estate of Walters*, 21 S.W.3d 495, 504 (Tex. App.—San Antonio 2000, pet. denied). When an expert simply applies different data of record to a previously disclosed formula to render an alternate opinion than the opposing expert, which qualifies as a mere refinement of his opinion without the need to supplement. *Koko Motel v. Mayo*, 91 S.W.3d 41, 50-51 (Tex. App.—Amarillo 2002, pet. denied) (and cases cited therein). When an expert “merely function[s] as a human calculator deriving sums from information already before the jury” it is a refinement of his testimony that does not trigger the duty to supplement. *Id.* at 51. Similarly, an expert may also modify his opinion testimony without supplementation if he is merely expanding on a subject that has already been disclosed. *Norfolk So. Ry. Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.); *Navistar Int’l Transp. Corp. v. Crim Truck & Tractor Co.*, 883 S.W.2d 687, 691 (Tex. App.—Texarkana 1994, writ denied). The testimony of an expert should not be

barred because a change in some minor detail of the person's work was not disclosed before trial. *Exxon*, 868 S.W.2d at 304.

Fees

Rule 195.7 of the Texas Rules of Civil Procedure requires that all fees charged by an expert pertaining to depositions are the responsibility of the party retaining the expert.

Disclosure of Previous Reports, Fees, Income

Although, in the author's experience, financial experts usually answer questions that seek information concerning their practices, including percentages of income derived from litigation, percentages of plaintiff assignments, etc., case law suggests that access to such information is limited, unless there is other evidence of bias on the part of the expert. A review of the case law may be found in a decision from the San Antonio appeals court: *In re Makris* 217 S.W.3d 521 (Tex.App.—San Antonio 2006, no pet.h.). That decision, at 524, particularly refers to the Texas Supreme Court's holding that personal financial records of a nonparty witness are not discoverable for the sole purpose of showing bias. *Russell v. Young*, 452 S.W.2d 434, 435 (Tex. 1970).

Presence of Experts at Trial

If the exclusionary rule, often referred to as "The Rule," is invoked by either party, all witnesses, unless expressly exempted by law, are excluded from the courtroom. Testifying expert witnesses may be permitted to listen to trial testimony, but only if the hiring party requests the court to exempt the witness, *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 117 (Tex. 1999):

When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. See *Burhus v. M&S Supply, Inc.*, 933 S.W.2d 635, 643 n.7 (Tex. App.-San Antonio 1996, writ denied); *Kelley v. State*, 817 S.W.2d 168, 172 (Tex. App.-Austin 1991, pet. ref'd); *Texas Employers' Ins. Ass'n v. Cervantes*, 584 S.W.2d 376, 381 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.). Witnesses found to be exempt by the trial court are not "placed under the Rule."

Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom.

IV. Economic Damages in Personal Injury

A. Elements of Damages to an Injured Person (from Section 8.2 of PJC 2006)

Texas law provides for compensation to the injured person for the elements of damages found in the following list. Generally, testimony from financial experts is presented for loss of earning capacity in the past and future, and for

medical care expenses incurred in the past and likely to be incurred in the future. A loss of household services can be an element of “physical impairment.” The pattern jury charges are worded, “What sum of money, if paid now in cash, would fairly and reasonably compensate [Plaintiff],” for

1. Physical pain and mental anguish sustained in the past
2. Physical pain and mental anguish that, in reasonable probability, will be sustained in the future
3. Loss of earning capacity sustained in the past
4. Loss of earning capacity that, in reasonable probability, will be sustained in the future
5. Disfigurement sustained in the past
6. Disfigurement that, in reasonable probability, will be sustained in the future
7. Physical impairment sustained in the past
8. Physical impairment that, in reasonable probability, will be sustained in the future
9. Medical care expenses incurred in the past
10. Medical care expenses that, in reasonable probability, will be incurred in the future.

The author of this paper has occasionally been asked to tabulate past medical charges, payments and discounts. Texas Civil Practice and Remedies Code Sec. 41.0105, a 2003 tort reform enactment, states that medical care expenses must be “actually paid or incurred” to be recoverable. Insurance, Medicaid, and Medicare write-offs, for example, are not recoverable. If a life care planner or economist were to base a damage calculation in part on past medical expenses, failure to use the after-write-off amount is likely to render the testimony vulnerable.

B. Elements of Damages to the Spouse of an Injured Person (from Section 8.3 of PJC 2006)

Texas law provides for compensation to the spouse of an injured person for the elements of damages found in the list below. Generally, testimony from economic experts is presented for loss of household services in the past and future. The pattern jury charges are worded, “What sum of money, if paid now in cash, would fairly and reasonably compensate [Spouse of Plaintiff],” for

1. Loss of household services sustained in the past.
2. Loss of household services that, in reasonable probability, [Spouse of Injured Person] will sustain in the future.
3. Loss of consortium in the past.
4. Loss of consortium that, in reasonable probability, [Spouse of Injured Person] will sustain in the future.

C. Elements of Damages to an Injured Minor Child (see PJC 8.4)

The following language applies to injured minor children:

1. Physical pain and mental anguish sustained in the past.

2. Physical pain and mental anguish that, in reasonable probability, [Child] will sustain in the future.
3. Disfigurement sustained in the past.
4. Disfigurement that, in reasonable probability, [Child] will sustain in the future.
5. Physical impairment sustained in the past.
6. Physical impairment that, in reasonable probability, [Child] will sustain in the future.
7. Loss of earning capacity that, in reasonable probability, will be sustained in the future after [Child] reaches the age of eighteen years.

Under Texas law, a child's earnings belong to the parents until the child reaches age 18. Similarly, the expenses of supporting the child under age 18, including medical expenses, are obligations of the parents. For this reason, economic experts evaluating life care plans (or other economic damages) for minors in Texas should perform separate calculations for the periods before and after age 18. See *Sax v. Votteler*, 648 S.W.2d 661 (Tex., 1983) at 666:

A child may recover damages for pain and suffering as well as other damages he may accrue after he reaches the age of majority. *Texas & P. Ry. Co. v. Malone*, 15 Tex.Civ.App. 56, 38 S.W. 538, 539 (Tex.Civ.App.1896, writ ref'd). For example, a child is entitled to recover loss of earning capacity, commencing upon the date of attaining majority or removal of disabilities. However, since the services and earnings of an unemancipated minor belong to his parents, an infant may not recover for diminution of his earning capacity during the period intervening between the injury and his attainment of majority. *Texas and P. Ry. Co. v. Morin*, supra. Historically, in Texas, the right to recover for medical costs incurred in behalf of the minor is a cause of action belonging to the parents, unless such costs are a liability as to the minor's estate. *Bering Mfg. Co. v. Peterson*, 28 Tex.Civ.App. 194, 67 S.W. 133, 135 (Tex.Civ.App.1902, writ dis'm'd).

D. Loss of Earnings and Earning Capacity in the Past and Future

Texas is an "earning capacity state," in that compensation for loss of earning capacity in the past and the future is allowed. *Strauss v. Continental Airlines*, 67 S.W.3d 428, 435 (Tex. App.—Houston [14th Dist.] 2002, no pet.):

Loss or impairment of past, as well as future, earning capacity is recoverable as an element of damages in a personal injury case. *Harris v. Belue*, 974 S.W.2d 386, 395 (Tex. App.—Tyler 1998, pet. denied). The measure of this type of damages is the plaintiff's diminished earning power or earning capacity in the past or in the future directly resulting from the injuries he has sustained. *Southwestern Bell Tel. Co. v. Sims*, 615 S.W.2d 858, 864 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Greyhound Lines, Inc. v. Craig*, 430 S.W.2d 573, 575 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd. n.r.e.). Recovery for loss of earning capacity is not based on the actual earnings lost, but rather on

the loss of capacity to earn money. *Brazoria County v. Davenport*, 780 S.W.2d 827, 832 (Tex. App.—Houston [1st Dist.] 1989, no writ).

Some attorneys are of the opinion that past loss of earning capacity is not recoverable. This is not correct. Although actual loss of earnings is evidentiary of the ultimate issue, there does not have to be any loss of actual earnings for there to be a loss of earning capacity. The Greyhound case cited above, has particularly pointed language. It specifically addresses post-injury altruistic payments by an employer.

This is a particularly important concept to remember when dealing with an injured nonworking spouse or an injured retiree—as their lost earning capacity will be recoverable even though they had voluntarily removed themselves from the workforce.

A loss of earning capacity, past or future, need not be supported by past earnings history, although there must be sufficient evidence for the trier of fact to determine such losses with the “degree of certainty to which such losses are susceptible.” *Strauss v. Continental Airlines*, 67 S.W.3d 428, 435-436 (Tex. App.—Houston [14th Dist.] 2002, no pet.):

In determining what evidence is sufficient to support a claim of loss of earning capacity, no general rule can be laid down, except that each case must be judged upon its peculiar facts, and the damages proved with that degree of certainty of which the case is susceptible. *McIver v. Gloria*, 140 Tex. at 569, 169 S.W.2d at 712.

From *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 899 (Tex.App.—Texarkana 2004 pet. denied), we find

Proof of loss of earning capacity is always uncertain and must be left largely to the discretion of the jury. *McIver v. Gloria*, 140 Tex. 566, 169 S.W.2d 710, 712 (1943). Earning capacity has been defined as the “ability and fitness to work in gainful employment for any type of remuneration, including salary, commissions, and other benefits, whether or not the person is actually employed.” *Baccus v. Am. States Ins. Co.*, 865 S.W.2d 587, 588 (Tex. App.—Fort Worth 1993, no writ); *Home Indem. Co. v. Eason*, 635 S.W.2d 593, 594 (Tex. App.—Houston [14th Dist.] 1982, no writ). It does not necessarily mean actual wages, income, or other benefits received during the period inquired about. *Baccus*, 865 S.W.2d at 588; *Eason*, 635 S.W.2d at 594-95. Factors such as stamina, efficiency, ability to work with pain, and the weakness and degenerative changes which naturally result from an injury and from long-suffered pain are legitimate considerations in determining whether a person has experienced an impairment in future earning capacity. Reduction in actual earnings is the best way to show a reduction in earning capacity. *Springer v. Baggs*, 500 S.W.2d 541, 544-45 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.).

Our courts have, however, consistently upheld judgments for reduced earning capacity, even though the plaintiff was making as much or even more money after the injury than before, where it was shown that

pain, weakness, diminished functional ability, or the like indicated that the plaintiff's capacity to get and hold a job, or his or her capacity for duration, consistency, or efficiency of work, was impaired. Id.

King v. J. S. Skelly d/b/a J. S. Skelly Fuel Company 452 S.W.2d 691, 694 (Tex. 1970), addresses the earning capacity of a self-employed person, pointing out that profits from self-employment may not be a true measure of earning capacity.

E. Losses in the Future

All future loss figures must be presented in present value terms, as of the date of trial. In the very recent decision, *Rangel v. Robinson*, No. 01-05-00318-CV, 2007 WL 625042 at 2 (Tex.App.—Houston [1st Dist.] March 1, 2007, no pet.h.), we find

In personal-injury actions, the trier of fact must assess damages to accrue in the future on the basis of their dollar amount if they were presently paid in cash. See *Mo. Pac. R.R. Co. v. Kimbrell*, 334 S.W.2d 283, 286 (Tex. 1960). Texas law does not require specific evidence of the discount rate. See *Marshall v. Telecomm. Specialists, Inc.*, 806 S.W.2d 904, 909 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 347 (Tex. App.—Austin 2000, pet. denied) (citing *In re Gonzalez*, 993 S.W.2d 147, 160 (Tex. App.—San Antonio 1999) (original proceeding)). The trier of fact is qualified to make a discount calculation. *Kimbrell*, 334 S.W.2d at 286. The trier of fact has the power to consider as proven any matter that is of common knowledge. *Kimbrell*, 334 S.W.2d at 286 (stating, “[W]hile the jury must assess damages to accrue in the future on the basis of their amount if paid now in cash, still no evidence of the earning power of money must be introduced . . . that jurors may not have sufficient knowledge of interest rates to discount damages to their present value, but we cannot say that the average jury composed, as we must assume, of men and women of intelligence is not acquainted with interest rates.”); see *Rendon v. Avance*, 67 S.W.3d 303, 310 (Tex. App.—Fort Worth 2001, judgment vacated w.r.m.). A trial court may also determine the discount rate and perform the present-value calculations. See *In re Gonzalez*, 993 S.W.2d at 160.

Although future damages must be discounted to present value, Texas case law does not require any expert guidance for the trier of fact in such calculations. It does not even require evidence of the proper discount rate. There are no specific legal restrictions on methods of discounting or proper ranges for discount rates. However, failure of the trial court to provide losses in present value terms can result in their being sent back for such calculations. From *In re Gonzalez*, 993 S.W.2d 147, 160 (Tex. App.—San Antonio 1999, no writ):

In Texas, specific evidence of the discount rate is not required. See *Missouri Pac. R.R. v. Kimbrell*, 160 Tex. 542, 334 S.W.2d 283, 286 (1960); *Taylor Publ'g Co. v. Systems Mktg. Inc.*, 686 S.W.2d 213, 217

(Tex. App.-Dallas 1984, writ ref'd n.r.e.). Therefore, Gonzalez's failure to introduce such evidence does not render the evidence legally insufficient. But we agree with O'Farrill that a discount rate must be applied to arrive at the present value of the future payments of \$6300. See *Sheshunoff & Co. v. Scholl*, 564 S.W.2d 697, 698 (Tex. 1978). We will remand to the trial court for the limited purpose of determining the proper discount rate and performing the present value calculations.

Thus, there are no artificial legal restrictions on discount rates, with short-term, long-term, and yield-curve based approaches being used. Both current and historical rates are used. Nominal rates, real rates and net rates are all used by experienced experts.

F. Household Services

A loss of household services may be sustained by the spouse, parent, or child of an injured person. From the Pattern Jury Charges, Section 8.3, we find a working definition (for a spouse), "Household services' means the performance of household and domestic duties by a spouse to the marriage." (Section 8.5 of the PJC gives language for loss of household services provided by a minor child to his parents.)

The testimony of an expert is not necessary for the proof of the value of household services. Note that this could result in a challenge to such expert testimony under *Honeycutt*, discussed above. There is also no need to prove that there have been out-of-pocket expenditures to replace lost services. Nor does evidence of such expenditures limit the amount of such damages. From *Armellini Express Lines v Marilyn Ansley* 605 S.W.2d 297, 312 (Tex.App.—Corpus Christi 1980, writ ref'd n.r.e.):

As a general rule, the jury can determine damages for loss of household services based upon their knowledge and sense of the value of a wife's services. *Arando v. Higgins*, 220 S.W.2d 291 (Tex.Civ.App.-El Paso 1949, writ ref'd n. r. e.). While evidence of the cost of domestic help is admissible, such evidence is not required, nor does it limit the recovery as such. A plaintiff will not be denied recovery for this element of damages where there is proof in the record of the nature of the household services rendered before the injuries and that the injuries received have impaired her capacity to perform such household services in the future. *C. E. Duke's Wrecker Service, Inc. v. Oakley*, 526 S.W.2d 228 (Tex.Civ.App.-Houston (1st Dist.) 1975, writ ref'd n. r. e.). Mrs. Ansley was substantially impaired in performing household services. Prior to the occurrence in question, she did most of the housework herself. Now, her children and husband do most of the work around the house. Based upon the record before us, we cannot say that the jury's answer to this special issue is against the great weight and preponderance of the evidence or that a remittitur is required.

A loss of household services, as a part of physical impairment, may be sustained by the injured person, and must be proved separately from other ele-

ments of loss. From *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 39 (Tex.App.—Tyler 2003, pet. denied):

To recover damages for physical impairment as a separate compensable element of damages, the plaintiff must prove he suffered an additional loss beyond that of lost earning capacity and pain and suffering. See Harlow, 729 S.W.2d at 950; *Green v. Baldree*, 497 S.W.2d 342, 350 (Tex. App.-Houston [14th Dist.] 1973, no writ). The impairment must produce a separate and distinct loss for which the plaintiff should be compensated. See Green, 497 S.W.2d at 350. Unless the separate and distinct loss is obvious, the plaintiff must produce some evidence showing the tasks or activities that he can no longer perform. See Harlow, 729 S.W.2d at 950-51. The plaintiff does not need to prove egregious injuries to recover for physical impairment. See *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 824 (Tex. App.-Houston [1st Dist.] 1999, pet. denied); *Robinson v. Minick*, 755 S.W.2d 890, 893-94 (Tex. App.-Houston [1st Dist.] 1988, writ denied).

G. Illegal Aliens

Although it is clear that illegal aliens may recover damages for loss of earning capacity, there is no guidance, familiar to the author, regarding whether their illegal status is relevant to the determination of the amount of such losses in Texas. From *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 247 (Tex.App.—Tyler 2003, no pet.), we find

Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity. See *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768, 770 n.1 (Tex. App. - El Paso 1993, writ denied).

H. Tax Considerations

Prior to September 1, 2003, evidence of loss of earnings and earning capacity were presented in before-tax terms. From the Texas Civil Practice and Remedies Code, we find:

After September 1, 2003, loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law, and the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes. (Section 18.091)

The following jury instruction (PJC 8.1.5) implements the second portion of this provision of the Texas Code:

You are instructed that any monetary recovery for [list each element of economic or noneconomic damages that is subject to taxation] is sub-

ject to [federal or state] income taxes. Any recovery for [list each element of economic or noneconomic damages that is not subject to taxation] is not subject to [federal or state] income taxes.

Now that taxes are a subject that can be discussed in Texas courtrooms, it is becoming more common for forensic economists to use after-tax discount rates, either by estimating applicable taxes, or by using municipal bond yields. To the author's knowledge, there have been no appellate level decisions regarding these 2003 changes to the Texas Rules of Evidence.

I. Intangible Losses

Texas law allows compensation for a number of damage elements that are not easily priced by reference to a relevant market, but Texas courts have not encouraged economists to solve the problem through the use of benchmarks derived from "comparable professions." See *Celotex Corp v. Tate*, 797 S.W.2d 197 (Tex. App.—Corpus Christi 1990, writ dismissed by agreement):

With regard to the first and third categories, [Economist] explained to the jury how to compute the present dollar value of these damages based upon hypothetical figures. He did not, as Celotex claims, assign a particular value to these damage elements. Thus, under the circumstances, [Economist]'s testimony fell squarely within the requisites of Rule 702 and was properly admitted.

On the other hand, regarding the second category, [Economist] calculated the value of past and future "guidance and counsel" damages by basing his specific figures on the average earnings of a teacher. This testimony was improperly admitted because it indicated that the value of "guidance and counsel" is commensurate to the hourly rate of a teacher. In *Seale*, [Economist] possessed no special knowledge which the jurors did not possess in arriving at any specific values. So it is in the case at bar.

See also *Seale v. Winn Exploration Co., Inc.*, 732 S.W.2d 667, 669 (Tex.App.—Corpus Christi, 1987, writ denied) appears to have held a similarly negative view. In a somewhat older decision, *Garza v. Berlanga*, 598 S.W.2d 377 (Tex.App.—El Paso [8th Dist.] 1980, writ refused n.r.e.), the El Paso appeals court denied an objection to the use of wages in benchmark occupations, the appeals court declined to review the methodology where the expert compared the value of moral guidance by a mother to the salary of a school teacher. The court held that the appellant's objections went to the weight of the testimony. In *Jose Santos Guzman V. Eduardo Guajardo and Lydia Castro*, 761 S.W.2d 506, 511 (Tex. App.—Corpus Christi 1988, writ denied), the appeals court declined to review the methodology where the expert used per diem benchmarks, but rather looked only to the bottom line.

J. Prejudgment Interest

Prejudgment Interest is payable on past losses in personal injury, wrongful death, and property damage cases, at the Prime Rate published by the Federal Reserve Bank of New York, as of the time of judgment. Financial experts do not present prejudgment interest calculations to the jury. Special rules apply to prejudgment interest, with beginning and ending dates that depend on various filings in the lawsuit, as well as the amount and timing of formal settlement offers. The reader is referred to Chapters 301 and 304 of the Texas Finance Code. These can be found at:

<http://www.occ.state.tx.us/pages/Legal/Laws/fcode/FCall.html#301>

V. Economic Damages in Wrongful Death

A. Parties

The list of parties that may bring a wrongful death suit in Texas is limited to the surviving spouse, children and parents of the deceased. From the Civil Practice & Remedies Code, Title 4. Chapter 71, we find:

Sec. 71.004. BENEFITTING FROM AND BRINGING ACTION.

(a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals. (Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.)

B. Loss of Probable Pecuniary Support

There are two elements normally addressed by expert economic testimony: Pecuniary Loss and Loss of Inheritance. The basic question from the Pattern Jury Instructions is “What sum of money, if paid now in cash, would fairly and reasonably compensate [Spouse] for her damages, if any, resulting from the death of [Deceased]?” (Pattern Jury Instruction 9-2). The jury is instructed to give separate answers for pecuniary loss sustained in the past, and pecuniary loss that, in reasonable probability, will be sustained in the future. The PJC contains the relevant definitions:

Pecuniary loss sustained in the past and future. “Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that [Spouse], in reasonable probability, would have received from [Deceased] had he or she lived. In determining damages, you may consider the relationship between [Spouse] and

[Deceased], their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

“Loss of inheritance” means the loss of the present value of the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death to [Spouse].

C. Loss of Financial Support

In a wrongful death case in Texas, plaintiffs may petition for compensation for loss of probable pecuniary support. Direct evidence of such support, such as financial records, are obviously relevant. It is common for economists to begin with expected earnings and subtract expected personal consumption. To my knowledge, there are no decisions governing the calculation of personal consumption. Due to the emphasis on loss of probable pecuniary support, it is not common for the parents of deceased minor children to present economic evidence of financial loss.

D. Remarriage of Surviving Spouse

In *Exxon Corp. v. Brecheen*, 526 S.W.2d 519 (Tex. 1975), the Supreme Court of Texas considered the wrongful death “marital status” provision that was then found in Tex. Rev. Civ. Stat. Ann. art. 4675a. The provision is now embodied, in identical text, in Tex. Civ. Prac. & Rem. Code Ann. 71.005 (Vernon 1997). The provision states:

In an action under this subchapter [i.e., in a wrongful death action], evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if true, but the defense is prohibited from directly or indirectly mentioning or alluding to a common-law marriage, an extra-marital relationship, or the marital prospects of the surviving spouse.

E. Death of Adult Child

A parent can recover for the present value of probable financial contributions of a deceased child. From *Missouri-Kansas-Texas Railroad Company v. Grace Pierce* 519 S.W.2d 157, 159 (Tex.Civ.App.-Austin 1975, writ ref'd n.r.e.):

Relative to the excessiveness *vel non* of the verdict of the jury it is in order to observe that an adult has no legal obligation to contribute to the support of his parents, and the parents have no legal right to the services or earnings of an adult child. For the wrongful death of an adult child, the parent may recover the present value of such an amount that he can show that the child would have probably contributed to his support had the child lived. *Francis v. Atchison, T. & S.F. Ry. Co.*, 113 Tex. 202, 253 S.W. 819 (Tex. 1923).

At best, the deceased child's probable contributions to his parent can be shown only imperfectly. To that end the parent may show the character of the deceased and his affection and disposition toward his par-

ent. In addition, the parent may show the deceased's past earnings, his probable future earning capacity, the proportion of his past earnings which he had contributed to the parent's support and maintenance, and the proportion of his future earnings that he would have probably contributed to the parent. The parent is also entitled to prove up his age, his state of health, life expectancy, and pecuniary condition and need of help and contributions from the deceased. *Francis v. Atchison, T. & S.F. Ry. Co.*, supra.

F. Loss of Inheritance

We find, from *Yowell v. Piper Aircraft* 703 S.W.2d 630, 632-633 (Tex. 1986):

Clearly, heirs or devisees may suffer pecuniary loss to the extent the decedent would have accumulated property and passed it on to the heirs at his later, natural death. In Texas, the plaintiffs do not receive a double recovery when they receive loss of inheritance damages because the decedent's estate has no cause of action for lost future earnings. Tex. Rev. Civ. Stat. Ann. arts. [**4] 4671-4678 (Vernon 1952 and Supp. 1985).

We define loss of inheritance damages in Texas as the present value that the deceased, in reasonable probability, would have added to the estate and left at natural death to the statutory wrongful death beneficiaries but for the wrongful act causing the premature death. True, not every wrongful death beneficiary sustains loss of inheritance damages. If the decedent would have earned no more than he and his family would have used for support, or if the decedent would have outlived the wrongful death beneficiary, loss of inheritance damages would properly be denied. This is for the jury to decide.

Piper also argued before the court of appeals that no evidence supported loss of inheritance damages. Although the court of appeals did not address this point, [*634] we have jurisdiction to decide it because no evidence is a question of law. See *McKelvy v. Barber*, 381 S.W.2d 59, 65 (Tex. 1964). The plaintiffs introduced evidence as to each of the decedents' salaries, expected raises, expected promotions and salary increases, earning capacities, enforced savings through pension plans, spending habits, age, health, and relationship with the wrongful death beneficiaries. The plaintiffs also produced evidence of the age and health of the wrongful death beneficiaries. We hold that adequate pleadings and some evidence support the jury's finding of loss of inheritance damages.

G. Economic Damages in Survival Actions

In Texas, there is no recovery of damages in a survival action, due to the death itself, on behalf of the deceased, except for pain and suffering, medical expenses, and funeral and burial expenses. For example, there is no recovery on behalf of the deceased for loss of earnings. There are "survival actions," however, that seek to recover damages for the estate if there was a pre-existing personal injury cause of action, and the injured person subsequently died:

Sec. 71.021. SURVIVAL OF CAUSE OF ACTION

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive. (Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.)

VI. Personal Injuries and Wrongful Death from Medical Malpractice

Medical Malpractice Damage Limitations limit recoverable damages in medical malpractice cases where the patient has died:

Sec. 74.303. LIMITATION ON DAMAGES

(a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed \$500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average--All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

(c) Subsection (a) does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.²

Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

Special rules apply to compensation for future economic losses in medical malpractice cases filed after September 1, 2003.

²Under the "Stowers Doctrine," an insurer who fails to accept an offer to settle within policy limits may be liable for amounts in excess of those limits. This no longer applies to medical malpractice cases.

Sec. 74.503. COURT ORDER FOR PERIODIC PAYMENTS

(a) At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

(b) At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.

(c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.

(d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the: (1) recipient of the payments; (2) dollar amount of the payments; (3) interval between payments; and (4) number of payments or the period of time over which payments must be made. Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

Sec. 74.506. DEATH OF RECIPIENT

(a) On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.

(b) Periodic payments, other than future loss of earnings, terminate on the death of the recipient.

(c) If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.

(d) Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant. Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

Sec. 74.507. AWARD OF ATTORNEY'S FEES

For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall: (1) place a total value on the payments based on the claimant's projected life expectancy; and (2) reduce the amount in Subdivision (1) to present value. Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

Note that the calculation of the present value of the periodic payments may be a task for an economist: For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall: (1) place a total value on the payments based on the claimant's projected life expectancy; and (2) reduce the amount in Subdivision (1) to present value. (See Sec. 74.507. Award Of Attorney's Fees)

VII. Other Topics of Interest to the Forensic Economist

A. Punitive or Exemplary Damages

Punitive damages may be awarded by Texas courts. To the author's knowledge, experts do not give opinions regarding the appropriate level of punitive damages. However, evidence of the financial strength of the defendant has been held to be relevant, and such evidence is presented in a hearing bifurcated from the trial on liability and compensatory damages. From *Transportation Insurance Company v. Juan Carlos Moriel* 879 S.W.2d 10, 29-30 (Tex. 1994):

We held in *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), that evidence of a defendant's net worth is relevant in determining the proper amount of punitive damages, and therefore may be subject to pretrial discovery. This decision aligned Texas with the overwhelming majority of other jurisdictions on this issue. See *Lunsford*, 746 S.W.2d at 472 n.2. As we noted in *Lunsford*, the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant. "That which could be an enormous penalty to one may be but a mere annoyance to another." *Id.* at 472.

However, evidence of a defendant's net worth, which is generally relevant only to the amount of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case. We therefore conclude that a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues. See *Wal-Mart*, 868 S.W.2d at 329-32 (Gonzalez, J., concurring). Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns findings on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

B. Hedonic Damages

The Texas Supreme Court gave a review of both Texas case law and other state law regarding whether loss of enjoyment of life, or "hedonic damages," was compensable in *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003). It is clear from this decision that loss of enjoyment of life is compensable in Texas. However, expert economic testimony regarding a loss of enjoyment of life is not presented in Texas, presumably because it is thought that the economist brings no special knowledge of the value of the enjoyment of life.

VIII. Summary

In most aspects of forensic economic testimony in Texas, the primary requirements are that the evidence be consistent with the facts of the case, based on generally-accepted economic analysis, and helpful to the trier of fact. There are few artificial rules that limit economic testimony or the evidence that the economic expert can consider. The damage rules in Texas may be summarized simply: the standard of economic loss in personal injury cases is that of earning capacity and the standard of loss in wrongful death cases is loss of probable financial support. Taxes must be subtracted from loss estimates. Past losses are presented without adjustment for the time value of money, but future losses are given in present value terms.

Case Law

- Armellini Express Lines v Marilyn Ansley 605 S.W.2d 297, (Tex.App.—Corpus Christi 1980, writ ref'd n.r.e.)
- C & H Nationwide v. Linda Gail Thompson, 810 S.W.2d 259, (Tex. App.—Houston [1st Dist.] 1991), aff'd in part, rev'd in part on other grounds, 903 S.W.2d 315 (Tex. 1994)
- Celotex v. Tate, 797 S.W.2d 197 (Tex. App.—Corpus Christi 1990, no writ)
- Drilex Systems, Inc. v. Flores, 1 S.W.3d 112, 117 (Tex. 1999)
- E.I. du Pont de Nemours & Co v. Robinson 923 S.W.2d 549 (Tex. 1996)
- Exxon Corp. v. Brecheen, 526 S.W.2d 519 (Tex. 1975)
- Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998)
- Garza v. Berlanga, 598 S.W.2d 377 (Tex.App.—El Paso [8th Dist.] 1980, writ ref'd n.r.e.)
- Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757 (Tex. 2003)
- In re Gonzalez, 993 S.W.2d 147, 160 (Tex. App.—San Antonio 1999, no writ)
- Greyhound Lines, Inc. v. Craig, 430 S.W.2d 573, 575 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd. n.r.e.)
- Guzman V. Eduardo Guajardo and Lydia Castro, 761 S.W.2d 506 (Tex. App.—Corpus Christi 1988, writ denied)
- King v. J. S. Skelly d/b/a J. S. Skelly Fuel Company 452 S.W.2d 691 (Tex. 1970)
- K-Mart Corp. v. Huneycutt, 24 S.W.3d 357 (Tex. 06/29/2000)
- In re Makris 217 S.W.3d 521 (Tex.App.—San Antonio 2006, no pet.h.)
- McIver v. Gloria, 169 S.W.2d 710 (Tex. 1943)
- Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997)
- Missouri-Kansas-Texas Railroad Company v. Grace Pierce 519 S.W.2d 157, (Tex.Civ.App.-Austin 1975, writ ref'd n.r.e.)
- Pilgrim's Pride Corp. v. Smoak, 134 S.W.3d 880 (Tex.App.—Texarkana 2004 pet. denied)
- Plainview Motels, Inc. v. Reynolds, 127 S.W.3d 21, 39 (Tex.App.—Tyler 2003, pet. denied)
- Rangel v. Robinson, No. 01-05-00318-CV, 2007 WL 625042 (Tex.App.—Houston [1st Dist.] March 1, 2007, no pet.h.)
- Russell v. Young, 452 S.W.2d 434 (Tex. 1970).
- Sax v. Votteler, 648 S.W.2d 661 (Tex.,1983)
- Seale v. Winn Exploration Co., Inc., 732 S.W.2d 667 (Tex.App.-Corpus Christi, 1987, writ denied)
- Strauss v. Continental Airlines, 67 S.W.3d 428, 435 (Tex. App.—Houston [14th Dist.] 2002, no pet.)

Taylor v. American Fabritech, Inc., 132 S.W.3d613 (Tex.App.—Houston [14th Dist.], 2004, pet. denied)
Transportation Insurance Company v. Juan Carlos Moriel 879 S.W.2d 10, (Tex. 1994)
Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex.App.—Tyler 2003, no pet.)
Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37 (Tex.App. Dist.4 06/21/2006, no pet.)
Yowell v. Piper Aircraft 703 S.W.2d 630, (Tex. 1986)

Other

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